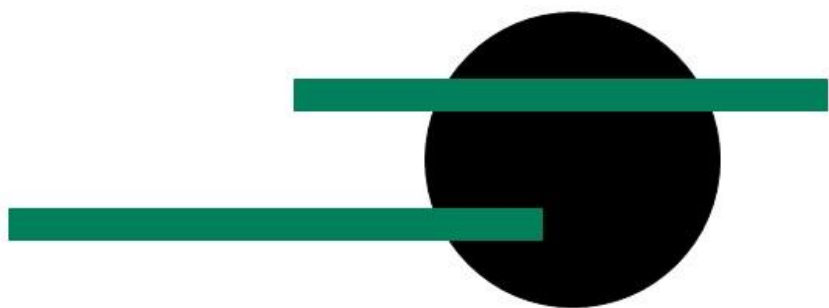


# VOICE AND VOTE

THE BOUNDARIES OF LEGITIMACY



FRITZ GILLERKE

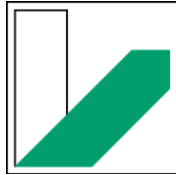


# **Voice and Vote**

The Boundaries of Legitimacy

The studies in this thesis were financially supported by the Heinrich Böll Foundation

University of Bayreuth  
Faculty of Humanities and Social Sciences



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**Voice and Vote:**  
**The Boundaries of Legitimacy**

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*For Misha*





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# Introduction

We live in a time of fundamental transformation. Climate change, digitisation and a global shift in international relations pose significant challenges to the functioning and the stability of democratic systems worldwide. These challenges touch upon core concepts of democratic theory. For instance, how to distribute political power, whose voices to include and how to shape spaces for public deliberation. These questions lend themselves to complex deliberations and require large-scale solutions that will shape not only our current political landscape but also lead to the creation of new institutions for generations to come.

When I first began conceptualising this project in 2016, my primary focus was to defend the claim that future generations need special political representation. I was motivated by the idea that a representation for posterity would be able to foster the long-term perspective required to address problems of such far-reaching implications. However, as I thought more about the implications of these challenges for the functioning of democracies, my research focus and along with it my outlook, changed considerably. I came to appreciate that the representation of future generations could only be secondary to the overall stability of democratic rule.

This stability seemed to be precisely what was at stake at the end of 2016. It appeared that democratic institutions were not adequately equipped to tackle the overarching challenges arising from these long-term, global and

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trans-generational political issues.<sup>1</sup> The inability of countries to effectively address the issue of climate change is exemplary in this regard. Indeed, democracies had repeatedly failed to sufficiently account for the long-term risks posed by consequences of human-caused global warming.

The inability of democracies to capture the long-term dimension of climate change is termed by Steven Gardiner as a “tyranny of the contemporaries”<sup>2</sup>. In order to address this problem and to give future generations a voice in political decision-making, a broad scientific and political movement took root which eventually came to be called Fridays for Future. Meanwhile, countries like Finland, Wales, Israel and Hungary implemented provisions to make institutions more adapted to the needs of posterity.<sup>3</sup>

However, while these institutions may seem to represent a generalized notion of political progress, many countries at the time were confronted with a strong conservative opposition and, in some cases, a cultural, social and political backlash against institutional transitions. The transformative forces that were driving the change of the outlook of global democracies appeared to simultaneously threaten societies’ social and political fundamentals. This led me to an important conclusion: As democracies tend to be inherently fragile social constructs, large socio-economic transitions must impact whatever social equilibrium forms their basis.

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<sup>1</sup> For an overview of these challenges see for example González-Ricoy and Gosseries 2016.

<sup>2</sup> Gardiner 2011.

<sup>3</sup> See e.g. Tremmel 2006; González-Ricoy and Gosseries 2016; Gonzalez-Ricoy and Rey 2019.

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In a New Yorker article from December 2020, Adam Gopnik uses a picture from the book “Through the Looking-Glass” to make a similar argument. The story features a creature called the Bread-and-Butterfly. Gopnik narrates that the plight of the Bread-and-Butterfly was that it could only live on weak tea with cream in it - much to the surprise of the protagonist, Alice.

*“Supposing it couldn’t find any?” Alice asks. “Then it would die, of course,” the Gnat answers. “That must happen very often,” Alice reflects. “It always happens,” the Gnat admits, dolefully.”<sup>4</sup>*

Just like the Bread-and-Butterfly, democracies often seem to exist on an almost impossible diet. And while they continue to exist, despite many challenges, it often appears to be the case that modern democracies have not yet made much progress in becoming more resilient.

Therefore, prior to the inclusionary projects that envision the representation of future generations and other non-voice parties, we need to consider a more pressing issue. The strengthening of democratic institutions must constitute a central project for scholars of democratic theory. I do not think that political instability is exclusively a problem of democracies, however. Historically, many political systems have struggled under rapidly changing circumstances – climate change, migration, technological change or diseases. Indeed, democratic forms of decision-making can be seen as a response to the need of accommodating such complex social dynamics. And this is ultimately the driving motivation behind this thesis: in times of

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<sup>4</sup> Gopnik 2020.

transformation, democracy has the potential to navigate change while facilitating justice.

From this motivation derives the central research question of my thesis: What are the democratic principles underlying the legitimacy of democratic inclusion and democratic representation? In exploring this question, I assume that what stabilises democracy at its core are the principles according to which we design our institutions. On the one hand, these institutions hold political power; they demand and they enforce obedience. On the other hand, democratic institutions are (ideally) the manifestation of an inclusive deliberative process of will-formation. The stability of democratic institutions must then depend on the right balance between power and reason. This balance between power and reason is what I call democratic legitimacy. The investigation of the principles of democratic legitimacy will therefore be the main focus of my work.

In particular, I investigate the All Affected Principle. I argue that the All Affected Principle spells out a central requirement of democratic legitimacy: being affected constitutes a justified claim to having a say in the political process, regardless of how this process is institutionally conducted and organised. Moreover, the All Affected Principle describes the terms in which democratic decisions should be made. It thus prescribes how democratic institutions must be organised. The All Affected Principle is crucial in one more sense. It connects the question of legitimacy to the question of inclusion. Hence, if institutions are regarded legitimate under the principle, we can further determine how far particular groups need to be included in its decision-making procedures.



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I present my argument in six chapters. In chapter 1, I address the question of how the demos is constituted. I engage with the claim advanced by some scholars, that the initial composition of the demos must determine the overall legitimacy of a democracy. I argue that we lack a normative principle that would sufficiently determine the legitimacy of the initial constitution of the demos. Therefore, I propose to think of democratic legitimacy instead as an ongoing process of re-constitution. Consequently, the boundaries that determine the composition of the demos must itself depend on the boundaries determined by our principles of legitimacy.

In chapter 2, I address the proper definition of democratic legitimacy. I argue that democratic legitimacy can be developed along the dimensions of power and reason and the corresponding properties of entitlement and obedience. I define three conditions for legitimacy to count as democratic: equality, liberty and solidarity. I show that if we define legitimacy in accordance with these conditions of democracy, we can derive three essential principles of democratic legitimacy: the principle of accountability, the principle of participation and the principle of basic morality.

In chapter 3, I engage further with the All Affected Principle. I analyse its two predominant interpretations, the Principle of All Affected Interests (PAAI) and the All Subjected Principle (ASP). Based on my analysis, I argue that the two interpretations should not be regarded as conceptually incompatible but in fact as complementary principles of legitimacy. I then briefly discuss some implications of this understanding.

In chapter 4, I develop this argument further. I argue that the complementary approach to the PAAI and ASP corresponds with the principles of

legitimacy derived in chapter 2. I suggest that we should distinguish the PAAI and ASP according to the qualities of inclusion that are granted to individuals in the decision-making process. I categorise these different qualities as Voice and Vote. I provide a brief taxonomy of Voice and Vote and the implications for the overall legitimacy of democratic institutions.

In chapter 5, I explore the All Affected Principle from yet another perspective. I discuss the historical roots of the principle in the medieval principle of *Quod Omnes Tangit*. I claim that this approach helps us better understand the conceptual ties to theories of political representation. I argue that we must in fact think of the All Affected Principle in a triad of legitimacy, inclusion and representation. I further analyse the notion of legitimate representation based on Hanna Pitkin's influential work.

Based on this analysis, in chapter 6, I develop an account of the representation of Voice and Vote. I build on the described triad of legitimacy, inclusion and representation and develop a conception of representation according to the All Affected Principle. In doing so, I refer to the work of Michael Saward and his concept of the "representative claim". Along with this concept, I explain how we can make sense of non-elected representation and how we can accommodate the boundaries of elected and non-elected representation within the boundaries of legitimacy. I end the chapter with a brief discussion of my argument's implications.

# Chapter I

## **The Question of the Demos**

At the heart of democratic theory lies an essential conceptual question: Are there democratic principles that can determine the correct composition of the demos? I want to call this question the question of the demos. The question points at a fundamental problem of democracy. If democracies establish a system of rule with the people being both rulers and ruled, how do we determine who precisely constitutes the people?

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On closer inspection the question of the demos might in fact consist of two separate problems. The first problem concerns the initial establishment of a democratic state. The question here is whether democratic theory must provide an answer to how democratic states should come into existence. Can we define principles how the creation of a state ought to happen democratically? I will refer to this problem as *the problem of the original constitution of the demos*. The second problem addresses the determination of the correct limits of democratic rule. It therefore focusses on a congruence between the rulers and the ruled and how it can be achieved. This is the *Boundary Problem of Democracy*, the question of how we can ensure that no one is unduly included or excluded from the ways of democratic decision-making.

Of course, the two problems are related. We might for example assume that if we can determine the correct original constitution of the demos, then no one can be excluded from the demos who is at the same time subject to the rule. Yet, as my discussion will show, the solution to the problem of the original constitution of the demos is complicated and a definite answer may not be available. However, in the absence of such a definite answer we may still be able to highlight the principles of constitution that interfere with our intuition about democratic boundaries. As I will argue, some of the principles that we associate with the original constitution of the demos are in fact essential to our understanding of the Boundary Problem.

And a coherent understanding of the Boundary Problem may in turn be essential for a robust foundation of democracy. In times when political realities of increasingly interconnected states require answers to the

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questions of rightful exclusion and inclusion, democratic theory must demand robust guidance on the determination of democratic boundaries. And this is probably one of the reasons why the Boundary Problem of Democracy has gained attention from scholars in the recent years.

*Demos, Populus and the state*

Before engaging with a deeper discussion about the democratic principles constituting the demos, I want to first clarify some of the terminology.

*The demos* I want to call the particular group of people who hold political power within a democracy. Holding political power does not necessarily entail the holding of a political office. In this chapter, I assume that the holding of political power in a democracy as having a right to participate in the collective making of political decisions. We can think of political decisions very broadly as being concerned with the introducing of laws and policies or the design of public institutions or the terms and rules of decision-making itself. Being a member of the demos is often associated with a right to vote. But voting is only one way to participate in a government. Ideally, in a democracy every member of the demos is ruler and at the same time subject to the rules that are created collectively. However, this does not necessarily imply that everyone who is subject to the rules will be part of the demos.

I use the term *populus* differently, although they are often used interchangeably. By *populus* I refer to the group of people who are permanent residents of a state but not necessarily holders of political power. In many states, for example, children are excluded from participating in collective decision-making, yet, they are part of the *populus*. In ancient

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Greece and in many modern democracies, women were not part of the demos, yet, they were subject to the same rules of the state.

Being a member of the populus is sometimes determined by reference to someone's nationality. This is, however, misleading because the ways in which we assign nationalities is itself often contingent on other apolitical factors. A refugee, for example, can constitute a part of the populus of a state but does not share the state's nationality.

*The state* is the social and political order that assumes political authority over a particular populus. For now, though preliminarily, I will assume political authority to imply a state's right to command and its correlative right to be obeyed.<sup>5</sup> However, in Chapter 2, I will provide a more nuanced account. It is generally assumed that if a state holds supreme authority over a territory or a group of people, then we can call this state sovereign.<sup>6</sup>

In a way, the concept of the state links the question of the demos to the question of legitimacy; namely when is a democratic state justified in assuming political authority? This has some important implications for theories of the original constitution of the demos. Does the right original constitution of the demos determine the legitimacy of a state? In order to answer this question, I want to distinguish two possible cases. In the first case, the correct original constitution of the demos does in fact determine

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<sup>5</sup> See Wolff 1970 p.4.

<sup>6</sup> See Oxford Dictionary of Law, Law 2018 or Philpott 2017. See also Pogge 1992, p.57, though I am not further distinguishing between sovereignty and absolute sovereignty here. To hold supreme authority over a territory should not imply that a sovereign state is not bound by international law. This understanding is for example discussed by Buchanan 2004 p.46 ff.

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the legitimacy of the democratic state. In this case we must seek to define what normative principles should guide the original constitution of the demos.

In the second case, the correct original constitution of the demos does not necessitate the legitimacy of the democratic state. In this case, the question of legitimacy must be answered according to principles independent of the right constitution of the demos.

Therefore, in a first step, I will take a closer look at the candidates for normative principles of determining the original constitution of the demos.

### **Normative Principles of Determining the Demos**

Democratic theory defines democracy as the rule by the people for the people. However, many theorists have been preoccupied with conceptions of democratic procedures. As a result, the ways of democratic ruling have received more attention than the important question of who should be included in the demos by which these democratic procedures are applied. Herein lies a problem. Democratic theory is sometimes implicitly, sometimes explicitly based on the assumption that if a state is constituted democratically, its rule must necessarily be justified. Yet, the problem is more complex. Who should be included in democratic procedures might itself depend on independent principles of democratic legitimacy. The question of this section is whether those principles of legitimacy can be motivated independently from the principles of the initial constitution of the democratic state. It is therefore essential to separate the question of democratic inclusion from the question of the original constitution of the demos.

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Hence the principle of the original constitution of the demos must be: A normative principle that determines the distinct initial composition of the demos of a democratic state.

The quest for a constituting principle of democracy has been a conundrum to many political thinkers. Robert Dahl has prominently exposed this conundrum. How to constitute the demos of a democracy was a problem that, according to Dahl, had been neglected by most political philosophers.<sup>7</sup> The claim he formulates is that philosophers generally assumed that they could “take for granted that a people has already constituted itself. How a people accomplish this mysterious transformation is therefore treated as a purely hypothetical event that has already occurred in prehistory or in a state of nature.”<sup>8</sup>

According to Dahl, the problem of the constitution of the demos is of outstanding importance because of its implications for democratic legitimacy. If we cannot determine the composition of the demos democratically by means of a normative principle, can democratic rule ever be fully legitimate? Or vice versa, how can we rule democratically over a group of individuals that has not been established according to a normative principle in line with some fundamental values of democracy?

The question has important implication for how we differentiate between the legitimacy of democratic procedures like majority voting or equal say,

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<sup>7</sup> See Dahl 1970 p. 60 f. I assume Dahl refers to the specific problem of democratic legitimacy and its modern boundaries. The contractarian tradition of Hobbes and Locke, e.g., can probably be said to having acknowledged the issue.

<sup>8</sup> Dahl 1989.



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and the overall legitimacy of democratic rule. For example, whether or not the state of the German Democratic Republic could count as democratic should not entirely depend on whether it applied democratic procedures within its ruling party. Instead, we need to ask whether everyone who should have a say in the decision-making was included in the constitution of the demos. Dahl's concern seems to imply that the principles that guide the modus of democratic procedures must be consistent with the principles that determine the initial composition of the demos, i.e. those who apply the procedures.

It is therefore essential to look at the principles that offer a potential solution to the problem of the original constitution of the demos. In the following, I want to consider three such principles.

The first principle is inspired by the Kantian tradition of political thought. I call this Kantian because I think that its normative foundation lies in the ways in which citizens relate to each other. Accordingly, what is morally relevant are the terms and conditions under which individuals enter into a state of interrelated freedoms. Of course, the Kantian republican ideas are not necessarily democratic. However, this is not the first concern here. Instead, we need to test whether Kantian ideas of state constitution can offer a solution to the problem of the original constitution of the demos.

The second and the third principle that I want to explore are voluntarist in nature. One is based on the moral significance of consent, the other one is based on a notion of affectedness. Consent based principles will assume that a demos can only be constituted if individuals give their consent to join the demos. A principle based on affectedness stipulates that the original demos

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must be defined in terms of who is getting affected by the collective decisions of the state.

As the discussion of these principles will show, each of them is insufficient to provide a normative basis to resolve the problem of the original constitution of the demos. The Kantian principle must be considered insufficient because of its failing to determine any particular demos. The consent-based principle is insufficient as it seems to be overdemanding. The affectedness-based principle is insufficient because of its circularity.

### *The Duty to Join the Demos and the Particularity Problem*

As the Kantian line of thought<sup>9</sup> I categorise a set of different approaches that are first and foremost concerned with the justification of the state and its authority. These approaches may include classical interpretation of Kant's writing as well as Rawlsian ideas or current philosophical thinkers like David Estlund, Thomas Christiano and Jeremy Waldron.<sup>10</sup> What these approaches have in common is that they seek to justify state authority by virtue of the individual obligations that people have towards the state. These obligations in turn are based on ideas about individual duties towards each

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<sup>9</sup> This line of thought is Kantian in the most rudimentary sense as I do not want to directly derive any of the positions from Kant's work in political philosophy. However, the common conceptual ground can be found in Kant's emphasis of freedom, equality and independence as the fundamentals of the state. Thus, I refer to Kant's arguments in *Theory and Practice* (see 8:290), and his most relevant work in political philosophy, the *Doctrine of Right* in the *Metaphysics of Morals* which explains why we are rationally required to enter into a civil condition. (see 6:306) By extension, his essay *Toward Perpetual Peace* is to be noted for international implications.

<sup>10</sup> See for example Estlund 2008; Christiano 2004; Waldron 1999.

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other like equal respect, equal standing or equal freedoms. The common argument is that only a state can guarantee the kind of well-ordered social structure necessary in the realisation of these moral qualities. The Kantian approach towards the constitution of the state is thus focussing on the structural aspects of the state.

Now, as I have stated above, the justification of the state and the constitution of the demos can be quite different things. Therefore, I want to focus here on the implications that Kantian approaches have for the original constitution of the demos. In order to do so, we need to further distinguish Kantian conceptions of the state from Kantian conceptions of democratic states. The latter must take into account the particular democratic structure of the institutions of the state. An aristocratic state structure and its corresponding authority over a populus, for example, may realise certain moral qualities. However, it does not realise the particular democratic moral qualities required by a democratic institutional structure.

A democratic Kantian might for example argue that an equal limitation of individual freedoms is necessary for the constitution of *a* state, yet not sufficient for the constitution of a *democratic* state. Correspondingly, if Kantian conceptions of the state seek to justify a state's authority to command, democratic conceptions must seek to provide a justification of democratic authority. But democratic authority must be based on a definition of the people who are subject to such authority (and authors at the same time). Thus even democratic Kantians must address the question of the constitution of the demos.

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A duty to join the demos?

The Kantian tradition generally assumes that there is an individual moral duty to give up, at least to a certain degree, our individual freedom by subordinating under the political authority of the state. It is a duty because only by doing so, human beings can escape their isolated position and emerge into the civilised community of political human interaction. The idea goes back to Kant's writing in the *Metaphysics of Morals*:

*“Given the intention to be and to remain in this state of externally lawless freedom, human beings do one another no wrong at all when they feud among themselves; for what holds for one also holds in turn for the other, as if by mutual consent [...] But in general they do wrong in the highest degree by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence.”*<sup>11</sup>

The duty to join the state is thus derived from the idea of a state of nature in which no one can be sure of their freedoms or possessions. In fact, Kant argues that private property cannot exist but only under the protection of a state's authority.<sup>12</sup> This is based on his Universal Principle of Right, stating that a right action must not violate another's external freedom. But if people live side-by-side it is unlikely that their individual actions, or private wills, will not interfere with each other. Therefore, in pursuit of equal freedom, human beings have a duty to construct a state by establishing and authorising

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<sup>11</sup> MM 6:308.

<sup>12</sup> Ripstein provides a good overview of the argument, See Ripstein 2009 p. 148 ff.

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public laws. This describes the most condensed version of the duty to join the state: “When you cannot avoid living side-by-side with all others, you ought to leave the state of nature and proceed with them into a rightful condition.”<sup>13</sup>

By accepting the authority of the state, we are acquiring an obligation to obey the state’s rules; we are thus justifying its authority by establishing the symmetric limitation of individual freedom. As argued above, the duty to join the state can even be applied to non-democratic states. We are in the same way under the obligation to join a monarchical state if this is the way to escape the fictional state of nature. However, we may apply certain democratic conditions for the proper construction of the state. For example, we could assume that everyone should be granted an equal say in designing public laws and institutions. But this seems to indicate the problem for the original constitution of the state. A duty to join a state does not provide us with enough guidance as to how a democratic state should be structured internally. However, this will be subject of the second chapter.

### The Particularity Problem

Another pressing problem for the original constitution of the state has been prominently pointed out by John Simmons. Simmons describes what he has coined the particularity requirement:

*“The particularity requirement states that theories of political obligation (with their correlative theories of political authority) must,*

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<sup>13</sup> MM 6:307.

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*to be successful, explain why a person's political obligations are owed specially to one particular political society (or government or body of citizens) over all others – namely, to that society naturally identified as the person's 'own.'*<sup>14</sup>

According to Simmons, the particularity requirement shows that Kantian conceptions of the constitution of the state can be both under- and over-inclusive. They may be under-inclusive because they must fail to specify why the citizens of one state are specifically bound by the rules of that state above any other. Citizens of France may as well have a duty not to interfere with the freedoms of German citizens, yet, they are bound by French law rather than German law. But in the same way we could argue that these theories are over-inclusive because if individuals have duties towards any state, how can we possibly define the distinct boundaries of state authority?<sup>15</sup>

I think the problem can be applied to the constitution of the demos. We could stipulate a duty for individuals in the state of nature to join a democratic state. This state not only guarantees that citizens are in the right position towards each other vis-à-vis their equal restrictions on individual freedom. Moreover, a democratic state may also ensure that no one holds unequal power over anybody else. Yet, the particularity problem remains. A duty to join a demos may be justified by virtue of the moral qualities that a

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<sup>14</sup> Simmons 1979, 31.

<sup>15</sup> Simmons discusses these issue in more detail in Simmons 2007 and Simmons 2016.

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democracy can bring about, however, it does not specify to which particular demos individuals owe their obligation.

However, Simmons is very quick to link this problem to the problem of territorial states. He argues that the particularity requirement overlooks issues of unjust acquisition of territory. In order to manifest its authority, every state must make claims over some particular territory. Yet, it is unclear whether justified authority is sufficient normative basis to make such claims. Simmons concern is that such claims could be misused by states to “make themselves the providers of just institutions to a region, acquiring by force legitimate jurisdictional authority over unwilling subjects and other group’s lands.”<sup>16</sup> While I agree with Simmons that an unjust acquisition of power by a state can render that rule illegitimate, I do not think that this must be a fundamental flaw in Kantian theories of the justification of authority.

The fact that Kantian theories fail to provide us with an answer about the particular populus or demos of a state does not mean that a state’s authority cannot be justified based on the Universal Principle of Right. As with many thought experiments, the state of nature provides us with a hypothetical scenario in order to explore the moral principles behind citizens’ duties towards the state. The argument thus intentionally ignores other factors in the creation of states, like history, territory or cultural association. This may appear unsatisfying to some because it reduces the explanatory power of the Kantian argument to the ad-hoc justification of a state’s authority. However,

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<sup>16</sup> Simmons 2016 p. 148.

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it equips us with the tools to evaluate the legitimacy of states based on their realisation of a well-ordered society or just institutions.

Consequently, Kantian approaches fall short of explaining why individuals can have a duty to join a particular demos above all others. However, contrary to Dahl's concern, this does not necessarily mean that democratic states must be rendered illegitimate. Historical or cultural factors may play a role in the initial acquisition of authority, yet, democratic authority can still be justified based on the moral qualities that the state provides. Under this view, cases of forceful and violent acquisition of authority over a group of people must be subject of separate considerations.

I am in fact aware that human history is filled with examples of unjust acquisition of territory and forceful suppression of minorities in the creation of states. It is therefore important that the history of a state informs our perception of the distribution of power within the state as well as its foreign policies. Nevertheless, I think that given the immanent presence of violence in human history, democratic theory may provide us with paths that can help to overcome past injustices. A robust theory of the justification of democratic authority will be essential in this regard.

### *The All Affected Principle and Democratic Inclusion*

The second candidate for a normative principle of the original constitution of the demos takes a different perspective on democracy. It is based on the idea that democratic decisions should be evaluated with regards to the effects they have on people. The underlying argument is an argument from equality. It roughly claims that those who bear the consequences of a decision have equal right to be included in the making of the decision.



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Contrary to the idea of a duty to join the demos, this principle of democratic inclusion prescribes conditions under which the original demos ought to include particular individuals. Principles of democratic inclusion are consequentialist in nature as they attempt to define the demos given the expected consequences of a democratic decision.<sup>17</sup>

The most prominent set of principles of democratic inclusion is discussed as the All Affected Principle. It states that everyone who is affected by the decision of a government should participate in the making of that decision.<sup>18</sup> Although the exact meaning of the All Affected Principle itself has been interpreted differently, all conceptions of the All Affected Principle share the idea that the demos ought to include everyone who is affected by a decision.

An important distinction has to be made, however, concerning the understanding of affectedness in this context. One important understanding of the All Affected Principle tries to redefine affectedness in terms of legal affectedness, thus resulting in some form of Legal Subjection Principle, All Subjected Principle or sometimes called Coercion Principle.<sup>19</sup> These interpretations naturally cannot be principles of the original constitution of the demos, since they seem to put the cart before the horse. Any individual can only be subjected to any law or legal system, if it has already been

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<sup>17</sup> To clarify this point: what matters for consequentialism is that a principle must generate the best consequences, not that the principle itself is based on the consequences for the included.

<sup>18</sup> Dahl 1970, p. 64. See also *ibidem* p.46.

<sup>19</sup> Most prominently Beckman 2009; López-Guerra 2014; Abizadeh 2008.

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determined who shall be under the jurisdiction of the state. In other words, only an already established demos can decide upon the right application of jurisdiction and hence subject anybody to its laws. I will expand on the different interpretation of the All Affected Principle in Chapter III. For clarity, I will refer to the relevant interpretations of the All Affected Principle as Principles of Affected Interests.

Not only our interpretation of affectedness plays a distinct role in the determination of the proper demos. In the same way the degree of democratic inclusion can be contested. Based on the idea of equality, we might argue that only equal degrees of being affected should yield equal degrees of inclusion. A fisherman might be more affected by a decision about fishing quotas than a political philosopher. If a principle of affectedness seeks to include both the fisherman and the philosopher in equal terms, further explanation will be necessary as to how equal inclusion can be justified.

This fundamental problem of principles of affected interests illustrates that it is not quintessentially democratic in nature. In fact, the history of principles of affectedness show varying legal applications. Its historic predecessors have often attached much less political influence to notions of being affected. Early appearances as the principle “quod omnes tangit ab omnibus comprobetur”, “what touches all, shall be approved by all”, can be found as a legal rule in the beginning of the 13<sup>th</sup> century, referring to an even older version in Roman law. As a principle of civil law, it quite literally meant that decisions that affect the interests of a right need to be approved by the right-holder. However, being affected in this sense did not entitle

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anybody to actually and actively hold political power. It was rather a principle of political consultation.

The common understanding of the principle then changed significantly and certainly had its renaissance in the democratic movements of the 20<sup>th</sup> century post world war era marked by the increased concerns for the interdependence of international state powers. In his remarks on the foundations of modern democracies Alexander Dunlop Lindsay notes in 1943 that some “more revolutionary [ones] hold out the hope that there could be a form of government where there is no act of government without the consent of all who are affected by it.”<sup>20</sup> Lindsay does not expand on the problem of constituting the demos. Yet, he addresses another question, namely that consent to a social contract can only be given if in the first place it had been established whose consent is required. To Lindsay being affected by a decision does provide the normative conditions under which one is entitled to ruling power. This link between being affected and ruling power has since become a reoccurring claim of proponents of the Principle of Affected Interests. Carl Cohen, for example, describes it as the ideal of a “perfect democracy”, whereas it was “virtually impossible for every full member of the community to play some part in the decision-making process.”<sup>21</sup>

More recently, Robert Goodin has taken this idea to the extreme, arguing that the Principle of Affected Interests possesses empirical significance. He

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<sup>20</sup> Lindsay 1947, p. 231.

<sup>21</sup> Cohen 1971, p.8.

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claims that “the reason we think that territorial or historical or national groups ought to make decisions together is that, typically if not invariably, the interests of individuals within those groups are affected by the actions and choices of others in that group. Those common reciprocal interests in one another’s actions and choices are what makes those groups appropriate units for collective decision making.”<sup>22</sup>

While Goodin’s claim has some intuitive appeal, it does little to explain the normative foundations of principles of affected interests. The fact that people associate with groups that share common interests cannot inform the quest for the normative foundations of the original constitution of a demos. Moreover, people may share certain interests *because* they are part of a particular group; leaving open the question why individuals should join the group in the first place.

#### The Circularity Problem of the AAP

In order to specify the normative basis of principles of affected interests, Goodin’s main concern lies with the fact that we need to bring what he calls “the who and the how” of democracy into alignment. According to this argument, a coherent normative theory of democracy must formulate a principle that specifies both: i) who should make decisions (holding political power as member of the demos) and ii) how decisions should be made (applying democratic procedures). For Goodin, principles of affected

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<sup>22</sup> Goodin 2007, p. 48.

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interests do precisely this. Hence he argues that his Principle of All Affected Interests was the “the most plausible candidate for bringing the “who” and the “how” of democratic politics into alignment.”<sup>23</sup>

Now, it is not entirely clear why democratic theory must align the who and the how in one consistent principle. After all, it appears that the question of “who should decide” addresses the more fundamental problem of assigning political power in state. The questions of how decisions are being made, on the other hand, seems to reflect upon the best ways in which states can govern.

Nevertheless, even if we assume that the alignment of the who and the how of democratic theory was a worthwhile endeavour, we must face its inevitable problem. Determining the group of deciders (everyone affected) depends on the decision that is made, which in turn depends on who is making the decision. Therefore, aligning the who and the how with the help of a principle of affected interests must lead into an infinite regress – the so-called Circularity Problem.

The Circularity Problem, according to Whelan states: “[...] democracy, which is a method for group decision-making or self-governance, cannot be brought to bear on the logically prior matter of the constitution of the group itself, the existence of which it presupposes.”<sup>24</sup> In other words, any attempt at determining the original composition of the demos based on a principle

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<sup>23</sup> Goodin 2007, p.50.

<sup>24</sup> Whelan 1983, p.40.

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of affectedness must fail because those who are affected can only be determined once the decision is made.

Goodin acknowledges the circularity problem: “Logically, constituting the demos - in the very first instance, at least - cannot itself be a product of ordinary democratic decision making.”<sup>25</sup> However, he argues that this has only limited effect on the explanatory power of the principle of affected interests. Instead of attempting to define the original constitution of the demos, principles of affected interests may guide us to the proper *reconstitution* of the demos.

This could of course lead to a slippery slope argument for democratic legitimacy: “Democratic though the subsequent decisions may be, the initial decision of how to constitute the demos can never be democratic; and that might be thought to contaminate all subsequent democratic decisions [...]”<sup>26</sup> This contamination of all subsequent democratic decisions appears unfortunate with regards to Dahl’s initial concern. However, Goodin argues that principles of affected interests, by reconstituting the demos, may help to democratically bootstrap a demos. Following this argument, democracies can be legitimate even if the original constitution of the demos was not decided upon democratically itself.

It is, however, hard to say where this leaves us with regards to the alignment of the who and the how of democratic theory. I think that it is therefore reasonable to focus on the procedural aspects of principles of affected

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<sup>25</sup> Goodin 2007 p.43.

<sup>26</sup> Goodin 2007 p.43.

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interests. The question of how democratic decisions should be made can be answered – by asking everyone who is affected. Of course, this does not immediately legitimise the composition of the demos. Who should be holding political power within a democracy may potentially depend on other principles independent of notions of affectedness.

Sarah Song, for example, has suggested that by defining the demos we should look neither at the ‘who’, nor the ‘how’ of democracy but instead at the question of “Why democracy”.<sup>27</sup> According to her proposal, only a normative justification of particular conditions of democracy itself can provide guidance for both the constitution of the people and the decision-making process. The conditions of democracy can be best fulfilled, she argues, by territorial state borders rather than theoretical boundaries the way the All Affected Principles prescribes them.

I agree with Song that there is reason to reject the All Affected Principle as a sole basis for the original constitution of the demos. However, I want to argue that it can provide normative justification to the conditions of democracy, on which I will further expand in the coming chapters. As such the All Affected Principle should be seen as a principle of procedural legitimacy rather than a constituting principle of the demos.

Consequently, the All Affected Principle is unsuited as a constituting principle of democracy. Although it can determine a distinct composition of people affected by political decision, it must fall short of explaining why a

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<sup>27</sup> Song 2012., p42.

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particular collective should be assigned ruling power in the first place – the grounds on which we can define the original constitution of the demos.

*Originating Consent and the Liberal Principle of Constitution*

A potential competitor to the Principle of All Affected Interests can be found in theories of consent. Simply put, the idea of consent is fundamentally built on the claim that no one is obligated to support any political power over her unless she has not consented to it. Consent theories are quintessentially voluntaristic. They defend the right to unilaterally withdraw from collective actions regardless of principles of affectedness or moral duties towards the state. However, just like the previous examples, consent theories cannot provide us with a principle of how to determine the initial composition of the demos.

The idea of consent in the creation of states and the justification of a state's authority have been prominently discussed in the context of the writings of John Locke<sup>28</sup>. As Locke states in the second treatise:

*“Every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority, and to be concluded by it; or else this original compact, whereby he with others incorporates into one society, would signify nothing, and be no*

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<sup>28</sup> I refer to Locke here, however, he stands in as one of the classical contractarian political philosophers. For further discussion of Locke's political philosophy see e.g. Simmons 1993; Grant 1987.



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*compact if he be left free and under no other ties than he was in before in the state of nature*"<sup>29</sup>

Locke's idea of consent serves two functions. On the one hand, consent is crucial for Locke's understanding of legitimising the absolute authority of the state. On the other hand, consent represents the reciprocal limitation of freedom that is expressed through the mutual recognition of everyone consenting to the same obligations and thereby constituting a state in the first place. However, consent does not necessarily coincide with the constitution of the demos. Individuals may as well consent to the rule of a monarch or autocratic systems.

So how can theories of consent inform the question of the original constitution of the demos? For that matter, it can be useful to distinguish two kinds of consent: originating consent and joining consent.<sup>30</sup> Originating consent describes the initial act of approval of a political authority and its institutionalisation. Joining consent describes an ongoing reaffirmation of a government.

The idea of originating consent is imbedded in the concept of the state of nature. Locke expresses originating consent as the joint effort of a collective to create a political body while departing from the state of nature. This progression of mutual agreement of entering into a joint political community is described by Locke in what I will call the Liberal Principle of Political Constitution:

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<sup>29</sup> Locke 1689, p.52.

<sup>30</sup> See Rawls 2007, p.124.

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*“When any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body political, wherein the majority have a right to act and conclude the rest.”*<sup>31</sup>

The Liberal Principle of Political Constitution comes under two restrictions for Locke. These restrictions define the conditions under which a new political community can be created. They can be seen as minimal conditions of legitimate demarcation of a political community. For Locke the original constitution of the political community:

- (i) Must not violate the freedom of those not part of the community  
and
- (ii) Must leave those not part of the community as they were in the  
liberty of the state of nature.

According to Locke, the original constitution of the state through the consent of a clearly defined group of individuals necessarily implies an act of exclusion. The Liberal Principle of Political Constitution expresses the idea that any constitution of a state is legitimate as long as everyone under the obligation to support its institutions, has consented to its creation. Locke thereby separates the question of the constitution of the state from the question of how the state ought to make decisions. He bases his principle of constitution solely on the idea of individual freedom to consent to a form of government.

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<sup>31</sup> Locke 1689,p.52.

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Sofia Näsström has argued that the Liberal Principle of Political Constitution is an insufficient normative principle for the original constitution of a demos. Näsström calls the principle Locke's "clever way of addressing the boundary question", yet, "it does not provide us with an answer as to what makes it legitimate. The composition of individuals who unite into society is one thing, and, legitimacy another." Näsström criticises that Locke indeed correctly assumes that the original legitimization of political authority must coincide with the original constitution of the people but fails to state proper criteria for the legitimacy of the people. She justifies her criticism by trying to place Locke in the historical-political context of the sixteenth and seventeenth century, where their "prime concern was how to replace the divine right of the king with a government based on individual consent."<sup>32</sup> Näsström concludes that Locke's principle must be outdated and in a world of growing interdependencies "the proposition that individuals can begin a new community without injuring 'the Freedom of the Rest' therefore looks anachronistic at best."

I think what Näsström is pointing at is the fact that originating consent is an insufficient basis for a democratic principle to determine the demos. It is insufficient in two ways. First, original consent does not provide any guidance in whether those consenting are in fact entitled to hold political power within the political community. But being able to participate in the government that one consents to, is the defining feature of a demos-based system of rule. Second, as the initial political community disappears, so does

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<sup>32</sup> Näsström 2007, p. 639.

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the initial consent of its members. It is thus practically impossible to think of a state that is continuously reaffirmed through originating consent of its members. This shifts the focus to conceptions of joining consent.

For example, Locke relies on a theory of tacit consent as joining consent. Members of the state are under an ongoing obligation to support its institution because of the consent-implying enjoyments that bind them in a political community. However, consent-implying enjoyments might justify individual obligations towards the state, yet they do not justify the composition of the demos. Joining consent cannot be translated into a normative principle of democratic constitution because it presupposes the bases of what it is trying to determine.

