

## Individual Rights and the Democratic Boundary Problem

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**Abstract:** Boundary problems arguably are primary in democratic theory. Until we settle who ‘the people’ are, numerous questions around rule by the people cannot themselves be settled. Recent accounts have advocated extending participatory boundaries outward, up to the fully global level, in order to better match decision makers to decision takers in a more integrated global system, or to appropriately account for coercion to which all are said to be subjected. Some critics of these accounts would give much stronger emphasis to national or other bonds between democratic participants. They would limit inclusion and participation accordingly. Defended here is an approach that is focused on enhancing individual rights protections through extending political boundaries. It would challenge the idea, implicit in ‘all-affected’ and ‘all-subjected’ approaches, that expanding the franchise is the appropriate tool for protecting participants’ vital interests. It challenges also any strong necessity claims for shared national sentiment to sustain democratic rule. The case of Turkish accession to the European Union is given some attention, for ways in which it highlights issues around the rights protections at stake, as well as ways in which some problematic identity questions lie at the root of much resistance to boundary extensions. While the application of a rights-based approach to the boundary problem will not be so straightforward in all cases, the approach can significantly inform participatory inclusion and institutional design at various levels of governance.

When it comes to the European Union, it's up to member states of the European Union to decide.  
Nicolas Sarkozy. Prague, April 2009 (Vogel 2009)

### Introduction

Boundary problems focus on how to determine who the people are for the purposes of rule by the people. They will be treated here as a cluster of related problems within the larger set of concerns around political legitimacy. Boundary problems are concerned not primarily with why, when or how it is legitimate to coerce persons to comply with decisions, but on who should be empowered to decide. How extensive should be the set of persons involved in the processes that produce coercively-backed laws, or simply laws or rules which have far-reaching impacts, including across national borders?

French President Sarkozy’s claim above was made in the context of debates over whether Turkey should be permitted to have full European Union membership. It usefully draws attention to the decision entitlements generally claimed for existing polities. It also points toward some

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important challenges to justifying such entitlements. Two kinds of challenges are particularly salient here. The first involves a longstanding theoretical paradox, and the second is focused on mismatches between decision makers and decision takers. In terms of the paradox, we can note that in a democracy, the people are understood to be sovereign. They are presumed to have the power to select, and sanction through de-selection, their lawmakers and governors. They also are held to be the ultimate repository of authority for modifications to constitutions or similarly foundational sets of principles. Yet, who ‘the people’ are cannot be decided democratically. Its members cannot be asked to choose whether they in fact are the people, because that would presume that they already are the people for the purposes of such decisions, and so on to infinite regress (Dahl 1989, 3-4; Yack 2001; Gould 2006, 49-50; Goodin 2007; Näsström 2007, 2011; Abizadeh 2008; D. Miller 2009; Zurn 2010). This regress problem has crucial implications. If the people cannot be the ones to determine who properly belongs to the sovereign people, then nor can they be the ultimate source of decision-making authority in the setting of decision boundaries. That source, the one which can ultimately decide the deciders, must be found elsewhere.

The second challenge, around mismatches between decision makers and takers, in fact comprises at least two distinct sets of challenges to current, geographically delimited participation boundaries. The first is concerned with ways in which those outside a decision-making set can be affected by the decisions made within. The second focuses on ways in which outsiders can be seen as subject to coercion arising from democratic decisions made inside a state. Those working within the first, ‘all affected’ frame see border-crossing effects, or decision externalities, as having greatly expanded and intensified in recent decades. Factors cited include increased interdependence between states and thus higher cross-boundary sensitivity to decisions

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(Koenig-Archibugi 2011), an increasing proportion of trade and other rules being decided by negotiators, not representative legislators, at the supraprstate level; and increasing effects on domestic polities from decisions made by trans-state firms and other economic actors (Falk and Strauss 2001; Held, 2004, Ch. 6; Archibugi 2008; Marchetti 2008; see Pogge 2008, 190-92). An ‘all possibly affected’ account would take the logic several steps farther. It would include all of those who could see their interests affected by any decisions, made from any possible decision agenda (Goodin 2007). The second, ‘all subjected’ approach emphasizes ways in which individuals are -- or might be -- subjected to coercion enacted through decision processes from which they are excluded, and why that should make them eligible for inclusion (Abizadeh 2008; Fraser 2008, 64-67; see Smith 2008; Näsström 2011).<sup>1</sup>

These sorts of challenges or questions dig to the core of both democratic theory and practice. If it is not clear who properly belongs to the people for the purposes of making binding collective decisions, then a host of subsidiary questions concerning what can legitimately be done to the people, or what the people should be permitted or enabled to do, become immensely more complicated. Even the principle of majority rule remains indeterminate until the set of persons from which the majority should be drawn has been established (Barry 2003, 328-31; cf. Christiano 2003, 12).<sup>2</sup>

This article offers a rights-based approach to answering crucial questions around participation boundaries, in particular around territorially-based exclusions from participation and individual rights protections. Unlike in all subjected and all affected accounts, the focus is

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<sup>1</sup> Fraser characterizes her principle as ‘all-subjected,’ but she offers an expansive reading of subjection which takes in some of the effects cited by all-affected authors. Smith argues that the roles domestic decisions can play in constituting outsiders’ identities makes some eligible for inclusion.

<sup>2</sup> Christiano asserts that democracy beyond the state cannot be taken up until ‘clarity on the question of what democracy is all about and what its underpinnings are’ is achieved (2003, 12; see also Christiano 2011a). As the above begins to show, however, many crucial democratic questions hinge on achieving greater clarity on the proper scope of the polity.

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not primarily on extending the franchise and related political participation. Rather, it is on the importance of more comprehensive suprabate integration, understood as the extension of political institutions capable of providing reliable protections for individuals' core civil, political and economic rights.

The argument is developed in four main sections. In the first section, I consider actual and proposed approaches to setting decision boundaries, beginning with the most exclusionary. I show how difficulties in addressing the regress and mismatch problems tend to push boundary solutions outward, initially to include all of those actually subjected or affected in the domestic frame. Yet, such domestic approaches cannot fully address the paradox, or regress problem around boundary setting, and they cannot adequately account for ways in which individuals are potentially subject to coercion outside territorial borders, or actually affected by a range of decisions made elsewhere. These concerns give rise, respectively, to 'all possibly subjected' and 'all possibly affected' accounts. Both types of solutions, I argue, point in an appropriately inclusive direction. Both are, however, subject to a serious challenge: extending the franchise in an all possibly subjected frame will not necessarily achieve the overriding objective of enabling individual autonomy for all. Expanding participation in an all possibly affected frame likely will not adequately protect all individuals' vital interests.

In the second section, I develop a more fundamentally rights-based approach to the boundary problem. Democratic procedures are seen in large part as tools to be used in protecting vital interests, expressed as the protection of core rights. Such procedures also are instrumental to publicizing and helping to rectify violations where they do occur, along with complementary mechanisms of accountability, including formal avenues for individuals to challenge possibly unjust rights rejections before a disinterested arbiter. In such an approach, the boundaries of

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political institutions would be set not according to some conception of conceivable affect from decision making, or subjection to it, but according to what sorts of boundaries and institutional configurations could be expected to provide reliable protections for individuals. Because of biases and other inward-looking dynamics naturally reinforced by a sovereign states system, it is likely that the creation of broader supranational polities would be required to ensure many of the requisite protections.

In the third section, I move from generic applications of a rights-based boundary approach to a more concrete one, the case of Turkish accession to the European Union. This case is highly salient, not only for drawing attention to the straightforward question of whether a set of democratic supranational boundaries should be extended, but also for bringing to the fore a number of objections around the perceived necessity of some forms of shared identity or ‘fit’ of participants to shared rule. In the fourth and final section, I take up those and some other objections. I close by discussing how, while the pursuit of intensive suprastate integration likely is not possible in the near term in all global regions, a rights based approach to setting participation boundaries can significantly inform dialogue around political inclusion and exclusion at all levels of governance, toward promoting appropriate inclusions in the longer term.

### **1) Approaches to Setting Decision Boundaries**

In practice, democratic decision boundaries have tended to be drawn according to criteria falling into three broad categories. These have included:

1. *current territories*, where the people is presumed to be legitimately contained within existing territorial borders, and those within the borders retain firm rights to decide on democratic inclusions or exclusions;

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2. *ascribed attributes* of individuals, where exclusions from decision sets are determined by usually negative attributes ascribed according to markers of difference, e.g., nationality, gender, religion, ethnicity, age, native intelligence, criminal status, and possibly citizenship status;<sup>3</sup>

3. the *earned credentials or status of individuals*, where it is presumed that the voting populace is appropriately limited to:

- a. those who hold title to certain levels of wealth or property, or who have educational or occupational credentials presumed to make them well suited to political decision making
- b. those who have the legal, economic or other specialist training that qualifies them to participate in decision-making on certain matters
- c. those who have been selected by the people in a representative democracy and thus are empowered to make binding decisions amongst themselves.<sup>4</sup>

Some commentators would want to make firm distinctions between participation boundaries set according to territory, and ‘demos’ boundaries which are set according to ascribed individual attributes (Goodin 2007, 40, n.1; Cheneval 2011, 1, n.6). Yet, often it is the perceived or ascribed characteristics of individuals – their suitability to participate in shared rule -- that determines not only whether they are included through the expansion of the domestic franchise, but also through the expansion of territorial borders or the liberalization of immigration rules for a specific group (see D. Miller 2009). I say more on that below. The emphasis throughout will be on territorial boundaries, but no rigid distinctions are presumed between the boundary-setting criteria.

Table 1 specifies how the most prominent normative treatments of setting participation boundaries would prescribe inclusions or exclusions according to each of the three categories of territory, ascribed attributes and earned credentials. As the discussion will show, tensions between participatory exclusions and a commitment to individual autonomy have tended to push such normative accounts toward the right side of the table, to ever more inclusive approaches.

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<sup>3</sup> Citizenship status is intended to be read broadly, taking in the standard exclusions of non-citizen legal residents from many forms of democratic participation, as well as the exclusion of those long-term residents who do not have formal authorization to reside. Non-citizen legal residents may be excluded in part according to perceptions about their characteristics as participants.