Nevertheless, the Liberal Principle of Political Constitution can tell us something about the normative conditions of democracy under which the hypothetical making of a political community will be legitimate. For Locke, the right composition of the demos must be based on the consent of free and autonomous individuals in accordance with the natural law.

Therefore, I want to focus on the link between the initial constitution of the demos and the normative conditions of democracy on which it is based. It seems that Locke's Liberal Principle of Political Constitution falls short of providing a full theory of how to determine the demos. Just like the thought experiment of the state of nature is meant to do, Locke's principle helps us understand the necessary tension between individual freedom and the power of the state to command. Consent can be essential as it indicates that no state should assume power over any individual without justification. If the state is the agreement between free individuals escaping a state of nature,

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Näsström argues, Locke’s principle “illustrate[s] the inbuilt discrepancy between those who are partakers of the agreement [...] and all those who fall under its jurisdiction [...], and the silent contract between them.”<sup>33</sup> One could argue that consent in this sense represents a necessary minimal requirement for the constitution of the demos without providing a sufficient principle of determining its exact composition. It depends on whether we hold consent theory to be plausible in this regard.

The minimal requirement of consent

Consent and consent theory might be some of the most discussed topics in political philosophy. It is therefore hard to point out a distinct definition of consent that is shared with the large number of competing conceptions. However, I think we can formulate the minimal requirement that consent postulates in the context of the original constitution of the demos. If we accept consent as a condition for the establishment of a democratic state then we are bound to adopt this minimal requirement.

Hence, as a condition of democracy any theory of consent must imply the following two features:

- i) the voluntary relinquishing of individual autonomous power to act for the sake of
- ii) empowerment of the democratic state to rightfully enforce its political will.

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<sup>33</sup> Näsström 2007, see footnote 62.

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The minimal requirement of consent indicates the dichotomy between individual will and collective (political) will as it has been classically discussed in political philosophy. I will refer to this discussion in more detail in the next chapter. The voluntaristic nature of theories consent, however, makes it difficult to imagine its application in the ultimate determination of democratic boundaries.

In order to provide a principle for the constitution or even reconstitution of the demos, voluntary consent must be a lasting source of legitimate political obligation. Therefore, consenting to join a demos is certainly not the same as, for example, casting a vote. By voting we generally do not express our consent to be part of the demos. In the same way, not voting is not indicative of excluding ourselves from a demos. Instead, by giving consent we accept the terms and conditions under which democratic government takes place. But since these terms and conditions are itself subject to democratic procedures in the design of public institutions, how can joining consent ever be a source of political obligation? If I consent to join a group which gives out free lemonade every Sunday, my consent might expire once the group decides to switch to Kombucha instead. But this is not the nature of a democratic understanding of collective decision-making. Thus, consent must be an unconditional source of obligation in the authorisation of a democratic government.

Yet, given the fact that most people are already born into an existing state or demos, how can we make sure that their commitment to the democratic form of government is truly based on their individual wills?

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This is the reoccurring question of tacit consent as addressed above. But as I pointed out, tacit consent does little to guide the determination of the demos. Moreover, it is unclear whether tacit consent can even provide the normative basis to justify the state's right to command in this way. It is a bit quick to say that I really enjoy drinking Kombucha every Sunday, if that is the only option that is being offered to me. Taking this offer in the absence of alternative can hardly count as me consenting to this scheme.

It seems that the legitimacy of state authority that consent theory tries to establish must therefore again depend on the original constitution of the state. In order to ultimately determine for everyone what counts as (tacit) consent, someone must already have the authorised power to do so.<sup>34</sup> But this is precisely, what consent theories were trying to explain.

Similar problems occur if we wish to rely on notions of hypothetical consent. Such notions generally argue that we can assume that people would consent if given a choice or they would consent if their moral compass was working correctly. Consequently, people do not actually need to consent to a state structure or public institutions since we can simply presuppose their consent. The idea of hypothetical consent has been critiqued extensively and I do not want to engage with it here in more detail.<sup>35</sup> I think the main argument against theories of hypothetical consent is that its ultimate

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<sup>34</sup> A similar argument is made by Wellman and Simmons 1996.

<sup>35</sup> Pitkin 1967 seems to interpret Locke's Natural Law as an independent source for hypothetical consent. See Simmons 1979 Chapter IV for a detailed discussion and a rejection of Pitkin's argument.

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normative source lies in fact outside the act of consent. Assumptions about the conditions under which an individual would consent must be based on universal substantive ideas about the good and right.<sup>36</sup> However, it is left unclear what role consent then has to play in the authorisation of a government. Counterfactual scenarios cannot re-establish an actual choice. Nevertheless, theories of consent remain an influential source of normative force for democratic theory. Even if we argue that *true* consent can never be achieved in reality, one must acknowledge that the dichotomy between individual will and collective will marks the conceptual guidelines along which theories of legitimate democratic rule must be developed. In fact, in pursuing consensual mutual restriction of individual power, consent theories point at the ongoing need for democratic legitimacy in the relation between the people and the state. Democratic legitimacy must thus seek to justify the state's right to command through justifying the restriction of autonomy of its citizens. Democratic legitimacy cannot be absolute once it has been justified to a group of particular individuals but it must engage in a constant process of reaffirmation. In short, consent theory puts a spotlight on the idea of individual freedom as a condition for democratic legitimacy.

To conclude this section, I want to argue that consent theories do not provide us with normative principles guiding the original constitution of the demos. Following Näsström's argument, originating consent fails to ensure that a political community is in fact constituted democratically. Furthermore, originating consent cannot justify already existing states or demoi. Tacit

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consent fails to inform the original constitution of the state as well as it does not provide a reliable source of democratic legitimacy. However, consent may indicate a necessary minimal condition for democratic legitimacy as it sketches out the normative framework within which a state can be said to legitimately wield political power.

### **The Boundary Problem and the Rightfulness of the Democratic State**

My discussion of the three candidates of normative principles has shown that each candidate appears insufficient as a guiding principle to the original constitution of the demos. But where does this leave us with regard to the legitimacy of democratic rule? The worry that some authors state is that democratic theory was build on quicksand if it fails to provide normative grounds for the right constitution of the people. Therefore, in the absence of satisfying principles determining the initial demos, I want to explore alternative options for legitimate democratic rule. Under this approach the rightfulness of the democratic state does not necessarily depend on the original constitution of its demos but instead on the principles of legitimacy that can be applied to an already existing association.

#### *Descriptive accounts of the demos: Territory and history*

An alternative to normative principles of democratic constitution can be found in historical conceptions of the constitution of the demos. Accordingly, the people must be defined by the forces and currents of history. The boundaries of democracy are shaped as people come together in contingent political associations. Most recent occurrences of such associations fall into the shapes of territorial borders, marking the boundaries of a state's territorial integrity. But these territorial borders as

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well cannot be motivated normatively. Moreover, territorial borders are often contested. For example, India might claim jurisdiction over the region of Kashmir. It is, however, unclear whether India's democratic rule does in fact extend to Jammu and Kashmir. Thus, territorial borders may coincide with the boundaries of democratic rule, yet often their relation remains controversial.

The people living within territorial borders, then too, must be a result of historical events. The *populus* of a state is a matter of chance. In a world of largely established formal borders and political communities, our political affiliations are often decided by birth. Territorial theories will therefore often presuppose an already defined *populus*. The *demos* of a democratic state will then often be a part of the so-defined *populus*. But any *demos* that is based on a historically defined *populus* must be under the suspicion of being more or less arbitrary. This is the main concern of opponents of historical theories of the *demos*. The historical approach generally amounts to the supposition of more or less arbitrary boundaries of the state, the *populus* and the *demos*.<sup>37</sup>

In fact, the arbitrariness argument is raised by both proponents and opponents of historical boundaries. Opponents argue that because historical boundaries must be considered arbitrary they must render any democratic state illegitimate. Membership of a particular *demos* and the right to participate in the government should not depend on arbitrary events of history. Proponents on the other hand argue that historical boundaries are

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<sup>37</sup> Whelan 1983 expands on this. See Song 2012 for a more recent discussion.

merely a practical concern. Accordingly, territorial borders and boundaries of jurisdiction constitute the practical framework within which normative democratic theories must determine legitimate principles of government.

Of course, both proponents and opponents operate under the assumption that such boundaries are a manifestation of the fact that human history is itself arbitrary. I think this assumption can be questioned. Historical events can often be explained in terms of causations and interdependencies. When we try to explain why a majority of British people voted to leave the EU in 2016, we generally refer to a set of reasons and causes that can be clearly identified. We hardly say that the Brexit was an arbitrary event – simply a glitch in human history. However, historical events might be arbitrary in terms of their normative qualities. Whether or not the Brexit was legitimate, cannot be decided by references to history. It must be decided based on normative principles of legitimate rule. In the same way, historical boundaries lack normative power and thus do not fulfil the requirements of fundamental principles of democratic theory.

History, the rightfulness of the state and democratic inclusion

Now, the question for democratic theory is whether the arbitrary composition of the demos is a fundamental problem for democratic legitimacy. Is a legitimate democratic form of government possible without the legitimate constitution of the people? If democratic theory cannot decide upon the original constitution of the demos, can democratic rule ever be legitimate?

I think most political theorists nowadays agree that the conceptual gap in the original constitution of the demos does not fundamentally question the

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legitimacy of democratic rule. Robert Dahl himself seemed to assume that the problem of the original constitution of the *demos* was not a fundamental flaw for democratic theory as long as we could identify principles that would allow us to identify the boundaries of democratic legitimacy. Thus, we need to identify principles guiding our understanding of the rightfulness of the state.

Joseph Schumpeter is often referred to as a radical advocate of arbitrary boundaries. Schumpeter famously posed the question: “must we not leave it to every *populus* to define itself?”<sup>38</sup> His notion of the *populus*, however, differs from the definition that I am using here. For Schumpeter, the *populus* is the same as the *demos*. For example, he states that the *populus* “may exclude slaves completely”<sup>39</sup>. This seems misleading as Schumpeter appears to fail to address how the *demos* then relates to the rest of the population of a state.

Näsström’s critique of Schumpeter stands exemplary for similar arguments raised against the Schumpeterian approach. She illustrates the mismatch between *demos* and *populus* with the example of ancient Athens which system was perceived as fully democratic by its citizens but excluded large parts of the population from the *demos* because it was argued that women or slaves belonged to the life of *oikos*.<sup>40</sup> These arguments, however, seem to miss the target. Schumpeter’s point was not that a political system cannot be more or less democratic by virtue of how inclusive it was towards parts

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<sup>38</sup> Schumpeter 1942, p. 245.

<sup>39</sup> Schumpeter 1942 p. 244.

<sup>40</sup> Cf Näsström 2011, p. 188.

of the populus. He rather argues that the fact how the demos of ancient Athens was constituted – and how it was decided to exclude women and slaves - does not make it *per se* undemocratic.

I think that the Schumpeterian approach must be divided into two different strands of argumentation. On the one hand, Schumpeter claims that the initial constitution of the demos can and must be decided only by the people themselves. This argument seems to be motivated in a descriptive account about the constitution of the state. With reference to Voltaire, Schumpeter states that “irrespective of legal discrimination, different groups considered themselves as the People at different times.”<sup>41</sup> On the other hand, Schumpeter acknowledges that a coherent theory of democracy needs to consider the moral implications of historical exclusion of groups from the demos: “we might say that a democratic society is one that does not thus differentiate, at least in matters concerning public affairs, such as the franchise.”<sup>42</sup> This argument is directly motivated by reference to the normative grounds of democracy theory – the idea that individuals must be treated as equal partakers in collective decisions about their shared world.

Now both arguments show some appeal. The historic argument points out that throughout history exclusion of particular groups, slaves, women, ethnic minorities, was part of states that we call democratic. Yet, the

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<sup>41</sup> Schumpeter 1942, p.244.

<sup>42</sup> *Ibidem*.

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normative argument must criticise such exclusion based on some stipulated moral values that we seek to realise through democratic ways of ruling.

In response to Schumpeter, Dahl has tried to argue that a political system was either democratic to its own demos or it was democratic in relation to all subjected to its rules.<sup>43</sup> Dahl analysed the distinction between the principles of democratic procedures and the principles of inclusion in those procedures. Accordingly, a state can appear democratic in applying democratic procedures of collective decision-making. Yet, at the same time this state can appear undemocratic if it fails to include all relevant groups in its procedures. It “is undeniable that in the United States, southern blacks were excluded from the demos. But surely to that extent the South was undemocratic: undemocratic in relation to its black population.”<sup>44</sup>

I think that Dahl’s terminology is unfortunate. Whether or not we can call a state democratic is a semantic concern. The fundamental problem lies with the fact of how we justify democratic rule to those subject to the rule. It is henceforth a problem of an underlying theory of democratic legitimacy. Do the normative conditions of democracy prescribe how a democratic government can be justified?

Dahl’s answer to this more fundamental question consists of two parts. First, democracy requires the absolute political equality of all adult members of

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<sup>43</sup> Cf. Dahl 1989, p.120 ff.

<sup>44</sup> Dahl 1989, p. 121.

the populus.<sup>45</sup> Second, democratic procedures must be such that they are sufficiently inclusive of everyone subjected to the rules of the state.<sup>46</sup> Consequently, the initial composition of the demos is less important to Dahl's justification of democracy than the way in which citizens relate to each other – namely as equals. The rightfulness of the democratic state, or the rightfulness of the demos consists of those moral principles that define the right social order amongst the people. In this way, the rightfulness of the demos has priority over democratic procedures: “The criteria of the democratic process presuppose the rightfulness of the unit itself.”<sup>47</sup>

The concrete composition of this unit, however, cannot be determined by democratic theory. Under Dahl's account, it must in fact be logically impossible to determine the original constitution of the demos through democratic processes because those processes must presuppose an already existing political association. However, the notion of the rightfulness of the state helps to clarify the justification of a people's right to self-government. Hence, it can be essential in our understanding of the justification of the authority of democratic states.

#### History and progressive re-constitution

Now, the argument from the rightfulness of the state seems to separate the question of legitimate collective self-government from the question of collective self-determination. In Schumpeter's words we might say that we

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<sup>45</sup> Dahl 1989 p. 130.

<sup>46</sup> Dahl 1989, Ch. 8, p.106 ff.

<sup>47</sup> Dahl 1989, p. 207.

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can leave it to the *populus* (*demos*) to define itself as long as every member of the *populus* (*demos*) is an equal partaker in the constitution of the collective government. But this leaves open the question of the rightful exclusion of non-members of the *populus*. And this becomes a serious problem for democratic theory, if the so-defined *populus* does not match the territorial boundaries of a state or if the membership is itself contested by some groups. The Spanish rule over Catalonia could serve as an example here. While Spain grants Catalonians equal rights to participate in the governments, Catalan separatists see a violation of their right to self-determination and political independence. Such claims of secession cannot be settled under this account of legitimate democratic rule.

This constitutes, I think, the Gordian Knot of the Boundary Problem of Democracy. How can the boundaries of legitimate democratic rule match the boundaries of political associations and their claims over distinct territories? Carol Gould, for example has suggested that we should not understand the question of collective self-determination as a problem of democratic constitution. Instead the original constitution of the people depends on a history of common activities in the realisation of shared goals. These activities “particularly those associated with cultures, involve appropriation of traditions and histories that are initially given to us rather than created *de novo*.”<sup>48</sup>

Territorial boundaries, nation states or spheres of political influences then might all manifest some physical limits to democratic rule. However,

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<sup>48</sup> Gould 2006 p. 50.



democratic boundaries – the question of who should participate in the government - are not necessarily congruent with the physical manifestation of states. Determining the democratic boundaries, based on theories of territory can be useful from a pragmatic point of view, yet it shows clear limitation with regards to the explanatory power of the emergence and constitution of democratic rule. Notwithstanding, the fact that territorial and democratic boundaries are incongruent does not imply that we must render one or the other unjustified. Rather we need to see this fact as an expression of conceptual independence. Democratic boundaries are the boundaries of democratic legitimacy. Territorial boundaries are often boundaries of historical contingency.

I think the task for democratic theory lies with how we can increase congruence between these boundaries. As I have discussed earlier, historical borders of states often depend on historical injustices, force or acts of violence. They seem to lack the normative justification we might wish for in the constitution of a democratic state. And the notion of historical injustices seems to divide philosophers at this point. Some argue that an appeal to history in the original constitution of the people simply perpetuates an unjust power structure. “It does not serve to open up democracy to change, but to put it on hold.”<sup>49</sup> Others emphasise the fact that an initially unjust constitution can or ought to change precisely because it adopts democratic ways of government.

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<sup>49</sup> Näsström 2007 p. 646.

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Jürgen Habermas has prominently argued for the latter view. In his remarks on the legitimation of the democratic constitution, he addresses the problem of the original constitution of the demos. If democracy seeks to reach a legitimate way of government, democratic procedures and institutions, its fundamental constitution are under constant suspicion:

*“The constitutional assembly cannot itself vouch for the legitimacy of the rules according to which it was constituted. [...] The democratic process is caught in a circular self-constitution that leads to an infinite regress.”*<sup>50</sup>

In order to avoid the infinite regress, Habermas suggests to separate the question of the original constitution from the question of democratic legitimacy. Instead of focussing on the original democratic constitution, we should focus on democratic re-constitution as a source of democratic legitimacy.

*“[...] the fallible continuation of the founding event can break out of the circle of a polity’s groundless discursive self-constitution only if this process [...] can be understood in the long-run as a self-correcting learning process.”*<sup>51</sup>

Now, Habermas’s argument is naturally progressive. In this way, the fact that the black population in the US was initially excluded from the demos but eventually granted voting rights later, might be seen as a self-correcting learning process of democracy. However, more recent world events and the

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<sup>50</sup> Habermas 2001 p.774.

<sup>51</sup> Ibidem.

strengthening of autocratic regimes around the globe may lead us to question whether the long arch of history does in fact bend towards justice at this point.

Yet, it seems that we do not need strong assumptions about the progressive nature of democratic development. Rather, the learning process of democratic constitution consists of the renewed interpretation and adaptation of democratic principles according to historical circumstances. Similarly, Seyla Benhabib describes modern democracies as “self-limiting collectives”. She argues that the common reference point for democratic legitimacy must be found in the postulation of fundamental human rights. Thus, the boundaries of legitimate democratic rule must be renegotiated along the normative lines of universal democratic principles. Consequently, Benhabib offers a more refined way in which the self-correcting learning process of democracy can take place. Her resulting model of “democratic iterations” argues that “universal right claims and principles are contested and contextualised [...] throughout legal and political institutions”, through “complex processes of public argument, deliberation, and exchange.”<sup>52</sup>

I think the idea of a progressive re-constitution of democratic constitution offers an appealing alternative to the quest of the original constitution of the demos. As my discussion has shown so far, the question of how to properly constitute the initial demos depends either on insufficient normative principles or on the unsatisfying acceptance of historical contingencies. One way to deal with this unsatisfying result is to turn towards the formulation

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<sup>52</sup> Benhabib 2004 p.179.

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of principles of democratic legitimacy. These principles do not address the original constitution of the demos but the subsequent democratic inclusion. Separating the legitimate constitution of democracy from the question of the original constitution in this way offers us a third way. Following this approach means that we can formulate principles of legitimate democratic rule without reference to the initial emergence of its political association.

### **The Demos Problem and the Problem of Democratic Legitimacy**

There is a lot of promise to talk about democratic legitimacy in this way. We assume that democracies possess the capacity to progressively reconstitute their fundamental legal structures, their institutions and their procedures in accordance with equally progressing universal moral values. The claim is not that we can right a wrong. In the same way, democratic theory does not offer an account of how to remedy historical injustices in the acquisition of territories and the emergence of states. Instead, democratic theory may offer a normative concept of how the state must be justified, once *a people* have been established.

It should be noted that this understanding of democracy is itself subject to a historical interpretation. Modern views of the legitimacy of democratic rule can vary distinctly from their ancient predecessors. The fact that slaves and women were not included in the democratic procedures of ancient Athens was also an expression of the general acceptance of a social hierarchy based on a division of the *kyrios* and the *oikos*. Today's conceptions of liberal democracy generally refer to more demanding conditions of social equality. The normative conditions that we ascribe to a theory of democracy are therefore essential to our understanding of democratic legitimacy.

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But what role does the original constitution of the demos play in this approach to democratic legitimacy? The quest for a normative principle of the original constitution of the demos has revealed two main insights. First, the concrete composition of the original demos cannot be determined by any available normative principle. A principle based on a duty to join the demos is insufficient because of the Particularity Problem. A principle based on affected interests cannot resolve the inherent circularity problem. Theories of originating consent are unsatisfying because they cannot specify conditions of democratic constitution. Consequently, it seems that we are on the wrong track if we wish to base a concept of democratic legitimacy on the legitimate original constitution of the demos.

However, this does not render the question of the demos irrelevant. Since historical accounts of demos constitution cannot be normatively satisfactory, democratic legitimacy requires an ongoing re-constitution in accordance with the normative conditions of democracy. Therefore, the question of the demos becomes mainly a question of correcting the legitimate boundaries of democratic rule. This leads to a number of new issues. How can we define universal and viable normative conditions of democracy? And how can we derive principles of legitimate democratic rule? The source of democratic legitimacy must thereby be determined on grounds independent of the question of the correct boundaries of democracy. Only then we can escape the circularity in the quest for the right composition of the demos.

To me then, the Boundary Problem of Democracy is precisely this: the challenge to identify principles of legitimacy that can determine the extent

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and scope of the boundaries of democratic rule. As my discussion has shown, these boundaries will not necessarily be congruent with the boundaries of the democratic states. States might exclude members of the *populus* from the *demos*, states might claim jurisdiction over contested territories, states might unduly exclude individuals from democratic procedures. And I believe that states can be legitimate in their initial constitution. However, if states seek to acquire the normative property of *democratic* legitimacy, the boundaries of their power must be justified based on democratic principles of rule.

Therefore, we come back to Dahl's central question. Who should participate in the government? But as it turns out, the answer does not depend on how we identify *the people*. Instead, the task for democratic legitimacy is to constitute and continuously re-constitute a system of rule of a pre-existing political association. Democratic theory requires us to constantly evaluate the structure and order of the political association and grant each member the appropriate right to participate in the collective self-government.

In the following chapter, I will therefore explore the principles of democratic legitimacy more closely.

## Chapter II

### **Power and Reason and three Principles of Democratic Legitimacy**

Romulus has a problem. He and his brother Remus were planning a new city along the shores of the Tiber. However, Romulus preferred a location on the Palatine Hill, whereas Remus would have liked to build the city on the Aventine Hill. They figured that the only way to settle their argument was through the practice of Augury, basically attempting to wait for a sign of the

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gods. To Romulus the result seemed clear, the gods were in favour of the Palatine. However, Remus was not willing to accept the verdict. That left Romulus in an odd place, because he expected Remus to except the authority of their decision-making procedure. After some thought, Romulus decides to go ahead, ploughs a furrow around the Palentine demarcating the future borders of Rome. Remus, who does not acknowledge these arbitrary boundaries, jumps cross the furrow. Romulus kills Remus.

Would Romulus have killed Remus if they had chosen a democratic decision-making procedure? A good part of democratic theory has established the view that the nature of democratic decision-making, if conducted correctly, can itself establish the kind of authority necessary to enforce democratic decisions. Because everyone is being respected in equal terms, everyone needs to respect the outcome of the procedure. This line of thought can be traced back to the project of early modern political thinkers who aimed to justify the power of state authorities through a process of collective reasoning. The central question of this project remains crucial for democracies globally: How can we reconcile collective decision-making with the requirements of freedom as individual self-legislation? In other words, how do we need to balance the authoritative power of the state with the idea of individual reason in democratic decision-making?

The discussion of this question will further illuminate the problems I have raised in Chapter 1. And the answers that I attempt to provide in this chapter are therefore meant to guide the development of principles determining the boundaries of democracy. The question of democratic legitimacy, and its exploration of the balance between collective decision-making and



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individual freedom, is the fundament on which we ground the necessary conceptional constraints of the democratic principles of exclusion and inclusion.

I start from the idea that the concept of democratic legitimacy can be found in a balance of power and reason. I assume that legitimacy aims to justify the wielding of political power. Thus in this chapter, I want to explore democratic legitimacy along the lines of the normative conditions of democratic theory. I will do so by investigating two key concepts: entitlement and compliance. I want to ask when a state is democratically legitimised in demanding obedience from its citizens and when a state is entitled to make decisions. By doing so, I will argue that a full account of democratic legitimacy must rely on three distinct principles. The use of power needs to be legitimised through a principle of accountability. Moreover, the decision-making procedures must be legitimised through a principle of participation and a principle of basic morality.

## **Political Legitimacy**

### *Political Legitimacy, Authority and Justice*

The term “political legitimacy” is ambiguous. The scope and extent to which the term is used in political theory varies significantly.<sup>53</sup> The source of

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<sup>53</sup> See for example: Applbaum 2010; Simmons 1999; Peter 2007; Buchanan 2002; Binmore 2000; Christiano 2008; Cohen 1997; Estlund 2008; Gaus 2012; Kolodny 2014a, 2014b; Landemore 2012; Peter 2008; Rawls 1993; Stilz 2009; Raz 1986 This list is neither exhaustive nor complete.

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ambiguity often lies with how a conception of legitimacy is situated in its relationship to political authority, political power and justice.

*Political Power and Political Legitimacy*

I think of political legitimacy as the justification of holding and wielding political power. Political power entails the ability to make someone act through means of persuasion or coercion. Political power, thus, can create reasons to comply for citizens.<sup>54</sup>

Legitimacy is often concerned with two dimensions of political normative theory: entitlement and compliance of political power.<sup>55</sup> The first dimension of political legitimacy addresses questions of who is entitled to wield political power and the ways that can justify the wielding of power. The second dimension explores political power in terms of how it constitutes reasons to comply with the rule of a state. Only a state that provides a justification of both, the entitlement to wield power and the reasons for compliance, can be called legitimate.

The relationship of entitlement and compliance of rule is often thought to be two sides of the same coin. It is said that if an entity is entitled to wield

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<sup>54</sup> I am drawing from Buchanan 2002 here, although his definition of power is more narrowly adapted to the specific power of the state. However, I would like to account for non-state actors that are wielding power as well.

<sup>55</sup> See Peter 2020, 2008 for an excellent analysis. Peter 2020 calls it the “mainstream view” of political legitimacy. p.2. Applbaum 2010 and Buchanan 2002 are two of the most prominent examples of unidimensional accounts.

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power, those subject to the power are bound to obey.<sup>56</sup> Such conceptions of legitimacy are mainly concerned with the justification of political authority. The idea of authority stipulates that some political entities may possess a right to be obeyed, hence constituting an obligation for every citizen. Authority can be distinguished from mere authoritativeness. A state possesses authoritativeness if citizens have reasons to comply with its rules but no general obligation to do so. Therefore, authority entails authoritativeness but not vice versa.<sup>57</sup>

Most theories of political legitimacy assume that if an entity is entitled to hold political power, it will at the same time possess political authority. For example, if a government is entitled to make a decision, then everyone subject to the rule of that government is obligated to obey the decision. Vice versa, if a government possesses political authority, it is at the same time entitled to make political decisions.

### **Democratic Legitimacy**

Democratic legitimacy describes the particular form of legitimacy that democracies must seek. The concept of democratic legitimacy addresses the question of how political rule can be legitimate given the normative commitments of democracy. On a secondary level, democratic legitimacy

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<sup>56</sup> Cf. Peter 2020.

<sup>57</sup> The distinction between authority and authoritativeness was prominently put forward by Buchanan 2002.

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might also provide an answer as to when procedures of rule can be counted as truly democratic.

I think of democracy very broadly as the rule of the people by the people. The salient and conceptually most significant feature of democratic rule is that those who are bound by the rules of the state are at the same time also the binders.<sup>58</sup> The way in which people relate politically in a democratic state is therefore determined by the basic institutional structure and the fundamental principles committing every member of the demos.

Much of our understanding of democratic legitimacy depends on the relationship between legitimacy and justice in the first place. It can be argued that any decision that a perfectly just state makes, is necessarily legitimate by implication. However, the opposite does not hold. A perfectly legitimate state does not necessarily produce just decisions. The argument is commonly used to establish the fact that justice is normatively prior to legitimacy. The problem with this view is that the perfectly just state is not only hard to achieve but people tend to disagree about their notions of justice. Acknowledging this disagreement, we can settle for the idea that states can be more or less justified by reference to diverging ideas of justice. The persistent disagreement between their ideas about justice is crucial for my understanding of democratic legitimacy. Therefore, I will assume that democratic theory must not prescribe a specific conception of justice. Neither does democracy require a particular social order. The terms of how the people structure their shared world must take into account individual

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<sup>58</sup> See e.g. Dahl 1956, 1970, 1989; Christiano 2008; Raz 1986.

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attitudes and therefore cannot be pre-political. However, democracy must subscribe to certain normative conditions that define how individuals and their attitudes can relate so that nobody's individual beliefs about what is the right and the good can be unquestionably imposed on others. In other words, no individual belief should be stated as a normative fact.

This assumption may be broadly related to Rawls' argument in *Political Liberalism*. Rawls' political conception of justice assumes that citizens will cooperate based on a political conception that every citizen can be expected to reasonably endorse and that is the product of different ideas found in political culture.<sup>59</sup> Opposed to his own views in the *Theory of Justice*, Rawls attempts to show how a conception of justice can find societal acceptance and stability in a reasonable overlapping consensus. However, this is not exactly my point here. Instead, I want to argue that a theory of democracy need not depend on a political conception of justice. Rather, democracy provides the framework within which societies can negotiate the terms and conditions of their shared conception of justice. Such a conception of justice might find acceptance in some form of overlapping consensus. However, democracy can be legitimate even if such a consensus cannot be reached.<sup>60</sup> Of course, this is not the same as claiming that perfectly just democratic states cannot possibly exist. However, in the absence of such states it can be wise to be able to demarcate states as better or worse in terms of how they

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<sup>59</sup> Rawls 1993 p. 143 ff.

<sup>60</sup> Without engaging properly with it, I restate parts of the debate between Habermas and Rawls starting with an early critique of Rawls 1971 in 1976, see Habermas 1979. A recent overview of the debate can be found in Finlayson 2019.

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can justify their rule. A pluralism of opinions and competing conceptions of justice may make it difficult to define what can count as a good reason to justify the authority of the democratic state. Thus, democratic legitimacy draws this demarcation line of justification by reference to our stipulated normative conditions of democracy.

### *Conditions of Democracy*

I assume that democracies are committed to three constitutive conditions of democratic rule: equality, liberty and solidarity.<sup>61</sup> While different conceptions of democracy emphasise different aspects of these conditions, they generally entail the following:

- i) Individuals acknowledge each other as equally capable of practical reason. Therefore, no one should hold more political power than anyone else.
- ii) Individuals are fundamentally free to pursue their own goals within reason. Therefore, everyone should be free from arbitrary coercion.
- iii) Members hold a solidary attitude towards each other that allows for political cooperation. Therefore, everyone is open to consider reasons and goals of others.

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<sup>61</sup> These conditions can be traced back to Robespierre's famous statement of "liberté, égalité, fraternité", Robespierre 1790. However, each aspect finds expression in some of the most influential works of the 20<sup>th</sup> century. For example, Rawls' justice as fairness is based on citizens' equal basic rights. Raz' account of authority is based on a defence of freedom. Habermas 1992 emphasises the role of solidarity in securing common allegiance to a set of values.

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Democratic legitimacy must justify the basic institutions of the state, its procedures and decisions under the commitment to these three conditions. I think that in as far as democratic citizens have an obligation towards the realisation of these conditions, democracy can be said to possess authority.

However, the realisation of the conditions of democracy depends on practical contexts, history and diverging beliefs about how to manifest those conditions – the actual circumstance of politics. Thus, characterising democracy as bound by these conditions gives rise to what I want to call the Imperfect Obligation of Democracy Thesis:

Everyone committed to the conditions of democracy has an obligation towards the realisation of some social structure consistent with the conditions of democracy. This obligation is yet imperfect because the scope and extent of this realisation are subject to practical judgment.

The argument is necessarily incomplete. What follows from this thesis is that stipulating the conditions of democracy alone is insufficient to ground democratic authority, i.e. a general obligation of each citizen to obey. The importance of the thesis lies in its guidance for any principle of democracy. Only those principles that are consistently aligned with the conditions of democracy, are able to justify the authority of the democratic state.

Of course, some might want to outright reject the assumption that we have any obligations towards the conditions of democracy. The problem of philosophical anarchism as it was raised by Robert Wolff would question whether it is possible to reconcile a general claim of authority with the

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demands from individual autonomy.<sup>62</sup> But this is precisely what a conception of democratic legitimacy must attempt. How can we justify a particular social structure so that it confers authority while being at the same time consistent with the requirements of individual freedom?

### *Three Principles of Democratic Legitimacy*

Much work in democratic theory has been addressing the correct justification of democratic authority or the ways in which democratic procedures may confer legitimacy to political decisions. By starting with the assumption of an imperfect obligation towards the conditions of democracy, I am attempting to sketch out possible commonalities between the various approaches to democratic legitimacy.

This attempt will yield three principle of democratic legitimacy. As I want to argue, these principles are necessary for any democracy to establish justified political authority. However, each principle addresses a different dimension of democratic legitimacy. While the first principle addresses the right distribution of power between democratic institutions, the second principle describes the particular terms of democratic decision-making. The third principle deals with the more fundamental question of the general ability of democracies to make the right decisions.

I think that each principle reflects upon a crucial aspect of the concept of democratic theory. However, I do not mean to argue that these principles are sufficient for an ultimate justification of democratic authority. Sufficiency

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<sup>62</sup> Cf. Wolff 1970.



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might even be a lost cause in this regard. As societies struggle to agree upon their shared interpretations of the right and the good, their perceptions of justified power and sufficiently justified reasons may change as well. This struggle, however, requires people to make compromises not only to their daily lives but even to their beliefs about justice. This is what I imply by the notion of practical judgment. And in this way, I agree with Jane Mansbridge who states that “when we compromise with justice, we must design our lives and our institutions so that the justice that is compromised remains nagging, in the margin somewhere, in a bracket that does not go away, to pique our souls and goad us into future action.”<sup>63</sup>

But this fundamental tension within democracy is not only an individual struggle for our perceptions of justice. Because the nature of democracy is marked by the congruence between ruler and ruled, democracies must as well struggle with their legitimate uses of power. Mansbridge points out this duality as the “need to find ways of removing coercion as much as possible from the arenas in which we struggle to understand what is just and unjust”; while we must at the same time “remember that in their decision-making functions democracies need coercion, that the coercion needed is usually far from fully legitimate, and that in using power, we must also fight it at the same time.”<sup>64</sup>

Therefore, I do not wish to provide a full account of legitimacy here. Instead I understand the three principles of democracy as a minimal account of

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<sup>63</sup> Mansbridge 1996 p. 59.

<sup>64</sup> *Ibidem*.

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democratic legitimacy, with each principle capturing an important dimension of how people can justify their collective rule to themselves.

### **Legitimising the Right to Make Decisions**

#### *Reconciling Equality and Liberty*

At the heart of the debate of democratic authority lies a dilemma: How can we reconcile the individual liberty to follow one's goals with the obligation to obey the collective will bound by the idea that no one's reason can take priority over someone else's reason? Of course, this dilemma relates to a much broader and older debate of the dialectic between liberalism and radical democracy. A detailed account of this debate lies beyond the scope of this work.<sup>65</sup>

Nevertheless, I want to acknowledge the position that has been defended by some scholars.<sup>66</sup> Accordingly, the dilemma can be resolved by the assumption that collective decisions do not necessarily need to conflict with individual freedom. Following this line of argumentation, we assume that democratic rule must rest on some general consensus among citizens about the good and the right. Collective decision-making, then, might yield exactly into what individual freedom prescribes.

I think we cannot escape the dilemma like this. Taking seriously the apparent pluralism of opinions present in current democracies, the assumptions made appear too strong. Hence, democratic theory should be

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<sup>65</sup> See Habermas 1992., p. 610 ff. for a detailed discussion.

<sup>66</sup> Mostly in the tradition of Rawls 1993 Buchanan 2002 must be interpreted like this, too.

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able to account for societies in which the collective will diverges from particular individual wills. And this necessarily diverts our attention to the legitimate enforcement of collective decisions. How can we ensure that everyone follows democratically made decisions even if some disagree with the decisions? The answer must lie with a democratic justification of coercion. This is the argument that Rousseau dreaded: “Now the less individual wills relate to the general will, [...], the more repressive force must increase.”<sup>67</sup>

So, the general problem of democratic rule is that it must explain how coercion is justified as a means of wielding political power. The particular individual reasons that people might have to accept democratic decisions are not sufficient to determine the legitimacy of democratic rule.

For example, a state could implement a plan for a general mandatory health insurance. While some citizens agree based on the health advantages for the population, others may disagree with the policy based on their worries about additional costs. If the government’s decision is legitimate, making the health care plan binding for everyone will be justified. Thus, every citizen must adhere to the plan.

On the view that I want to promote, we might disagree upon the exact policies that a government implements, yet, democratic authority must ensure that everyone is bound by the same rules. Since democratic authority

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<sup>67</sup> Rousseau 1762, *Du contrat social*. Book III, Chapter I, p.82. (Standard translations vary. I found this translation most convincing) Original: “or moins les volontés particulieres se rapportent à la volonté générale, c'est-à-dire les moeurs aux loix, plus la force réprimante doit augmenter.”

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entails an obligation to obey, coercion is justified in cases where individual reason is insufficient for justifying resistance.

However, an orthodox view in political philosophy might argue that authority and coercion are conceptually independent and moreover, that authority takes priority over coercion. This view, which is often related to the work John Stuart Mill<sup>68</sup>, must explain when the state is justified in using violence to force its members into order. Accordingly, irrespective of the normative justification of the state, every act of coercion is a distinct violation of individual freedom that needs justification. To put it simply, the Millian view stipulates that citizens need protection from violations of their freedom and that consequently there should be as few restrictions as possible.

Arthur Ripstein has offered an alternative approach. He strengthens a Kantian understanding of coercion, according to which state coercion reflects the idea of mutual reciprocal constraints of individuals' external freedom. The reciprocal limitation of individuals' freedom is the only way to constitute a social structure in which people are recognised as free and equal and thus all must be subject to the same limits. Otherwise any attempt to enforce what one takes to be her will simply result in unilateral imposition of her will upon others. "As reciprocal limits on freedom, those rights are enforceable even if people do not agree about them."<sup>69</sup>

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<sup>68</sup> See his essay on Utilitarianism. Mill 1969.

<sup>69</sup> Ripstein 2004 p.27.

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Ripstein's argument supports the idea that authority and coercion can be thought of as complementary instances of political obligation. This is not the same as to say that all state coercion is always justified. Rather, coercion can be an expression of a state's authority to create a political order that allows for the justification of collective decisions against particular wills. Adjudicating between liberty and equality in this way appears to be a solid base for the rule of all by all; and in accordance with the stipulated conditions of democracy. Any state coercion that goes beyond the enforcement of this basic democratic structure, the reciprocal and symmetric limitation of external freedom, may require an additional political justification.

Ripstein offers a viable way to reconcile the conditions of equality and liberty under a concept of democratic authority. Democratic states can fulfil normative conditions of equality and freedom and at the same time pose restrictions on individual freedom. In fact, following this view, given the inevitable gap between collective will and individual wills, the limitation of individual freedom is practically necessary for the functioning of any political order.

At the same time, however, coercion can only be permissible if the limitation of liberties is reciprocal and symmetric. We must therefore ensure that no one can on the most fundamental level of political organization be in a position to hold more power than anyone else. Consequently, an essential criterion for a democratic social structure is an equal distribution of political power, ensured through appropriate processes of political control.

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In this way, a democratic social structure marked by symmetric limitations of individual freedom is what enables the democratic wielding of political power. It is not possible to wield political power in accordance with the conditions of democracy without the prior establishment of a democratic social structure bound by law. If authority is constituted by a state structure that is meant to apply equal limitations to people's external freedom, then the existence of this basic structure ensures that political power can be wielded democratically.

Yet, in reality states require that some will hold offices and positions, that some will wield power, while others do not. In order for this basic structure to fulfil the requirement of political equality, the institutions of power must be appropriately responsive to those subject to the power.

#### *Authority from Consent and its Defects*

An important alternative view attempting to justify the authority of the state can be found in theories of consent. While consent theory is mainly concerned with voluntarist conceptions based on a Millian view of authority, its influence on the philosophical discourse have been too significant to ignore at this point. The lessons that can be drawn from the debate about consent are essential for a full understanding of the nature of a state's authority. Therefore, I want to highlight some of the implications for my argument here.

The idea behind all conceptions of consent can be summarised by one of its main theorists:

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*“Men being, as been said, by nature, all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent.”<sup>70</sup>*

According to John Locke, state authority can never be justified if it is not based on the consent of those subject to its power.

Despite its prominent position in political philosophy, consent generally is too demanding of a concept to ground political authority. I mainly agree with John Simmon’s critique that if consent demands that everyone has to give explicit consent to a state’s coercive rule, then legitimate authority appears virtually impossible. On the other hand, authors who wish to retreat into some notion of tacit consent seem to thereby make the notion of consent impossibly inclusive.<sup>71</sup>

However, I want to highlight two important distinctions that can be found in the early writings of consent theory. The first, sometimes overlooked distinction, is made by Hobbes, stating that authorisation must happen in the sphere of subjection to power not in the sphere of territorial residence. Hobbes separates the right of possession from the right of doing an action. Whereas one can permanently transfer the right of possession, only authority can give someone else the right to act. This implies that political authority, if it is legitimate, must be distinct, from the possession of territory.

*“That which in speaking of goods and possessions, is called an owner, [...] speaking of actions, is called author. And as the right of*

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<sup>70</sup> Locke 1689 Bk 2, Ch. 8.

<sup>71</sup> Simmons 1979 Mainly Chapter III but also IV.

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*possession, is called dominion; so the right of doing any action, is called authority. So that by authority is always understood a right of doing any act; and done by authority, done by commission, or license from him whose right it is.*<sup>72</sup>

This distinction is important with regards to issues raised in the first chapter. The question of authority of the state must be seen independent from the question of possession of territory, boundaries or property rights. Consequently, consent should not be seen as consent to join a particular state but as an act of authorisation of the state. Thus, subjection to power must be justified regardless of the question of how to bring about the state in the first place. Or as Raz puts it: Consent theories “are addressed to the question of the legitimacy of its authority, not to the issue of the justification of its dominion.”<sup>73</sup>

The second important distinction, I want to mention, can be found in Locke. Whereas Hobbes idea of consent is marked by the assumption of absolute political power that can be transferred through a social contract, for Locke the social contract can only transfer legitimate authority if it is in accordance with the natural law.<sup>74</sup> Therefore, the legitimisation of political authority of the state needs to happen in the right way. For Locke, although a state can be illegitimate due to it being inconsistent with the natural law, consent plays a crucial role in determining whether political power had been transferred in the right way. While adhering to the notion of the natural law

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<sup>72</sup> Leviathan, EW III, 148.

<sup>73</sup> Raz 1994, p.356.

<sup>74</sup> Locke 1988. See also Dunn 1969; Ashcraft 1987.



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seems outdated by today's standard, it indicates that mere consent may be an insufficient source of justification for authority. A power that enjoys the consent of those subject to it, may still be illegitimate if it violates more fundamental substantive conditions. Consequently, we might read Locke as suggesting that legitimate authority must entail consent in addition to some normative force in the background.

I think that what Locke defines as Natural Law has some resemblance with what modern theorists sometimes describe as normative authority. For example, Fabienne Peter states that an entity has normative authority if it is a valid source of sufficiently justified beliefs about what should be done.<sup>75</sup> This is not a trivial notion since it can be quite tricky to determine what counts as a source of sufficiently justified beliefs. Essential for this epistemic concept of normative authority is that its claims about what should be done are in fact based on beliefs that are *sufficiently* justified. Claims by a normative authority must therefore override individual claims. Whether or not the Natural Law possesses normative authority must depend on whether it can in fact be justified as a valid source of such claims about what should be done. But this is precisely what is at stake for the justification of democratic authority; since democracy demands that people recognise each other as sources of valid claims.<sup>76</sup>

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<sup>75</sup> This most compelling notion of normative authority was put forward by Fabienne Peter, most recently in Peter 2020.

<sup>76</sup> Referring to Rawl's notion of freedom and equality in a well-ordered society. See Rawls 1980 p. 543 ff.

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### Normal Justification Thesis

A conceptually similar point is put forward by Joseph Raz. He argues that “to admit that an authority is legitimate, which entails that its directives are binding, is to hold that those subject to its authority must surrender their judgment to that of the authority. This is inconsistent with their autonomy.”

<sup>77</sup> In order for authority to be truly legitimate, consent must be a valid source of obligations. Simply authorising some decision once cannot be sufficient to create an ongoing and legitimately binding obligation. Hence consent, if it is justifying democratic authority, is not an unconditional source of legitimacy for a government. Raz suggest a different solution, which he calls the Normal Justification Thesis:

*“the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.”<sup>78</sup>*

Raz proposes an elegant way to spell out in what way the transfer of power can be thought of as legitimate. It is legitimate if the state’s authority only commands what citizens have reason to do anyways. However, Raz’s account must rely on a distinctive notion of normative authority. Individuals

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<sup>77</sup> Raz 1994, p.357.

<sup>78</sup> Raz 1986p. 53.

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are asked to surrender their own judgment by virtue of following the judgment of authority. But this does not solve the problem of normative authority in the justification of democratic authority. As Peter has pointed out:

*“normative authority plays a key role in the normal justification thesis because having normative authority—or being prepared to defer to it—is what enables the political decision-making body to make decisions that enable people to comply better with what they should do anyway.”*<sup>79</sup>

The Normal Justification Thesis thus points out the circumstances under which an obligation to obey can be legitimate. The circumstances must be such that the entity claiming authority must seek to establish normative authority. Yet, since democracy does not make pre-political commitments to claims about what should be done, normative authority cannot itself be a precondition of democratic authority.

Raz’s account seems compatible with the idea that democratic authority must entail the realisation of a social structure that manifests the symmetric limitation of individual freedom. It is compatible if it can be shown that such a structure is the best way to establish normative authority under the conditions of democracy.

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<sup>79</sup> Peter 2020 p.11.

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## Normative Consent

Another account that highlights the importance of normative authority for democratic legitimacy is David Estlund's conception of normative consent. He diverts the focus away from the reasons that people might have to obey a decision. He instead promotes the view that what is relevant for the justification of authority are the moral circumstances under which compliance with the state is demanded. He argues that "Normative consent theory says that you are under authority even if you refuse to consent, because, owing to [the circumstances], you would be wrong to refuse to consent"<sup>80</sup>

Normative consent thereby offers a solution to the problem of consent theory that people might consent to something that is plainly immoral. If someone consents to a state structure that supports the systematic oppression of a minority, her consent may be nullified. Vice versa, if a state structure is the only way to overcome a moral hazard, not to consent is wrong, non-consent will be nullified and authority remains justified.

However, it is unclear what normative relevance consent really has under this account. If consent can be nullified under morally-relevant circumstances, it seems what justifies authority is not depending on consent but on the underlying moral claims of some normative authority.

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<sup>80</sup> Estlund 2005p. 358.

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*Practical Authority and Normative Authority*

As I have tried to argue in this section, an obligation to obey can be justified democratically. Democratic Authority is justified if, based on the idea of equal and reciprocal limitations of individual freedom, power is wielded within a social structure that allows for an equal distribution of power. If coercive power through rules and laws applies to everyone equally, everyone has an obligation to obey those rules and laws; and this can be consistent with the conditions of democracy.

However, the authority to legitimately apply coercion is first and foremost a form of practical authority. Its justification depends partly on the equal distribution of power within the state structure and partly on the ways in which this power is wielded. The wielding of political power must be in accordance with what is normatively required and what is normatively required is a matter of normative authority. If normative authority can be established, it must put further limitation on the wielding of political power. If sufficiently justified claims about what should be done exist, then these claims will not only determine the correct distribution of political power but also the way in which this power ought to be wielded. In other words, while democratic practical authority determines the correct distribution of power, normative authority determines the right ways of wielding power.

A distinction between practical authority and normative authority allows us to evaluate cases in which political decisions are the outcome of a justified basic constitution of governing, yet, they also are clear violations of valid claims of morality. For example, the constitution and procedures of the United States in 2003 might have been overall justified, possessing practical

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authority, however, their decision to invade Iraq might be called illegitimate on the grounds that it violates justified claims about what should be done.

A major problem for realist politics that stems from the distinction between practical and normative authority can be found in the fact that governments may attempt to establish normative authority by virtue of the position of power that they enjoy. Although the validity of claims of what should be done must be subject to epistemic considerations, those in positions of power could seek to misuse their power in an undue attempt to justify their individual beliefs about what should be done. But I think that this highlights again the importance of legitimacy in creating structures and procedures that effectively control the use of political power.

#### *Accountability and Equal Power*

The notion of normative authority will be crucial for the next section and for our understanding of what justifies and entitlement to wield power as another dimension of a concept of democratic legitimacy. However, I want to conclude this section by pointing out the relevance of practical democratic authority as a necessary, yet insufficient, condition of democratic legitimacy.

The basic idea is that democracies must justify their use of coercion. They can justify the use of coercion, as I have argued, by reference to the concept of symmetric and reciprocal limitations on individual freedom, necessary to establish a just system of rule.

The symmetric and reciprocal limitations of individual freedom prescribes that no one can hold undue power over anybody else. Yet, it is the case that some individuals will hold offices and positions that equip them with more

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power than others. Social structures that allow for some to wield power thus must rely on procedures and processes that make those in power appropriately responsive to those subject to power. The degree of responsiveness will determine how legitimate we can call the resulting structure of democratic authority. Hence, how well a particular social structure realises the conditions of democracy depends on practical judgment.

Consequently, establishing democratic authority is a necessary but by no means sufficient condition of democratic legitimacy. The main insight of what grounds obligation in democracies can be formulated in what I want to call the first Principle of Democratic Legitimacy:

Principle of Accountability: The basic institutions of the state and the corresponding distribution of political power must be appropriately responsive to those subject to the power.

### **Legitimising the Procedures of Decision-Making**

#### *What Justifies the Entitlement to Wield Power?*

In the following, I want to address another dimension of political legitimacy. This dimension explores questions concerning the justification of who is entitled to hold political power and the terms of how this power is wielded. Democratic theory generally assumes that the locus of democratic entitlement is some form of democratic assembly. However, it is often unclear what this assembly must entail.

The common image seems to be inspired by the gatherings of the citizens of Athens in ancient Greece. Yet, modern democracies, their institutions and

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procedures often rely on a more complex system of rule. I think that the notion of what is commonly described as the democratic assembly is best captured by a manifold collection of institutions and their decision-making procedures. As an essential part of shaping the social structure of the state, these decision-making procedures must as well reflect upon the conditions of democracy. The way people make decisions must be in accordance with how they relate as solidary, free and equals.

I want to promote the understanding of the modern democratic assembly as an institutional structure that allows the democratic state to generate a collective political will from the variety of competing individual wills. In fact, the common idea behind most concepts explaining the political entitlement of the democratic assembly is that it provides a justified way to adjudicate between conflicting wills. This is well captured by Thomas Christiano:

*“When there is disagreement about how to organize the shared system of law, property, public education and the provision of public goods, no one can have his way entirely in this context without someone else not getting her way. Each person thinks that the ideas about justice and the common good with which the others wish to organize their shared world are mistaken in some way. Yet there is a*



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*need for collective action. The only way to do this that is reasonably fair to all the members is to make the decision democratically.*"<sup>81</sup>

To adjudicate between conflicting wills means that decisions are made in a way that considers all affected interests and standpoints.<sup>82</sup> Therefore, concepts of legitimacy that focus on democratic entitlement are often focused on notions of political participation. Most commonly discussed are concept of egalitarian democratic procedures that attempt to base political participation on principles of political equality.<sup>83</sup>

Among these approaches, Allen Buchanan's conception of democratic legitimacy stands out as it tries to establish legitimacy purely in terms of political entitlement, disregarding the normative relevance of what I have discussed as citizens' obligation to obey.

#### *Buchanan's Agent-justification Account of Legitimacy*

Allen Buchanan's<sup>84</sup> influential account of political legitimacy centres around a notion of democratic entitlement. On his account, individual compliance is merely secondary concern of little consequence for his concept of political legitimacy. Governments may not be able to rule effectively without some degree of compliance of the citizenry and therefore they must attempt to provide reasons to act. But this was not an essential concern of justifying the wielding of political power. Instead under Buchanan's account, the wielding of political power is legitimate if the

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<sup>81</sup> Christiano 2020.

<sup>82</sup> He expands on this for example in Christiano 1997.

<sup>83</sup> Examples include Buchanan 2002; Christiano 2004; Kolodny 2014a.

<sup>84</sup> Buchanan 2002.

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wielder of power does a credible job of protecting the most basic human rights. In other words, a government is entitled to wield political power if its wielding of power is not an apparent violation of those basic human rights.

What I have so far called the entitlement dimension of legitimacy is, I think, captured by Buchanan's central assumption, based on the agent-justification notion of political legitimacy:

*“political legitimacy is an agent-justification notion, having to do only with the normative sufficiency of the justification for the act of imposing rules, not with whether those upon whom the rules are imposed have obligations to those who impose the rules.”*<sup>85</sup>

Despite his focus on the justification of the agent wielding power, even Buchanan's account must rely on a notion of obligation. However, in this case the obligation is not political but an obligation of justice. He argues that nobody can have a right not to be coerced by what justice prescribes. Therefore, coercion is justified in cases where coercion is necessary to bring about justice.

*“the moral purpose of political power is, first and foremost, to achieve justice; given its coercive and monopolistic character and the fact that it necessarily involves inequality of power, nothing short of this could justify it. A wielder of political power that does a credible*

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<sup>85</sup> Buchanan 2002 p. 695.

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*job of achieving justice is morally justified in wielding that power, at least if it seeks to achieve justice through processes that are themselves just, and if it came to be in a position to wield power in a way that was itself not seriously unjust.*"<sup>86</sup>

Consequently, the only obligation in this account of legitimacy is an obligation of justice. This assumption seems to be problematic for two reasons. Firstly, it seems to blur the useful conceptual distinction between justice and legitimacy. Legitimacy is generally a much less demanding normative concept than justice. Secondly, the justification of wielding power under this account depends on the notion of *credibility*. But credibility is a misleading term in this context because it itself depends on practical judgment. We must then ask what the criteria are that determine a credible attempt of protecting basic human rights.

Buchanan's answer is that only through processes of democratic procedures governments can achieve a credible job of protecting human rights. Accordingly, democratic procedures are well equipped to justify the wielding of political power, if they satisfy strict egalitarian conditions of equalised power and equal consideration. Therefore, citizens must have an equal say in i) determining who may hold positions of power and ii) determining what the most fundamental laws of the state are. Since equal consideration is a demand of justice, coercion can be justified as a means of wielding political power, if the wielding of political power satisfies democratic criteria of an equal say.

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<sup>86</sup> Buchanan 2002, p.709.

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Moreover, if citizens share this fundamental commitment to equal consideration, democratic rule must be authoritative, “because the fact that a law was produced by democratic processes is itself a reason for compliance.”<sup>87</sup>

*Critique of Buchanan’s Account*

I think that Buchanan’s arguments are misleading. They are misleading for two main reasons. First, it stipulates a substantive notion of justice to ground political legitimacy. Second, it fails to address a qualitative distinction between the holding of political power and the making of political decisions. As I have argued above, it is sufficient for an account of democratic legitimacy to assume that a democratic state has political authority if its basic structure is in accordance with the conditions of democracy. Whether or not such a state realises a particular conception of justice is a secondary concern. Moreover, it seems to be inconsistent with Buchanan’s emphasis of equal consideration. If people, as they often and persistently do, disagree about their ideas of justice and the common good, then we cannot make a substantive idea of justice the basis of democratic legitimacy. Equal consideration appears therefore insufficient as a source of the legitimate holding of political power. How power is distributed depends on a fundamental understanding about how individuals relate to each other. It is thus a matter of equal recognition of political standing rather than equal consideration of voices.

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<sup>87</sup> Buchanan 2002, p. 714.

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Nevertheless, Buchanan is right in pointing out an essential problem of democratic legitimacy. According to his egalitarian understanding of power, no one is entitled to hold political power over anyone else:

*“the egalitarian democratic theorist acknowledges, as he must, that legislators, administrative officials, officers of the court, and the police wield powers that ordinary citizens do not. Even in a direct participatory democracy in which every citizen has an equal vote on every law, government officials will wield powers ordinary citizens do not. It is this asymmetry of power that raises the question of whether political power is reconcilable with the fundamental equality of persons.”*<sup>88</sup>

As I have argued above, democratic legitimacy can reconcile this asymmetry of power by designing procedures and processes that are appropriately responsive to everyone subject to it. Beyond this basic structure, however, democratic procedures must account for the notion of equal consideration in determining how decisions are made within democratic institutions that wield power.

### *Deliberative Democracy*

I think that once a symmetry of political power has been established, the best way to account for the notion of equal consideration is through processes of political deliberation. The idea is that given a persistent disagreement amongst people about how to design their shared world,

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<sup>88</sup> Buchanan 2002 p. 710.

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political decision-making must be equally responsive to the diversity of interests and opinions. The entitlement criterion of democratic legitimacy must therefore reflect upon the idea that every citizen is an independent source of political claims. The democratic assembly is therefore entitled to make decisions if it is equally responsive to all valid claims about what should be done.

My terminology may somewhat resemble Rawls' notion of people as "self-originating sources of valid claims".<sup>89</sup> However, I think the idea finds similar expression in Christiano's notion of the "equal advancement of interests" through democratic processes.<sup>90</sup> Although, I do not want to suggest a particularly conception of deliberation for now, I think these notions capture well what many theories of legitimate democratic procedures have in common. Valid claims, in Rawlsian terms, are practical claims about what should be done. By assuming people to be self-originating sources of such claims we can account for the existence of a disagreement between individual beliefs on how to create a just social order. Advancing everyone's interest equally implies that democratic processes ought to consider each individual belief about what should be done as a matter of fundamental respect for individual autonomy. But the validity of these interests and claims cannot be imposed. The validity of self-originating claims is based on practical judgment and this precisely captures the essence of what I have stated in the Imperfect Obligation of Democracy Thesis.

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<sup>89</sup> Rawls 1993, 1980.

<sup>90</sup> Christiano 2004 p. 269 ff.

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Political procedures that allow us to account for individual claims about what should be done can thus help us shape a social structure committed to the conditions of democracy. They are themselves determined by conditions of equal consideration. However, the outcomes and contents of political decisions will determine how conditions of equality, liberty and solidarity are realised in the institutions, rules and laws of the democratic state.

Of course, not all decisions will carry the weight to be fundamentally committed to democratic conditions. Determining the fee that someone has to pay for a parking ticket is hardly a concern of the basic structure of democracy. Other decisions, for example deciding about anti-discrimination laws, might refer much more closely to how people decide upon the right interpretation of equality and freedom in law.

### *Procedures and Participation*

There exists a variety of interpretations of deliberative forms of democracy.<sup>91</sup> I do not want to engage in a detailed discussion of their respective advantages and disadvantages here. For my purposes it is sufficient to condense the grounds on which deliberative procedures are a legitimate way of democratic decision-making.

Thomas Christiano for example states that “democratic discussion, deliberation, and decision-making under certain conditions are what make the outcomes legitimate for each person.”<sup>92</sup> For Christiano, what makes the

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<sup>91</sup> Cohen 1997; Elster 1998; Benhabib 1996a; Bohman and Rehg 1997; Gutmann and Thompson 1998.

<sup>92</sup> Christiano 1996 p.35.

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decision-making legitimate is the fairness of the procedure itself, regardless of the contents of the decisions. Under this view the legitimacy of the decision-making procedure and the resulting decision depends on the notion of fairness that describes the procedure.

The fairness of the process can be based on different considerations about equality. Some authors argue that fairness must reflect on equal consideration. Others argue that it is a matter of equal respect among everyone participating in the deliberation. All accounts share the understanding that modern societies are marked by a persistent disagreement about what should be done. People tend to disagree about what they believe is the best justification of a decision. Equal concern for all beliefs about the right justification is therefore essential for the legitimacy of the decision-making process.

The mere focus on the fairness of the process can, however, be criticised. David Estlund<sup>93</sup> has drawn attention to the fact that the decision-making process must be evaluated in terms of its epistemic value, as well. He argues that it is insufficient to judge a decision-making procedure purely on grounds of fairness. Rather, it is important to take into account the epistemic implications of deliberation. His argument has some intuitive appeal. Rolling a die might fulfil some requirements of fairness, yet, we do not consider it an appropriate way of making decisions. The epistemic value of deliberative processes must lie in how it contributes to the justification of a particular decision.

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<sup>93</sup> Estlund 2008.



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Most recent accounts of deliberative democracy have become increasingly aware of this fact. I think that the epistemic value of deliberation can be adequately expressed by the transformative capacity that it possesses. By that I mean that political deliberation has the capacity to form or transform individual beliefs about what should be done. This must include that people do more than merely raising their voices and listening to the voice of others. The assumption of deliberation must be that through being exposed to other opinions and experiences, we are able to update and revise our beliefs about the world; or in cases in which such a transformation is impossible, find compromises.

An influential proponent of the transformative power of deliberation is Iris Maria Young. She explains that through the process of public discussion “with a plurality of differently opinioned and situated others, people often gain new information, learn of different experiences of their collective problems, or find that their own initial opinions are founded on prejudice or ignorance, or that they have misunderstood the relation of their own interests to others.”<sup>94</sup>

It should be noted that any account that wishes to endorse the transformative capacity of public deliberation must acknowledge the way in which people engage. Mere participation in decision-making might be insufficient if people fail to engage in an appropriate exchange about their beliefs on what should be done. I think that equality of power can play an important role in this interaction. Those with access to power might not feel the need to

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<sup>94</sup> Young 2000 p.26. See also Mansbridge 1993.

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engage with diverging reasons and beliefs. It can therefore be essential for public deliberation that democratic processes are appropriately responsive to all affected voices.

*What Justifies an Obligation to Obey?*

Whether or not people have an obligation to obey a democratic government has been subject to some debate amongst philosophers.<sup>95</sup> The question addresses multiple levels of democratic theory. Democratic authority can be located at the level of the state, arguing that if a state is justified, citizens have an obligation to obey its orders. Others argue that democratic authority should be located at the level of democratic procedures. This line of thought claims that the nature of democratic procedures is such that it confers authority to the decisions made through these procedures and the institutions which apply these procedures.

My idea of democratic rule takes a hybrid form. It locates authority at the level of the state but it claims that it must be constrained by procedures and processes consistent with the conditions of democracy. Thus, what justifies democratic authority must be the correct constitution of the state.

*Principle of Participation*

To conclude this section, I want to summarise how an entitlement to wield power can be democratically justified. As I have argued, what constitutes an entitlement is best embodied by the idea of the democratic assembly. The democratic assembly represents the procedures and processes of decision-

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<sup>95</sup> See e.g. Applbaum 2010; Buchanan 2002; Simmons 1976; Ripstein 2004.

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making in the democratic state. Decision-making procedures are democratically justified if two conditions are fulfilled: First, no one holds undue power over anybody else. And second, everyone is treated as a self-originating source of valid claims about what should be done. The former can be satisfied by the principle of accountability. The latter supports the idea of deliberative democracy. I have tried to establish a notion of deliberation that can accommodate a broad range of conceptual approaches. The distinct features of democratic deliberation are that the processes and procedures must follow some account of fairness marked by the notion of equal consideration. This gives rise to what I want to call the second Principle of Democratic Legitimacy:

Principle of Participation: Democratic procedures of decision-making and public deliberation must be appropriately responsive to all affected voices.

### **The Legitimacy of Procedural Outcomes**

#### *Normative Authority, again*

A focus on the deliberative processes and the epistemic and non-epistemic virtues that they realise might divert attention away from another crucial issue of democratic procedures. As I have already discussed in the previous section on democratic obligation, people might defer individual judgement in cases where an universal validity of a claim about what should be done can be established. This is important because such normative authority might not only override our obligation towards the state, as Raz's argument showed. Normative authority will also impact practical judgment about

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political decisions. It therefore has the capacity to render a decision illegitimate even if it is the outcome of a fair deliberative procedure.

I believe this is an important qualification for the theory of democratic legitimacy because it allows us to call decisions illegitimate in cases where the decision is a clear violation of widely shared ideas about justice. States deciding democratically to torture or murder are thereby not only making an illegitimate decision but they also lose their right to be obeyed by those subject to the decision.

Now there is some controversy around the correct location of normative authority in theories of legitimacy. Buchanan's account simply situated normative authority by stipulating minimum requirements of justice that democracies have to fulfil. As I have argued, this must undermine the Imperfect Obligation Thesis because the extent and scope of the realisation of conditions of democracy must be subject to practical judgement. Instead, I suggest that establishing normative authority should be located at the level of democratic procedures. If democratic procedures entail the epistemic capacity to determine the validity of claims, it is in principle possible to adjudicate between claims about what ought to be done.

The problem of epistemic considerations about normative authority is that we need to establish some criteria about what counts as a sufficiently justified claim. In other words, what are the relevant beliefs that we need to consider when determining the universal validity of claims about what ought to be done? I think there are two answers to this question. The first answer assumes that those claims are based on sufficiently justified beliefs if they reflect upon widely shared beliefs about what is right and good. For

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example, a universally valid claim might be that murder should be prohibited because it is based on the widely shared belief that taking someone else's life is the wrong thing to do. This claim can be based on a widely shared belief, or even a consensus, about what people regard as a normative fact. The second answer would assume that questions about what ought to be done can be deferred to experts. Experts must be recognised holders of sufficiently justified beliefs. However, this can be difficult to achieve because it must include a method to determine whose claims qualify as expert claims.

Normative authority, although it can play a significant role for the deliberative process, is thus hard to establish. I share the view that the "epistemic circumstances of politics" are often such that normative authority cannot be achieved.<sup>96</sup> The epistemic circumstances of politics are such that it is often hard to clearly point out who is a holder of normative authority or even what may count as a sufficiently justified belief. Most decisions that are made in processes of political decision-making that can be expected to engage with a variety of claims about what should be done. The complexity that is involved in empirical considerations as well as the complexity that is involved in moral considerations can make it hard if not impossible to establish an entity of normative authority. In this way, I share Peter's conclusion that "conclusive arguments for why a particular decision is the one that is favored by the normative facts will often be hard to make, as

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<sup>96</sup> Cf. Waldron 1999 and Peter 2016.

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evidenced by our many sophisticated and longstanding disagreements in moral philosophy and beyond.<sup>97</sup>

However, I think that at least in some cases normative authority can play a role in determining the legitimacy of a decision. As I have mentioned above, cases of murder, torture or slavery serve as examples of how normative authority can impact how we justify political decisions. Moreover, democratic legitimacy in its commitment to the conditions of democracy must allude to some fundamental normative facts. Clear violations of established principles of equality, liberty or solidarity can therefore be rendered illegitimate by reference to the normative authority that they have.

### *Principle of Basic Morality*

Therefore, the outcome of democratic processes and procedures must track sufficiently justified beliefs about what should be done. Democratic legitimacy must seek to establish normative authority where this is possible. This gives rise to what I want to call the third Principle of Democratic Legitimacy:

Principle of Basic Morality: Democratic decisions must not violate basic and commonly established principles of morality.

### **From Legitimacy to Inclusion**

In this chapter, I have explored the concept of democratic legitimacy along the lines of the normative conditions of democratic theory. I argued that as we wish to balance reason and power in a democratic state, we must rely on

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<sup>97</sup> Peter 2020 p.13.

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the notions of entitlement and obedience. Following my argument, we can sketch out a concept for a full account of democratic legitimacy. This concept must rely on three distinct principles: a principle of accountability, a principle of participation and a principle of basic morality.

The first two principles inherently rely on the notion of *appropriate responsiveness*. This notion describes the qualities that political entities ought to have vis a vis their constituents. Similarly, basic morality requires responsiveness as well. However, basic morality, as I have described, must be responsive to normative authority, and this will be (at least to a great part) an epistemic question.

How responsive the principles of legitimacy are vis a vis their constituents, on the other hand, depends on *affectedness*. Consequently, we must spell out responsiveness in terms of how individuals are affected by political entities - institutions and decisions. Therefore, in the next chapter, I want to explore a principle of affectedness – the All Affected Principle. As I will argue, the All Affected Principle equips us with the essential link between legitimacy and inclusion, providing the crucial vocabulary to further describe the boundaries of democratic legitimacy.





# Chapter III

## **Two Faces of the All Affected Principle**

The All Affected Principle (AAP) states that everyone who is affected by a decision of a government should have a say in the making of that decision. The principle is widely regarded as essential to our understanding of modern democracies. It is an underlying principle of a range of influential philosophical work in the last decades, ranging from cosmopolitan

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theories<sup>98</sup>, theories of deliberative democracy<sup>99</sup> to the defence of orthodox ideas of national democracies.<sup>100</sup>

In this chapter, I do not wish to defend any particular theory of democracy. Instead, I want to explain how the All Affected Principle relates to the fundamental principles of democratic legitimacy that I have indicated in chapter 2. My argument is based on the assumption that I have already argued for in chapter 1. The All Affected Principle is unsuited to determine the original constitution of the demos. Rather its predominant interpretations reflect upon how democratic rule is justified under the conditions of democratic legitimacy.

I will first provide a detailed account of the All Affected Principle and its different interpretations. I will critique each interpretation and argue for a particular view of *being affected*. In the second part, I will show how my view of the All Affected Principle reflects upon our insights of democratic legitimacy. I will argue that we can determine particular categories of democratic procedures that purport the overall legitimacy of democratic rule. I will finish with a brief outlook on how these categories will influence our view on legitimacy and inclusion.

### *The All Affected Principle in Democratic Theory*

Before engaging with a more detailed critique of the All Affected Principle, I want to sketch out the taxonomy of the AAP that I will use. While the AAP

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<sup>98</sup> See for example Held 2000.

<sup>99</sup> See for example Goodin 2012.

<sup>100</sup> See for example Miller 2009.

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has been widely used by theorists, its particular meaning often remains ambiguous.

Under the All Affected Principle, I subsume all democratic principles that wish to determine some principle of inclusion or participation based on a notion of *being affected*. What all of these versions have in common is that they seek to determine who needs to be accounted for when making political decisions democratically.

The two predominant interpretations of the All Affected Principle differentiate between being affected as a matter of *having an interest* in the decision or being affected as a matter of *being legally subjected* to the decision of a government. Because of its focus on interests, I will refer to the former version as the Principle of All Affected Interests (PAAI). The latter version, I will refer to as All Subjected Principle (ASP).

A lot of our understanding about the role of the All Affected Principle depends on how claims of being affected are supported. Claims based on the idea of having interests must specify what the notion of an interest and the concept of an agent holding interests must entail. Furthermore, we need to understand precisely in what way interests can be affected by political decisions. Claims based on the idea of being legally subjected must specify the way in which people relate to the law and what that relation entails. The relationship between the law as a legal realm of obligations and the coercive nature of law are of particular importance to this understanding.

In the following, I will first address questions raised by the Principle of All Affected Interests.

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### **The Principle of All Affected Interests**

A preliminary version of the Principle of All Affected Interests states: “Everyone whose interests are affected by the decision of a government should have a say in the making of that decision.”

One of the most influential advocates of the Principle of All Affected Interests is Robert Goodin.<sup>101</sup> In his paper “Enfranchising All Affected Interests, and its Alternatives” he outlines a basic concept of the PAAI that has become a standard account for claims raised based on the notion of being affected as matter of having an interest.

Goodin’s account is meant to address what he calls the “problem of constituting the demos”. The problem consists in determining who exactly should make democratic decisions and how we justify the specific group of people involved in making the decisions. However, as I have argued in Chapter 1, the All Affected Principle does not equip us with a final or satisfying answer to this problem.

However, Goodin has raised an important discussion to explore the scope of how affected interests need to be taken into account in democratic decision-making. Therefore, my critique of his account is meant to provide a base on which we can more closely investigate the role of the PAAI in democratic theory. I will start with a discussion of the notion of “being affected”. Being affected is generally discussed in terms of three categories of affected; first,

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<sup>101</sup> Goodin 2007.

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being causally or actually affected; second, being probably affected; and third being possibly affected.

*Actually Affected*

“According to what I shall call the “all actually affected interests” principle, the decision-making body should include all interests that are actually affected by the actual decision.”<sup>102</sup>

The principle of all actually affected interests defines being affected in terms of the actual impact that a decision has on someone. Accordingly, an individual is affected by a decision if the decision has an actual effect on the interests of the individual. A slightly different version is being discussed as the all causally affected principle. Beckman, for example, seems to understand it that way.<sup>103</sup> According to this interpretation, an individual is affected by a decision if the decision shows a causal effect on the interests of the individual. The difference between the emphasis on causalities as opposed to actuality shows in cases of inaction. If a government decides to abstain from a policy for some reason, this will have an actual effect on the interests of some. However, it is questionable whether the same can be said for causation. If a government decides not to interfere with the housing-market, it thereby does not actively cause any rent-adjustment that might affect people’s interests.<sup>104</sup>

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<sup>102</sup> Goodin 2007 p.52.

<sup>103</sup> Cf. Beckman 2009 p. 43 ff.

<sup>104</sup> A similar point is put forward by Beckman 2009.

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But the nature of political decisions is such that inaction can be reasonably interpreted as a decision. The US not interfering in Syria in 2015 was widely considered a shift in their foreign policy strategy. Yet, the shift was expressed through inaction. For this reason, I think it is preferable to speak of actually affected interests.

Yet, the actually affected interest version suffers from another problem. Whose interests are actually affected by a decision depends entirely on the decision that is made. This is true for action as well as inaction. The decision not to provide social housing will actually affect the interests of lower income groups. On the other hand, if social housing is provided this may affect the interests of realtors wishing to score higher rates on their listings. This example is, of course, a simplification and there will be interdependencies in both cases. Yet, it is meant to express the fact that those whose interests are actually affected may vary depending on the actual decision that is taken.

But that is a problem for the principle of all affected interests, because the outcome of a political decision will likely depend on who has a say in making the decision. So if we wish to determine who gets a say in making a decision this must in turn depend on an outcome that itself depends on who gets a say. This is quite obviously incoherent and should thus be disregarded – a fact that has been pointed out by Goodin, as well as most authors.<sup>105</sup>

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<sup>105</sup> Most commonly quoted in this regard is Whelan 1983.

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*Probably Affected*

Another version of the PAAI explores being affected in terms of probability. This version assumes that we need to consider a certain probability with which a decision will have an impact on the interests of individuals. This version seems to circumvent the problem of the actually affected version but it leaves open another crucial question. Because in order to provide an account of who is probably affected by a decision we need to have some kind of criterion of what counts as probable.

One way of addressing this problem is to interpret 'probable' as some measure of scientific plausibility. Accordingly, an action is probably affecting an interest if there is sufficiently plausible reason to believe that the action is in fact affecting the interest.<sup>106</sup>

However, the nature of political decisions and political circumstances can be such that a measure of plausibility can be hard to establish. The issue then lies with determining a threshold of plausibility. We may want to give a high threshold of plausibility in order to exclude cases where people are granted an undue say in the decision-making. We may want to give a low threshold of plausibility to ensure that no one gets excluded from the decision-making, whose interests are in fact affected.