<sup>4</sup> Some judges would hold decision-making power through elements of both b and c, as they are either elected or are appointed by elected representatives based in part on their juristic credentials.

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**TABLE 1**

<b>Boundary Setting Practices</b>	<b>Procedurally Fair</b>	<b>All Subjected to Domestic Coercion</b>	<b>All Possibly Subjected to Coercion</b>	<b>All Actually Affected Interests</b>	<b>All Possibly Affected Interests</b>	<b>Rights-Based Approach</b>
<b>1. Existing Territory</b>	Those within existing territorial boundaries set rules on inclusion, subject to fair democratic procedures within the enfranchised group.	Existing territorial boundaries are generally accepted as found.	The franchise may include all of those subject to coercion, in effect all persons in the world.	The franchise should be proportionate to actual decision effects, including beyond existing borders in many cases.	The franchise should be proportionate to all possible decision effects, including from all possible agendas.	Territorial boundaries should be extended where it would plausibly strengthen the protection of individual rights; global extension to be pursued.
<b>2. Ascribed Attributes of Individuals</b>	Exclusions according to these characteristics are permissible, subject to fair internal procedures requirement.	All competent adults within the existing territory are to be enfranchised in order to participate in deciding the laws that bind them.	Exclusions of competent adults would not be permissible, since all are subject to being coerced.	Exclusions of competent adults would not be permissible if their interests are clearly affected.	Exclusions of competent adults would not be permissible if their interests could be affected.	Exclusion of competent adults would not be permissible; some exclusion in cases of those who would seek to suppress others' core rights.
<b>3. Earned Credentials of Individuals</b>	Judges, elected officials and others within earned-credentials groups would be subject to the fair internal procedures requirement.	Elective democracy; some judicial review is permissible, though with clear limits.	Standing trans-state decision-making bodies would be created.	Elected parliamentary bodies at regional and global levels; judges empowered to decide within International Human Rights Court	Exclusions by earned credentials would be problematized insofar as such groups have agenda-setting powers.	Exclusions by earned credentials are permissible, though checks on the power of judges and law makers would be consistent with rights emphasis.

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### *Procedural Fairness and All-Subjected Approaches*

We can begin at the far left of the table, where effectively all participation boundaries are to be taken as found. A political community's democratic practice is not to be assessed according to whom it excludes, whether they be territorial outsiders making some claim to participation, or insiders left disenfranchised because of their ascribed attributes. The appropriate focus is said to be on whether the decisions made by those who do have the franchise are made democratically, according to internally fair and consistent procedures (Schumpeter 1950, 243-45). I will refer to this as a procedurally fair approach. It is one that has been widely criticized for the ascriptive exclusions it would permit. Yet, its claims for taking domestic participation boundaries as found are similar in important respects to claims, including Sarkozy's above, that existing territorial boundaries should simply be taken as found for democratic purposes (see Dworkin 2011, 382; cf. Näsström 2007). That link is discussed in Section 3 below.

Here I will highlight some problems in setting domestic boundaries according to a procedurally fair approach by giving a attention to a relatively recent case: the participatory exclusion of Swiss women. Switzerland was one of the last affluent liberal democracies to extend the full franchise to women.<sup>5</sup> Where countries such as the United States and Britain began extending voting rights soon after World War I, Swiss women did not get the franchise in national elections until 1971. This was due in large part to the country's procedure for determining the extent of its decision making polity. Enfranchised Swiss men — those who were then recognized as the people for purposes of self rule — were constitutionally granted the power to determine, via direct referendum, whether the exclusion of women should continue. In the first referendum in 1959, some 67 percent of men voted against giving women the full franchise, though a few individual cantons did affirm it. In a second referendum, held in 1971

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<sup>5</sup> Thanks to Dimitris Christopoulos for providing key insights on the Swiss case.



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after years of struggle by women activists and allies, the majority of men voted yes (see Banaszak, 128-29).

Both the mismatch and paradox challenges are salient to such a case. The 1959 referendum in particular illustrates the democratic paradox. Those already empowered to vote were being asked to vote on whether they should be the ones to vote to decide who should be empowered to vote in national elections. Legitimate decision making authority cannot easily be claimed for a democratic people determined in such a circular procedure.<sup>6</sup> Further, the mismatch permitted in a procedurally fair approach between domestic decision makers and takers has been criticized as simply reinforcing unjust discrimination, or as rejecting without justification the political equality that lies at the heart of democratic rule (Dahl 1989, 121-22; see also Goodin 2007, 46-47; D. Miller 2009, 203). Robert Dahl, perhaps the most prominent critic of such an approach, argues that any system of rule with a genuine claim to being democratic must enable participation by all of those who are bound by the laws or rules produced in the decision making process (1989, 120). For Dahl, it is an unjustifiable restriction of individual autonomy to exclude long-term adult residents from contributing to decisions about the laws under which they are required to live. His critique of a procedurally fair status quo approach would push decision boundaries outward, to an all-subjected account of domestic shared rule.

### *1.2 Coercion and Will Engagement*

While such an extension goes some way toward addressing domestic exclusions, it can only incompletely meet the mismatch and paradox challenges. In terms of the paradox, an emphasis on the subjection to law of those who currently belong to a polity cannot address the historical contingencies that determined where territorial boundaries would be drawn, and thus to which

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<sup>6</sup> The Swiss Constitution had itself been adopted in 1874 after a popular vote of Swiss men.

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decision set individuals would belong. We cannot say with confidence, based only on an account of the imbalance between the set of domestic decision makers and takers, that external territorial boundaries are appropriately set. Pointing to the ‘is’ of actual state coercion, in other words, cannot settle the question of who ‘ought’ to have been subject to it, or indeed who ought to be able to share in the benefits of the protective enforcement of laws, coercively backed distributions of resources, etc.<sup>7</sup> Nor can such an approach offer clear guidance on questions of secession and internal autonomy for specific groups or regions (Buchanan 2004, Ch. 9).

Ultimately, it may do little but restate the paradox in the frame of existing territory: those who already happen to be included are the ones who should be empowered to determine who should be included, because they are the ones already included.<sup>8</sup> The circle spins.

It might be claimed, adapting a much-discussed argument for strong domestic priority in matters of distributive justice, that in addition to coercing, the state uniquely ‘engages the will’ of those within by enacting laws in their name (Nagel 2005, 128). Such will engagement is said to distinguish defensible political coercion from plain oppression, and to give individuals within a state standing to make claims on it that those outside do not have. Similar claims might be seen as implied in the context of democratic boundary problems: those outside territorial state boundaries will not be sufficiently subject to political coercion enacted in their name to have robust claims to participation inside. Yet, the mismatch critiques would still apply, in addition to

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<sup>7</sup> See also Pevnick (2008, 401-2), for an argument that, if state coercion is ideally deployed to solve coordination and collective action problems for all insiders, then no special justification for it is needed. This is distinct from claims that those who have been subjected to state oppression are owed some form of compensation or rectificatory justice. If an oppressive regime were replaced by a moderate one, for example, the victims of the old regime could justifiably demand restitution, but their victim status would not give them clear standing to reject inclusion demands by other individuals. It is conceivable that a political community could justify some exclusions in the short term by citing the need to focus material distributions and other state resources on rectification, but that would not stand as a permanent justification for exclusions.

<sup>8</sup> Dworkin, for example, asserts that “the boundaries created by accidents of history remain the default” (2011, 382). Yet, claiming that all territorial boundaries must simply be accepted as found could be analogous to claiming that any form of governing power, however oppressive, must be accepted as found, given that it also emerged from some historical process (Näsström 2007, 625-26).

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a critique similar to the democratic paradox. In terms of the latter, such an account cannot independently demonstrate that the ones whose will is currently engaged are the ones whose will should be engaged. It simply stipulates that historically contingent territorial boundaries are to be taken as found, and that the focus should be on the coercion to which insiders are subjected. Further, the salient forms of coercion and will engagement may in fact be exercised by institutions outside the domestic sphere, as when a state is required to impose domestic austerity measures in order to receive bailout loans from the International Monetary Fund, or when it must enact domestic legislation in the name of its people but in compliance with WTO rules (see Cohen and Sabel 2006; Julius 2006; see also Abizadeh 2007; Moellendorf 2009, 19-39).

The above, of course, does not conclusively show that there is no possible justification for exclusions from shared rule. Exclusions or inclusions *might* be justifiably based in cultural, national, or related group identity claims (see Walzer 1983, Ch. 2; Miller 2009). Considered below is an argument that certain kinds of ascriptive attributes, specifically those related to the ‘fit’ of some kinds of groups or individuals within a democratic polity, can be defensibly cited as reason to exclude. Here, the essential point is that an approach emphasizing the importance of enfranchising those who are currently subject to domestic political coercion cannot clearly address the paradox or mismatch challenges. Such considerations will move the discussion a step farther to the right in Table 1, to an all-subjected approach which is not limited to the domestic sphere.

### 1.3 *All Possibly Subjected*

In such an approach, in particular in Arash Abizadeh’s systematic and well elaborated treatment (2008; 2010; see also Fraser 2008; Smith 2008; Näsström 2011), the value of

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autonomy is seen as sufficiently large to individual lives that any limitation of it triggers an imperative to extend decision boundaries to those so affected.<sup>9</sup> Expanding the decision set is understood as necessary to reaching justifiable – democratically legitimated – decisions about any coercive limits to autonomy. Abizadeh, noting the infinite regress problem, asserts that the polity must be viewed as in principle unbounded. Thus, any coercion employed to set and maintain boundaries must be justified to all who are subject to that coercion. A joint process of democratic legitimation is required between insiders and would-be insiders (2008, 44-45). Further, such a process also would be required for all persons in other countries, given that all would potentially be denied entry should they choose to pursue it (Abizadeh 2008, 48).

I will bracket here any concerns about whether border controls are coercive per se (see Miller 2010b). A challenge more essential to the current discussion is whether coercion and diminishment of autonomy are the factors giving individuals standing as democratic participants, rather than some broader principle of need or vital interests protection. Consider that, because all individuals are said to be subject to coercion at some equal baseline level, the actual extension of participation boundaries is to be dictated by how much individuals would value inclusion. There would be “a greater participatory say to foreigners for whom entry actually represents a valuable option; an even greater say to those for whom the option of entry is necessary to have an adequate range of valuable options; and perhaps the greatest say to citizens themselves” (2008, 58).