Yet, a high threshold could run into the risk of collapsing the 'all probably affected' version into the 'all actually affected' version. On the other hand, a low threshold could undermine the role that probability is meant to take here. If we need to account for actions that affect interests under a very low

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<sup>106</sup> This is discussed somehow similarly by Goodin 2007 p. 60.

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scientific plausibility, this could eventually collapse into including everyone possibly affected.

I think that there is no reason to disregard the ‘all probably affected’ version of the PAAI too early. It is reasonable to assume that at least for some political decision we can find a reasonable threshold of plausibility. However, the importance that probability can assume in this version of the PAAI remains limited.

### *Possibly Affected*

A third version of the PAAI seeks to understand being affected in terms of ‘possibly’ being affected. The ‘all possibly affected’ interpretation is likely to be the most influential and most controversial version of Goodin’s PAAI. Goodin states that:

*“we will have to give a say to anyone who might possibly be affected by any possible decision arising out of any possible agenda.”<sup>107</sup>*

This version of the PAAI is a radical approach of political inclusion because it assumes the nature of political decisions to be all-encompassing. However, this radical approach may be justified given the complications addressed above. Political decisions often affect people in more ways than the mere impact on immediate interests.

*“More generally, you are rightly said to be “affected,” not merely by the “course of action actually decided upon,” but also by the range of alternative courses of action from which that course was chosen.*

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<sup>107</sup> Goodin 2007 p.55.



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*Furthermore, you are rightly said to be “affected,” not merely by what the consequences of that decision actually turn out to be, but also by what the consequences might have turned out to be.”*<sup>108</sup>

It is important to note that the ‘possibly affected’ version of the PAAI explicitly transcends any political boundaries – territorial or temporal. It has therefore huge inclusionary effects on determining who is to get a say in the decision-making.

Because of the wide extension of its inclusionary requirements, the ‘possibly affected’ version has been disregarded as impractical to determine the democratic franchise. However, as I want to argue, the impracticality argument stems from Goodin’s claim that the PAAI is a principle of constituting the demos. This gives raise to the idea that, if taken seriously, democratic theory provides a strong argument in favour of a global democratic state. But this need not be the case if we are willing to accept that democratic participation does not need to require the formal assignment of voting rights and the enfranchisement of everyone affected into one legal realm.

I will expand on these thoughts later. For now, I want to point out that the ‘possibly affected’ version of the PAAI should not be disregarded based on over-inclusionary implications. If being affected can give grounds to claiming political participation, the PAAI should be granted normative force. The ‘possibly affected’ version thereby avoids some problems of the

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<sup>108</sup> Goodin 2007 p. 54.

other versions and is therefore an adequate candidate as a principle of political participation.

### *Beliefs and Interests*

Another important qualification of the PAAI can be made in terms of how we understand interests. Unfortunately, this problem is hardly addressed by Goodin. He acknowledged the question of “Should ‘all affected interests’ include anyone who *believes* his or her interests could or would be affected by some possible outcome of the decision process, or ought we limit it to those who really would?”<sup>109</sup> Yet, the question is disregarded as a complication of a more fundamental problem.

I think that the question is, however, quite relevant because as the ‘all possibly affected’ version has shown, the PAAI can address a wide range of political sentiments. The question whether interests are indicative of our beliefs or some notion of material interests is thus of significance.

The Oxford Dictionary of Philosophy defines an interest as:

*“Those things that a person needs, or that are conducive to his or her flourishing and success. [...] But people may not desire or value, what they need; hence people’s real interests may not be revealed by their immediate choices and preferences.”*<sup>110</sup>

A general statement of what people’s interests are must include the things that individuals desire or value and the things that they may need but which are sometimes left concealed by immediate action. Now this account is

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<sup>109</sup> Goodin 2007 p.54.

<sup>110</sup> Blackburn 2008 p.189.

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subject to individual beliefs in two important ways. First, individuals will hold beliefs about what they value and need. Second, individuals will hold beliefs about what they and others need.

Beliefs about what we need can take a simple shape, like the expression of a preference. I believe I like oranges; thus, I can express an immediate interest in having oranges. But they can also take the shape of beliefs about what we value in terms of how we relate to others. I can value equality and therefore have an interest in policies that foster egalitarian distributions.

This is related to beliefs about what we and others need. Such beliefs normally require some underlying attitudes about the right and the good. I may, for example, believe that people need access to basic goods in the society. I will therefore have an interest in policies that defend an access for everyone to such basic goods.

A similar point is raised by Robert Dahl in relation to the PAAI. Dahl argues that “what affects my interests depends on subjective factors.” For example, it is “to my interest to protect the right of black Southerners to vote in elections [or] coal miners in West Virginia to be protected against diseases.”<sup>111</sup> I think Dahl’s examples are compelling. They reveal two implications of the notion of affected interests. First, individuals’ interests may depend on subjective judgments and preferences. Second, available information and communication can play a distinct role in determining individual interests.

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<sup>111</sup> Dahl 1970 p.66.

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These implications can have far-reaching consequences for the application of the PAAI. If interests depend on individual judgment, this will further enlarge the scope of people affected. People do not only get affected in what is immediately at stake, but as well in the implications that the decision has for their beliefs about what is at stake. Furthermore, available information is essential as “the more global the network of communications [...], the more your ‘interests’ are likely to expand.”<sup>112</sup>

I think that the discussion of the role of individual beliefs further strengthens the ‘all possibly affected’ version of the PAAI. Political decisions are likely to affect people’s attitudes towards the right and the good. It can be reasonable to assume that this is enough to constitute a case of being affected. The ‘all possibly affected’ version of the PAAI covers these cases, since it simply assumes the possibility that everyone might be affected.

I think that there is one important qualification to be made, though. Beliefs about individual needs and beliefs about the right and the good are matters of epistemic consideration. They refer to individual claims about what should be done. However, it is likely that at least in some cases people will have shared beliefs about what should be done. For example, it is likely that many people share Robert Dahl’s beliefs about the protection of voting rights of black Southerners in the US.

But this seems to be problematic for the PAAI. Should we account for those shared beliefs as one affected interest or as several independent affected

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<sup>112</sup> Dahl 1970 p.66.

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interests? And in turn, do we have to give a say to every holder of a belief individually or is it sufficient to give one say to each affected interest?

My last point seems to share some similarities with the much broader and ongoing dispute between proponents of aggregative and deliberative models of democracy.<sup>113</sup> I do not wish to settle this discussion here. What matters for the understanding of the PAAI is that at this point it is not trivial to determine what “having a say” in the decision-making should entail. I will come back to this at a later point.

### *The Argument from Equality*

Another important qualification of the PAAI lies in its relation to considerations about equality of affected interests. The issue raised by this relation is how we weigh different interests against each other. My interest in the protection of coal miners in West Virginia against diseases appears to have a different quality than the interest of actual coal miners in West Virginia. How to reconcile the different qualities of interests cannot simply be answered by reference to granting an equal say to each affected party.

Unfortunately, Goodin’s account of the PAAI provides little answer to this problem. He argues that because the PAAI was a principle meant to protect people’s interests, it was a fundamentally democratic principle. As such it dictates who should be included in the decision-making group and at the same time determines how decisions should be made – namely democratically. But this leaves a range of questions unaddressed. Whether

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<sup>113</sup> See Knight and Johnson 1994 for an overview.

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or not the PAAI does a good job in protecting people's interests is not so much a matter of giving a say to each interest. Instead it is generally assumed that the *outcome* of a decision-making process determines whether or not people's interests are sufficiently protected.<sup>114</sup>

#### The Condorcet Jury Theorem

Now, we may assume that democratic procedures of decision-making can ensure the protection of people's interests. However, this does not explain the specific role of the PAAI in this. Goodin seems to rely elsewhere on the application of some version of the Condorcet Jury Theorem.<sup>115</sup> The Theorem assumes that if a political decision is to be made between two choices, one of which is correct, and if voters pick the right choice with a probability on average higher than 0,5, then a majority vote is likely to yield the right answer – and at least more likely than any minority decision. Moreover, the chance to yield the correct answer increases as more people are included in the voting process.

Opponents of the Condorcet Jury Theorem generally argue that it is insufficient to capture the nature of actual political decisions.<sup>116</sup> Political decisions are rarely bound to only two options. Neither is it trivial to determine ad-hoc the correctness of either of the possible choices. Another objection is more problematic for the PAAI. According to this objection, it is not the case that expanding the electorate will necessarily increase the

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<sup>114</sup> See for example Arneson 2003.

<sup>115</sup> Goodin 2003b Chapter 5 discusses the Theorem as a “Truth-Tracker”.

<sup>116</sup> Estlund 2008 chapter XII provides a detailed overview of the arguments.

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chance to yield a right outcome. The idea behind this argument is that including votes of people with little or no information about the political topic are not very likely to anticipate the right answer. Again, my vote on the protection of West Virginian coal miners may not carry the same quality as someone more closely involved with the topic. It is questionable how increasing the electorate to 7,6 billion people would overcome this epistemic problem.

I do not wish to disregard the Condorcet Jury Theorem entirely. Much academic work has been done in recent years on illuminating the terms and conditions under which the Theorem may still capture some important insights about democratic decision-making.<sup>117</sup> However, I do not think that it necessarily helps us understand the ability of the PAAI in protecting people's interests. Therefore, the democratic grounds of the PAAI need to be further explored.

#### Equal power

Another promising approach to defend the PAAI as a principle to determine the terms of democratic decision-making lies in its relation to political power. I will rely here on the notion of political power I have introduced in chapter 2. Political power entails the ability to make someone act through means of persuasion or coercion. Political power, thus, can create reasons to comply for citizens.

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<sup>117</sup> Goodin's account is a good example.

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Now, one way to approach the relationship between power and interests is to argue that wielding political power necessarily requires the exercise of power of some over others. And this exercise of power can only be justified if it is in accordance with the interests of those over whom power is wielded.<sup>118</sup> So democratic procedures may justify a particular distribution of power that ensures a particular way of wielding power that is conducive to the protection of individual interests. The question is then, whether the PAAI helps us to determine this particular distribution of political power.

I think this is what Goodin has in mind when he characterises the PAAI as a fundamentally democratic principle. However, his interpretation of the principle seems to simply equate equality of power with equality of interests. In his defence of the PAAI as a democratic principle, he argues:

*“the all affected interest principle is fundamentally egalitarian, counting all interest equally; and equal political power is arguably the cornerstone of democracy.”*<sup>119</sup>

Now, equality is doubtlessly and as I have argued before a fundamental condition of democracy, however, it is not straightforwardly clear why counting all interests equally is necessarily supporting this condition. By presupposing that equal interest can ground equal political power, Goodin might align the “who” and the “how” of democratic theory, however, this equation challenges our understanding of the relation between equality of interests and political equality.

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<sup>118</sup> Cf. again Arneson 2003.

<sup>119</sup> Goodin 2007, p.50.



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If we interpret the PAAI in this way, I think that some of the implications are in fact quite counterintuitive and I want to illustrate this with a short example about how we make collective decisions.

Let us assume that I decide to get a new haircut. Let us also say that I have the options to choose between long haircut and a short haircut. The person who is actually, probably and possibly most affected by this decision will be my partner. After all, she will be the one who has to see my face most of the time. So, when choosing between long hair and short hair, I might want to include her in the decision-making process. Meanwhile my partner's interest in my hairstyle may involve a set of different beliefs apart from mere looks. She might consider beliefs about my personality, beliefs about how it will be perceived by others, including beliefs about how gender roles are supposed to be represented.

Now, the problem lies with how her interest in the decision about my haircut constitutes some form of power and how this power can be justified. I am happy to grant that my judgement will probably depend to some degree on how my looks are perceived. In this way, my partner's comments will have an influence on my final decision. This influence, I think, is mainly grounded in some of my beliefs about how I respect her interests and beliefs. However, her influence is not coercive in any way and it will be hard to justify why it should be. On the contrary, if my partner seeks to justify a right to coercion by claiming that it is based on her interest, this would undermine my basic right to self-determination.

I think what this example goes to show is that it can make a difference whether someone has *a say* in the decision-making process or whether

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someone has *the final say*. By considering the interests of my partner, I give her the opportunity to influence the deliberative process that will finally lead to my decision. It still has to be my decision because I am fundamentally free to do what I intend to do.

Of course, the nature of a political decision is usually different. Political decisions are, per definition, collective decisions. They determine the rules that collectives give to themselves in order to structure their shared worlds. So political decisions are ultimately less about individual self-determination but about collective self-determination. Yet, that does not mean that the use of coercion is justified whenever it is motivated by affected interests. Generally, the terms of collective decision-making, i.e. to whom the decisions apply and how rules are enforced, needs to be decided upon before the decision is made.

Let us assume that my partner and I both decide to get a haircut. Moreover, we agree that we would both like to get the same haircut and that the decision which haircut to choose will be made together. Now, whatever will be the *final say* in the process, it will apply to both of us equally. And because the decision applies equally to both of us, neither of us should have the power to unilaterally force the other one into choosing a particular option. Under these conditions it is then plausible to assume that both of our interests should be accounted for. However, it is not our interest that requires the equalisation of power in the first place.

Therefore, I want to argue that equal interests in a decision do not necessarily coincide with equal power. On the contrary, it is *because* power

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ought to be equally distributed that those holding power must account for all interests.

### Equal consideration

But this is quite different from how Goodin positioned the Principle of All Affected Interest. He is right stating that equal power is a cornerstone of democracy. As I have argued in the previous chapter, equality of power is in fact a main principle of the democratic justification of political obligations. However, equal power is not a consequence of counting all interests equally in the decision-making process. It is because people have agreed to share power equally that the decision-making process must be appropriately responsive to all affected interests.

This leaves the PAAI still in a powerful place. It prescribes that if we want to conduct democratic forms of decision-making we need to grant a say to everyone whose interests are affected by the decision. It may well be justified that we in fact give a say to anyone who might possibly be affected by any possible decision arising out of any possible agenda.

I think the important distinction for the PAAI lies in the difference between giving *a say* as a matter of considering someone's position and granting *the final say* as a matter of self-determination. An interest in the political decision may necessitate the former but not the latter. Thus, the PAAI is best explained as a principle of equal consideration. It grants those affected influence on the decision-making process by virtue of expressing desires and beliefs about what is stake. Democratic procedures must be appropriately responsive to such expressions as a matter of acknowledging valid claims about what should be done.

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### **The All Subjected Principle**

Some of the nuances in our interpretation of the Principle of All Affected Interests are best understood in contrast to its alternatives. Therefore, I want to shift the focus to the second predominant interpretation of the AAP, the All Subjected Principle. Roughly stated, the ASP defines being affected in terms of legal subjection. Accordingly, everyone who is subject to the law or rule of a political association ought to participate in the making of the law or rule.

A first genuine definition of the ASP is provided by Goodin, as well, who considers it a possible alternative to the PAAI before rejecting it: “all those who will be bound by a rule should have a say in making the rule.”<sup>120</sup>

However, Goodin’s initial interests in the formulation of an All Affected Principle is motivated by the “alignment of the who and the how” of democratic decision-making. As I have argued before, the All Subjected Principle is insufficient in this regard because it must presuppose an already established political association. Being subject to a law or a rule depends on the logically prior matter of establishing a political association to which all laws and rules apply equally. Nevertheless, it is worth acknowledging the divergent democratic boundaries that the ASP and the PAAI prescribe under certain circumstances. Goodin illustrates this contrast with the following example:

*“Imagine a German law that requires polluting factories there to build chimneys tall enough to ensure that their emissions fall to*

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<sup>120</sup> Goodin 2007, p.49. I believe Goodin’s example is inspired by Dobson 1996.

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*ground only in Scandinavia: legally, that law binds only manufacturers in Germany; but it clearly affects Scandinavians, and is indeed designed to do so. Giving only Germans (the only ones who are literally “bound” by the law) a vote on the law, as the principle here in view envisages, would be adjudged fatally underinclusive in consequence.*”<sup>121</sup>

The example of the Scandinavian Lakes serves to illustrate the difference between the two principle of affectedness. Scandinavians are affected in the interest in clean water and intact environment, yet, they are not legally bound by any German industry regulations. On the contrary, German manufacturers are bound by German law, may be affected in their business interests but do not share the environmental burden. According to Goodin and other proponents of the PAAI interpretation, the Scandinavian Lake example shows how the ASP must necessarily be underinclusive as a democratic principle, given the interdependence of international political actions.

However, the underinclusiveness claim only holds if we have already accepted that affected interests are in fact the democratically relevant matter for the enfranchisement of Scandinavians in this case. But as I have argued, having in interests in a collective endeavour does not qualify one to get a *final say* in the making of the decision – at least for as long as one is not willing to be subjected to the same set of rules. Therefore, to most proponents of the All Subjected Principle the underinclusiveness claim

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<sup>121</sup> Goodin 2007, p. 49 f.

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would be regarded as irrelevant. While the All Subjected Principle simply presupposes the existence of an already existing political and legal unit, it must strictly separate the constitution of the demos and the legitimacy of democratic rule. Within the boundaries of this political unit all those subjected to political rule will then have a vote in the decision-making process.

It is maybe little surprising then that the ASP has served as a powerful tool for historical movements of a more inclusive suffrage. Once a political unit, commonly in the form of a nation state, has been established, people may raise their claim for participation based on the fact that they are permanently subjected to the rule of the government. Well known examples are the claims of American settlers based on the slogan “taxation without participation is tyranny”<sup>122</sup> or the post world war II movements for the inclusion of women in politics. More recent applications of the ASP refer to the inclusion of migrants or even non-human subjects of law like animals or plants.<sup>123</sup>

These claims for inclusion in the decision-making of a democratic state are generally based on an idea of ‘public autonomy (or political autonomy)’<sup>124</sup>: Democracies must be so organised that people can perceive of themselves as the authors as well as the subjects of laws. Nobody gets to decide upon

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<sup>122</sup> According to Pitkin, the Slogan originates from an Irish settler in Massachusetts, yet, its historical roots lie well before the American revolution. See Pitkin 1967 p. 3 (especially footnote 7) and p. 191. Also Dahl 1970 p.65 ff.

<sup>123</sup> See e.g. Stone 2010; López-Guerra 2014; Beckman 2009; Cochrane 2020 . Stone and Cochrane refer to different interpretations of the All Affected Principle.

<sup>124</sup> I am borrowing this term from Benhabib 2005.

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the rules of the state who is not bound by the same rules and nobody can be bound by a rule that she cannot decide upon. The idea of public autonomy expressed the idea that citizens are owed the fundamental right to self-determination and that this right is politically expressed by giving each a *final say* in the collective decisions made by the state. While people may as well have an interest in the decisions of a government, it is the fact that they are bound by political decisions that grants them equal votes to determine the outcome of the decision.

The right to a vote in the decision-making process is further substantiated by reference to the democratic justification of political authority. We are entitled to a vote because no democratic government has the right to command without it being at the same time accountable to us. This points us to the fundamental difference between the PAAI and the ASP, namely the source by which both principles seek to legitimise democratic decisions. While the PAAI refers to the stakes that people have in a political decision by virtue of their interests, the ASP refers to the justification of how a political decision can be legally binding.

### Vote and Consent

The democratic justification of political authority is often associated with theories of consent. Therefore, it seems important to note that the All Subjected Principle does not prescribe the consent of everyone governed. The All Subjected Principle claims that everyone subjected to the law should be included in the decision-making process. But the participation in the government is not an act of consent. We can consent to the establishment of a democratic state structure, to the rule of law or the democratic constitution

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and therefore potentially legitimise a political order. However, the legitimacy of a democratic decision made within a democratic state does not depend on individual consent. If I disagree with the specific environmental regulation of German factories, my disagreement should not per se affect the overall legitimacy of a collective decision. And while this may appear trivial to some, it is important to stress the fact that a right to vote should not be equated with a right to prevail in an election. But this is exactly what consent requires – the fact that decisions are made consensually by everyone. As a principle of legitimate democratic rule, the ASP therefore does not require the consent of everyone subjected to the rule. Instead it requires that everyone subjected to the rules of the state has an equal stake in the making of the rules.

Rather than consent, the right to participate in the government is more likely to express the idea of equal distribution of political power within a democratic state. Since no individual will should count for more than anybody else's will, the government should be equally accountable to each member of the association. Therefore, the ASP does not prescribe the consent of everyone subjected to a decision. Rather, the ASP requires political decisions to be equally accountable to everyone subjected. Because of this fact, the ASP is often argued to substantiate the claim for a general right to vote. Accordingly, the franchise must give a vote to everyone subjected to the rules of the state because no one should be subjected to the wills of others without having herself the opportunity to express her will. In other words, everyone has an equal stake in the *final say* about what should be done collectively.



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Expressing your will through vote, however, can be quite different than raising one's opinion. A vote is not a mere consideration of individual beliefs or interests. Because the vote directly impacts the outcome of the democratic decision procedure it is also an expression of political might. The democratic procedure therefore both necessitates and requires the vote of everyone subjected. It requires the vote of everyone subjected because otherwise it cannot be justified as a way of political ruling. It necessitates a general right to vote because it is the only way to equalise decision-making power amongst citizens.

The vote as substantiated through the ASP is thus fundamental for the establishment of democratic sovereignty. No democratic state can justifiably claim supreme authority over a political association without granting a right to vote to everyone subjected to its rules. The democratic state manifests its right to be obeyed through the democratic procedures that are controlled by those under the obligation to obey.

#### From Subjection to Coercion

The active part that citizens take in the making of decisions is what differentiates the right to vote from mere consent or from epistemic consideration. Adam Przeworski, for example, has argued that "voting is an imposition of a will over a will" and, paraphrasing Condorcet, that "when a decision is reached by voting, some people must submit to an opinion different from theirs or to a decision contrary to their interest."<sup>125</sup> This distinguishes the act of voting from political deliberation. Although

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<sup>125</sup> Przeworski 1999 p.14.

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deliberation may take place around elections, it is primarily an act of political reasoning. Deliberation has the power to explore and even alter individual reasons to support or reject political decisions. Hence, deliberation is essential as it provides a government with guiding reasoning in the implementation of a decision. However, Przeworski argues:

*“if all the reasons have been exhausted and yet there is no unanimity, some people must act against their reasons. They are coerced to do so, and the authorization to coerce them is derived from counting heads, the sheer force of numbers, not from the validity of reasons.”*<sup>126</sup>

Przeworski’s argument here is certainly oversimplified. The sheer force of numbers, in principle, refers to simple majority rules. Most representative democracies, however, rely on the fact that representatives will attempt to balance diverging positions in order to gain a majority of votes. Making concessions on each side may therefore be more promising than assuming contrarian positions. Consequently, the force of numbers may as well be the result of a nuanced process of political negotiation.

However, I do not wish to defend models of representative democracy for now. The point in Przeworski’s argument is that it highlights the link between the right to vote and the justification of state coercion. This link is essential for our understanding of the All Subjected Principle, because it allows us to further specify what we mean by “being subjected” to the rules of a state. If the notion of subjection requires democratic states to grant a

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<sup>126</sup> Przeworski 1999 p.15.

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vote to every individual, the notion of coercion helps to identify who must count as being subjected. According to this understanding of subjection, everyone who is subject to a law or rule is at the same time subject to the coercive power necessary to enforce the law or rule. In turn, everyone who is subject to the coercive powers of a democratic state must be granted a vote in the decision-making process of that state. This is the reason why some authors refer to the All Subjected Principle as Coercion Principle.<sup>127</sup>

*Subjected to Coercion or Subject to Law?*

The relationship between subjection and coercion is essential for the right understanding of the All Subjected Principle. While it is generally assumed that the law is necessarily coercive to its legal subjects, simply equating the All Subjected Principle with a Coercion Principle risks to overlook some important intuitions.

Some of these intuitions stem from our distinction between coercion in general and the nature of state coercion in particular. A thug who forces bypassers to hand out their money might apply an act of coercion. Yet, his mode of coercion is quite different from a state coercing its citizens to pay taxes. Being robbed on the street subjects us to the arbitrary forces of an individual criminal. Whereas the coercive force of the state is backed by a law that applies to everyone equally. Herein lies maybe the most crucial feature of acts of state coercion; the fact that coercion must be justified through symmetrically and collectively binding rules of law.

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<sup>127</sup> See for example Song 2012 or Miller 2009.

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An act of coercion that is not authorised by a law is hence a use of arbitrary force and not an act of state coercion. Of course, there are cases where this distinction itself might be blurred. The abuse of prisoners at the Abu Ghraib prison in 2004 is an example of how the powers of a state can be used and misused without the proper authorisation through laws. I think that although these acts are executed by institutions of a state, they do not qualify as acts of state coercion. In fact, such acts spark even greater condemnation precisely because they subject people to abusive instances of state power without the proper authorisation.

Sometimes we even speak of state coercion without reference to direct acts of force. A state's law may prevent me from occupying my neighbour's house. However, since I did not intend to squat on his grounds, no actual force must be applied. In such cases, state coercion is merely preventive. For as long as I do not intend to squat on someone's property, the state will not deploy any force. Nevertheless, in order to prevent any arbitrary squatting, the state can carry out threats of force and punishment.

Now, one might argue that in this case I am merely subjected to a preventative law but not subjected to any acts of coercion. For example, Friedrich Hayek has stated that we should differentiate between *avoidable* and *unavoidable* acts of state coercion. Insofar as my occupation of the neighbour's house is avoidable, I need not be coerced by the state. In fact, Hayek argues that avoidable instances of coercion should not count as acts of state coercion whatsoever:

*“At least insofar as the rules providing for coercion are not aimed at me personally but are so framed as to apply equally to all people in*

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*similar circumstances, they are no different from any of the natural obstacles that affect my plans.* <sup>128</sup>

Hayek's argument appears inconsistent with what I have characterised as the relationship between authority and coercion. As mentioned in the previous chapter, as long as a law is authoritative it is coercive precisely because it imposes binding equal restrictions on individual freedom. On this view, any interference with individual freedom must be coercive. It is coercive because it interferes with your capacity to autonomously set and pursue your individual ends. Such interferences need to be justified and they are democratically justified if and only if they are authorised by everyone in a symmetric manner.

But Hayek's understanding of individual freedom seems to differ. Accordingly, individuals are free to pursue what they want and desire and their freedom, at least partly, consists in whether they are able to succeed in their pursuits. Hence, people need to be protected from any obstacles that hinder their plans. State coercion must be justified only in cases where the law interferes with individual wants.

*“it seems that freedom demands no more than that coercion and violence [...] be prevented, except for the use of coercion by government for the sole purpose of enforcing known rules intended to secure the best conditions under which the individual may give his activities a coherent, rational pattern.”*<sup>129</sup>

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<sup>128</sup> Hayek 1960 p. 210.

<sup>129</sup> Hayek 1960 p.211.

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I think that it is important to differentiate between these two understandings of state coercion. On Hayek's view, the laws of the state are coercive with regards to the causal effects that they have on individual plans. On the view that I favour here, the laws of the state are generally coercive regardless of their causal effects.

This has important implications for the interpretation of the All Subjected Principle. According to the Hayekian view, individuals can be subject to laws while at the same time they are free from coercion. The problem with this view is that some laws can be coercive to some while they are not coercive to others. An understanding of the All Subjected Principle in terms of coercion would then prescribe that only those will be granted a vote who are actually coerced by the law in question. But this seems counterintuitive because our enfranchisement would then depend on whether we acknowledge a law to be interfering with our life plans in some relevant way.

This problem can, of course, be solved if we emphasise the alternative view that any law is by nature coercive. The nature of state coercion is then such that anyone who is potentially subjected to the coercive powers of the state, in form of violence or mere communicative acts, must be granted a vote. This is because we must see laws as coercive regardless of their actual effects on people's plans. What is important is the mutually binding force of collective and equal subjection.

One might argue that under this view coercion is simply a conceptual by-product of legal subjection – a marker for whether someone can be counted as being subject to the law. However, this argument is misguided for two

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reasons. First, legal subjection without *de facto* coercive power is meaningless. A law that cannot potentially be enforced by the state loses the quality of being practically binding. Therefore, rather than a by-product, actual and instantiable coercive power is essential for legal subjection. Second, there can still be cases where an act of coercion does not indicate any subjection to a law. I want to call such cases *coercive externalities*. They are externalities because such acts interfere with the freedom of some outside the sphere of their legal intent.

Coercive externalities are different from unintended consequences of laws as they are often discussed in literature. For example, the US prohibition of alcohol in the 1920s had the unintended effect that it strengthened a large illegal alcohol industry by driving small producers out of business. Coercive externalities do not necessarily produce unanticipated effects but they unintentionally expand some coercive force beyond the legal boundaries of the law. A law that allows German factories to pollute Scandinavian lakes, for example, will in some way interfere with the freedom of Scandinavians to use the water from their lakes. However, Scandinavians are not subjected to the German law but merely to the coercive externalities the law has produced outside the German jurisdiction. Thus, the German law will certainly require justification but it does not require the enfranchisement of Scandinavians, because enfranchisement must be based on the subjection to equally and mutually binding laws.

Nevertheless, there are cases in which the relationship between coercion and subjection is less clear. I want to discuss two of the most controversial cases in the following. Maybe unsurprisingly, these cases are directly concerned

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with the physical manifestation of legal boundaries in the form of territorial states. The first case is the case of border coercion in the context of immigration laws of states. The second case will be the case of citizens who permanently reside outside the state territory of their assigned citizenship. Let me start by clarifying some terms first.

*Residency, citizenship and the territorial view of jurisdiction*

The case of immigration is first and foremost a case of state residency. Someone is a resident of a state if she is physically located within the territorial borders of a state. We generally distinguish between permanent and non-permanent residents. Non-permanent residents only temporarily reside in a certain state, for example tourists, foreign delegates or business travellers. Permanent residents, on the other hand, spend most or at least a significant part of their life's time in a location. Permanence is often given special relevance because it is assumed that is important for the way in which people form communities and carry out their life plans.

Residency can coincide with citizenship. For example, in the European Union roughly 92 per cent of the population reside in the country of their citizenship.<sup>130</sup> Citizenship, however, often refers to a more expansive notion of rights and privileges that a national group enjoys by virtue of their shared national identity.<sup>131</sup> These rights and privileges even hold if the citizen is

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<sup>130</sup> See EuroStat. Of course, there are vast differences between member states. Only 52 per cent of the residents of Luxembourg hold a Luxembourgian citizenship, but the rate is more than 99 per cent in Rumania.

<sup>131</sup> There are varying notions of 'national identity'. Some hold that a national identity can be inherited while others believe that one's national identity can be chosen or assigned.



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located abroad. In one sense, citizens are thus subject to the law as they are addressed by the law of the state of their citizenship. However, because citizenship does not require residency it stands in a conflict with certain conceptions of democratic jurisdiction.

As I have already argued in Chapter 1, the scope of democratic jurisdiction cannot satisfactorily be determined by national membership. The jurisdiction of a state, the authority to execute its laws, is practically determined by the territorial borders of a state. This is in line with common practice in international law. The European Convention on Human Rights for example states that its parties “shall secure to everyone in their jurisdiction the rights and freedoms” as defined in the convention.<sup>132</sup> And in a legal interpretation of its *ratione loci*, the court has argued that “the Convention must be considered to reflect [an] ordinary and essentially territorial notion of jurisdiction.”<sup>133</sup>

Based on the territorial interpretation of jurisdiction, Ludvig Beckman has suggested that the All Subjected Principle should be understood by reference to residency rather than citizenship. According to his understanding of the All Affected Principle, “political rights should be established on the basis of the individuals’ territorial status, where the alternative is ‘resident’ or ‘non-resident’.”<sup>134</sup> The territorial understanding challenges common conceptions

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<sup>132</sup> European Court of Human Rights (ECHR).

<sup>133</sup> European Court of Human Rights (ECHR), of 12th December 2001. See also Wildhaber 2007 p.223.

<sup>134</sup> Beckman 2009 p. 74.

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of voting rights within states. It is based on the aforementioned idea that “democratic boundaries should correspond to jurisdictional scope.”<sup>135</sup>

Rainer Bauböck, on the other hand, has argued that the territorial view was unsatisfying precisely because it was undermining citizenship as the relevant concept defining the right to vote. His objection is based on a sociological idea where the status of citizenship is essential for political belonging. Accordingly, there is a “discrepancy between the territorially bounded jurisdiction of states and the wider political community of citizens.”<sup>136</sup> Bauböck’s idea of a political community of citizens somewhat resembles a community of fate, where citizens share an interests in citizenship itself. Consequently, claims to voting rights should be assessed based on citizens’ link of “their future well-being to the flourishing of a particular polity.”<sup>137</sup> But Bauböck’s adherence to the concept of citizenship does not reject the territorial view of jurisdiction. Understanding the All Subjected Principle as a legal principle of territorial jurisdiction leaves enough conceptual space to account for the other reasons people might have to endorse their citizenship. The question is whether having a stake ‘in the flourishing of a particular polity’ is enough to establish a legitimate right to vote in the polity. And my answer simply is ‘no’, because having a stake is not the same as being bound by the rules of the polity.<sup>138</sup>

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<sup>135</sup> *Ibidem*.

<sup>136</sup> Bauböck 2007 p. 2419.

<sup>137</sup> Bauböck 2007 p. 2422.

<sup>138</sup> Beckman 2009 p. 74 f. criticises Bauböck for needlessly conflating citizenship and residency. However, the point is that Bauböck thinks that citizenship is essential for a principle of political participation.

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Once the territorial view of jurisdiction is established, it follows that the All Subjected Principle applies to everyone living in the territory of a particular state. However, I see the territorial view as an approximation of legal subjection rather than a conceptual necessity. Since we need to provide practically guiding conditions to assess when someone is entitled to participate in elections, the territorial view is salient as it reflects valid legal practice in determining the bindingness of law. The conclusion from applying the territorial view is simple: Everyone who (permanently) resides within the territory of a particular democratic state, is entitled to a share of the *final say* in the making of political decisions.

As Beckman has pointed out, this puts the territorial view of the ASP in stark contrast to current principles of democratic inclusion. “The current exclusion of resident non-citizens, practiced in virtually every democratic country in the world today, is, thus, inconsistent with fundamental criteria of democratic inclusion.”<sup>139</sup> But this seems to be a crucial feature of the All Subjected Principle as is highlighted by Näsström. She claims that a particular strength of the ASP lies in its capacity to “detect a violation of the democratic ideal in situations and practices that hitherto would have passed largely unnoticed. [...] Today we see the democratic discrepancy that existed in Athens precisely because of our attentiveness to what for the Athenians themselves was closed from view: the distinctively *political* nature of the boundary between *demos* and *oikos*.”<sup>140</sup>

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<sup>139</sup> Beckman 2009 p.76.

<sup>140</sup> Näsström 2011, p.120.

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*The Case of Immigration*

The territorial view is directly connected to the case of immigration. Defining subjection in terms of residence, can equally subject non-residents to the coercive powers of a state. Arash Abizadeh for example has prominently pointed out an interpretation of the All Subjected Principle according to which the coercive boundaries of a state do not always match the legal realm. He argues that we do not only need to rethink the inclusion of non-citizen residents but non-citizens non-residents as well. Immigration laws and how they are decided upon will hence fundamentally change the requirements for democratic participation.

Abizadeh argues that unilateral border controls subject non-residents to a certain form of state coercion that can qualify as democratically illegitimate. To prevent migrants from entering a country is an act of coercion because it interferes with individual choices of residence. He bases his argument on the idea that all acts of state coercion must receive a justification consistent with an ideal of autonomy.<sup>141</sup> But the ideal of autonomy cannot be limited to only residents. Instead it must be equally acknowledged for outsiders. Consequently, applying the coercive force of the state at its territorial borders unduly subjects non-residents to the power of the state. And because of that, non-residents must be granted a vote.

Now, Abizadeh's argument to enfranchise non-residents if they are subjected to the coercive force of border controls has been widely criticised.

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<sup>141</sup> See Abizadeh 2008 p.40. Abizadeh's ideal of autonomy is inspired by Joseph Raz's conditions of autonomy, emphasising the freedom from subjection to another's will.

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The most prominent critique stems from David Miller who objects to the fundamental premise that unilateral border controls are in fact an act of state coercion. On Miller's account, states are justified in unilaterally rejecting migrants at their borders, even if that includes the use of authorised force. Since border controls can generally and reasonably be avoided, they did not subject would-be immigrants to the coercive nature of law. Miller applies the example of a boat of migrants who attempt to cross a national border via the high seas but are forced to turn back by border patrols. "This act is likely to be coercive in nature, but the law that it is being used to defend is preventive rather than coercive: it simply requires outsiders not to enter the state's territory without proper authorization."<sup>142</sup>

But Miller seems to refer to a notion of state coercion that I have earlier rejected as incompatible with my view of the relationship between authority and coercion.<sup>143</sup> Consequently, whether or not the law was preventive or not does not really matter. What matters is that migrants are subject to a law that prevents them from doing a certain action and that the state claims to rightfully enforce the law on them. Preventive or not, the state thus interferes with the autonomy of these migrants. Migrants are therefore subjected to the binding law(s) of the state.

It should be noted that this implies that border controls are not a form of what I have called coercive externalities, either. The intent of immigration laws is generally to prevent certain outsiders from entering the territory of

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<sup>142</sup> Miller 2009 p.225.

<sup>143</sup> The same argument is made by Abizadeh in his response to Miller. See Abizadeh 2010.

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the state. This intent is enforced permanently and coercively at the borders and it targets everyone wishing to enter the territory of the state.

Another objection to Abizadeh is made by Ludvig Beckman by reference to the territorial view of jurisdiction. Beckman argues that migrants might be causally affected by border controls, yet they are not legally subjected:

*“In fact, the US government cannot create legally binding precepts for Mexican residents unless the Mexican state has assumed the responsibility to enforce them. Since a person ‘locked out’ of the territory of a state is not thereby rendered a legal subject of that state, there is no basis for concluding that this person should be granted political rights in line with the all affected principle.”<sup>144</sup>*

Prima facie, Beckman’s argument seems consistent with the territorial view of jurisdiction which prescribes that only residents of a particular territory are subject to the jurisdiction of the state governing that territory. But this argument seems too simple. If we define subjection in terms of territory we necessarily and systematically exclude those from the jurisdiction who are permanently residing outside the state’s borders. This does not only concern the initial establishment of a state’s territory but manifests a continuing and systematic force of exclusion. Therefore, the territorial view simply stipulates the significance of borders in the first place. But because border controls are inherent to this view, they subject outsiders - by design - to the coercive law of the state.

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<sup>144</sup> Beckman 2009 p.82.

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This is precisely what the case of immigration tries to challenge. To recede to the territorial view is an unsatisfying evasive manoeuvre. And it restricts the ASP's ability to detect an important violation of the democratic ideal.

#### Amendment to the territorial view

Instead of avoiding the challenge brought about by the case of immigration, I think it is more expedient to expand the territorial view of jurisdiction. Because the problem of border controls is inherent to the view, it appears straightforward to make a particular amendment for cases in which the law of a state targets outsiders.

However, border controls certainly constitute a special case of state coercion and thus may not require the unconditional enfranchisement of outsiders. This is mainly for two reasons. Firstly, outsiders are not subjected to the full extent of domestic laws. Second, outsiders are subject not only to the coercive law of one state but possibly of all states.

That non-residents are not subject to the full extent of the law can be interpreted in two ways. Non-residents may be only temporarily subjected to the law or they may be only bound by certain laws. I do not want to refer here to temporary subjection because I do not think that it really applies to the case of immigration. Borders and border controls are a permanent manifestation of immigration laws and they pose a constant obstacle to anyone intending to enter a territory. Partial subjection, on the other hand, is of concern for the case of immigration. Non-residents who are subject to coercion at the border are not at the same time subjected to the full curriculum of laws of the state. Mexicans do not have to follow tax laws or traffic rules of the United States. Yet, Mexicans are bound to follow US

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immigration laws and these laws, including the right to control their borders, are enforced by US authorities.

But in the same way, Mexicans are not only subject to US immigration laws. They are as much subjected to the laws of Guatemala, Belize or any other country in the world that does not share borders with Mexico. Therefore, in a world where cross-border travel is in principle possible for everyone, individuals are subject to an international system of different immigration laws and their corresponding border enforcements.

Because of the widely encompassing realm that these immigration laws claim, Robert Goodin has urged us to understand the All Subjected Principle as a cosmopolitan principle.<sup>145</sup> He argues that non-citizen non-residents are entitled to a vote in cases where they are subject to domestic laws. However, Goodin bases his radical view of the ASP on a purely juridical interpretation of subjection. Accordingly, laws that merely claim to address outsiders, without having actual authority over them, can count as cases of subjection. But as I have argued above, what needs to be justified through a Principle of Subjection is not the addressee of the law itself but the authority with which it is executed.<sup>146</sup>

Nevertheless, Goodin agrees that it makes a difference for the enfranchisement of non-residents that they are only partially subject to

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<sup>145</sup> Goodin 2016.

<sup>146</sup> For a more expansive discussion of de jure and de facto forms of subjection see Beckman 2014.



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certain laws of the state. They are not subject *to too many laws*.<sup>147</sup> The Partially Subjected Argument supports an important qualitative distinction between the subjection of residents and non-residents then. Goodin, for example, suggests that non-residents who are subject to domestic laws should have a vote only in decision-making processes that directly concern the subjecting law. Abizadeh instead prefers a cosmopolitan forum “in which foreigners, on whom such restrictions fall, also have standing to participate.”<sup>148</sup>

*“To be democratically legitimate, any regime of border control must either be jointly controlled by citizens and foreigners or, if it is to be under unilateral citizen control, its control must be delegated, through cosmopolitan democratic institutions giving articulation to a “global demos,” to differentiated polities on the basis of arguments addressed to all.”*<sup>149</sup>

I think Abizadeh’s proposal is a compelling idea to overcome both the inherent problem of exclusion of the territorial view and the Partially Subjected Argument. While an international forum does not entitle foreigners to vote on domestic laws that are not binding on them, it allows for a democratically legitimate way to address the international system of immigration law to which a global polity is subjected. It is therefore reasonable to amend the territorial view of the All Subjected Principle in

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<sup>147</sup> Goodin 2016 p. 384. See also Miller 2009 p.222 and Abizadeh 2012 p. 345 ff. for similar points.

<sup>148</sup> Abizadeh 2008, p. 54.

<sup>149</sup> Ibidem.

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this regard. However, this amendment does not affect the general validity of the territorial view for my interpretation of the All Subjected Principle.

### *The Case of Expatriates*

Another case that poses a challenge to the territorial view is the case of expatriates. The case of expatriates is in some way a subcategory of the case of immigration. Expatriates are non-resident citizens who permanently reside outside the territory of the state of their citizenship.

Now if the right to vote is determined by citizenship, as it currently is in most democracies, this poses two main challenges for my proposed understanding of the All Subjected Principle. First, since expatriates are subject to the jurisdiction of their country of residence, they might be unduly excluded from the country's suffrage. Second, some expatriates hold a citizenship that entitles them to vote in the country of their membership, thereby unduly granting a vote without being bound by the law. For example, India is home to the largest democracy in the world while at the same time it is the country with the largest diaspora, amounting to more than 18 million Indians living abroad.<sup>150</sup> India allows its citizens to vote in its general elections even if they are permanently living abroad.

The territorial view, as I have described it, prescribes that only those should have a vote in the decision-making processes of a state who are under the *de terra* jurisdiction of the state. Indians who permanently live abroad, can thus avoid the form of subjection that is significant to determine their

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<sup>150</sup> Cf. United Nations department of Economic and Social Affairs, Population Division 2020.

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enfranchisement according to the All Subjected Principle. While they might be *de jure* addressed by the laws of India they are not *de facto* subject to the coercive institutions that can effectively and fully enforce those laws.

Yet, there can be reasons why we would still want to include non-residents in the democratic franchise. One of the reasons I have alluded to above. In fact, Bauböck's argument that there is a link between citizens' future well-being and the flourishing of their particular polity finds special resonance with expatriate communities. This link can be spelled out in different ways. Some argue that there is a significant emotional bond between expatriates and their homeland. Others argue that there can be material stakes as well. Expatriates may own property in their home country or support their families.

But neither of these possible links seem to provide a solid base for a right to vote. While we might accept that being a member of a particular nation has certain identity-conferring features, it remains arguable whether national identity should motivate a democratic right to vote. The understanding of the All Subjected Principle that I am promoting does in fact stand in a stark opposition to voting rights based on national identity. If we support the claim to an equal distribution of power to secure equal freedom for everyone, we cannot at the same time discriminate between possibly different national identities within a polity. But if national identity is irrelevant for the granting of voting rights within the polity, it is hard to argue that it should become relevant once a citizen has left the polity. Based on this argument, Claudio Lopez-Guerra has influentially concluded that "the contemporary philosophical and political trend of dissociating

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irrelevant factors such as national identity from entitlement to political rights should be carried to its logical end."<sup>151</sup>

In his argument for the disenfranchisement of expatriates, Lopez-Guerra considers three more possible reasons in support of an expatriates' right to vote: political and economic influence, forced exile, and taxation.

The first point is quite salient. For example, the Indian diaspora remains hugely influential in Indian elections. Although the numbers of their total votes are relatively insignificant, they act as a multiplier for domestic campaigns through their economic support and their international publicity.<sup>152</sup> Similarly, diasporas can be influential economically as expatriates often account for a significant amount of international transactions. Lopez-Guerra, for example, quotes that remittances from the world's second largest diaspora account for more than 2 per cent of Mexico's GDP.<sup>153</sup> However, neither the political nor the economic influence of expatriates can substantiate their democratic right to vote. Tourists may account for more than 5 per cent of the Italian GDP<sup>154</sup>, yet, this does not mean that tourists should be enfranchised in Italy. Perhaps, the fact that expatriates are often devoted to their home country is a good indication for the existence of an identity-conferring bond. At the same time, numbers

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<sup>151</sup> Lopez-Guerra 2005 p. 234. It seems, though, that it remains a philosophical trend rather than a political one.

<sup>152</sup> See for example Mogul 2019.

<sup>153</sup> Lopez-Guerra 2005 p. 229.

<sup>154</sup> Banca d'Italia 2018.

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seem to indicate that expatriates can assert their interests without necessarily being assigned a right to vote.

This can of course be quite different for those expatriates who were forced into exile. The reasons why people can be forced to leave their home country can be manifold. People may feel forced to leave because of the lack of economic opportunities or they might be targeted for political, religious or societal reasons. However, as Lopez-Guerra rightly argues:

*“The causes of immigration, deplorable as they may be, have nothing to do with the reasons for enfranchisement. [...] Having suffered from deprivation is no reason at all for being allowed to elect rulers that will not govern us, but others.”<sup>155</sup>*

The injustices that are often the underlying cause of emigration do not directly constitute a claim to enfranchisement, neither domestically nor abroad. However, countries that provide refuge to those who had to leave their homes, need to open their suffrage to anybody who is permanently subjected to their jurisdiction regardless of their national membership.

Taxation appears a more pressing argument for the enfranchisement of expatriates. Being taxed is widely accepted as a form of subjection to the coercive force of the state. Of course, in case of expatriates, taxation can be applied only partially. Most expatriates do not pay income taxes or VAT in their home countries. But in some cases, expatriates might be taxed on the properties they own. However, this seems rather like the cases I had discussed under the Principle of All Affected Interests. Someone who owns

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<sup>155</sup> Lopez-Guerra 2005 p. 231.

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property abroad can have an interest in the taxation and the revenues that are derived from her property. However, she is not herself subject to the law but indirectly by means of her possessions. I think that the interests that expatriates have in their properties can very well make for an argument to support political representation. However, I think property is an insufficient ground for enfranchisement.

This points us to a crucial difference between residence and property. While I have supported the view according to which the All Subjected Principle should be interpreted in terms of the individuals who permanently reside within a territory, one alternative could have been to attempt the same in terms of the property rights that people hold within a jurisdiction. In this regard I disagree with Beckman who stipulates that a “democratic people is constituted by individuals, not by pieces of property.”<sup>156</sup> If we define the constitution of the democratic people in terms of the territory under their jurisdiction, a more expedient distinction lies between territorial rights on the one hand and property rights on the other hand. But as the debate on territorial rights shows, property rights and territorial rights share some commonalities. For example, according to a Lockean understanding of territory, the boundaries of jurisdiction are congruent with the boundaries of the property that individual property holders incorporated when the polity was constituted in the first place.<sup>157</sup> However, property and territory should not simply be equated, as Locke’s notion of territory is fundamentally

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<sup>156</sup> Beckman 2009 p. 77.

<sup>157</sup> See Locke 1689 Ch. VIII.

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concerned with the justification of a state's authority. This fact is expressed by the common assumption that any conception of territory must include the notion of a right of jurisdiction.

So, while the territory of a democratic polity may as well be established through pieces of property, the justification of authority over the territory must be defined in terms of democratic theory. Herein lies a difference to a Lockean understanding of territory. And because authority is democratically justified through the symmetric allocation of power, voting rights must be assigned to people not property. Therefore, the territorial view must be defined in terms of residence and not in terms of property.

Another practical advantage of this view is that it avoids the counterintuitive implication that people may acquire voting rights by purchasing property abroad.<sup>158</sup> Nevertheless, I do not think that it resolves the problem of expatriates' domestic properties entirely and others may argue in favour of a more comprehensive right to political participation. However, under a narrow interpretation of the territorial view the exclusion of expatriates from the franchise can be justified.

### *Subjection and the Accountability of Political Power*

As I have argued, the All Subjected Principle reflects upon a main principle of the democratic justification of political authority. Giving a vote to everyone subject to the coercive force of the law, is crucial to equalise political power amongst the people. We may thus see the All Subjected

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<sup>158</sup> Cf. Lopez-Guerra 2005 p. 233.

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Principle as establishing a principle of accountability of democratic authority. While not everyone can have the final say in democratic decision-making, we can at least ensure that everyone gets an equal share in the final say. In this way, the All Subjected Principle can adjudicate between individual self-determination and the justification of state coercion.

It prescribes that if we want to conduct democratic forms of decision-making we need to grant a vote to everyone who is subject to the jurisdiction of the state. The territorial view then specifies that every permanent resident must be enfranchised regardless of their citizenship. While non-residents may have good reasons to have *a say* in the political processes, they are not justified in having *a final say*.

Thus, the ASP is best explained as a principle of accountability. It grants those subject to the law control over the decisions on the basic institutions of the state and the corresponding distribution of political power. Democratic states must be appropriately accountable to everyone subjected as a matter of acknowledging their individual autonomy.

### **The All Affected Principle and the Boundaries of Legitimacy**

Concluding this chapter, I want to again draw attention to the distinction that I have argued is essential to a coherent understanding of the All Affected Principle and its different interpretations. We may distinguish the two principles in the kind of *say* that they prescribe for those affected.

While the PAAI states that we must give *a say* to everyone affected, the ASP states that those subject to the law are granted a *final say*. The two principles then differ in the ways in which affected individuals are included in the decision-making process. A final say thereby describes the idea of control



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that people have over a decision. The final say, in this way, is not actually or chronologically the last word of the process. It instead means to confer the authority necessary in the creation of mutually binding laws.

Thus, the two principles spell out two different ways in which political entities can be responsive vis a vis their constituents. They can be appropriately responsive if they give equal consideration to every voice, to each say equally. Or entities can be appropriately responsive if they are accountable to everyone who is equally subject to the authority of the state. But because being subject to the law and being affected in one's interests do not necessarily coincide, the PAAI and the ASP can target quite different constituents. The legitimacy that is achieved through these principles must hence depend on the distinct boundaries that they describe. According to this understanding, the All Affected Principle indicates the somewhat fuzzy boundaries of legitimacy that any democracy must face.

In the light of this fuzziness, in the following chapter, I will therefore attempt to further specify the boundaries of legitimacy by sketching out how the PAAI and ASP relate and how their internal relation connects to the overall constitution of democracy.



# Chapter IV

## **Voice and Vote**

The All Affected Principle states that everyone who is affected by the decision of a government should be able to participate in the making of that decision. Scholars mainly disagree about the right interpretation of the principle. While some argue that being affected should be understood in terms of individual interests, the Principle of All Affected Interests. Others support the view that being affected should be understood in legal terms as being subject to the coercive force of the state, the All Subjected Principle.

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Both interpretations traditionally revolve around the question of democratic inclusion: who should be included in the demos generally? Or more particularly, who should participate in the decision-making procedures of the state. My argumentation so far has shown that the faultline between these competing views lies somewhere between the republican tradition and the liberal tradition of justifying the state. As the republican tradition, I roughly understand the line of thought that seeks to legitimise state power via the assumption of public sovereignty, the collective self-determination of the people based on the reciprocal limitation of individual freedom.<sup>159</sup> The liberal tradition, on the other hand, bases its conception of state legitimacy on the idea of the protection of equal individual liberties.<sup>160</sup> It is probably of little insight to assign every particular conception of the All Affected Principle to one of the two traditions of thought. Neither do I think that is straightforwardly possible to do so without encountering justified opposition. However, the proponents of the All Subjected Principle generally lean towards republican ideas, whereas proponents of the Principle of All Affected Interests tend to refer to the liberal line of thought.<sup>161</sup>

I assume this is the main reason why the different interpretations of the All Affected Principle are often treated as distinct concepts of democratic

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<sup>159</sup> Pettit 1997, 2012; Bellamy 2007.

<sup>160</sup> Rawls 1993; Gaus 1983. Although Rawls qualifies that he does not see a fundamental opposition to Republicanism, see p. 205 ff. See also Goodin 2003a; Brennan and Lomasky 2006.

<sup>161</sup> For examples see Beckman 2009, 2016 and Goodin 2016, 2003a.

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inclusion. Since the Principle of All Affected Interests and the All Subjected Principle differ significantly in the scope and extent of their inclusionary implications, they are thought of as conceptually incompatible.<sup>162</sup> This incompatibility thesis is helped by arguments that invoke certain claims of democratic inclusion without reference to the underlying normative source meant to substantiate the claims. However, understanding the normative source of principles of democratic inclusion is crucial if we wish to determine their legitimising force.

Therefore, I want to argue that we need to give up the incompatibility thesis of the All Affected Principle. My argument is based on the central insight that the All Affected Principle is first and foremost a Principle of Democratic Legitimacy. It is only secondly and by implication of the former a principle of democratic inclusion. By focussing on the legitimising force of the All Affected Principle we necessarily need to shift the focus to the normative sources substantiating the justification of democratic rule. As a consequence, we can assign particular terms of inclusion to each

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<sup>162</sup>See for example Goodin 2016; Owen 2012; Erman 2014. Erman for example agrees that the AAP is a principle of legitimacy firstly, yet, she adheres to the incompatibility thesis. She writes: “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.” Cf. p. 542.

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interpretation of the All Affected Principle, each engaging and reflecting upon distinct principles of democratic legitimacy.

*From Inclusion to Equal Participation*

In order to approach the particular terms of democratic inclusion that I have in mind, in a first step, it is important to abstract from the predominant idea of “one man one vote” as the only form of democratic inclusion. Democratic inclusion is sometimes differentiated from democratic participation. It is said that democratic inclusion entails enfranchisement, the right to vote in political decisions or to elect the government. Democratic participation describes all the other ways in which individuals may influence political decisions; advising, consulting and negotiating political action without the aggregating force of majority decisions. But the distinction between inclusion and participation might be blurry from the perspective of democratic legitimacy. It is true that a decision gains some legitimacy from the fact that it is authorised through majority voting. However, the justification of democratic decisions generally reaches beyond that and includes the interference with individual liberties and epistemic concerns.

For example, this finds expression in Rawls’ principle of equal participation: “It requires that all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply.”<sup>163</sup> While the principle makes strong demands on part of the rights that people enjoy in democratic procedures, it does little to specify the exact arrangement of democratic institutions. In

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<sup>163</sup> Rawls 1971, p.194.

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critique of the principle, Claudio Lopez-Guerra has asked what institutional prescriptions may follow from this. “Who are to count as ‘citizens’? Does the principle require or only permit the exclusion of noncitizens? What does it mean to ‘take part in’ the process? Is universal suffrage a requirement of justice? We cannot simply unpack the answers from the principle itself.”<sup>164</sup>

Lopez-Guerra is right, although Rawls himself is expanding on the terms of his principle of equal participation. While for Rawls, elections play a crucial part in the design of democratic decision-making, he argues that ‘one man, one vote’ is not an exhaustive derivative of equal liberty. With reference to the principle of *quod omnes tangit, omnibus tractari et approbari debet*, Rawls writes that

*“the medieval maxim that what touches all concerns all is seen to be taken seriously and declared as the public intention. Political liberty so understood is not designed to satisfy the individual’s desire for self-mastery, much less his quest for power. Taking part in political life does not make the individual master of himself, but rather gives him an equal voice along with others in settling how basic social conditions are to be arranged.”*<sup>165</sup>

So, the principle of equal participation seems to do more than merely assigning legal voting rights. It lays the grounds for the moral relationship between citizens. It may even constitute what Rawls calls the “ethos of political culture.” What matters, of course, is that the manifestation of

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<sup>164</sup> López-Guerra 2014 p. 13 f.

<sup>165</sup> Rawls 1971 p.205.

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political life through equal participation is an important realisation of equal political liberties for Rawls. Seen this way, the principle of equal participation appears to conflate the normative grounds of democratic inclusion and democratic participation.

I think that in order to understand the function that the principle of equal participation serves for the legitimacy of democratic rule, we must further explore the distinct normative grounds that are expressed through different forms of democratic participation.

*The Incompatibility of the All Subjected Principle and Deliberative Democracy*

One way to further engage with the distinct normative grounds of democratic participation is provided by Jürgen Habermas. His Discourse Principle is invoked by both proponents of the legal interpretation of the All Affected Principle, as well as adherents of theories of deliberative democracy. An interesting argument is thereby made especially with respect to the All Subjected Principle.

In his defence of the legal interpretation of the All Affected Principle, Claudio Lopez-Guerra prominently states that there exists “an elementary difference [...] between being affected by the decision of a state and being governed by the laws of that state.”<sup>166</sup> By opposing the Principle of Affected Interests interpretation, Lopez-Guerra argues that what matters for democratic inclusion was the fact that citizens were governed by the state

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<sup>166</sup> Lopez-Guerra 2005, p.224.



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rather than merely affected by its actions. Therefore, he argues that Habermas' "discourse principle, when transformed into the principle of democracy, limits the scope of inclusion to those individuals who live together under the same legal system."<sup>167</sup>

Following Lopez-Guerra, Ludvig Beckman has asked us to differentiate between a moral principle, on the one hand, and a democratic principle on the other hand.<sup>168</sup> Accordingly, a political action might be morally wrong if it fails to recognise the interest of all affected parties. However, "the idea that an action is morally legitimate in so far as it takes the interests of all affected persons into account does not imply the requirement that anyone affected by a government is entitled to participate in the political process."<sup>169</sup> In one way, we might see this principle as a purely moral principle. Its normative contents guide political action to attempt cohesive ways of deliberation. On the other hand, as I will argue, a distinction based on morality can be misleading. *Prima facie*, there is little reason to differentiate between the moral contents of being-affected as opposed to the moral contents of being subjected.

The distinction becomes clearer considering its origins. Both Beckman and Lopez-Guerra partly base their argument on the distinction made by Habermas between the Discourse Principle and a democratic principle. The Discourse Principle states that a moral norm can only be valid if it was agreed upon by 'all-affected' in a rational discourse. The democratic

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<sup>167</sup> Lopez-Guerra 2005 p.225.

<sup>168</sup> Beckman 2009 p.46 f.

<sup>169</sup> Beckman 2009, p.46.

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principle is the application of the Discourse Principle for cases in which moral norms must be specified legally. But the legal sphere requires us to contextualise moral norms regarding the actual circumstances of politics. The recognition of individual reason will be insufficient to that end. Instead, the democratic principle requires that moral norms cannot be justified by pure moral reasoning but must take into account practical, and political concerns as well.<sup>170</sup>

For Beckman the democratic principle thus expresses the fact that democratic authority must be established by recognising and preserving the external freedom of every member of the political association. He argues that “the mistake made by [some] writers [...] appears to be rooted in the failure to distinguish ‘affected’ as a condition for moral consideration from ‘affected’ as a condition for participatory rights in a democratic political system.”<sup>171</sup>

Yet, Beckman’s argument assumes that moral consideration does not require any participatory rights in a democratic political system. But this is precisely what I want to question. The condition for participatory rights that Beckman refers to are the conditions of justified authority. According to this understanding of democratic legitimacy, state coercion must be justified through the democratic control over the state’s institutions. This seems to be in line with Habermas’ argument for the democratic principle. Habermas

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<sup>170</sup> See Habermas 1992, p.138 ff.

<sup>171</sup> Beckman 2009, p.47.

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argues that laws need to be agreed upon, through appropriate democratic procedures, by everyone subjected to them because of the binding force that these laws have over citizens.<sup>172</sup> Thus the normative source of the democratic principle and Beckman's interpretation of the All Subjected Principle is individual self-determination, the fact that citizens must conceive of themselves as authors of the law.

But in this way the All Subjected Principle is meant to control the power of the institutions of the state. It assumes that state coercion is necessary for the functioning of the state. However, since no one should have unjustified power over anybody else, the power of the state to coerce must be accountable to everyone equally. One way to implement such accountability in democratic procedures is through giving people a final say, a right to vote in elections or on decisions directly. And this is what Beckman and Lopez-Guerra have in mind.

However, the ultimate subject of Habermas' Discourse Principle is not the implementation of formal procedures but the communicative act of negotiating the validity of norms. The appeal of it lies with the attempt to coalesce the idea of sovereignty of the state with the idea of individual liberties. The Kantian idea of individual moral authority, that each individual must be the independent author of ideal moral laws, must be expanded to the form of public autonomy in which everyone participates in the making of a shared morality. "Discourse theory conceives of morality as

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<sup>172</sup> See Habermas 1992 p. 141.

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an authority that crosses the boundaries between private and public spheres.”<sup>173</sup>

Within this project, Habermas often emphasises that the institutional framework will provide the practical, external structure within which this discourse can unfold. Democratic institutions, therefore, on the one hand depend on practical judgments about their political legitimacy; on the other hand, these institutions enable the kind of discourse that is necessary to make practical judgments. Consequently, the democratic principle cannot narrowly define democratic participation as restricted to universal suffrage. It is indissolubly tied to the possibility of deliberative will-formation. At the level of institutions “provisions are made for an effective participation in discursive processes of opinion- and will-formation, which take place in forms of communication that are themselves legally guaranteed.”<sup>174</sup>

But this seems to be inconsistent with the accounts of the All Subjected Principle provided by Lopez-Guerra and Beckman. Both authors have situated their interpretations of the All Affected Principle in clear opposition to deliberative models of democracy. For example, Lopez-Guerra criticises Jon Elster for his view that deliberative democracy “includes collective decision making with the participation of *all who will be affected by the decision* or their representatives: this is the democratic part.”<sup>175</sup> Similarly,

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<sup>173</sup> Habermas 1992 p.141.

<sup>174</sup> Habermas 1992 p.142.

<sup>175</sup> Elster 1998 Introduction, p.8. Cf. Lopez-Guerra 2005 p. 224 footnote 25.

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Beckman argues that deliberative models of democracy are often based on a problematic confusion between moral consideration and democratic inclusion. Beckman quotes John Dryzek who states that “democratic legitimacy is secured largely to the extent those affected by a policy decision have the ability or right to participate in deliberations about its content.”<sup>176</sup>

According to Beckman, the alleged confusion stems from a misinterpretation of Habermas’ democratic principle and the failure to engage with the legal interpretation of the All Affected Principle. However, I think the scepticism towards deliberative conceptions is misleading. Dryzek, for example, directly refers<sup>177</sup> to Joshua Cohen who elsewhere states that “the fundamental idea of democratic, political legitimacy is that the authorization to exercise state power must arise from the collective decision of the equal members of a society who are governed, [rather than affected] by that power.”<sup>178</sup>

Cohen specifies his statement by arguing that democratic legitimacy was fundamentally concerned with the justification of state authority and only secondarily with the justification of influence on the political process.<sup>179</sup> This distinction becomes crucial because Cohen associates influence on the political process with Dahl’s principle of equal consideration, the idea that

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<sup>176</sup> Dryzek 1999, 2002 p.34. Cf. Beckman 2009 p. 46.

<sup>177</sup> *Ibidem*.

<sup>178</sup> Cohen 1998 p. 185, see also note 1, p. 224.

<sup>179</sup> Cohen 1998 p.224. I believe Cohen is influenced mostly by Walzer 1983 , see p.292.

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each interest must be given equal consideration in democratic procedures.<sup>180</sup> Deliberation is accordingly marked by a “free public reasoning among equals who are governed by the decision.”<sup>181</sup>

Consequently, some of these general objections against a deliberative conception of democracy, presented by Lopez-Guerra and Beckman can be rejected. Promoting the participation in the deliberative process does not necessarily undermine the idea that only those subject to the laws of the state should be included democratic decision-making.

### **Two Modes of the All Affected Principle**

I think the controversy between adherents of the All Subjected Principle and proponents of Deliberative Democracy indicates that the underlying problem is more nuanced. On the one hand, I think Beckman and Cohen are right that the justification of democratic authority must be based on the mutual control of political power by those subjected to the power. On the other hand, the justification of democratic authority does not prevent us from arguing that a full account of democratic legitimacy requires the equal consideration of all affected interests.

But there is obviously a problem arising from this view. The boundaries within which we define those who are subject to the law of a state do not necessarily match the boundaries within which we define those whose interests are affected by the decisions of a state. This problem becomes even more pressing, considering a wide understanding of affected interests.

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<sup>180</sup>See. Dahl 1989 p. 85 f.

<sup>181</sup> Walzer 1983; Cohen 1998 p. 186.

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Affected interests may as well include people's attitudes towards the right and the good. But it is hard to argue why questions of morality, given their universal nature, should be only restricted to the boundaries of a particular political association. It is, however, beyond question that moral considerations play a distinct role in political, democratic procedures.<sup>182</sup> Consequently, democratic deliberation with its focus on reasoning cannot stop at the borders of the state but must account for all beliefs and opinions equally and globally.

A procedure that is concerned with the production of best reasons for a policy gains its justification from the inclusion of all relevant voices. In this sense, conceptions of deliberative democracy often reject the idea of voting and universal suffrage as a way to legitimise democratic decisions and instead seek justification in the process of deliberation itself. I understand Dryzek's conception in this way when he states that "an outcome is legitimate to the extent its production has involved authentic deliberation on the part of the people subject to it."<sup>183</sup> But such a discursive model of democracy must transcend any boundaries, spatially or temporarily. Dryzek's proposal for a transnational democracy is thus a strong call for cosmopolitanism.

But Dryzek's account for the legitimacy of deliberative democracy seems to deviate from Cohen's initial notion of justified democratic authority. Justified practical authority as the control of state power and the right to

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<sup>182</sup> This point is also raised by Habermas in his distinction between a democratic principle and a moral principle. See Habermas 1992 p.141.

<sup>183</sup> Dryzek 1999 p. 44.

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coercion are of less relevance to the concept of discursive will-formation. The currency of the deliberative process is practical reason, the currency of authority is power. Hence, it is coherent for Dryzek to argue that “the intimate link between democracy and the state can be severed.”<sup>184</sup>

Nevertheless, I think Dryzek goes one step too far. As the discussion of Habermas’ discourse principle has shown, discourse and political deliberation to a large part depend on the constitution of a political association and a corresponding social order. In our quest for democratic legitimacy, we can neither lean exclusively on the justification of state authority nor can we exclusively rely on the justification of political discourse. The process of reconciliation between private and public autonomy, in Habermas’ terms, must consequently be based on both conceptions. I believe this is why Habermas specifies that the justification of a democratic state constitution must consist of two conditions:

*“the democratic process warrants the supposition that its outcomes are rationally acceptable to the extent that it fulfils the preconditions of an inclusive and discursive process of opinion- and will-formation;”*

and

*“that the legal institutionalization of such a democratic lawgiving procedure requires that both the liberal and the political basic rights be guaranteed simultaneously.”<sup>185</sup>*

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<sup>184</sup> Dryzek 1999 p.44.

<sup>185</sup> Habermas 2008 p. 103. By reference to Habermas 1992 Ch. 3.



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This seems to be in line with my initial argument: We can think of the two interpretations of the All Affected Principle as compatible, even complementary principles of democratic legitimacy.

In fact, the justification of democracy calls for two principles of democratic participation. One principle must determine to whom democratic institutions are accountable, i.e. whose basic rights are guaranteed under the system of rule. Another principle must determine who must be included in the deliberative process of democratic decision-making. As my discussion has shown the set of people that each principle encompasses are not necessarily congruent.

Furthermore, the principles will differ by reference to the underlying normative sources. Individual autonomies are secured by reference to the protection of freedom from arbitrary interference by the state. Inclusion in the deliberative process is justified by reference to the fundamental equality of individual reasons and the right to equal consideration.

From this difference it must also follow that both principles operate on different levels of significance. The democratic social order and the rule of law are significant only for all those members of the political association who are subject to the laws of the state. Consequently, those who are not *governed by* the particular state have no right to control the institutions of the state that are made to bind others. However, the democratic procedures that the political association might apply will depend on an inclusionary deliberative process and this process is significant to everyone whose reasons are tangent.

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Therefore, we should neither reject the All Subjected Principle interpretation nor conceptions of Deliberative Democracy and instead seek to integrate both under an encompassing concept of democratic legitimacy.

*Qualities of Participation: Voice and Vote*

The problem with this concept of democratic legitimacy lies of course with the incongruence between the inclusionary implications of the two principles. But this problem can easily be solved. The solution lies with the assumption that both principles require a different quality of political participation.

By different qualities of political participation, I mean the different shapes that participation in the process of democratic decision-making can take. I am thinking broadly of two categories, each including a number of rights and privileges that can be granted those participating. Those rights and privileges that allow people to share control of the institutions of the state I call 'Vote'. Those rights and privileges that allow people to have an influence on the processes of political deliberation I call 'Voice'.

I differentiate between Vote and Voice roughly along the lines of political power and reason. Vote acknowledges the fact that the institutions of the state that exercise power over citizens need to be accountable to those subject to the power. Voice accounts for the fact that the exercise of power, must be sensitive to the consideration of all affected interests and reasons equally.

I thereby follow closely what Joshua Cohen has argued to be the institutional framework of deliberative democracies:

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*“facilitate free reasoning among equal citizens by providing, for example, favourable conditions for expression, association, and participation, while ensuring that citizens are treated as free and equal in that discussion;*

*and*

*Tie the authorization to exercise public power – and the exercise itself – to such public reasoning, by establishing a framework ensuring the responsiveness and accountability of political power to it through regular competitive elections, conditions of publicity, legislative oversight, and so on.”<sup>186</sup>*

Now, as I have mentioned before, Cohen argues that at the level of deliberation, participation in political discussion should be restricted to only those governed by the state. But this stipulation cannot be upheld. Instead, the deliberative process must be sensitive to *all* reasons, regardless of political, spatial or temporal boundaries. This is because the outcome of the deliberative process gains legitimacy only through the inclusion of all affected voices. The reasons that we provide in a justification of a political decision must thus reflect upon the fact that equal consideration does not stop at the borders of the state. Instead the category Voice acknowledges the democratic principle of participation: Democratic procedures of decision-making and public deliberation must be appropriately responsive to all affected voices.

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<sup>186</sup> Cohen 1998 p. 186.

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Consequently, Beckman was right to point out that there is a significant difference between being affected in moral terms and being subject to the legally binding decisions of a state. However, the idea “that an action is morally legitimate in so far as it takes the interests of all affected persons into account” will have implications for an institutional arrangement that allows for the inclusion of all affected voices.

*Vote: Accountability of power*

Under the category of Vote I subsume all those institutional arrangements that facilitate the accountability of political power to everyone subject to the power. I call this category Vote because universal suffrage is often argued to be the main source of legitimacy for democratic institutions exercising power.

Thus, Vote follows the line of argumentation spelled out by proponents of the All Subjected Principle. The establishment of democratic authority is a necessary condition of democratic legitimacy. However, democratic authority can only be justified if no one holds undue power over anybody else. Hence, Vote must follow a principle of accountability: The basic institutions of the state and the corresponding distribution of political power must be appropriately responsive to those subject to the power.

Another way to look at the category of Vote is by assigning a *final say* to everyone subject to the law. A final say expresses the factual control that citizens have over the collective decision they make. During the process of political deliberation, many voices will have a say in adjudicating between competing reasons. However, a final say expresses the direct impact of decision-making capabilities. Casting a vote, under this view, is

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consequently more than the expression of an interest but the exercise of an equal share of power over the decision-making procedure. So as Adam Przeworski put it, democratic procedures sometimes require that “some people must act against their reasons. They are coerced to do so, and the authorization to coerce them is derived from counting heads, [...] not from the validity of reasons.”<sup>187</sup>

Of course, a final say can be expressed in more ways than simply a vote. Veto rights must therefore fall into the same category. If an institutional arrangement allows citizens to veto a decision, these citizens will have factual and direct control over a political decision. Just like the right to vote, the right to veto must come under the category of Vote and consequently be legitimised through an All Subjected Principle. Only those who are subject to the law of the state can share rights to vote or veto the decisions of the government.

However, I do not think that vote and veto constitute an exhaustive list of rights and privileges that need to be granted under a principle of accountability. The democratic institutional arrangement must be such that it is appropriately accountable to those subject to the exercise of power. Citizens under this arrangement might be owed duties of institutional transparency, prevention of nepotism and corruption or basic social equality. The exact actual composition of a state’s democratic institutional constitution must be negotiated in a process of political deliberation and be

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<sup>187</sup> Przeworski 1999 p.15.

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decided upon by everyone subject to the power that these institutions exercise over them.

Summarising, as a basic principle of democratic legitimacy, the All Subjected Principle requires that that everyone subject to the power of the state enjoys the rights and privileges that enable the accountability of a state's institutions of power.

*Voice: Influence on the Deliberative Process*

Under the category of Voice, I subsume all those institutional arrangements that facilitate the responsiveness of democratic procedures to all affected voices. I call this category Voice because granting a say to everyone affected is argued to be the main source of legitimacy for outcomes of the deliberative process.

Thus, Voice follows the line of argumentation spelled out by proponents of the Principle of All Affected Interests and adherents of conceptions of Deliberative Democracy. The facilitation of public deliberation is a necessary condition of democratic legitimacy. However, the outcomes and the process of political deliberation can only be justified if everyone affected can influence the discourse. Hence, Voice must follow a principle of participation: Democratic procedures of decision-making and public deliberation must be appropriately responsive to all affected voices.

One question could be whether responsiveness to affected voice is sufficient to capture the normative demands of the principle of participation. Some might object that for a legitimate deliberative process, every individual voice must be included. However, I think of Voice rather as an impersonal category. It is impersonal because the reasons that people may raise during

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a deliberation can be impersonal. For example, my reason to oppose the construction of a coal power plant might be a concern for climate change and its impact on future generations. So, although I might not be personally affected by the impacts of climate change my reason is justified and must be accounted for under a process of democratic deliberation. But in the same way, I believe, it is irrelevant whether my reason is brought up by me personally or by any other representative who shares my concern for climate change. As long as the reason is given equal consideration, the democratic procedure appears to be appropriately responsive to my voice.

But, of course, political realities can be such that only those reasons will be considered that are shared by those actually present or those holding a majority. Therefore, the Principle of All Affected Interests urges us that only those procedures can count as democratically legitimate that in fact include all affected voices.