The last claim, that current citizens should have the most say over borders, likely cannot be sustained without simply reinforcing the democratic paradox. Giving priority to current

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<sup>9</sup> Closely following Raz (1986, 372-78), Abizadeh specifies that the conditions of autonomy obtain when an individual: “(1) has the appropriate *mental capacities* to formulate personal projects and pursue them, (2) enjoys an adequate range of valuable *options*, and (3) is *independent*, that is, free from subjection to the will of another through coercion or manipulation” (Abizadeh 2008, 39-40).

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citizens would be in effect to declare that existing territorial boundaries are to be taken as found. The same critiques would apply as to the all subjected domestic approach above. More crucially here, an emphasis on valuable options in setting boundaries – whether valuable because of intense preferences for them or plain need -- dilutes the importance of coercion to the account and ultimately will cause it to overlap significantly with an all possibly affected interests approach. Consider how weak the link may now be between actual coercion and democratic standing. If we presume that ‘value’ is to be interpreted in the first sense above, as preference for entry, then even persistent actual coercion may play an inconsequential role in determining decision boundaries. For example, those who live in the shadow of a fortified border – say the heavily patrolled fence and walls dividing Nogales in Sonora state Mexico from Nogales in Arizona, USA – may spend a significant portion of their time under the watchful eyes of armed agents, remote surveillance crews, etc. Yet, they may have only a weak preference for crossing. Some persons farther south in Mexico may have much stronger preferences, and yet not have any direct contact with the coercive apparatus at the border. They are actually threatened by coercion at a lower level, but the much higher value they place on crossing could give them more democratic say in border enforcement.

Perhaps more importantly, the thwarting of some persons with very strong preferences for wrongdoing could give them a stronger claim to democratic say than other persons.<sup>10</sup> We can consider some activity such as the cross-border trafficking of women who will be coerced into sex slavery or other forced labor (Van Den Anker 2006). There are strong independent reasons to disallow such activity, however strong the preferences of the wrongdoers to continue. Yet, the limitations of the smugglers’ autonomy that would be entailed could give them prominent

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<sup>10</sup> Pevnick (2008, 401-02) similarly notes, in the context of Nagel’s coercion claims for strong domestic priority in distributions, that coercion which is not independently justifiable—e.g., conscription for a clearly unjust war—cannot be justified by decreasing material inequality for those subject to it.

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standing in border-control decisions within an all possibly subjected frame. An emphasis on the intensity of value preferences easily could lead to a range of such perverse outcomes in the setting of decision boundaries. This points to a more generic concern, of course, with any straightforward claim that a democratic process necessarily legitimates a decision outcome. If it is unjustifiable for someone to arbitrarily seize property, carelessly or randomly injure others, rob them, etc., then the coercion used in stopping such actions does not clearly give the wrongdoers the right to take part in a decision-making process through which they might be able to generate a majority authorizing their behavior. Such a process could simply provide a façade of legitimation for wrongdoing or the persecution of a minority.

Alternately, if what is being valued by the would-be entrants is more plausibly understood in Abizadeh's second sense, as core interests, or those things "necessary to have an adequate range of valuable options" (2008, 58), then such problems are less acute. Here, however, we can ask again how central a role coercion actually plays in the all possibly subjected approach. Abizadeh is firm that it is not merely having valuable options at stake that prompts an extension of decision boundaries, or defensible demand for justification. An individual must also be subject to potential or actual coercion (2008, 64, fn. 46; 2010). That subjection is said to be sufficient to trigger the demand for justification. Yet, if coercion exercised over individuals plays no other role than as an equal background condition to which all are equally subject, need is doing the work in setting actual participation boundaries. Decision sets are being configured by a more comprehensive conception of those things all persons can be said to need or have reason to value in their lives. Thus, an all possibly subjected would appear to overlap significantly with, if not collapse into, some of the more expansive accounts within all-affected interests approaches.

### 1.4 *All Actually Affected Interests*

I will begin with accounts which emphasize the mismatch between the sets of those affected by actual decisions and those empowered to participate in the decision process. Such accounts take in a broad range of ways in which individual interests can be affected, rather than concentrating on possible limitations of autonomy via direct state-backed coercion. They would consider, for example, a decision such as whether to site a nuclear reactor or other industrial facility near an international border (Held 2004, 99), or decisions on how such a plant will be regulated and maintained so as to minimize risks to those nearby. Negative externalities may be significant, e.g. in terms of pollution, risks of contamination or worse. These and like factors may give strong reason to expand the decision set on such issues to include all of those who stand to be affected, even if they are not being actually subjected to coercion from laws or policies put in place by another state (see Näsström 2011, 123; Koenig-Archibugi 2011).<sup>11</sup> Further, as noted above, the increasing effects of governance rules negotiated within bodies such as the World Trade Organization, as well as effects or impacts arising from the ability of increasingly large multinational firms and other actors to avoid domestic regulation, are seen as important reasons to shift some boundaries outward, up to the fully global level (Falk and Strauss 2001; Held 2004, Ch. 6; Marchetti 2008; Archibugi 2008).