The justification of a policy must depend on whether it can be agreed upon by all affected parties in a rational discourse amongst equals. It is well reasonable to assume that the notion of *affected* here means everyone possibly affected in their interests; and interests refers to the beliefs that people hold about the right course of political action. Thus, democratic deliberation must include all voices regardless of spatial or temporal boundaries.

I believe this is a quite demanding condition for the deliberative process. It is demanding because it requires more than mere consideration by those holding positions of power or with decision-making capacities. The condition is most likely not fulfilled by relying on individual moral

conscience, the kind of moral consideration that Beckman seems to have in mind.<sup>188</sup> The question appears even more difficult in cases where a political decision affects those not present or not yet born. How *can* a decision-making process possibly include those voices?<sup>189</sup>

It is after all a problem of democratic institutions regarding their responsiveness to reason.<sup>190</sup> Therefore, whether or not institutional arrangements fulfil conditions of responsiveness and allow for the participation of all voice, depends on political realities and public practical judgment. Democratic publicity and a rational political culture are crucial to this understanding of deliberative democracy. I believe the answer lies with an appropriate conception of political representation. If political participation includes the influence of all affected voices on the deliberative process, democratic representation must enable the kind of institutionalisation necessary to establish equality of reason. A taxonomy of Voice and Vote

To conclude this chapter, I want to briefly sketch out the conceptual relationship between Voice and Vote and the corresponding Principle of All Affected Interests and All Subjected Principle. It is not entirely clear whether the ASP can count as prior or subordinate to the PAAI. It is certainly prior in the sense that it can justify democratic authority through the

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<sup>188</sup> See Beckman 2009, 2013, 2015. A similar argument is made by Jensen 2015.

<sup>189</sup> The problem is probably intrinsic to conceptions built on Habermas' discourse principle, as has been pointed out by Luhmann 1993.

<sup>190</sup> For conceptions of epistemic democracy see e.g. Anderson 2006; Landmore 2012; Goodin and Spiekermann 2018; Cohen 1986.



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inclusion of everybody subject to a state's jurisdiction. It therefore stipulates most of the social order and individual rights necessary for the institutionalisation of a rational discourse. On the other hand, no institutional arrangement can achieve full democratic legitimacy without defining decision-making procedures appropriately responsive to all affected voices. The legitimacy of the formal legal structure meant to ensure the equal distribution of power is hence accountable to a publicity marked by equal consideration of reason and the unrestricted inclusion of all possibly affected voices.

This picture strongly resembles what I think is underlying Nancy Fraser's distinction between weak publics and strong publics. Weak publics are "publics whose deliberative practice consists exclusively in opinion formation and does not also encompass decision-making."<sup>191</sup> On the other hand, strong publics are "publics whose discourse encompasses both opinion formation and decision making. As a locus of public deliberation culminating in legally binding decisions (or laws) [...]"<sup>192</sup> Here, democratic authority is coupled inextricably to the notion of publicity. For example, we may understand parliaments (if sovereign) as the locus of a strong public, "the site for the discursive authorization of the use of state power." However, just like the incongruence between the ASP and the PAAL, parliaments do not always represent the full extent of public opinions. For

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<sup>191</sup> Fraser 1992 p. 134.

<sup>192</sup> *Ibidem*.

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their opinion-formation, they may depend on weak publics, although their formal relation is not automatically clear.

I think that giving up the incompatibility thesis of the All Affected Principle implies that we further blur the distinction between strong and weak publics. Acknowledging both the Principle of All Affected Interests and the All Subjected Principle as principles of democratic legitimacy must thus yield into a form of deliberative democracy where public spheres between formal decision-making and moral consideration are closely interlocked. I believe this is what lies at the heart of Habermas' project, the fact that democracy's emphasis on rational discourse implies that law itself must "draw on sources of legitimation that are not at its disposal"<sup>193</sup>

### **From Participation to Representation**

As I have argued in this chapter, the two interpretation of the All Affected Principle can be reconciled. They can be reconciled and at the same time their reconciliation provides us with the vocabulary to explain the different ways in which democracy seeks legitimacy.

The different qualities of participation that are expressed through the two modes of the All Affected Principle allow us to mirror the insights from chapter 2 and 3, namely that democratic legitimacy must depend on distinct qualities of responsiveness.

The qualities of participation that are described though *Voice* and *Vote*, however, must find expression in political institutions. It is at this point that

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<sup>193</sup> Habermas 1992 p. 131.

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the All Affected Principle reveals its inbuilt link to theories of representation. As the concept of political representation is based on the idea of facilitating the participatory rights of those unable to speak for themselves, it is essential for a coherent understanding of legitimate democratic institutions. And the All Affected Principle uniquely allows us to link the concept of representation to the concept of democratic legitimacy, as I will argue in the following chapter.



## Chapter V

*“Le peuple anglais pense être libre, il se trompe fort; il ne l’est que durant l’élection des membres du parlement: sitôt qu’ils sont élus, il est esclave, il n’est rien.”*

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- Jean-Jacques Rousseau<sup>194</sup>

*“[...] a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking.”*

- James Madison<sup>195</sup>

### **Democratic Legitimacy and Theory of Political Representation**

James Madison might be one of the most famous advocates of democratic representation. While political representation is a feature of most democracies today, it was, however, a daring concept for Madison's contemporaries. His praise for representation is a defence of the new constitution of the United States. He is defending it against direct forms of democracy, an institutional scheme that allows citizens to directly decide on matters of the union. The view is often assigned to Rousseau who saw representation as a residual of a feudal form of government and argued that “sovereignty cannot be represented.”<sup>196</sup>

Madison was certainly concerned with practical questions of how to politically and institutionally unite the different factions of the union. And the argument is still often made in favour of political representation, that it is simply more practical not having citizens to vote on all the complex matters of the government. My point here, however, is concerned with Madison's other main argument, the idea that in a large state like the Union,

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<sup>194</sup> Rousseau 1762 Ch. 15. “The English people thinks it is free; it is greatly mistaken, it is free only during the election of Members of Parliament; as soon as they are elected, it is enslaved, it is nothing.”

<sup>195</sup> Madison 1787.

<sup>196</sup> Cf. Rousseau 1762 Ch. 15.

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majority voting is likely to be exploited by particular interest groups and factions. In order to prevent the decay of the state, representatives should thus not be seen as representing the sovereignty of the people but as representing the voice of the people. He argues that under a system of representation it “may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.”<sup>197</sup>

In the light of 250 years of experience of western liberal democracies, our view of political representation has certainly changed. Madison’s idea of representation is under the suspicion of attempting to secure a powerful position for a political elite.<sup>198</sup> Nevertheless, the conflict between Rousseau and Madison mirrors nicely the conflict between *Voice and Vote* as I have described. And equally, I believe that democratic representation can overcome some of the conceptual issues that I have described before.

Yet, in order to see the parallels more clearly, we need to put aside the institutional questions for the moment and focus again on the question of democratic legitimacy.

I think it is worth exploring not just how different forms of representation can be legitimate but instead how political representation itself can legitimise democratic rule. The historical perspective is crucial to this approach. As Hanna Pitkin has prominently argued, all modern forms of

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<sup>197</sup> Madison 1787 p.53.

<sup>198</sup> See for example Pitkin 2004.

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political representation can be linked to the principle of “quod omnes tangit”.<sup>199</sup> As a medieval principle of legitimate rule of the king, the principle rose to importance in early modern parliaments and eventually substantiated claims of European democrats to shares of governmental power. As such, the principle of quod omnes tangit links a tradition of legitimate feudal rule to the tradition of political representation that parallels my reconstruction of the All Affected Principle.

Therefore, in this chapter, I will provide a brief sketch of the historical significance of the principle of quod omnes tangit for the emergence of political representation in early modern Europe. I will thereby point out the conceptual similarities it shares with the All Affected Principle. In the second part of this chapter, I will further investigate the particular function of political representation for democratic theory. In doing so, I will mainly follow Pitkin’s influential analysis of representation.

### **Quod Omnes Tangit and the Emergence of Political Representation**

A historical predecessor of the All Affected Principle is the principle of Quod Omnes Tangit. In legal history, Quod Omnes Tangit is closely linked to both theories of legitimacy and the concept of political representation. A closer look at the historical roots of the All Affected Principle is, thus, illuminating in two ways. First, it helps understanding the legal tradition behind the two aforementioned interpretations of the All Affected Principle. It may consequently deepen our understanding of its limits and its scope. Second, the connection between the All Affected Principle and theories of

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<sup>199</sup> Pitkin 1967 p. 245.



representation provides a crucial element of the nature of the principle itself; namely the qualification of being affected in terms of the kind of *say* that people may have in the making of political decisions. This element, is essential to a coherent understanding of the All Affected Principle as a concept of political participation.

The principle “quod omnes tangit ab omnibus comprobetur” – “what touches all, shall be approved by all” – started its rise as a legal rule in the beginning of the 13<sup>th</sup> century. Often quoted in this regards is Pope Honorius III, who made use of the principle in 1225 when he justified the representation of the chapters in provincial councils. However, most historians trace back the principle of Quod Omnes Tangit to its first records in Roman law.<sup>200</sup> As a principle of consent it was stated in Justinian, C.5,59,5: “ut quod omnes similiter tangit, ab omnibus comprobetur.”<sup>201</sup> As such it was originally meant to regulate cases of a legal ward having several guardians. If the guardians had to decide on the ward they had to do so with the consent of all. In general, the principle represented cases in which the consent of those affected was legally required, often cases of affected possessions or joint resources, like water streams. If different parties had a right in the usage of a resource, any decision on the resource had to be made with the consent of all those affected.

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<sup>200</sup> The work of Gaines Post is outstanding here. See Post 1950, 1964, 1943 See as well Congar 1958.

<sup>201</sup> See Buckland 1921 p. 162. ff

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The Quod Omnes Tangit principle eventually turned into a principle of political – not yet democratic – legitimacy and became one of the most important legal concepts of the Middle Ages and early modern Europe.<sup>202</sup> Its influence even reaches until the discourse of legitimate colonisation of the Americas. When Bartholomé de Las Casas was addressing the question of legitimate rule of the Spanish crown of native Americans, he referred to a version of Quod Omnes Tangit. In a profound combination with a natural right of liberty he argued that “a free people of community accepting a burden had to give their free consent; all whom the matter touched should be called.”<sup>203</sup>

The relevance of Quod Omnes Tangit in the legal discourse of early modern Europe highlights its relation to a pre-democratic question of justified rule. This fact is sometimes overlooked in the discussion of the All Affected Principle in democratic theory. Its history indicates the principle’s underlying normative commitment to notions of equality and liberty regardless of the system of rule. Although so far, I have discussed the All Affected Principle merely as a democratic principle, its legitimising force is presumably pre-democratic. With reference to Quod Omnes Tangit, Gaines Post points out:

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<sup>202</sup> For a comprehensive overview see Condorelli 2013.

<sup>203</sup> Quote and translation taken from Landau 2015.

*“In the feudal system of king and assembly of magnates and prelates consent was already important.”*<sup>204</sup>

Post notes that “the famous clause in Magna Carta, that the king must obtain the individual consent of prelates, barons and earls in order to get any extraordinary tax, was based on the feudal contract between lord and vassals and could apply to French and Spanish Kingdoms as well.”<sup>205</sup>

Of course, the notion of consent that is required by the medieval principle differs significantly from the term used in modern consent theory, both in meaning and application. Consent served a very distinct role in the legitimacy of the rule of the king. The king and his council held the power of decision, and final decisions were generally given consent by representatives. Yet, each representative had to defend the interests of his constituent in court and only after all interests were heard, consent could be given to the king’s decision.<sup>206</sup>

This might still be far from a democratic interpretation of the All Affected Principle but it gives an insight into an important distinction made earlier. The power of decision, the *final say*, was perceived differently than the right to be heard, to have *a say*, in court.

It is wrong to assume that therefore the selection of representatives and their affected constituencies only served to the will of the king. *Quod Omnes Tangit* was given distinct legal significance, as is indicated by the fact that

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<sup>204</sup> Post 1950, p. 67.

<sup>205</sup> *Ibidem*.

<sup>206</sup> See Post 1943 p. 405.

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as early as the twelfth century assemblies were held to decide on matters of the realm. Post argues that those early instances of the demand for broad consensual decisions are clear indications of the popularity of Quod Omnes Tangit in law and legal procedures in courts. He states that from the late twelfth to the fourteenth century Quod Omnes Tangit can increasingly be found to support the principle of consent.<sup>207</sup> And while an individual judgment of a single representative may not have counted for much, soon representatives began to group together to state their interests collectively. “The judgment of the whole community of communities was of far greater weight in influencing the royal judges and councillors.”<sup>208</sup>

With regard to my discussion of the All Affected Principle it is of some interests to note that consent in the medieval sense is strictly limited to legal matters. In fact, law of the thirteenth century assumed that every right was accompanied by the right of consent. Thus, in another formulation we can find Quod Omnes Tangit as “the consent of all is required whose *ius* (right) may be taken away”. As Post points out “the consent of all” means here “the consent of all who have any power or authority over the thing involved.”<sup>209</sup> This could also mean that rights such as property rights would fall under a certain interpretation of Quod Omnes Tangit. It then depends on the comprehensiveness of our notion of authorship to require consent for other kinds of easements. This might lead to a version of Quod Omnes Tangit that

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<sup>207</sup> Post 1950 p. 68.

<sup>208</sup> Post 1943 p. 405.

<sup>209</sup> Post 1950. p. 69.

comes closest to the interpretation of the Principle of All Affected Interests. Accursius in the beginning of the thirteenth century, for example, endorsed the version of "... that this may be done by the consent of all, who will benefit"<sup>210</sup>. Accordingly, consent is required by everyone who may profit from a decision. This could of course work either way, when a change in a contract was either profitable or adverse. However, unlike Goodin's claim<sup>211</sup> that equal interests translate into equal political powers, the medieval theory left power asymmetries untouched. "The consent of a high administrator was of superior quality and effect to that of a lower, which, however, must be obtained."<sup>212</sup> Nevertheless, the *Quod Omnes Tangit* principle was to be understood as a principle of individual interests and rights. Individual consent was still necessary no matter how awry the power relation was.

Despite the absence of a final say, the strict individualistic nature of *Quod Omnes Tangit* was maybe the principle's politically most powerful feature. In the legal procedures leading to a decision, consent of everyone was needed and dissenting voice needed to be appeased. But the appeasement of everyone was an ineffective way of government and therefore, lawyers relied on a legal restriction of the terms and conditions under which individual consent was required. The restricting terms can be described in three conditions. According to Post, from the thirteenth century they were meant to serve mainly two functions: On the one hand they needed to keep

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<sup>210</sup> Own translation. Original "...ut id consensus omnium fiat, quod omnibus profuturum est".

<sup>211</sup> Referring to Goodin 2007.

<sup>212</sup> Post 1950, p. 71.

intact the legal notion of being affected, and thus the key element of the Quod Omnes Tangit principle. On the other hand, they had to provide a solution to a possible disagreement among the affected parties.

The conditions included a clause of majority decision-making;

*“ (1) the right of the majority in a corporation or other community to carry the issue in spite of a dissenting minority,*

a clause of legal proceduralism;

*(2) the association of quod omnes tangit with judicial procedure and due process of law, [...]*

and a clause of common good;

*(3) the subordination of consent, both of individuals and of a majority, to the idea of the end of society, the common good or welfare and public utility.”<sup>213</sup>*

These three conditions of the medieval application of Quod Omnes Tangit come with far reaching implications. The first condition clearly states the close connection of Quod Omnes Tangit to the notion of *maior pars*, the idea that a decision need not be made consensually by everyone but that instead a decision by a majority was valid. By implication this meant that a majority could in fact represent the will of a community. And this was first and foremost a practical concern. If the consensus of the community was an unreliable source of legitimacy, the majority of the affected parties could decide in the place of the whole community. The majority was hence

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<sup>213</sup> Post 1950, p. 71.

numerical and did not necessarily represent the *sanior pars*, the more authoritative part of an assembly. However, in cases of equal or not clearly differentiated authority, numbers alone counted. Moreover, reasons had also to be considered.<sup>214</sup> And as an important limitation to *maior pars* it was necessary to give a voice to everyone and a forum for political deliberation. The idea that a majority could speak for the whole community eventually became an important driver for the concept of elected representatives. By the fourteenth century, elected representatives were commonly perceived as representing the opinion of the majority.<sup>215</sup> Of course, that did not mean that all representatives were necessarily elected, even less that they were elected in a way that we would call democratically today.<sup>216</sup> However, as representation in political debate became more and more institutionalised, it eventually provided the conceptual bases on which the early modern democrats of the 17<sup>th</sup> century would build their claims. Instead of the community, representatives got to represent the voices of the public, based on a right to individual liberty and thereby overthrowing the sacred hierarchy that was holding the medieval aristocratic system. In 1647 the Leveller Thomas Rainsborough states that “every man that is to live under a government ought first by his own consent to put himself under that government; and [...] the poorest man in England is not at all bound in a strict sense to that government that he has not had *a voice* to put himself

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<sup>214</sup> See Ganzer 2000.

<sup>215</sup> See Post 1950 p. 73.

<sup>216</sup> For a discussion see for example Skinner 2006.

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under.”<sup>217</sup> It was thus the movement of early modern democrats that ultimately merged the idea of an All Affected Principle, with the democratic ideas of liberty and equality and the concept of elected representation.

I believe conditions (2) and (3) reflect upon two other principles of legitimacy as I have discussed them in Chapter 2. Specifically, they are mirroring the separation of the procedural and the moral sphere. (2) binds *Quod Omnes Tangit* to an institutionalisation of the legal procedures necessary for the equal consideration of all affected interests. The condition therefore stipulates a principle of political participation that aims to legitimise the procedures of political decision-making.<sup>218</sup>

Moreover, (3) guarantees that any decision must lie within the bounds of a principle of basic morality. Without a substantive moral theory, one might argue, (3) leaves room for arbitrary overruling of a majority decision. At the same time, we can understand (3) as a requirement of moral sufficiency or a version of what more recently is discussed as basic human rights or moral common sense. Insofar it is analytically relevant that by separating (2) and (3) the moral and procedural sphere were kept apart. Ruling by majority or ruling by inclusive procedures alone was seen insufficient for the full legitimacy of the king.

In reality, clause (3) was less arbitrary than one might expect in the first place. It is reasonable to understand the condition as meant to support the

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<sup>217</sup> Woodhouse 1938 p. 53.

<sup>218</sup> While I am not expanding on it here, there is an interesting parallel with the significance of judicial proceduralism in Habermas’ discourse theory. The connection to *Quod Omnes Tangit* is partly discussed, e.g., by Luhmann 1993.



moral integrity of the ruler. In medieval understanding, the prince as the ruler had a superior right to do what was for the common good. “If he could successfully prove, in his high court in assembly, that he was justified in acting for the common welfare, he had the right to compel representatives to consent.”<sup>219</sup>

As a principle of legitimacy *Quod Omnes Tangit* was central in medieval legal theory and thereafter. Whenever a decision or business touched the rights of others, the principle required that all must be summoned, informed and granted a say to present their interests.<sup>220</sup> Thus *Quod Omnes Tangit* ultimately caused legal representatives to give a voice to those men who were progressively perceived as free. However, the medieval principle did not express any ambition for democratic sovereignty. It is, hence, important to note that the history of *Quod Omnes Tangit* does not support Goodin’s narrative of the All Affected Principle as the constituting principle of the demos of modern democracies.<sup>221</sup> Nevertheless, and this is where the commonalities of the two principles become crucial, a king despite his superiority in legal authority was required by law to gather the consent of all affected in an inclusive procedure that gives voices to all affected interests. Post makes this fact very clear when he writes that “*quod omnes tangit* was neither a constitutional principle of sovereignty of the people, nor a theoretical maxim. It was a principle of the fundamental medieval legal

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<sup>219</sup> Post 1950, p.76.

<sup>220</sup> Cf. Post 1950, p.75

<sup>221</sup> Referring to my earlier discussion of Goodin 2007.

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theory, that of government, by law, for the people, not government of and by the people.”<sup>222</sup>

As the quod omnes tangit principle was more and more institutionalised, it gained a prominent role particularly in political decisions about taxation. This close link between taxation and the required consent of all those who were taxed, is often described as a main impulse for modern forms of representation. Pitkin in her analyses of what it means to be “standing for” something writes: “This doctrine of quod omnes tangit ab omnibus approbatur est apparently fostered the requirement, in both church and secular government, that extraordinary taxes must have the consent of those taxed.”<sup>223</sup> She further argues that, although the rule was never a democratic rule since the freemen of the thirteenth century were not democratically elected, it nevertheless paved the way for the a form of representation according to which people could delegate their authority to formal representatives.

*“The idea of men being sent to Parliament “for” their communities, and consenting on their behalf, received a further application in the fourteenth century, when judges began to argue that since everyone was presumed to know the actions of Parliament, ignorance was no excuse for disobedience. Everyone was taken to know the law because everyone was considered (“intended”) to be present there, either personally or “by procuracy.””<sup>224</sup>*

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<sup>222</sup> Post 1950, p.77.

<sup>223</sup> Pitkin 1967, p.85.

<sup>224</sup> Pitkin 1967.

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From the idea that the decision-making procedures of the parliament could legitimise the decisions of the state, it followed that political representation was key to democratic legitimacy. Political decisions needed to be justified to everyone affected and they were justified through the a concept of representation. In this context the clause “no taxation without participation” is often quoted. The principle of *Quod Omnes Tangit* has been shown to be central to the development of some of the distinct features of modern democracies. Its relation to the All Affected Principle, thus, gives it outstanding importance to the history of democratic theory and stipulates a historically influential triad: First, Legitimacy originates from those affected, second, being affected requires participation and third, participation requires representation.

### **Pitkin's Concepts of Political Representation**

Today, academic discourse on democratic representation cannot do without reference to the work of Hanna Pitkin. Therefore, in the following, I want to explore the significance of Pitkin's work for our understanding of political representation. In order to close the gap between the concept of the All Affected Principle and the concept of democratic representation, I will rely on Pitkin's taxonomy of representation.

Pitkin's 1967 analysis of the *Concept of Representation* has in many ways laid grounds for our understanding of democratic representation. Pitkin prominently spelled out conceptual distinctions that have since shaped the academic discourse on representation. In her book, she first discusses a formal approach, the *view from formalistic representation*, focussing on the basic understanding of authority and accountability through which political

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representation is generally seen. She then sketches out two alternative perspectives on representation: First, representation as *standing for*. Here she further distinguishes the view from symbolic representation and the view from descriptive (or mirror) representation. Secondly, Pitkin discusses the perspective on representation as *acting for*, the view that representatives act substantively based on the interests of the represented. Pitkin's distinctions help to navigate conceptions of representation according to how they strike a balance between the two perspectives of *standing for* and *acting for*. The approaches reflect on distinct views of representation that are not mutually exclusive. Although Pitkin appears to argue in favour of a strong view of substantive, acting-for representation, each view offers different criteria of evaluating forms of political representation. In discussing each view, I will highlight some of Pitkin's arguments that are relevant to the idea of representation that I want to sketch out in Chapter VI.

### *Formalistic Representation*

The most general conceptual approach to representation can be found in the view from *formalistic representation*. Examining representation with regards to its formalistic structure seeks to describe the formal arrangements and institutions of representation. Pitkin separates these arrangements into two categories: authorisation and accountability.

Simply put, any individual can become a representative by holding a particular institutional position. The representative can then be assessed with regards to how this institutional position can justify its authority and to what regard the representative can be held accountable for her actions. The actions of the representative are not necessarily independent of the office

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but may in turn be shaped by institutional procedures, implicit or explicit rules and social norms.

According to Pitkin, however, formalistic representation is an inadequate view to take if we want to evaluate the performance of a political representative. She provides two main arguments for this inadequacy claim. First, the formalistic view is itself inconsistent. The two essential categories of authorisation and accountability are two incompatible approaches to political representation. Second, neither authorisation nor accountability can guarantee that a representative will actually represent its constituent substantively. In order to understand the motivation behind these arguments, we have to take closer look at Pitkin's idea of representation.

Pitkin's argument for authorisation starts from a Hobbesian idea of authority. Accordingly, representation must entail some transfer of power from the represented to the representative. In as far as this transfer of power is legitimate, the representative can be seen as possessing legitimate political authority to act in the name of the represented. Yet, Pitkin remarks, some hold similar positions of authority that do not qualify as political representation. "An army officer has authority over his men and can issue commands binding on them, yet he is not thereby their representative."<sup>225</sup>

Moreover, Pitkin is indicating the fact that authorisation as a simple permission to act on someone's name may be an insufficient account of what it means to represent. For a full account of representation, we might want to include cases where a representative does not represent in the name of a

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<sup>225</sup> Pitkin 1967 p. 53.

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particular person but advances an abstract cause or principle. For example, an academic might act in the name of the sciences without concrete reference to individual interests.

Since the substance of representation seems essential to the idea of representation, Pitkin introduces a crucial distinction. *Substantive* “occasions for ascribing actions and invoking representation seem related also to the kinds of representing by inanimate objects which the authorization view completely ignores because of its focus on action, rights, and responsibilities.”<sup>226</sup> However, opening up the authorisation view for the possibility of representing abstract ends comes at the cost of accepting that such views cannot easily be evaluated from the standpoint of an individual interest. On the one hand, this means that the purely formalistic authorisation view cannot provide us with a theory of good representation because of its limitation to a strict principal-agent relationship. If representatives act on more than the direct mandate given to them by virtue of individual authorisation, then individual authorisation is in turn insufficient to capture the extent of political representation.

On the other hand, this fact demonstrates how the authorisation view may be incompatible with a notion of accountability. Accountability describes the idea that “if A represents B, he is presumed to be responsible to B, that is to say, he is answerable to B for what he says and does.”<sup>227</sup> Hence accountability may *prima facie* be opposed to the authorisation view. While

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<sup>226</sup> Pitkin 1967, p. 54.

<sup>227</sup> Pitkin 1967, p.55, originally quoted from Friedrich 1950, p. 263 f.

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the authorisation view holds that the authorised representative is generally free to act as she will, or as she is authorised, accountability prescribes that every representative must in principle be held responsible for her actions. Or in Pitkin's words: "Where the one group defines a representative as someone who has been elected (authorized), the other defines him as someone who will be subject to election (held to account)."<sup>228</sup>

But Pitkin's argument for the incompatibility of the two views can be challenged. Her definition of authority is quick to assume that once authorised, the representative is not answerable to the represented. However, this presents a quite narrow conception of political authority. If we diverge from this strict interpretation of the Hobbesian idea of authority, we may find a wider conception of authority that allows us for cases in which the representative is authorised *because* she is answerable to the represented. Following this argument, accountability may as well be a constitutive condition of authority.

So, while we might want to disagree with Pitkin on this point, her second argument against the formalistic view appears more conclusive. The fact that we cannot assign any substantive content to the formal act of representation means that we cannot evaluate the actions of the representative appropriately. Instead we are forced to concede the mere assessment of the institutionalised structure of representation. This is unsatisfying. A formal requirement may demand the coach of the FC Barcelona to show up for work every morning, yet, we want to evaluate the

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<sup>228</sup> Pitkin 1967, p.58.

coach in terms of how well the team is performing under his command. Similarly, a concept of representation should provide us with the tools to evaluate representatives on how well they perform politically.

In this sense, the view from authorisation and the notion of accountability both “are meaningful only if we assume that representation is activity and that both representative and represented are human beings. Yet we know that sometimes inanimate objects [...] represent, and that sometimes men [...] represent an interest or a cause or some other abstraction.”<sup>229</sup> This does not mean that the notions of authority and accountability are irrelevant for political representation – they are in fact crucial. It simply points out the fact that the formalistic view alone is insufficient to explore standards of how well a representative behaves. It provides the conceptual framework for institutionalising political representation, yet, it leaves the normative contents of such representation empty. In this sense the formalistic view “defines representing in terms of a transaction that takes place at the outset, before the actual representing begins. To the extent that he has been authorized, within the limits of his authority, anything that a man does is representing.”<sup>230</sup>

### *Standing for: Symbolic Representation and Politics as Narration*

Having briefly laid out the framework of institutionalised representation, we can now take a closer look at the contents of representation and Pitkin’s

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<sup>229</sup> Pitkin 1967, p. 59.

<sup>230</sup> Pitkin 1967, p. 39. I understand “man” as “person” here.



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pivotal distinction of *standing for* and *acting for* representation. I will start with a form of *standing for* representation.

Approaching representation from the perspective of *symbolic representation* focusses on the symbolic expression of occupying a political position and in the ways in which one can identify with these symbols. The view from symbolic representation starts with the assumption that representation basically functions in the same way as any other kind of political symbolism. Political symbols for example are a flag that *stands for* a nation or a royal who might *stand for* a state.

Symbolic representation depends to a large part on the perception of the symbol by the audience. The Stars and Stripes represent the United States only if there are sufficiently many people who perceive of it as the national flag of the US. More than that, a symbol does not only stand for an entity, beyond that it often attaches emotional value to it, a feeling of pride, home or power. Thus, this way of political representation must depend on the emotional response of the public and whether it is believed to be a representation.

Because of the larger emotional attachment, symbolic representation can manifest itself within a broader social narrative, a narrative that is in some cases constitutive of the political identity of citizens. In this way, the Stars and Stripes does not only stand as a symbol for the United States as a legally defined entity but for an overarching narration of a nation that reaches from the Declaration of Independence, to the post civil war union and the liberation of Europe after WWII. It confers meaning to the justification of the American political identity as promoting liberty, equality and unity.

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Similarly, Pitkin argues that a representative can function as a projection of an emotional response expressing the self-understanding of an individual. Whether or not this emotional response can be changed by and through symbolic representation remains controversial. Pitkin argues that “creating a symbol is apt to be a matter of working on the minds of the people who are to accept it rather than of working on the symbol itself. [...] For accepting this symbol rather than that one, symbol-making is not a process of rational persuasion, but of manipulating affective responses and forming habits.”<sup>231</sup> Accordingly, no rational justification of representation is possible, because political representation depends entirely on whether people believe that they are represented.

Hence, the worry with symbolic representation is that representatives will actively seek to shape the emotional responses of their constituents. Fascist leaders, for example, often claim that they are representing a deeper truth<sup>232</sup>, one that is not accessible or not openly expressed by the public. Whether or not the fascist leader succeeds as a symbol depends on whether she is able to shape the beliefs of the people in a way that a majority can identify themselves with the ruler; thereby turning the will of the ruler the will of the public. The view of symbolic representation may thus lead to a slippery slope, arguing that a strong identification with the representative through symbolism provides opportunities for the establishment of a fascist regime.

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<sup>231</sup> Pitkin 1967, p.101.

<sup>232</sup> The term ‘deeper truth’ is commonly used recently. I understand it to mean a deeper spirit of a nation or ethnos.

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More recent understandings of symbolic representation have tried to emphasise a different aspect that appears to partly contradict the slippery slope argument. Michael Saward's account of the *representative claim* uses a symbolic approach by investigating the mechanism of representatives posing political claims, stipulating a debate and thereby fostering the creation of a political agenda that may shape the identities or interest of the represented.<sup>233</sup> Instead of attempting to represent the constituents' interests, the representative "has to mould, shape, and in one sense create that which is to be represented."<sup>234</sup> I will expand on Saward's argument in the next chapter. However, the idea of representatives posing claims that may influence fundamentally what is to be represented describes a crucial problem to an orthodox Pitkinian understanding of representation.

An underlying problem is that according to Pitkin's argumentation we need to assume a strict conceptual separation of the representative and the represented in terms of how each of them determine their set of particular interests. According to Pitkin, only if the interests of the represented do not depend on or even interfere with the interests of the representative, we can assess as to how adequate the political representation is being realised. If we assume, like Saward, that constituents' interests can in fact be influenced through forms of symbolic representation, then electing or judging a representative becomes a complex problem of mutual interdependencies.

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<sup>233</sup> See Saward 2006, 2010.

<sup>234</sup> Saward 2010, p.29.

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Some might even argue that such a conception will undermine the autonomy of the represented.<sup>235</sup> However, additional arguments are needed in order to support this objection. More specifically, we need to establish how distinctive sets of particular interests are essential for the assumption of individual autonomy. I do not want to take up this task for now.

Instead I want to focus on another angle of symbolic representation. As explained above, symbolic representation is likely to be part of broader political narrative. It has thus become increasingly interesting to scholars conceptualising political representation through a more recent focus on political narratives as a way of conducting politics.<sup>236</sup> Accordingly, political narratives offer politics a method of shaping constituents' understandings of the world through storytelling.<sup>237</sup> The theoretical idea of applying political narratives is based on empirical findings in psychological research. These findings indicate that people tend to think, perceive and act based on narrative structures.<sup>238</sup> Yet, it is debatable how well those narrative structures present some form of political truth. If narratives are applied in order to distract from facts and political realities, they are certainly under the suspicion of mere propaganda, opposed to the idea of public deliberation. If narratives are applied in order to provide a shared

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<sup>235</sup> Dovi 2015.

<sup>236</sup> There is a broad range of available literature. A good overview in relation to political representation is provided by Shenhav 2006. See also Mitchell 1980.

<sup>237</sup> The human as a „story-telling animal” is sometimes quoted in this context. I believe this goes back to MacIntyre 1981, p. 216. However, MacIntyre promotes a particular Aristotelian concept that might be misleading here.

<sup>238</sup> See for example Sarbin 1986.

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understanding that can help people to make sense of political realities, then it can reflect a certain truth shaped by a narrator but consistent with facts and realities.

Of course, the line between propaganda and the shaping of political culture is thin and blurry. However, most narratives require some form of symbolic representation, often a leader of a movement or a figurehead who stands for a common political goal that is meant to unite its followers. And this clarifies Pitkin's initial concern. If political leaders mobilise support by appealing to a particular way of narrating political realities, one could argue that what these leaders actually represent is the symbolic power of the narrative rather than the individual interests of those adopting the narration.

No matter what standpoint we want to take with regard to these points, the view from symbolic representation creates a mutual dependency between the representative and the represented. As the representative will try to shape the interests of the constituent, the constituent will support and eventually elect the representative able to narrate best the political reality. In this sense, symbolic representation is central to the concept of publicity and public deliberation.

#### *Standing for: Descriptive Representation and the Problem of Exclusion*

Symbolic representation can be distinguished from another way of *standing for*. Instead of symbolism we might want to focus on representation as the ways in which constituents can identify with their representatives. The perspective of *descriptive representation* focusses on the descriptive traits of the representative rather than the symbolic interpretation of representation.

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In this sense, the view from descriptive representation evaluates concepts of representation in terms of the likeness between the represented and the representative. How we evaluate likeness thereby depends on the political context and can be described in categories such as resemblance of personal identities, shared history, personal experience or individual interests.

Descriptive representation thereby puts the focus on the social situatedness of the represented. The general idea is that for an adequate representation, the representative must relate to the represented in her descriptive characteristics. Of course, descriptive characteristics can vary depending on our social lens. A member of the working class, for example, may be represented by a representative of the working class. Yet, working class women may demand the representation by a female representative.

Therefore, it can be argued that approaching representation from the view of descriptive representation asks us to display the whole spectrum of (relevant) power relations between different social groups within a society. As each group will be differently situated, descriptive representation requires the institutional ability to portray the complexity of power structures in political decision-making.

Consequently, those who emphasise the descriptive aspect of representation will argue that likeness between the representative and the represented is deeply connected to a notion of egalitarian justice. If power ought to be equalised amongst citizens, representation must account for the different power relations between differently situated social groups.

I think the argument can be supported in two ways. First, human experience, interests and identity might be fundamentally inaccessible to people without

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similar experiences, interests or personal histories. This argument is based on similar arguments in social epistemology. The idea is that only a certain likeness between the represented and the representative can approximate the political reality believed by the constituent. The second way of supporting the likeness condition directly refers to the social power structure that is reflected by a representative. Here the argument is not so much concerned with how well the representative is in fact representing the interests or reality of the constituent. Instead representation is seen as a tool to change the social structures by means of allowing particular, often disadvantaged, social groups to have equal access to positions of political power.

For example, democratic parliaments in most parts of the world consist of a majority of men. It is argued that this leads to an inadequate representation of women's lived realities and in some parts even to an unjust oppression of women's rights. In principle, it would be possible for men to represent women's rights and interests. In the same way representatives may represent more than merely their particular social situatedness.

However, if MPs are predominantly recruited from one particular social or ethnic class, then the worry is that this creates an inaccessibility for other social or ethnic classes to acquire actual political power. And this inaccessibility risks to bend political discourse and decision-making towards the interests of the social group in power. In this way, the likeness condition plays a key role in our understanding of identity politics.<sup>239</sup>

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<sup>239</sup> Taylor 1989, 1999.

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Yet, in the theory of representation the condition is quite controversial. Pitkin expressed her concern with the implication of descriptive representation:

*“We tend to assume that people's characteristics are a guide to the actions they will take, and we are concerned with the characteristics of our legislators for just this reason. But it is no simple correlation; the best descriptive representative is not necessarily the best representative for activity or government. [...] a lunatic may be the best descriptive representative of lunatics but one would not suggest that they be allowed to send some of their numbers to the legislature. In the same way, “while we might well wish to complain that there are not enough representative members of the working class among Parliamentary representatives, we would not want to complain that the large class of stupid or maleficent people have too few representatives in Parliament: rather the contrary.”<sup>240</sup>*

The argument might, *prima facie*, appear sound. However, it is not as straightforward as Pitkin puts it. Certainly, any representative needs to fulfil some minimal requirements of sanity in order for her to be able to adequately represent the constituent. I think, it is questionable whether lunatics would in fact prefer to be represented by a lunatic. Nevertheless, there have been cases of lunatics acting as democratically elected representatives, even voted

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<sup>240</sup> Pitkin 1967, p.89. She is referring to an argument originally made by Phillips Griffiths and Wollheim 1960, p.190.



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into office by supposedly sane voters. It is thus neither logically nor practically impossible for a lunatic to become a representative.