In the all affected approach, vital interests – in health, life expectancy, etc. – are generally given the greatest weight. David Held, who has offered the most fully elaborated theoretical defense of the approach, sees its justification as springing from the basic justification for democratic rule per se: the protection and promotion of individual autonomy (1995, 206-16;

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<sup>11</sup> Koenig-Archibugi suggests a GDP-based formula for determining what percentage of a country's votes should be allocated to outsiders. He estimates that outsiders should constitute about 20 percent of the electorate in the United States, for example, based on its economic power and ensuing impact beyond its borders (2011, fn. 20).

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2004, 170). Thus, there is significant overlap at the core with the all-subjected approaches, though again a broader range of threats to individuals is explicitly considered. Held in fact offers a highly elaborated set of necessary enabling conditions for democracy beyond the state, including the protection of a set of basic rights seen as necessary to ensure the protection and expression of individual autonomy through democratic participation (1995, 190-94, 201-12). While the affirmation of some of the rights, including basic income and basic health care, would represent a significant expansion of protections in some states, Held rejects a more comprehensive human rights emphasis, citing disagreement across states on which rights should be seen as universal (1995, 223).

Such all affected accounts can offer important insights, in particular for the promotion of near-term, incremental reforms to existing institutions. That is especially the case for relatively strongly empowered supranational institutions such as the World Trade Organization and International Monetary Fund. Elsewhere (withheld), I have argued for the transformation of the ad hoc Parliamentary Conference on the WTO into a formal arm of the Organization, empowered to represent the interests of those within member states. The creation of such a body could better match input to the impact of WTO rules compliance. As a more comprehensive approach to setting decision boundaries, however, all-actually affected will face some of the challenges identified above, in particular around the democratic paradox, or infinite regress more generally. To limit participation to those who happen to be affected by a decision made at some specific time would again be simply to reinforce contingent present boundaries – taking them as found rather than justifying them.<sup>12</sup> Consider also that the agenda of decisions to be made by any

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<sup>12</sup> This challenge also can be raised to Thomas Christiano's critique of global democracy. He argues that the domestic sphere is morally distinctive in that those within states share common interests, or have "a rough equality of stake" (2011a, 74) in their communities that does not obtain globally. Yet, that may be no more than a description



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political entity, as well as the decision outcomes themselves, will vary depending on who is included in the decision-making set.<sup>13</sup> Those affected by any particular decision, and thus those who are seen as appropriately included in the decision-making process, cannot be determined until the decision already has been made.

### *1.5 All Possibly Affected Interests*

This reinforced paradox is cited as reason to push the boundaries outward once more, to an all possibly affected approach. Since conceivably any person could see her or his interests affected, depending on the agenda chosen and the decisions issuing from it, all must stand to be included in decision making processes (Goodin 2007, 55). The urgency of particular interests is also said to be an important consideration in applications of such a maximally inclusive approach. Thus, concerns around the intensity of need are introduced in much the same way as in the all possibly subjected approach above. I will suggest that all possibly affected rightly directs our attention to the importance of protecting the vital interests of all persons, and to some possible means of protecting or advancing those interests. Two significant challenges arise, however. The first has to do with a specific kind of indeterminacy in trying to distinguish between the protection of vital or urgent interests and relatively trivial ones within the approach. A related but more essential challenge is focused on whether enfranchising all whose interests could be affected is the most appropriate means of actually protecting their interests.

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of the system of participation that has evolved historically, rather than a justification of the exclusions that cause the interests of some to be much more deeply enmeshed with others'.

<sup>13</sup> Marchetti (2008, 81) offers an instructive analysis of ways in which most all affected accounts would in application exclude a large proportion of the global poor from important life opportunities. He would, however, set jurisdictions on specific issues according to some straightforward voting procedure, meaning those in a persistent minority could still find themselves excluded (2008, 81).

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First, because agendas are to remain so conceptually open, it could not be determined in advance whether any conceivable decision that might be taken from any possible agenda would have implications for the most urgent interests or for the most trivial interests of any set of individuals. Nor would it be possible to determine whose vital interests would be most deeply affected by any particular decision. For example, one set of very needy persons could be granted agenda-setting powers. They might choose to set a referendum on whether extremely demanding transfers are required from a more materially secure set of persons. Assuming they could muster a majority and that the results were actually binding, the process could then result in impoverishment for the previously secure set – transforming them into the persons with the most urgent needs. Any possible agenda, and any decision arising from it, could affect any person, and possibly very deeply (see Marchetti 2008, 91, fn. 20; D. Miller 2009, 216-17).<sup>14</sup>

Implied here is the more general challenge around whether extending the franchise to individuals is the most appropriate means of actually enabling them to protect their own vital interests. An all possibly affected approach looks outside democratic procedures to determine where democratic boundaries should be set, according to the importance of enabling individuals to protect their interests. Simply extending the franchise, however, does not ensure that individuals' interests will be protected. As is familiar in discussions around domestic constitutional democracies, some groups could find themselves persistent voting minorities in a given polity, and they could see their rights suppressed and interests unprotected through a democratic process that is heavily weighted toward majority interests (Beitz 1989, p155-63; Dworkin 2000, Ch. 4). It can be asked, for example, how far it would protect the interests of

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<sup>14</sup> Koenig-Archibugi (2011) argues that in practice agendas need not be so open, since polities have widely varying powers to affect the interests of others. This undoubtedly is true as a matter of probabilities, yet even very small states' decisions may have deep impacts on outsiders, including distant ones. Consider the accommodation of terror training camps by regimes in Sudan and Afghanistan, or the large-scale negative impacts associated with illicit financial flows to small-state tax havens (Palan, Murphy and Chavagneux, 2010).

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those in a very poor, very small state that faces specific threats, e.g. from climate change-induced rises in sea level, to be first granted some form of global franchise, rather than to focus more directly on means of actually protecting their interests (see Caney 2005a). Such a limited regime for the protection of interests should be rejected for the same reason that Goodin (2007, 45-46) would reject some domestic form of purely procedural democracy under which, as long as the preferences of all are consulted and weighed equally, the result produced is taken to be legitimate or defensible.

Nor is Abizadeh's approach immune to such procedural concerns. Consider that, because would-be entrants see their autonomy diminished through being thwarted from entry, they are said to have standing to determine democratically with insiders the contours of a legitimate regime of border control. Yet, such standing might count for little in terms of protecting autonomy. Those actually petitioning to enter could be easily and persistently outvoted. Abizadeh rightly does not want to affirm such a process. He posits a fundamentally deliberative democracy, in which "those subject to political power must be able to see their political institutions and laws as the outcome of their own free and reasoned public deliberation as equals" (2008, 41). Yet, if the process is at root designed to ensure legitimation through democratic means, individuals' deliberatively informed preferences must at some point be aggregated. Given the likely intensity of the preferences at stake for those in affluent receiving countries, it is not unlikely that the aggregative outcomes would be the same as in the non-deliberative referendum process. The persistent minority of would-be entrants could perpetually see their autonomy limited, however formally equal their standing in the decision-making set.

### **2) A Rights-Based Alternative**

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I will offer an alternative here that is more fundamentally focused on providing such protections. It would begin with vital human interests but would not necessarily see global enfranchisement as the starting point for protecting them. Vital interests are understood as including familiar ones in avoiding premature death, unchosen physical harm, having adequate nourishment and access to medical care, as well as being able to exercise agency and avoid being subject to unjust discrimination (Buchanan 2004, 25-26, 134-35; see Raz 1986, 166; Caney 2005b, 72-77). These interests are essential enough to human well-being, or to leading a minimally decent human life, that they are seen as giving rise to specific protective rights. This package of rights likely would be much more extensive than that offered by Held, who would limit his account to rights necessary for robust democratic participation by all individuals. Just how extensive the package of rights should be, and whether the account should lead to some version of trans-state equality of opportunity based in rights against unjust discrimination, cannot be pursued here, though there is nothing in what follows that should be seen as ruling out some such possible imperative.<sup>15</sup>

Further, rights are understood here as most effectively protected within appropriately configured political institutions. Such institutions are the agents that are best able to provide full coverage and obtain full compliance. That is, they have the greatest potential to reliably protect the core rights of all individuals within a given set, as well as to ensure the fullest compliance with individual duties to contribute to the actual protection of rights. In such an approach, democratic procedures are seen primarily as a set of instruments to be used in protecting against violations of core rights (see Caney 2006; Withheld; Follesdal 2011).<sup>16</sup> They also are

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<sup>15</sup> Buchanan (2010), for example, would make a distinction between the protection of interests necessary to meet some decency standard and rights against unjust discrimination, which he characterizes as belonging to the discrete category of equal status. I presume here that rights against unjust discrimination, enacted as various forms of legal and political rights to directly challenge salient decisions, will be necessary in a range of cases to individuals being able to effectively protect their most vital interests.

<sup>16</sup> Complementary instrumental accounts draw empirical links between democratic institutions and specific individual rights or related outcomes, as in the protection of civil rights against torture, arbitrary imprisonment or

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instrumental to publicizing and helping to rectify violations where they do occur. Such procedures would include not only voting to select representatives and possibly some forms of referendum voting, but also publicity and accountability mechanisms associated with the civil and political rights generally recognized by consolidated liberal democracies, e.g., legally actionable rights to freedom of speech and press, rights to peaceably assemble and protest, and some legal rights to directly challenge laws, rules or decisions with significant implications for the core rights of individuals. Each is seen as an important defensive mechanism to publicize and protect against the suppression of core rights corresponding to the most urgent or vital human interests.

I will note that, while the approach is focused on the instrumentality of some democratic practices to rights protections, it is not fundamentally consequentialist. The claim here is not that democracy is choiceworthy because it is the system of rule that will tend to produce the best outcomes over time, maximize aggregate welfare, etc. (see Arneson 2003). It is conceivable that some majoritarian procedure which suppressed core rights for a small, persistent minority could create more utility overall. Here, democratic practices are viewed as instrumentally useful to protecting core rights, where procedures are consistent with respecting rights. Also, while this approach presumes that the purpose of democratic procedures is not primarily to enable the expression of some shared popular will, or more broadly enable or facilitate the self-determination of a people, it does not presume that the need for democratic politics as a protective tool can ever be eliminated (cf. White 2010). Even if some genuinely benevolent and

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other mistreatment by the state (Christiano 2011b); treatments of the democratic peace (Bohman 2006), or the prevention of famines (Sen 1999, 7-8). For a detailed empirical analysis of links between rights protections and democracy, see Davenport and Armstrong (2004); For a novel account focused on the instrumental importance of human rights *for global democracy*, see Goodhart (2008). For an argument rejecting a human right to democracy *per se*, see Cohen (2010).