I think the theoretically more pressing question is: Assuming that two candidates are (given their capabilities) equally equipped for a representative office but differ in their social situatedness. Are there any additional reasons to prefer the representative who shares more characteristics with the constituent? For example, if a woman and a man are intellectually equally capable to hold political office, is there an additional reason for the woman to represent women. This is the extra condition that the view from descriptive representation adds. And given this extra condition it becomes much harder to shrug off the view from descriptive representation.

However, Pitkin seems rather interested to offer an isolated account of representation regardless of the social circumstance. This is why she concludes that judging a representative purely based on their likeness with the constituent must be insufficient. Yet, from today's perspective, for example, gender equality is generally assumed to be crucial for sound government.<sup>241</sup> Not taking the likeness condition into account for our account of representation will likely put a flaw on the theory.

But the likeness condition might need certain restrictions. That is why Pitkin is strengthening her argument by stating that a focus on descriptive representation will eventually distract from the importance of what representatives actually do, the activity of representing. Following this

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<sup>241</sup> See for example *Women in Government* - OECD 2021.

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argument, a sole focus on descriptive representation can lead to a decrease in accountability to the represented group. A member of the working class, for example, could be a good representative of the working class according to the likeness condition. However, if the representative eventually supports legislation contrary to the interests of the working class, we may want to rely on a different evaluation criterion than likeness. Therefore, Pitkin's argument has sparked a controversial debate, especially in the context of social rights movements.

This can be said to be a crucial dilemma for the view from descriptive representation. Underlying the dilemma are two contradicting assumptions as to how to evaluate democratic representation. On the one hand, we hold the assumption that a representative should be accountable as to how adequately she is representing the interests and opinions of the constituent. On the other hand, we hold the assumption that a representative should represent the essence of the constituent's identity and her social position. However, the two conditions do not necessarily coincide and a focus on one might obstruct the clear evaluation of the other.

Moreover, a hierarchical setting of the conditions seems to highly depend on the theoretical context. Questions of identity representation are often discussed under larger issues of equal access to political power, whereas questions of accountability refer to the rather abstract debate of the formal constitution of power. The distinction unfolds more complexly along the

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lines of the discourse between structuralism and post-structuralism.<sup>242</sup> I think that much of the discussion of the view from descriptive representation has thus been evolving from attempts to dissolve this dilemma which has turned out to be a fruitful undertaking for several branches of literature.

Anne Phillips, for example, when reviewing her own understanding of Pitkin's work, calls her analysis of descriptive representation both an "inspiration and foil. It was inspiration because it forced us to think more carefully about the meanings we were attributing to 'underrepresentation.' It was also, however, foil because it seemed so discouragingly critical of descriptive representation. It figured, therefore, as the position that had to be argued down."<sup>243</sup> Phillips argues that Pitkin's critical view on descriptive representation can partly be explained by her concern for elements in democratic theory that might open the door to paternalism and undermine the freedom of individuals. Phillips herself argues for a more descriptive view on representation.

In "a Politics of Presences"<sup>244</sup> she argues that our analyses of democratic representation should focus more on the actual structure of participation in democratic decision-making. She is highlighting the exclusionary features that a mere focus on the formal structures of representation must entail. Her

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<sup>242</sup> I understand post-structuralism as the philosophical reaction against structuralism, starting in France, and associated with writers such as Derrida, Foucault or Kristeva. Most important here are its refusal of any concepts of objectivity, reality or truths and the rejection of the idea of social progress. For an overview see Gutting 2001, 2005; Flynn 2008.

<sup>243</sup> Phillips 2012. p. 513

<sup>244</sup> Phillips 1998.

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approach of resolving the dilemma of descriptive representation argues for a justified balance between accountability and resemblance.

Other authors have correctly pointed out that the divergence of accountability and resemblance is driven by the fact that representation is necessarily an instrument of group representation in modern democracies. Political representatives in most cases represent a certain group of interests, opinions or people. Therefore, any form of representation must face difficulties with regard to individual accountability. The approach of descriptive representation to represent particular identities or values can make this fact even more salient. Resemblance of a particular identity is already a difficult task, representing a group of identities can be practically impossible. A mere focus on resemblance may thus increase problems of accountability in terms of interests.

Iris Marion Young's understanding of descriptive representation can be understood as an attempt of further exploring the balance between accountability and resemblance. Young argues that attempts of group representation pose a problem to all kinds of representation because of their inherent suppression of difference of the constituent group. In "Inclusion and Democracy", Young formulates a revised version of descriptive representation, taking into account the importance of differentiating between social identities. According to her understanding, including certain voices through representation must necessarily exclude others.

Therefore, for the legitimacy of the representative it is crucial to acknowledge the diversity of the constituent. We cannot reduce representation to the mere resemblance between represented and

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representative, yet, the democratic process must be such that it *recognises the voices* of all identities.<sup>245</sup> However, the elements of authorisation and accountability remain central to Young's understanding of representation. She states:

*“Conceiving representation as a differentiated relationship whose primary moments are authorization and accountability, [...] helps dispel this logic of identity. Representation of social positions structured by gender, race, nation, class, age, and so on, moreover, should be thought of primarily in terms of perspective rather than interests or opinions. Representing a social perspective means bringing to discussion certain kinds of experiences, questions, and sensibilities, moreover, rather than making positive assertions about policy outcomes.”*<sup>246</sup>

Young acknowledges that representing social perspectives is more demanding than representing interests or opinions. It is particularly difficult to unify diverging social perspectives under one representative, yet, it is a worthwhile attempt because it will “maximise fairness and social wisdom”, even if it comes at the cost of overriding majority interest or opinions.

The implications of Young's argument can be far-reaching. Under certain conditions, it can be right to assess a representative based on her identity and social perspective rather than in terms of how adequately she represents the interests and opinions of the constituent. Thus, I understand her

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<sup>245</sup> See Young 2000 and Young 1997

<sup>246</sup> Young 1997 p. 373.

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argument as emphasising democratic legitimacy as political equality based on the adequate representation of the diversity of social perspectives and positions of power.

### Descriptive Representation and the Oppression Principle

Susan Dovi has offered an important qualification of Young's argument. She suggests that we can interpret descriptive representation as a minimal requirement safeguarding the rights of minority groups. Accordingly, democratic representation can demand special limitation on the influence of overrepresented privileged groups. For Dovi, the central question of the argument is: How can we justify the exclusion of certain groups from representation under the assumption of political equality?

Dovi argues that on the one hand democracies cannot exclude anyone categorically since "citizens should not be deprived of their right to vote, their right to run for office, or any basic political and civil liberties based on their gender, race, sexuality, or class."<sup>247</sup> On the other hand, Dovi remarks that even if we accept that formal exclusion must be deemed undemocratic, "informal norms are properly used to marginalize certain citizens, so as to limit their influence in the political arena."<sup>248</sup> Yet, we do not regard, for example, the right of association as undemocratic. Therefore, it must be possible to describe an "ethics of marginalisation" that allows us to determine when it can be justified to marginalise certain groups in

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<sup>247</sup> Dovi 2009 p. 1181.

<sup>248</sup> *Ibidem*.

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democracies in order to safeguard an overwriting concern for justice. Consequently, Dovi formulates what she calls the “oppression principle”:

*“The oppression principle has two parts: democracies need to marginalize (1) those who oppress and (2) those whose privileged status sustains oppression. These two parts are listed in order of their priority.”*<sup>249</sup>

A lot of conceptual work is done by Dovi's notion of “oppression”. Hence it is important to understand the definition of the term. Again, Dovi relies on Young's categories of oppression as exploitation, powerlessness, violence, cultural imperialism, and (socioeconomic) marginalization.<sup>250</sup> The oppression principle attempts to rule out those social groups who seek to oppress other groups by means of their unique access to political power. And by extension, the principle tries to prevent those groups gaining most from an oppressive status quo from actively seeking to perpetuate that status quo.

Consequently, the oppression principle can serve two important functions for representative democracies. It can correct for blatant power imbalances between social groups and hence prevent that certain factions dominate others. It also protects democracies from attempts to misuse institutions of representation to oppress others.

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<sup>249</sup> Dovi 2009, p. 1182.

<sup>250</sup> See Dovi 2009 p. 1182 f. Dovi's understanding seems to differ from Young's original much stricter interpretation, see Young 1990 p. 64-80.

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Thus, we may as well call the oppression principle a defence principle. It defends democracies on two fronts. It defends against privileged social groups unjustly oppressing underrepresented social groups. On the other hand, it defends democracies against factions that seek to undermine the claim to equal political representation by all social groups.

In this sense, the oppression principle is related to James Madison's concerns that democracy could fall prey to the interests of particular influential factions of the Union. And just like Madison weaved it, the concept of representation could offer a solution. But in order to do so, modern forms of representation need to be redefined. The Oppression Principle stands exemplary as such a refinement. It acknowledges the fragility of democracies if left to the currents of social power.

That democratic states often possess constitutional provisions to protect its institutions from malicious use is indicative of this fact. The US' idea of checks and balances meant to defend the separation of powers is a prominent example. The German term of "Wehrhafte Demokratie" (fortified democracy) goes even beyond that. The term describes the wide-ranging constitutional provisions aiming to prevent anybody from misusing democratic institutions in order to abolish the democratic system or the order of liberal democracy. Such Provisions can entail the prohibition of political parties or groups. The constitutional court may even restrict the basic rights



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of citizens attempting to undermine the liberal democratic order, as defined by human dignity, democracy and rule of law.<sup>251</sup>

Germany's sensitivity to the importance of such constitutional provisions clearly stems from the historical experience of the NSDAP gaining power through democratic institutions. A fortified democracy therefore acknowledges the vulnerability of liberal democratic societies towards the possible instability in the balance of power.

The view from descriptive representation and the oppression principle are taking this vulnerability seriously and apply it subsequently to institutions of political representation. According to this view, political representation serves a crucial function in the equalisation of factual political power within a society. Since democratic institutions of representation and majority rule can be misused by one social group to oppress others, the oppression principle can be an appropriate tool to evaluate the legitimacy of democratic representation and to help prevent the decay of a liberal society.

I, by no means, think that this conclusion is an exhaustive summary of the view from descriptive representation, even less of Pitkin's understanding. What I meant to point out is the fact the descriptive aspect of representation should not easily be disregarded and instead is connected to some fundamental problems in forming a democratic society and democratic institutions. As such it will be influential in my later discussion of the concept of representation.

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<sup>251</sup> See ruling by the German constitutional court 1952. Bundesverfassungsgericht, BVerfGE 2,1, especially Ls. 2, 12f. , See DFR - BVerfGE 2, 1 - SRP-Verbot 2020.

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*Acting for: Substantive Representation*

Both symbolic and descriptive representation are characterised by Pitkin as “standing for” views of representation. The symbol stands for the represented, as well as a representative stands for certain characteristics of the represented. According to Pitkin both views miss to address the actual substance of representation – namely the action of representing. And this in Pitkin’s analysis leads to the view from substantive representation.

In a way, the view from *substantive representation* is Pitkin’s answer to the quest of filling the gap left by the formalistic view. The view attempts to tackle the activity of representing as acting for others that is both authorised and accountable to the represented. While the pure formalistic fails to substantiate the conduct of representatives, the view from *standing for* representation may well describe certain requirements of representation but fails to account for any substance of the activity of representing itself. The most genuine definition of the view from substantive representation is thus:

*“What I should like to say about substantive acting for others is that the represented thing or person is present in the action rather than in the characteristics of the actor, or how he is regarded, or the formal arrangements which precede or follow the action. This makes the “substantive acting for” view the central most important view of Pitkin’s analyses.”*<sup>252</sup>

And although Pitkin argues that the view from substantive representation is mostly based on the idea that the representative needs to have a substantive

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<sup>252</sup> Pitkin 1967 p. 144.

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relation to the interests of the represented, it appears to be motivated rather by the idea of representation as an action. This becomes clear when Pitkin disregards the “standing for” views as “views” that “could not be directly applied to the realm of action.”<sup>253</sup>

Therefore, what ultimately matters for the view from substantive representation is the activity of representing. “The activity of representing as acting for others must be defined in terms of what the representative does and how he does it, or in some combination of these two considerations.”<sup>254</sup>

Under this view perfect gender parity in a parliament would be irrelevant. It is irrelevant because the mere characteristics of the representatives do not or do only indirectly matter for the action itself that the representatives take.

However, the view from substantive representation comes with its own set of conceptual problems. Most central to these problems is the problem of how to properly substantiate the activity of representation. The only criterion to evaluate substantive representation seems to be how adequately the substantive interests of the represented are in fact carried out. But it seems that the best way to carry out the substantive interests of someone is to not have it represented in the first place and instead. The problem becomes more complex as a representative does not only represent one person but generally a group of people with possibly different interests.

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<sup>253</sup> Pitkin 1967 p. 142.

<sup>254</sup> Pitkin 1967 p. 143.

Therefore, according to Bernard James Diggs, the idea of representation is a practical one. But precisely in its practice lies its biggest challenge. “Persons do have representatives because they cannot ‘be present’ themselves, in a particular role, to do a job, or exercise the rights and obligations of the role.”<sup>255</sup> Maybe more importantly, the lived realities in modern societies require individuals to not only be knowledgeable in one particular matter but in many areas of political decision-making. It is thus practically impossible for anyone to assume every political role that she is entitled to be present in person and by virtue of exercising her democratic power. And even non-democratic government can require representation for the same reason, namely that a particular voice cannot be present at all places at the same time. *Practical representation*, as Diggs calls it, hence means:

*“one person cannot be wise in all matters and he cannot be in all places at once. As the pursuit of his goals in a complex society requires him to be in many ‘places’ at once, he has to have help, of which representation provides one form. This function of representation accounts for its ubiquity. The more one undertakes, the more advice and the more representation he is apt to need.”*<sup>256</sup>

Diggs description of representation shares some similarities with my earlier discussion of the medieval principle of *quod omnes tangit*. The medieval interpretation often led to the conclusion that everyone whose rights were

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<sup>255</sup> Diggs 1968 p.31.

<sup>256</sup> Ibidem.

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affected by a decision of the ruler needed to be heard in council. Yet, practically this required the representation of certain right-holders who were physically not able to attend simply because distances were too great and everyday necessities locally oriented. The principle of *quod omnes tangit* and its modern equivalent are therefore closely related to the emergence of political representation in early modern states.<sup>257</sup>

The perception of representatives, however, has changed significantly between the early modern version and today's interpretation of political representation. Whereas it was common to suggest that political rulers require some special skills or knowledge in early modern days, it has become much less common in current discourse. This is partly due to the fact that modern liberal democracies often work based on the assumption that any special knowledge for good ruling lies in knowing what the people really want, a *want* that is often assumed can only be known by every individual herself.

Nevertheless, knowing what one wants and how to navigate the available means in order to achieve it, can still require special expertise. This expertise, assuming it can be provided by specialised representatives, is often argued to constitute a special need for political representation in liberal democracies. In fact, the understanding of the interface between the interests and wishes of the constituent and the trained and skilled political representative is assumed to be central for any coherent theory of political representation.

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<sup>257</sup> Cf. Pitkin 1967; Post 1950.

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Pitkin, for example, states that “the average man should be confined to what is within his capacities: the selection of experts. Any voter, it seems, could say, ‘I don’t know much about government but I know what I like.’”<sup>258</sup> This, however, can lead to some unsatisfying consequences. It appears that there exists an epistemic paradox. If the citizen has to choose an expert without actually having the expertise herself to decide what counts as an expert, it is hard to believe that she can make that choice in any adequate way. On the other hand, if we assume that one is the best judge of one’s own interests, it is hard to believe that the expert representative can truly act in the interests of the represented. Yet, this is precisely the act of representing that Pitkin wants to describe with the view from substantive representation.

Substantive representation and the mandate-independence controversy

For Pitkin, the view from substantive representation must necessary lead into a paradox. If the best way of representing individual interests is to make the representative act, think, argue and decide just in the same way the represented would, then the concept of representation seems dispensable. The representative is present and, in a way, not present at the same time.

As Pitkin argues, it appears that this fact is the main source for some conflicting views about the right understanding of substantive representation. “Should (must) a representative do what his constituents want, and be bound by mandates or instructions from them; or should (must) he be free to act as seems best to him in pursuit of their welfare?”<sup>259</sup> This is

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<sup>258</sup> Pitkin 1967 p.137.

<sup>259</sup> Pitkin 1967 p. 145.

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the mandate-independence controversy. Theorists who emphasize the mandate view of representation argue that the representative functions as a delegate. Constituents delegate their power to the representative, who then is bound by a concrete mandate.<sup>260</sup> Theorists who emphasize the independence view argue that representatives work as trustees. They act independently but in the best interests of the constituent that has authorized them.

On Pitkin's account the controversy cannot and should not be settled. She argues that "the representative must act in such a way that, although he is independent, and his constituents are capable of action and judgment, no conflict arises between them."<sup>261</sup> The representative must first and foremost act in the interest of the represented, which for Pitkin means "he must not normally come into conflict with their wishes."<sup>262</sup>

Consequently, Pitkin's idea of substantive representation is some form of an equilibrium between two potential extremes of representation. Representatives should not hold the kind of power that makes them absolutely independent. On the extreme, such forms of representation risk to become dictatorial because the constituents are subject to the will of the representative. On the other hand, representatives should not be strictly

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<sup>260</sup> The historical roots of this form of representation I have discussed above as *plena potestas*. Of course, the *potestas* of the representative can take different qualities than full executive power. See Post 1943.

<sup>261</sup> Pitkin 1967 p. 166.

<sup>262</sup> *Ibidem*.

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bound by the will of the constituent. On the extreme, such representation risks to become a mere mouthpiece.

To balance out these two extremes, the representatives should be “a free agent” and “a mere agent” at the same time.<sup>263</sup> The agent must be free to act on behalf of the constituent but must be held accountable. For Pitkin this allows the concept of representation to change and to adapt to changing political circumstances. The ability to adapt is essential because it requires us to view political representation as an activity. We are “thinking of representing as activity, and activity implies a certain minimum of autonomy.”<sup>264</sup> Therefore, the activity of representation asks us to think of representing as the preserving of autonomy on two ends. It preserves the political autonomy of the constituent while at the same time assigning autonomy to those who are acting on behalf of the constituents. Good representation then consists of the authority of the representative within the limits of practical judgment, which has to be constantly renegotiated amongst citizens in an ongoing process of holding the representative accountable.

### **A Principle of Legitimacy and Representation**

The discussion in this chapter allows us to reflect critically not only upon the historical roots of the All Affected Principle. Rather the analysis shows the close connection between questions of democratic legitimacy and questions of representative democracy. Legitimate democratic

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<sup>263</sup> Pitkin 1967 p. 122.

<sup>264</sup> Pitkin 1967 p. 152.



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representation must be developed along the dimensions of Voice and Vote. Our institutions of representation must reflect upon both of these dimensions as only then we can ensure the equal distribution of power amongst citizens while at the same equally recognise individual voices in the decision-making process.

Therefore, in the following chapter, I will further develop the conceptual framework applying the principles of legitimate democratic representation.



# Chapter VI

## **The Representative Claim and Deliberative Democracy: Why elections?**

Building on chapter V, in this chapter, I want to further explore the relationship between democratic legitimacy and political representation. Thereby, I want to lay out a concept of political representation that allows us to view representation as a crucial institutional arrangement to gain

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democratic legitimacy as described in chapter 2. I will do so by first introducing a concept of the representative claim by Michael Saward. I will again address the Paradox of Presence and the so-called non-objection Criterion by Hanna Pitkin. In an attempt to combine Pitkin's analysis and the concept of democratic legitimacy, I will further investigate the important distinction between elected and non-elected representation. This will introduce the evaluative framework for two kinds of democratic justification. Electoral and non-electoral representation can coincide with the two categories introduced in chapter VI, voice and vote.

### **The Constructivist Extension of Representation**

On the 20<sup>th</sup> of February 2018, the president of the United States of America, Donald Trump, held a speech at the world economic forum in Davos. He started with the words: "I am here today to represent the interests of the American People [...]."

Just about a year before that speech, hundreds of thousands of people had gathered in several cities of the United States in protests organised under the title "not my president". Protestors stated that they were fighting against the view that Donald Trump was in fact representing any of their values, views and opinions. According to some protestors, Trump was an illegitimate president.

Meanwhile in Davos, Trump was meeting another guest speaker. Greta Thunberg was invited as the representative of a global movement for intergenerational justice named Fridays for Future. Thunberg was widely recognised as the voice of future generations and thought of as presenting a crucial perspective to the making of future economic policies.

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Trump and Thunberg stand for two distinct types of representation. Whereas Trump was the democratically elected president of the United States, Thunberg has never been an elected representative. Neither did she possess a well-defined constituency with explicable boundaries of territory or nationality. Yet, Thunberg represented a distinct political claim resonating with a broad public. Therefore, calling Thunberg a self-appointed representative does not seem to adequately capture the social dynamic behind her political role. Rather, Thunberg's participation in the World Economic Forum demonstrates the relevance of political representation beyond orthodox concepts of elected representation. Thunberg qualifies as a non-elected representative, one who has not been elected through formal procedures but appointed through the public approbation of a constituent created around a specific political claim or a so-defined part of the political discourse.

Trump and Thunberg serve as an example for a recent conceptual turn within theories of representation. Michael Saward has prominently coined a debate about the "representative claim", the idea that political representation takes place around the making and resonance of representative claims. In critiquing Hanna Pitkin's standard account, Saward developed an alternative concept of political representation.

He argues that representation takes place around *representative claims*, defined as:

*"seeing representation in terms of claims to be representative by a variety of political actors, rather than (as is normally the case) seeing*

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*it as an achieved, or potentially achievable, state of affairs as a result of election.*"<sup>265</sup>

The concept of the representative claim is challenging. It does not only focus on the “performative aspect” of claim-making but seeks to incorporate it into institutional frameworks while potentially allowing for a “radical extension” both in terms of inclusion and plurality of representative politics.<sup>266</sup>

In response to Saward, a number of scholars have criticised these challenging implications of his approach.<sup>267</sup> One of the central questions addresses the legitimacy of claimed representation. How can we call a representative legitimate who has not been formally legitimised through a process of authorisation? This view fundamentally echoes Pitkin’s analysis of representation based on the idea of a transfer of political power. Authorisation is the transfer of a right to act and speak in the name of the represented. It is legitimate if the transfer happens in the right way.

It may come as a surprise then that “legitimacy” is not a term used by Pitkin.<sup>268</sup> She seems to understand legitimacy as implied by her broader idea of authorisation. The only way to legitimise representation is through authorisation. This view ultimately interlocks authorisation and

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<sup>265</sup> Saward 2006, p. 298. (sic)

<sup>266</sup> Saward 2006 p. 299.

<sup>267</sup> See Schaap 2012.

<sup>268</sup> Referring to Pitkin 1967. She uses the term „legitimate“ nine times, in a different context though. “Authority” appears more than 120 times.

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representation and eventually leads us to what I have mentioned as the paradoxical nature of representation.

However, Saward's concept of representation breaks the orthodox relation between authorisation and representation. The representative claim is first and foremost a claim because it does not depend on elections as a formal method of authorisation. Consequently, legitimacy must be relocated. The concept of the representative claim does significantly deviate from Pitkin's conceptualisation of political representation. It shifts the focus away from Pitkin's guiding question of "how to make present" towards a view that *constructs* representation as a communicative process between representative and represented. This shift in focus has been described as the "constructivist turn"<sup>269</sup> of the concept of representation.

However, the constructivist turn might rather be a constructivist amendment. In fact, Saward does not disregard Pitkin's framework entirely. Saward builds on Pitkin's view that representation entails a form of substantive *acting for* the constituent. Accordingly, a representative claim made by any candidate includes a claim to a substantive form of representation. It is hard to imagine in fact how a representative claim could be formulated without reference to the interest of a potential constituent. Donald Trump, when claiming to speak for the American people, must refer to himself as the person who is capable to act in the interests of the American people. Likewise, Greta Thunberg does not only represent a group of young

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<sup>269</sup> See Disch 2015.

people but the claim that these young people have a substantive interest in the enactment of efficient climate policies.

As the representative claim breaks with the idea of authorisation, at the same time Saward's concept deviates in the directionality of the argument. Hence, his main thesis is that the "unidirectional approach" of Pitkinian conceptions of representation "is unnecessarily but influentially limiting, in that it has encouraged theorists to underplay the subtle processes of constructing the represented, or that which needs to be represented."<sup>270</sup> In order to break with the unidirectional approach, Saward suggests to extend a "triangular conception" of representation:

*"A subject [S] stands for an object [O] that is an account of a referent [R]".<sup>271</sup>*

The concept of the representative claim remains centred around the relationship of the subject of representation and the object to be represented and its reference to a substantive interest. Yet, it puts this relationship into the context of the making and receiving of claims of representation, while opening up the modes of relations between the object and the referent:

*"A maker of representations (M) puts forward a subject (S) which stands for an object (O) which is related to a referent (R) and is offered to an audience (A)."<sup>272</sup>*

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<sup>270</sup> Saward 2006, . 300.

<sup>271</sup> Saward 2010, p.6.

<sup>272</sup> Saward 2010, p. 302.



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This extension brings back forms of representation initially more or less disregarded by Pitkin. Symbolic representation and descriptive representation can take place exactly at the communicative relationship between M and A. The relation between O and R, furthermore includes substantive claims, as well as claims of a symbolic and descriptive context. For example, Thunberg's claim to representation does not only stand for the object of future environmental concerns but includes a broader notion of intergenerational justice, symbolises the inclusion of young people while being performed by someone who is believed to embody the voice of a generation.

Of course, in the same way, even elected representatives must be analysable under this scheme. Donald Trump does not only represent the majority of American voters (or the Electoral College) but at the same time he symbolises a shift in American conservatism, he accommodates a notion of anti-globalism and a narration of securing national supremacy. In a way, his representative claim is institutionally authorised on the one hand, yet, on the other hand based on a communicative act engaging with a public audience. My focus here, however, lies with the legitimacy of non-elected representation. And as I have argued, in order for the concept of the representative claim to be valid, it must break with the idea of how representation can be brought about. Since the object of representation is not exclusively determined by the referent but can as well be proposed to the audience, it is meaningless to think of the referent as the sole determinant of representation. This may diminish the role of elections for the act of representation. The concept of the representative claim broadens the scope

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of representation to all forms of representation, even outside of established political institutions. Representatives do not have to be called into office by the result of an election or the assignment of delegates. Instead a claim is not validated through elections but by a broadly defined processes of mutual engagement with the claim of both the claimant and the constituent.

Opening the concept of representation to the constructivist extension may increase its explanatory power, however, it seems to undermine its normative foundation of the theory of representation. The question of what good representation must entail is left to the acceptance or rejection of the audience of representative claims. Pitkin's concerns to adopt symbolic or descriptive views of representation are largely motivated by her understanding that nothing but a "substantive acting for" view could be adequately evaluated by its outcomes and thus express some control by the represented. A "standing for" view of representation evades this judgement of the represented as to whether the representative succeeds in the performance of making present the interest of the constituent.

Whether or not the president of the United States succeeds in the reduction of carbon emissions may well be evaluated through assessment of her policies. Whether or not Donald Trump qualifies as a symbol of the United States eludes such assessment. We cannot hold a symbol accountable for being better or worse at standing for something. After all, a symbol is only a symbol in the eyes of those perceiving of it as a symbol.

### **The balancing of Autonomy and Accountability**

Breaking with the unidirectionality of the concept of representation does not only challenge the way in which representation is brought about. It poses a

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more fundamental challenge to the relationship between representative and represented. This relationship is commonly discussed in context of modern representative democracies and deviates significantly from historic interpretations of representation. Pitkin, for example, remarks that “far from being a privilege or right, attendance at Parliament was a chore and a duty, reluctantly performed. Only with the passage of time did parliamentary representation begin to be used as a device for furthering local interests, as a control over the power of the king.”<sup>273</sup> Oppositely, modern representative democracies rely on the perception of representation as a right and privilege. Citizens have the right to their representation, while representing constitutes a privilege by the grace of the constituent. Moreover, representation has become more and more of a performative act. How representative and represented relate is increasingly filtered through the social dynamics of press and media.

As discussed previously, in standard Pitkinian theory, constituents and representatives relate to each other in a principal-agent relationship. Citizens delegate the furthering of their political interests to politicians who have to act in the interests of the represented. The concept of representative claims is more complex. Claims can create particular interests and thereby constitute a relationship between citizens and politicians. Arguably, Greta Thunberg’s school strike has sparked new public interests in the politics of climate change. Such claims can set topics in public debate and thereby foster citizens to take position or opposition. Moreover, representatives are

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<sup>273</sup> Pitkin 1967 p.3.

subject and object of the deliberation process and can function at the same time as formal holders of political power.

Hence the concept of the representative claim urges us to rethink what I have previously called the paradox of representation, described by Pitkin in the *Concept of Representation* but more condensed in an earlier article called “The Paradox of Representation”.<sup>274</sup> She points out that any representation requires the represented entity to be both present and absent at the same time. On the one hand, representation’s ultimate goal must be to literally make present what cannot be present for some reason. On the other hand, representation requires that this entity has to be absent because otherwise there would be no reason for representing it in the first place.

David Runciman has defended the paradox against authors claiming it to be of mere linguistic interest. He points out the relevance of the paradox:

*“In politics, it allows for the idea of representation to be identified both with the view that representatives should take decisions on behalf of their constituents (because the constituents must be absent for there to be representation at all), and with the view that voters should issue instructions to their representatives (because genuine representation also requires their presence in some recognisable form.)”<sup>275</sup>*

Others have attempted at resolving the paradox by focussing on the role of the representative and what action can be *legitimately* taken by her. The

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<sup>274</sup> Published in Pennock and Chapman 1968.

<sup>275</sup> Runciman 2007, p.95.

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debate, known as the mandate-independence controversy, tries to capture the essence of representation by virtue of how much autonomy should be granted to the representative in terms of how she promotes the interests of the constituency.

Pitkin seems to think of the paradox as fundamentally irresolvable, and more or less essential to a proper understanding of good representation. As I have discussed in the previous chapter, her account of “substantive acting for” representation amounts to an adequate balancing of the autonomy of the representative against the autonomy of the represented. Only this adequate balancing of autonomies will allow representative democracies to prevent misuse of power by political office holders while at the same time prevent representatives from becoming mere proxies.

So how can the representative claim manage to realise an adequate balance between autonomies? In order to find an answer to this question, it is helpful to take a step back and look at alternative ways of resolving the paradox of presence. One of Pitkin’s initial responses to the paradox lies in sketching out a *latent* presence of the constituent. Runciman calls this approach the Non-objection Criterion. Pitkin argues:

*“the substance of the activity of representing seems to consist in promoting the interests of the represented, in a context where the latter is conceived as capable of action and judgment, but in such a way that he does not object to what is done in his name. What the*

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*representative does must be in his principal's interest, but the way he does it must be responsive to the principal's wishes.*"<sup>276</sup>

Accordingly, the non-objection criterion states that the represented must in principle have the option to object to the ways in which her interests are being promoted by the representative. If objections are raised, representation fails. For as long as there is no objection from the constituent, this can be taken as a silent form of assent.<sup>277</sup> Runciman argues that the non-objection criterion is a way of the represented to assert their stake in the political action:

*"The ways in which this stake can be asserted range from strong forms of control [...] through some weaker forms of identification [...] through to mere non-objection (having but not utilising the ability to object). This last comes closest to capturing the way the concept of representation has evolved in the politics of liberal democratic states."*<sup>278</sup>

For Pitkin the non-objection criterion must necessarily rule out any forms of abstract representation, such as plants, animals or not-yet-born. "Such abstractions cannot literally act for themselves and do not have wishes that could be consulted. [...] An abstraction [...] cannot suddenly rise up and object to what a representative is doing in its name."<sup>279</sup> This may exclude

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<sup>276</sup> Pitkin 1967, p.155.

<sup>277</sup> See. Runciman 2007, p.95.

<sup>278</sup> Runciman 2007, p.96.

<sup>279</sup> Pitkin 1967, p.155.

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forms of representation very commonly conceptualised in current democratic theory.

Another problem for the non-objection criterion, one that I have already alluded to earlier, stems from the fact that most representatives do not only represent individuals but groups of individuals. In conceptualising such group representation, we will most likely face objections from some members of the group, while other members of the group may approve. In some cases, individual objection might be overruled by a majority. However, as Runciman points out, those overruled “do not cease to have representatives, in the sense that they still belong to the constituency on whose behalf a representative acts.”<sup>280</sup> One way of safeguarding the non-objection criterion here is to argue that the representative does not merely represent the individual in this case but the constituent, thus “the people” as such. However, this will introduce the kind of abstraction that Pitkin was trying to eliminate in the first place. It leads to the kind of mismatch between constituent and representative that was introduced in the initial example.<sup>281</sup>

In order to circumvent this argumentative trap, we may distinguish between the kind of objection individuals can raise versus the kind of objection formulated on the grounds of *the public*, “on the grounds that the public has a mind of its own, separate from the minds of its individual members.”<sup>282</sup>

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<sup>280</sup> Runciman 2007, p.100.

<sup>281</sup> Runciman 2007, p.101.

<sup>282</sup> Runciman 2007, p. 103.

Runciman suggest an approach by Philip Pettit of the concept of collective reason.<sup>283</sup> While I do not want to go into the details of this approach, I want to engage with the central claim. Runciman claims that groups can have an identity independent of the views of their individual members, “yet one that remains subject to the views that their individual members take of the activities of the group.”<sup>284</sup> As a result of this understanding, we are forced to give up the unidirectionality of orthodox concepts of representation. Instead representation can be understood as a mutual process of claim-making and response:

*“As a result, political representation is best understood not in the language of veto but of competition. [...] For these objections to count, they must be voiced not on behalf of the crowd, speaking for themselves, but by a crowd making a claim to speak in the name of the people.”*<sup>285</sup>

Interestingly, Runciman’s critique of Pitkin’s non-objection criterion seems to suggest a version of balancing of autonomies quite amicable towards Saward’s concept of the representative claim. Runciman’s argument shows that the relationship between individuals and representatives does not need to be narrowly defined by a principal-agent relationship as a result of an election. Instead the non-objection criterion may demand that an individual can be represented within a political system as a whole.<sup>286</sup> The remaining

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<sup>283</sup> Pettit 2003.

<sup>284</sup> Runciman 2007, p. 106.

<sup>285</sup> Runciman 2007, p.107.

<sup>286</sup> Runciman 2007 See p. 112 ff.



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question must be whether Saward's proposed system of the representative claim can offer such a political system.

### **Legitimacy of Non-elected Representation**

The discussion of the non-objection criterion again puts the focus on the question of legitimate representation. What do we mean when we qualify representation as legitimate or someone being legitimised in speaking in the name of the people?

For example, the movement "not my president" that was protesting against the presidency of Donald Trump seems to fall short of actually providing a good answer as to why Trump's representation was illegitimate. The fact that a group of people objects to his presidency is important but appears conceptually less relevant to his legitimacy than the fact that he was assigned his position through legitimate procedures of democratic approbation. After all, Trump does not represent a particular individual or a particular group of individuals. He is granted de facto political power through the constitutional institution of presidential office representing the American nation as a whole.

However, according to my discussion, a valid objection to Trump's presidency could be raised by a competing claim. Someone else would make a competing claim of representation for the American people. Only if a competing claim to represent the American people trumps Trump's claim to

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representation, he is no longer justified in his role as a representative.<sup>287</sup> Of course, such a claim would not automatically undermine the constitutional powers of the office. The challenge would lie with the symbolic part of representation that seeks to justify the right to speak in the name of the people. Yet, what are the procedures and conditions that give legitimacy to such competing claims?

Both Saward and Runciman see competing claims as the central interaction determining the legitimacy of representation. This competition takes primacy over elections. The competition may still revolve “around electoral cycles, with their complex and somewhat contingent rules and conventions governing what is to count as a decisive objection”<sup>288</sup>, however, “those institutions are themselves ‘performed’ or enacted. They are pieces of crucial institutional and constitutional culture.”<sup>289</sup> As such elections and claim-making are neither mutually exclusive, nor diverging conceptions of representation. Electoral claims may gain political significance from the cultural and institutional control assigned to them. However, restricting the concept of representation to only electoral claims prevents us from

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<sup>287</sup> Runciman 2007 discusses the example of protestors in 2003. He argues that “An alternative slogan to ‘Not in My Name’ for gatherings of protestors objecting to the Iraq war was ‘Not in Our Name’.”

<sup>288</sup> Runciman 2007 p.107.

<sup>289</sup> Saward 2006, p. 311.

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accounting for the entire range of political representation found in modern democracies.

I think, the idea of representation as claim-making is probably best understood as imbedded in a framework of Deliberative Democracy which requires democratic decision-making to be the result of a deliberative process between citizens. Seyla Benhabib, for example, has prominently argued that “legitimacy in complex democratic societies must be thought to result from the free and unconstrained public deliberation of all.”<sup>290</sup> Yet, representative democracies certainly require more argumentative steps. The right relationship between the legitimacy of democratic rule and the legitimacy of political representation, appears far too complex to simply assume it. On a conceptual level, it becomes even more difficult given the fact that the term “legitimacy” is rarely used univocally.

Saward, in his article on authorisation and authenticity<sup>291</sup>, seems to perceive of legitimate representation as those forms of representation that can validate and thus justify the claims of representatives by some normative standard of validation. Legitimate representation, so understood, does not guarantee the legitimacy of resulting decisions or even of the political system. It attempts to offer evaluative criteria beyond orthodox concepts of majority voting. A legitimate representative claim is one that can be validated by the public. Through this form of public approbation, a claim

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<sup>290</sup> Benhabib 1996b,p.68.

<sup>291</sup> Saward 2009.

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can gain political ground and serve as bases for legitimate political representation.

This approach seems consistent with the general outlook of theories of deliberative democracy. By focussing on the legitimising force of deliberation, we might disregard voting and elections as mere aggregative instruments of decision-making. However, for analytical purposes it is important to make a clear distinction between voting in the form of a referendum and voting in the context of the election process. While the former is concerned with an exercise of political power, the latter in many cases implies a transfer of power. Moreover, referenda appear inconsistent with the basic idea of deliberative processes with their focus on resolving public disagreement through reasoning. Referenda foster majority decisions, an imposition of the will of the majority.

Elected representatives take a different role. They are often granted additional institutional powers that can shape and alter the laws to which their voters are subjected. But even if they do not possess far reaching institutional powers, by virtue of their position take a central state when engaging in processes of public deliberation. In fact, elected representatives constitute essential parts of the political discourse in many democratic states. Yet, the election process is not essential for representatives to formulate claims. It is instead a practical instrument of evaluating representative claims in a formalised procedure. Given that most elections take place periodically, they provide only limited scope for assessment for a range of claims raised throughout the election period.

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The more relevant problem for electoral representative claims, however, can be seen in the fact that they are never entirely independent of non-electoral claims. In the public arena of representative claims, electoral and non-electoral claims are indistinguishable drivers of an ongoing deliberative process. Greta Thunberg's representative claim, when speaking in Davos, despite the fact of not being an elected representative, was competing not only with Donald Trump's claim but with the many voices of the climate discourse. So how can we call Thunberg's representative claim legitimate without relying on a standard account of electoral accountability?

Saward proposes three criteria to determine the legitimacy of representative claims. Claims must seek:

- i) evidence of sufficient acceptance,
- ii) by appropriate constituencies,
- iii) under reasonable conditions of judgement.<sup>292</sup>

In the following I want to discuss each criterion with regard to the function it can serve in my conception of democratic legitimacy.

### *The Sufficient Acceptance Standard and Democratic Legitimacy*

Under i) evidence of sufficient acceptance, Saward discusses acceptance events that allow us to provisionally accept a representative claim as legitimate. The clearest case of such an event, as already mentioned, might be an election. However, as the discussion of the non-objection criterion has shown, even electoral representation is challenged by the persistent

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<sup>292</sup> Saward 2010, p. 145.

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mismatch between the acceptance of a representative and the acceptance of the performative act of representing.

Yet, acknowledging this mismatch is not enough. Neither can we rely exclusively on the performative part of representation. My claim to represent X is clearly not valid as long as I am not engaging with an audience in any meaningful way. As a necessary condition for representative claims, we can thus argue that in order for a claim to be able to be accepted it is not enough to simply raise a claim. The claim must be “audible and listened to”<sup>293</sup>, hence it must engage in real public deliberation. But what are the conditions of real public deliberation? Saward suggests three categories of criteria for accepting a claim: the connection criteria, the confirming criteria and the untaintedness criteria.<sup>294</sup>

*The connection criteria* are mainly concerned with the question whether the representatives act in the context of a broader social and or political network. The representative might either be a direct or indirect delegate of a democratically elected institution or part of a larger network of political decision-making. Such networks may be distinctive because of particular expertise, specific political access or efficiency of the representation of particular interest.

*The confirming criteria* are evaluating representative claims in terms of whether they refer to a specific referent. Does the referent exist or call a new referent into existence and how reasonable is the claim given the referent?

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<sup>293</sup> Saward 2010 ,p. 152.

<sup>294</sup> See Saward 2009, p. 15 f.

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The confirming criteria might also distinguish degrees of acceptability. Each claim must be given sufficient time and attention in a deliberative forum to be immediately or provisionally accepted.

*The untaintedness criteria* put special emphasis on the quality of the deliberative process. Representative claims may be assessed in terms of how they represent voices and interests that are otherwise unheard due to the structure of certain democratic institutions. The untaintedness criteria may accept certain claims as legitimate if they break with the dominance of a discourse in order to foster comprehensive deliberative process.

Because of the broad social evaluative features of these criteria, Saward coins the legitimization of non-elective representative claims a process of authenticity. He states that “the distinctive strength of key types of non-elective claims tends to be closely linked to underlying values of authenticity.” The acceptance of these values is marked by “what we might call apparent and constant responsive consent.” Oppositely, “the distinctive strengths of electoral claims tend to be closely linked to underlying values of authorisation, or apparent and episodic prior consent.”<sup>295</sup>

Put this way, Saward’s distinction between authorisation and authenticity seems to resemble the main insight of the paradox of representation, namely that any concept of representation must tackle the problem of how to adequately balance between two autonomies, the autonomy of the

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<sup>295</sup> Saward 2009, p. 21.

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representative as well as the autonomy of the represented. I believe this is what Saward means when he argues that “the words and their associated political practices express two views of which side of ‘self-authorship’ matters most.”<sup>296</sup>

Thus, Saward is right in arguing that this poses an irresolvable puzzle to the concept of representation. Given the nature of the paradox of representation, this should not surprise anybody at this point. However, the puzzle does not apply to the concept of representative claims to the full extent. And this is one of the conceptual main insights.

While representative claims can be accepted through both electoral and non-electoral processes, authorisation of power of decision is strictly limited to the concept of elections. A representative claim by design cannot be authorised, as the discussion of the non-objection criterion has shown. The claim does not rely on a one-dimensional form of approval or disapproval but is instead accepted to a multifaceted process of communication. It is in fact the nature of the representative claim that it must defy demands of individual objection or non-objection. Instead representative claims can only be accepted through a collective process of deliberation. As such representative claims represent the voice of an ongoing political discourse rather than the consent to act or speak in someone’s name.

It is the particular strength of the concept of the representative claim that it can find an adequate balance of autonomies. It stipulates a competition of claims that is justified through a mutual interaction of representatives and

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<sup>296</sup> Ibidem.



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represented. If representative claims cannot be validated through a deliberative process they can no longer be legitimate claims to representation.

Pitkin's preferred form of legitimacy, however, is the proper authorisation of the representative. And authorisation must aim at a different kind of legitimacy. Authorised representation cannot be evaluated in the same way. Authorisation is the transfer of power or of agency. It may seem that authority can be claimed, as it is sometimes the case during coups. Yet, ultimately, a claim to authority must be consented to. And hence it can be objected to as well.

Therefore, authorised representation, especially if it concerns the justified transfer of institutional power, is legitimate if it is subject to a democratic procedure that ensures the equal weight of everyone's vote. Yet, the source of its legitimacy is not the performative acts of representation but a formal justification that is required by a just distribution of positions of power.

Again, this relates back to Pitkin's formal view of representation. Pitkin distinguishes the authorisation view and the accountability view and disregards both as adequate candidates to analyse what she calls the "activity of representation".<sup>297</sup> However, she agrees that the question of democratic legitimacy is not a question of the contents of representation but of practical concerns about the appropriate transfer of power:

*"For so many of the authorization theorists, the ultimate concern is neither with rights nor with normative consequences in general, but*

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<sup>297</sup> Pitkin 1967 p. 59.

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*particularly with political authority, authority over others, the right to command. Defining representation in terms of authority, they tend to assume that all authority is representative and that every representative is in authority over those for whom he acts.*<sup>298</sup>

The examples of Donald Trump and Greta Thunberg further illustrate that an adequate concept of representation cannot be reduced to the authorisation view. Thunberg does not have the authority to act in the name of any people, she does not have the right to command or demand obedience. Yet, she is clearly a representative and her act and claims can be evaluated under a concept of the representative claim.

So, what is the role for the authorisation view in the concept of representation? It appears that, although authority does not provide us with a coherent picture of legitimate political representation, it remains essential to an understanding of democratic legitimacy. But this understanding of democratic legitimacy deviates from Pitkin's original understanding and generally from the ways in which legitimate representation is perceived.

Therefore, I want to distinguish two kinds of legitimate representation. On the one hand, representation is legitimate according to the standards of legitimate claim-making. Accordingly, it is a necessary but not sufficient condition for democratic legitimacy that representative claims are legitimate through some form of acceptance. Only those representatives can legitimately speak in the name of others whose claims have been evaluated by the public, either through elections or non-elective forms of acceptance.

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<sup>298</sup> Pitkin 1967, p. 53.

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On the other hand, representation is legitimate according to the standards of the right transfer of decision power – the authorisation view. Accordingly, those representatives who hold actual decision-making power, who act in the name of a constituent, in parliament or as delegates need to be appropriately authorised in their doing. This is not only due to the fact that such representatives need to be accountable for their actions but because democratic rule requires that no one can impose her will upon anybody else. Legitimate democratic representation equipped with the institutional power of decision must be based on the symmetric and equal distribution of political power.

Thus, if a representative is in a position of institutional political power, this position of power must be justified. And it can be justified through an adequate process of balancing power so that no one is subject to arbitrary state coercion and no one can accumulate undue power over others.

Now this is central to my argument. It appears that we can distinguish two forms of political representation that are required by democracies. Each kind of representation requires a different source of legitimacy. And these sources of legitimacy coincide with what is essentially conveyed by the two interpretations of the All Affected Principle. I think that together these two kinds of political representation must satisfy two principles of democratic legitimacy that I have laid down in chapter II. I want to recall these principles here:

1. Legitimate representation, according to the authorisation view corresponds to the *principle of accountability*: The basic institutions

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of the state and the corresponding distribution of political power must be appropriately responsive to those subject to the power.

2. Legitimate representation, according to the concept of the representative claim corresponds to the *principle of participation*: Democratic procedures of decision-making and public deliberation must be appropriately responsive to all affected voices.

### Two roles of democratic representatives

From my distinction follows that if we take seriously the distinction between these two principles of democratic legitimacy, we must conclude that representation as an important democratic institution cannot be reduced to one or the other. Representation of power of decision, and the corresponding claim to a right to be obeyed, requires the democratic and legalised control of all citizens subject to the claim. One widely accepted way of such democratic control are elections. As I have argued before, voting is an appropriate way to realise an equal distribution of decision-making power.

Of course, voting is not the only possible way to realise such an equal distribution. Yet, given its historical roots in the All Affected Principle and the majority decisions, voting is deeply entrenched in today's democratic culture. The authorisation of power of decision in democratic states and the idea of accountability, hence, find expression in the procedures of democratic elections.

Institutional norms often underline this view. For example, the American president is perceived to represent the American state without adhering to his partisanship. Obama, Trump, Biden were authorised to act in the name of the people, regardless of the fact that the people may disagree on

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particular political issues. However, and this is a different quality of representation, president's may not be authorised to speak in the name of every particular political issue. Thus, Donald Trump might have felt justified in his claim to speak for the American people. However, there are reasons to believe that his claim will not be accepted merely based on the fact that he was an elected president.

And I think this is driving my point here. As most elected representatives, Trump was serving two distinct political roles. He was an elected representative, authorised to act in the name of the American people. At the same time, he was a representative engaging in a process of public deliberation, a public arena of competing representative claims. In fact, it is thereby a pivotal feature of elected representatives that they must occupy both roles. Contrarily, Thunberg's role of representation is clearly limited to the power of speaking in the name of her constituent. She cannot command, vote or veto any decisions, or demand obedience. She does not possess the institutional political power to justifiably claim a right to be obeyed. She represents the voice of her constituent, the power to represent a somehow accepted claim in the public arena and in political discourse.

Given these two roles of representation, one might ask how we can possibly reconcile them under a consistent concept of representation. The question resembles an argument made by Saward:

*“Could it be that threshold democracy requires elections, while advancing along the democracy continuum (to make a democracy*

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*more democratic) requires additionally non-elective representation?*

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What Saward might call threshold democracy is the basic institutional structure of the democratic society that determines the legal sphere and organises the shared world of all members of the demos. In advancing this basic structure, in making democratic rule more legitimate, however, we require additional forms of political institutions. And these institutions are provided by the concept of representation. Democratic legitimacy requires electoral and non-electoral forms of representation. And from this argument it follows that the two roles of the representative do not need any further reconciliation. Representatives can function as an instrument of temporary authorisation of power as well as they can contribute “to the extent and quality of public deliberation”.<sup>300</sup>

The role of an authorised representative, legitimised through a process of democratic election, consists of acting and deciding in the name of the constituent. Elected representatives however are not automatically legitimised in every of their representatives claims that are made before or during their election period, simply by virtue of them holding an elected office. Vice versa, non-elected representatives can legitimise their representative claims by engaging in public deliberation, nevertheless they are not entitled to act or decide in the name of their constituents. In fact, it

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<sup>299</sup> Saward 2009, p.21.

<sup>300</sup> Saward 2009, p. 22.

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can be of outmost importance that we keep these ways of legitimate representation distinct.

First, we need to distinguish the representative claim to speak in the name of a constituent. This representative claim is a claim of justified *voice*. It requires justification through democratic forms of deliberation and participation.

Second, we need to distinguish the representative claim to act on behalf of a constituent. This representative claim is an act of authorisation. It requires justification through equal control of power, or *vote*.

Whether or not these two forms of legitimate representation are compatible might after all not be a conceptual problem but a problem of the democratic virtues held by the public. On the one hand, representatives in position of power might misuse their de facto power to corrupt and undermine public deliberation. On the other hand, claims and exclusive influence on those holding positions of power by non-elected representatives may weaken the institutions designed to ensure democratic control over political power.

Following this distinction, I want to re-evaluate Trump's claim in Davos one more time. While he was right to represent the United States, his claim to speak for the American people can be seen as invalid for two reasons. First, it is a representative claim to speak for others. Yet, it appears unclear if the claim would find sufficient acceptance. Second, the fact that he is speaking at a multinational event, addressing a range of different constituencies may further undermine his claim. I will expand on this in the next section.

Despite these possible objections to Trump's claim, he was clearly representing the United States as an authorised figure, equipped with the

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power to act in their name. On a deliberative forum like the World Economic Forum, his role, however, might require more than the temporary approval of his administrative function. Thus, Trump displays quite appropriately the inherent problem that elected representatives might face. They must always be torn between de facto power of their office and the provisional acceptance of their claim to represent the voice of their constituent.

*Appropriate Constituencies and Deliberative Significance of Representative Claims*

The two roles of representatives can have further implications for the understanding of the acceptance of representative claims.

Under acceptance ii) by appropriate constituencies, Saward discusses the issues arising from the fact that representative claims do not only originate in some referent but can create referents for their claims. It is therefore essential to determine the constituency of the representative claim. For Saward the appropriate constituency for a legitimate representative claim consist of a combination of intended and actual constituencies, which in turn can be subsets of each other.

*“The intended constituency is the group the claimant claims to speak for [...] The actual constituency is the group whose members recognize their interests as being implicated in the claim in some way, who judge that the claim is indeed for and about them.”*

An actual violation of the criteria of appropriate constituencies occurs if the actual constituency reached by a representative claim is much smaller than the intended constituency. If Trump claims to speak for the American people but his claim only resonates with the people of the State of New York we



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cannot conclude that he has a legitimate claim to represent the people of America. Moreover, Saward suggests that the intended constituency should not only consist of those who are explicitly addressed by the claim but could in some cases consist of all those whose interests are affected by the claim. However, it is important to differentiate between constituency and audience. Claims can also address audiences different from its constituency, as Saward points out by reference to his prominent example of Bono claiming to speak for the voiceless people of Africa:

*“Bono may have been addressing Western television media as his intended audience in his claim about voiceless people in Africa. But if that intended audience is an effective disseminator of the claim, it may provoke into being a much larger actual audience, some part of which may come to regard itself as part of the actual (and therefore the appropriate) constituency of the claim.”*<sup>301</sup>

Audiences can be significant drivers of public deliberation without being part of the appropriate constituency. Nevertheless, it is up to the receiver of the claim whether she regards herself as her interests being implicated. This opens the concept of the representative claim to much broader notion of referents and may even imply the representation of discourses as for example presented by Dryzek and Niemeyer.<sup>302</sup>

Greta Thunberg’s claim to represent future generations might, however, be challenged at this point. If her intended constituency are young people who

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<sup>301</sup> Saward 2010, p.150.

<sup>302</sup> See Dryzek and Niemeyer 2008

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will have to carry the burden of insufficient climate policies, her claim can be legitimate. If her intended constituency included the not-yet-born future generations, she must fail in legitimising her claim since the non-existent cannot respond to her claim meaningfully. More charitably, we might understand her claim as addressing those who share concerns for future generations, a claim that can be evaluated by a broad audience.

Laura Montanaro has additionally argued that there can be a broader scope for the application of the all-affected interests standard. She points out that a representative claim can be constitutive through the principle of affected interests. Montanaro distinguishes between the legitimising<sup>303</sup> constituency and the affected constituency.<sup>304</sup> She argues that non-elective representation must be considered “nondemocratic” if the constituency empowered to legitimise “is different from the constituency whose interests the representative claims affect.” Under empowerment to legitimise, Montanaro speaks of publicity, a term that subsumes the broad similar notions of acceptance discussed above as modes of public deliberation.

The legitimization of representative claims is determined by whether “the claim was made public. [...] For the purposes of democratic legitimization, a representative claim must be made known not only to the audience and to the authorizing constituency, but to those whom it affects.”<sup>305</sup>

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<sup>303</sup> Montanaro uses the term „authorising” which given my discussion is problematic in this context. I believe that “legitimising” is most appropriate in my context to capture her argument best.

<sup>304</sup> See Montanaro 2012, p.1099. ff.

<sup>305</sup> Montanaro 2012, p. 1100.

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Montanaro's notion of publicity of representative claims is similar to Saward's mention of the audience of representative claims. However, if publicity requires adherence to the all-affected-standard, its normative force is to be regarded stronger. For Montanaro, the aim of publicity must be to mobilise objections or non-objections of all affected parties in order for the claim to be legitimate. This means that the legitimation of the representative claim does not depend on the evaluation of those who regard themselves as being affected but on those who are in fact affected by the claim.

This is a challenging insight for the idea of representatives incorporating the two roles of speaking for a constituent and acting for a constituent. It indicates that each role that a representative can take may find a different constituent. Trump being legitimised to act by the constituency of the United States is confronted with a global, potentially intertemporal, constituency of affected interests legitimising competing claims to speak in the name of future generations. He may be accountable on an electoral level to the authorising constituency and answerable on a non-electoral level to what I want to call a *deliberative constituency*.

However, the fact that the two constituencies do not necessarily match does not need to lead to problematic implications. In some cases, for example, state interests and global interests may coincide. Yet, under this distinction, we can express another evaluative criterion for democratic decision-making. Decisions may count as *less* legitimate if they are made solely and without further consultation by an authorised representatives. An account of *complete* democratic legitimacy may demand the appropriate consultation of all those - or their representatives - whose interests are affected by the

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decision. And this must hold even if those who authorise are a different constituency from those who are affected.

### Voices of the non-existing and non-human animals

For those who wish to further subsume non-existing groups and non-human species under the all affected standard, this argument will be insufficient. The acceptance of a representative claim hinges on the engagement in a communicative act between the claimant and the affected. Therefore, as long as we cannot meaningfully communicate with past or future generations or non-human animals we cannot find deliberative validation of their voices.

However, the deliberative process surrounding a representative claim allows for the raising of a variety of voices and positions.<sup>306</sup> Taking account of all affected interest may therefore imply that we need to give a form of appropriate consideration to reasonable interests that can be stated even for non-existing groups. A legitimate claim in this sense does not only include all *actually* affected voices but extends on an epistemic level to all *possibly* affected voices.<sup>307</sup>

Such an argument can lead to a slippery slope since representatives may usurp the voices of non-existing groups to justify particular selfish policy claims. Germany's push for austerity during the 2010s, for example, is often

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<sup>306</sup> The diversity of voices that are represented in democratic deliberation is well explored in Benhabib 1996a. See especially Cohen 1996b, p. 104; Young 1996, p.122; Gould 1996, p. 172; Cohen 1996a, p. 192; as well as Phillips 1996.

<sup>307</sup> The distinction is based on my discussion of the Principle of All Affected Interest in Chapter 3.

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justified as a policy measure to protect the interests of future generations. Yet, it is arguably the case that a lack of government spending and resulting climate adaptation policies likely threatens to undermine the livelihood of future Germans.<sup>308</sup> I think therefore it is wise to restrict claims about the interests of non-existing groups according to criteria of epistemic virtues.<sup>309</sup> I may not be able to provide a full account of what such criteria would entail. However, I think that attempting to represent the affected interests of a non-existing group must depend on a justified belief about what those interests can reasonably be assumed to be.

Consequently, if it can be established that an affected constituent does not exist and thus does not have the capacity to engage in public deliberation, their interests and opinions may be represented by those who hold certain expertise with regard to the non-existing group. The interests and opinions of future generations, for example, cannot simply be assumed. They must be subject to a deliberation about our best available knowledge on the future. Under such epistemic restrictions, claims concerning the representation of non-existing groups can be subject to democratic legitimation.

#### *Reasonable Conditions of Judgement and Deliberative Democracy*

Deliberation about our best available knowledge regarding policy decision, however, may be a necessary yet insufficient condition for the legitimacy of representative claims. It appears that the presence of deliberation is desirable for the acceptance of representative claims. Nevertheless, the deliberative

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<sup>308</sup> See for example Märtin and Mühlbach 2021.

<sup>309</sup> See Medina 2013 on the vocabulary of epistemic vice and virtue.

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process itself must as well fulfil certain minimal requirements. The quality of deliberation meanwhile can be assessed in different ways. We might for example want to evaluate how well best available knowledge is in fact traced by a deliberative process. In other cases, we would require deliberation to be sufficiently inclusive of individual identities and standpoints. These conditions of judgment from which a representative claim can be assessed are another important benchmark for the acceptance of representative claims.

The Conditions of Judgment Criterion sheds additional light on a topic raised earlier in Chapter 2, the relationship between power and reason. As I have argued there, democratic legitimacy must seek to justify both an equal distribution of power as well as an equal access to the public formation of political reason. But again, these two ways of democratic legitimacy cannot easily be separated. While the conceptual distinction may be clear, in practice, political power tends to shape public reason. There is a thin line between engaging institutions of power in public deliberation and state propaganda. There can as well exist a particular asymmetry when it comes to how responsive institutions are to the political pressure of one interest group rather than another, thereby distorting public deliberation.

In a similar way, elected representatives can never fully perceive of their two roles as separate. On the one hand, they may be equipped with the powers to act in the name of the people. On the other hand, their re-election depends on the public opinion; an opinion that they might have the power to influence significantly. And this institutional dilemma must be essential to democracies. In order to execute their office adequately, representatives

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must be given a central stage in the public arena of political discourse. Yet, occupying such a stage threatens to undermine the quality of deliberation as it is necessary for a legitimate democratic deliberation.

An interesting case in this regard is probably the campaign around Brexit in 2016. While public discourse was largely centred around the claim that Britons' needed to "take back control", it was hardly questioned what such control must in fact entail. However, it appeared to many that control of one's borders and democratic institutions was a step towards legitimacy that could not be realised under a pan-European political structure. But the claim seems misleading. As it is argued here, democratic control of power is insufficient to fully legitimise democratic institutions. If the deliberative process is not appropriately responsive to the interests of those affected, the democratic institutions hosting the deliberative process are not fully legitimate. A campaign, like the Brexit one, that is largely built on influential private institutions actively seeking to manipulate public opinion, must therefore undermine its proclaimed cause.

And while democracy is globally on the defensive<sup>310</sup>, the issue seems quite pressing. States on the brink of turning into autocracies can stage elections and referenda to perform the looks of democratic institutions. At the same time, officials and elected representatives are undermining public deliberation by arresting opposition, controlling media or the use of violence. In such cases it becomes more apparent that the degree of the

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<sup>310</sup> See for a study of recent trends Repucci et al. 2020.

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quality of deliberation does determine the degree of legitimacy of our democratic institutions.

Against this background, the context within which representative claims can be accepted is essential to a coherent understanding of their legitimacy. And I think, this is what Saward discusses under the criteria of iii) reasonable conditions of judgment. Such conditions enable societies to evaluate and accept representative claims. According to Saward, reasonable conditions are associated with the existence of an open society, one that establishes conditions that allow and foster public deliberation. These may include “elected officials, free and fair elections, inclusive suffrage, right to run for office, freedom of expression, alternative information, and associational autonomy.”<sup>311</sup> The more of these conditions are absent, the less potential exists in a society for a representative claim to be legitimate.

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<sup>311</sup> Saward 2010, p.155.



I do not think, however, that this list is exhaustive. Since Saward’s book in 2010 the world has learned again that alternative information can be a virtue for an open society only if the quality of information is appropriate. Nevertheless, I want to argue that especially the epistemic circumstances of democracy often depend on the responsiveness of political institutions to their constituents. An open society, like Saward fosters it, is marked by the kind of responsiveness that allows for an unhindered exchange of reasons. It is therefore constitutive for the communicative process underlying the idea of representative claims. Constant response in a deliberative process of accepting and rejecting representative claims is therefore the fundament of deliberative democracies as well as the precondition for their legitimacy. The following table is meant to summarise these findings.

	<b>acceptance</b>	<b>responsiveness</b>	<b>constituent</b>
<b>electoral representation</b>	aggregative	around elections	everyone allowed to vote / subject to law
<b>non-electoral representation</b>	deliberative	constant	everyone affected

**Representing Voice and Vote**

I want to argue that conceptualising democratic representation along the lines of representative claims allows us to accommodate the distinction made in chapter 3 between the two categories of political participation, voice and vote.

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Under the category of Voice, I subsume all those institutional arrangements that facilitate the responsiveness of democratic procedures to all affected voices. I call this category Voice because granting a say to everyone affected is argued to be the main source of legitimacy for outcomes of the deliberative process.

Under the category of Vote I subsume all those institutional arrangements that facilitate the accountability of political power to everyone subject to the power. I call this category Vote because universal suffrage is often argued to be the main source of legitimacy for democratic institutions exercising power.

The representative claim helps to conceptualise forms of political representation that are non-electoral. Non-elected representatives can assume the role of Voice, they can have a say and represent all those who are affected in their interest or their opinions. However, as a restriction on political power, non-elected representatives cannot have a final say, they are not entitled to the same decision-making power that elected representatives hold by virtue of their office.

However, non-elected representatives do play a key role in the process of public deliberation that may lead to a decision. They relate to the constituent in a state of constant responsiveness, reflecting upon the dynamic acceptance and disapproval of representative positions.

Yet, in the same way, elected representatives must engage in public deliberation. Therefore, elected representatives necessarily have to fill the roles of two categories. They are elected representatives equipped with the power and legitimacy to make binding decisions. At the same time, elected

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representatives and their positions are subject to publicity, their positions and decisions must be reflected in a broad and open communicative process. This process will practically culminate around elections but it is a role that democratic representatives must take up constantly while occupying positions of power.

Another important distinction between representatives of Vote and representatives of Voice can be found in the composition of their constituent. As I have argued, the category of Vote follows the boundaries of legitimacy as defined by the All Subjected Principle. Accordingly, everyone who is subject to the binding decisions of the representatives is entitled to vote in the election leading to the approval or disapproval of the representative. On the other hand, the category of Voice follows the boundaries of legitimacy as defined by the Principle of All Affected Interests. Accordingly, everyone whose is (possibly) affected in their interests should have a say in the deliberative process. But this constituent is much wider than Vote, it allows in principle for the representation of all kinds of global and intertemporal communities. What I have called the deliberative constituency might therefore run into a problem of indeterminacy because it appears that a large potentially global and intertemporal group will be hard to subsume under a single representative claim.

### *The Problem of Indeterminacy of Voice*

The fact that the legitimacy of representative claims depends on a prima facie boundless concept of publicity gives rise to the objection that we need to further specify the terms under which representatives can make

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substantial claims. Here I distinguish between the claim to represent a certain group and the claim to represent a certain reason or cause<sup>312</sup>.

While group representation can be accounted for under the concept of preliminary acceptance of the respective audience, it appears harder to validate particular claims connected to political reasoning. Greta Thunberg might be accepted by an audience as a representative of a global youth movement that is concerned with global climate change, however, she does not represent the whole range and variety of arguments that are provided under the movement. Some activists, for example, will agree that climate change must be tackled by a fundamental transformation of the global economic system towards a sufficiency-based circular economy. Other activists, quite contrarily, would agree that the only feasible option to fight climate change is through the generation of green economic growth based on the very existing economic system. By taking sides with one or the other voice, Thunberg makes a separate representative claim, one that is unlikely to find acceptance by the same constituent.

I think that the concept of representation to a certain degree entails the capacity to adjudicate between conflicting arguments like this and to mediate political disagreements. However, it can be wise to exercise caution when it comes to the acceptance of representative claims as legitimate. Representing the voice of someone becomes especially complex if this someone is not immediately present to validate the representative claim. As

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<sup>312</sup> I am referring to reasons here instead of interests because I wish to explore the epistemic implications specifically. However, a similar case can be made for interests, and in some cases, it will be hard to even distinguish between the two.

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the deliberative process must be responsive to all reasons of the public arena, we should be careful not to narrow down the set of possible voices.

This may leave a representative claim in a constant state of indeterminacy. Not only is the acceptance of the claim preliminary but so are its contents. Thinking of the relevant audience as a deliberative constituency means that the deliberative process is itself boundless and ongoing. As circumstances and reasons change, so must the concept of representation be able to adjust. Thunberg may ultimately not choose sides between circular economy and green growth, as long as her representative claim is appropriately responsive to all reasons, to all voices of the movement.

Therefore, I think in order to counter the problem of indeterminacy, non-elected representative claims must aim to represent a set of voices. Only if all voices are brought to the deliberative forum can the process be appropriately responsive and can the representation of Voice be fulfilled. In this sense the representation of Voice might be viewed as a filter for democratic deliberation. It groups together, it synthesises, it counters and adjudicate between reasons and thus aims to represent a wide range of political discourse surrounding the constituent.

### *The Problem of the Institutional Threshold*

Another problem for representing Voice may result from the question of institutional design. In fact, a lot of recent debate has been centred around considerations as to how non-voice parties may be included in democratic

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institutions.<sup>313</sup> The representation of these groups through certain institutions like special councils, Ombudsman, commissioners or committees are commonly mentioned.

Yet, if we wish to represent Voice, as we have seen, we cannot rely on elections as a legitimate way to fill those institutional positions. We must consequently explain how the representation of Voice could be utilised for democratic institutions. In other words, can we determine a threshold as to when a representative claim must find a corresponding expression in a special institution?

It can be useful to take a step back first. The reason for the institutionalisation of special representatives is generally the elevated influence on political decision-making. It is argued that an official commissioner for future generations, for example, provides a larger stage for publicity, and sometimes is equipped with parliamentary rights of inquiry and information. Those rights are used to increase public attention and improve deliberation as well as evidence-based policies. But there are other forms of institutionalised representation. Representatives of international organisations or NGOs often participate in political fora and possess an augmented influence on political discourse.

However, not every representative gets access to such augmented positions of influence. Bono certainly filled a great public stage, yet, he was never involved in official political negotiations or was equipped with parliamentary rights. Thunberg was invited to speak on several international

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<sup>313</sup> See prominently González-Ricoy and Gosseries 2016; Tremmel 2006.

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fora, however, her representative role was never equipped with financial or political resources of a public institution.

And this appears intuitively correct. Public institutions, even if they are not equipped with the kind of decision-making powers occupy powerful position in the decision-making procedures. They possess elevated influence and deliberative significance. Therefore, it can be useful to define an institutional threshold as to when non-elected representatives should legitimately take up such positions.

I will not be able to sketch out a conclusive account for the institutional design of representing non-voice parties here. Yet, I think that the question can be narrowed down towards its epistemic dimension. As I have argued above, non-voice parties are best represented by those who hold certain expertise with regard to the represented group. Such expertise can be assessed and thus in principle is able to provide a threshold as to when a representative is capable to legitimately provide arguments representing the reasons and interests of the non-existing constituent. When selecting representatives to take part in our political institutions, we should hence justify to what degree the representative can filter the particular expertise around a political discourse and in what way the representative will improve our political deliberation institutionally. The institutional threshold can then be a tool to adjust political deliberation and make it more responsive to the relevant voices that would otherwise be excluded. At the same time, however, the threshold must be high enough to exclude all those voices that would deteriorate deliberation in favour of political partisanship or selfish reason.





# Concluding Remarks

I want to conclude this thesis by reflecting upon some of my main arguments. The main focus of this thesis was the investigation of the principles of democratic legitimacy that are underlying our democratic institutions. I argued that principles of legitimacy can be described in the form of Boundaries of Legitimacy. These boundaries manifest themselves in various ways. Boundaries of legitimacy can follow the boundaries of democratic inclusion. Such boundaries are concerned with the general composition of the demos. Boundaries of legitimacy can as well follow the boundaries of state borders. Such boundaries are concerned with a state's sovereignty and its territory. But boundaries of legitimacy are also concerned with deliberation. They define the terms and conditions under which certain reasons may enter into democratic discourse. Therefore, I hope this thesis can contribute to a better understanding of how these boundaries relate.

In chapter 1, I investigated the so-called Question of the Demos. This question is concerned with a central assumption in democratic theory, namely whether the legitimacy of democracy must fundamentally depend on the initial composition of demos. I argued that as we are unable to identify a satisfying normative principle for determining the composition of the demos, we must rely on historically and socially contingent facts. Nevertheless, I provided arguments that allow us to view the composition

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of the demos and questions of democratic inclusion according to principles of democratic legitimacy.

In chapter 2, I further defined those principles of democratic legitimacy. Starting from the stipulation of three fundamental conditions of democracy; liberty, equality and solidarity. I argued that we can derive three distinct principles of democratic legitimacy. These principles consist of a principle of accountability, a principle of participation and a principle of basic morality. The resulting concept of democratic legitimacy attempts to combine existing strands of literature while accounting for the various and sometimes ambiguous conceptual requirements attached to the notion of legitimacy.

In chapter 3, I provided a detailed analysis of the All Affected Principle. I showed that its predominant interpretations, the Principle of All Affected Interests (PAAI) and the All Subjected Principle (ASP) elaborate on distinct branches democratic legitimacy. Based on my analysis, I argued that the two interpretations should not be regarded as conceptually incompatible but in fact as complementary principles of legitimacy and that their application will yield somewhat fuzzy boundaries of legitimacy.

In chapter 4, I combined my insights from the previous two chapters. I argued that the complementary approach to the PAAI and ASP corresponds with the principles of legitimacy derived in chapter 2. From this conclusion it follows that my concept of democratic legitimacy requires two categories of democratic inclusion. These categories, I suggested, should distinguish between the qualities of inclusion that are granted to individuals through democratic institutions. In categorising these different qualities, I stated that

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Voice must grant individuals an equal say in the decision-making process, while Vote must grant individuals an equal say controlling the use of the coercive power of the state. As Voice and Vote are fundamental for the concept of democratic legitimacy, their distinct inclusionary implications must be essential for democracies to gain full legitimacy.

Starting from the discussion of the All Affected Principle in chapter 3 and 4, I then in chapter 5 explored the conceptual connections to the concept of representation. As I have shown, the history of the medieval principle of *Quod Omnes Tangit* indicates the deep roots of the All Affected Principle in legitimising institutions of representation. I justified the claim that the insights from *Quod Omnes Tangit* provide us with a better understanding of the conceptual ties between inclusion, democratic legitimacy and theories of political representation. This understanding led me to the conclusion that we the All Affected Principle occupies an important conceptual intersection, described in a triad of legitimacy, inclusion and representation. This triad, I further explored and substantiate through a discussion of Hanna Pitkin's concept of representation. As Pitkin's concept has been hugely influential for most works on political representation, the discussion helped me explain the significance of my concept of legitimacy to an extensive range of literature on representation.

Equipped with the conceptual vocabulary from chapter 5, in chapter 6, I developed an approach of how to express the categories of Voice and Vote in a concept of representation. Based on Michael Sward concept of the "representative claim", I critically discussed forms of non-elected representation and their implications for the overall legitimacy of

democracies. Built on this discussion, I explained how we can make sense of elected and non-elected representation under the categories of Voice and Vote. I concluded the chapter by arguing that we should accommodate the principles determining the boundaries of elected and non-elected representation within the principles determining the boundaries of legitimacy. Thus, the All Affected Principles help us substantiate the legitimacy of democratic institutions while at the same time laying out the grounds for political representation.

What then follows from this? The conclusions derived from my arguments are both conceptual as well as practical. Conceptually, I suggested a solution for how to reconcile some diverging strings of philosophical arguments. I argued that the two predominant interpretations of the All Affected Principle are compatible and in fact essential principles for a full understanding of democratic legitimacy. This insight is based on the idea that democratic legitimacy is itself best understood as multidimensional and can be approached through three distinct but complementary principles. Both concepts are inherently connected to the concept of political representation. Representation can foster democratic legitimacy while at the same time facilitate the implementation of inclusive institutions. The fundamentals of this triad are revealed through my line of argumentation.

From these conceptual conclusions, it follows that democratic institutions must be designed to fulfil the requirements of the All Affected Principle. In order to gain full legitimacy, institutions must seek to be appropriately responsive to all affected interests. At the same time institutions must be appropriately accountable to everyone subjected to their power. Vice versa,

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everyone whose interests is affected by an institutions should have a right to a say in the decisions made by the institutions. However, the boundaries of legitimacy remain fuzzy at this point. Those whose interests will be affected will sometimes be different from those who are subjected to political power. Institutions for the representation of all affected help bridging this gap. Representative institutions can accommodate the multitude of affected voices while being accountable to the constituents' subjected citizens. This means, that elected representatives must sometimes achieve a balance between their accountability and their authenticity.

Non-elected representatives, on the other hand, can be strengthened. Their role of integrating public voices into political deliberation is essential to the developed concept of democratic legitimacy. However, political deliberation must depend on the appropriate spaces of communication that our institutions provide. In order to represent the interests of everyone affected, representatives must be equipped with the institutional power to elevate relevant voices from the white noise of opinions that marks today's digital public. Given the existing wide-ranging global and temporal interdependencies, our representative institutions must increasingly include the voices of a cosmopolitan community of affected parties.

The stability of today's democracies depends on how well their institutions can adapt to these demands by globalised set of voices while preserving their accountability to those subject to their powers.



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