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well-meaning set of administrators, or perhaps Platonic Guardians (Dahl 1989, Ch. 4), were put in place across a set of institutions, and they were fully empowered and genuinely committed to securing the core rights of all individuals in their jurisdiction, they still could not be expected to be all-knowing. It would remain important for those within the polity, or within various sub-sets of it, to be able to share with even some maximally benevolent despot their own ‘insider’s wisdom’ (Shapiro 2003, 39-43) about how specific proposals or decisions could affect them.

Further, the justification for democracy is not presumed to be wholly instrumental. There would be important intrinsic reasons to favor democratic rule in ‘choice sensitive’ areas. I follow Dworkin (2011, 390-91) here in the presumption that democratic processes have intrinsic value in terms of how they embody and express respect for the equal standing of all persons within a political community. The closer we move to clearly vital interests, however, the more firm rights protections should be, and the more items taken off the decision making table. In other words, core rights would generally fall within the area of governance that is seen as ‘choice insensitive.’

### *2.2 Integration and Rights Protections*

In such a rights-based approach, the boundaries of political institutions would be set not according to some conception of coercion or conceivable affect, but according to possibilities for actually providing protections. Thus, the answer to who should be considered part of the people is along the lines of ‘all whose rights could be reliably protected within shared political institutions.’ I have discussed in some detail elsewhere reasons to think that current institutional boundaries likely would need to be extended in order to ensure the protection of all persons’ core rights (withheld; see also Pogge 2008, Ch. 7; Caney 2006). The argument centers on interconnected biases against distributions not only of resources and opportunities to non-

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compatriots, but also the extension of fully fair terms of trade and investment, equitable aid conditionalities and targeting, responsibilities to address climate change and other issues. Biases include an electoral or stakeholder one, where domestic leaders have strong incentives to tend to the interests of their own constituents first; and an own-case bias, where states are left the judges of their own obligations in a global system lacking a neutral suprastate judge or forum where salient decisions can be challenged from outside the states taking them. These and other biases against fully recognizing and accommodating the interests of non-compatriots are inherent to a system in which states remain the ultimate judges in their own cases. They can be mitigated to some extent through the creation of supranational institutions empowered to adjudicate claims in accordance with rights-respecting principles. The European Union represents a partial exemplar, and Turkish accession would be recommended if it were likely to ensure that many more persons' rights would be reliably protected.

Some more specific details on the European Union context will be useful here. These are offered not in service of presenting the EU as a full model for wider participation boundaries. It gives us, rather, an essential living laboratory for the exploration of both the rights-enhancing potential inherent in deep integration, and the challenges to which such integration naturally will give rise. We can note, first, that EU citizens hold a significant package of actionable civil, political and social rights that are portable across state boundaries, including a right to free movement across those boundaries. Further, individuals already discharge a range of duties within a supranational framework of EU institutions. The union does not constitute a straightforward tax-and-redistribute regime of social welfare protections (see Bailey 2008), though there has been some increased provision secured through individual cases in the European Court of Justice and European Court of Human Rights (Conant 2006). It is the case

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that significant, routine transfers of resources have been made across national boundaries as part of cohesion policy, or initiatives aimed at reducing disparities between EU states and sub-state regions (see Hooghe 1996). The policy was formalized in the European treaty system in the Single European Act of 1986. Transfers have been made via ‘cohesion funds’ focusing on transport projects and the environment, and ‘structural funds’ focusing on employment, training and development within regions. Hundreds of billions of euros are transferred through such programs, primarily to lower-income ‘convergence regions’ within member states (European Commission/Eurostat 2009).

Significant economic convergence has been reported for poorer states—generally Spain, Portugal, Ireland and Greece—that acceded in the 1970s and 80s (Pastor 2004). Some effects of the global economic crisis were of course felt acutely in such states after 2007, and their difficulties raised questions for some about the viability of the European project, and the shared currency in particular (see Tokic 2010; Krugman 2011).<sup>17</sup> Yet, besides narrowing their policy options and possibly intensifying some aspects of the crisis, EU membership helped ensure that such states as Greece and Ireland were backed economically by other member states as they were forced to seek assistance to cover debt, and a special bailout fund was created for other member states potentially facing such challenges (Forelle 2010). Further, significant economic benefits related to immigration also have been reported for less-affluent members acceding since 2004 (Baas and Brucker 2008), as well as some income convergence (Matkowski and Prochniak 2007).

### **3) The Turkish Case**

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<sup>17</sup> Tokic speculates that the crisis and ensuing problems in economically more vulnerable member states could provide impetus for much more extensive fiscal and political union in the EU. Krugman highlights the same possibility, though he also outlines more dire possible outcomes.



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Certainly hopes for ongoing economic convergence with EU member states help to explain continued interest by neighboring states such as Turkey in joining the union. Turkey is a member of the “rich state club,” the Organization for Economic Cooperation and Development (OECD), but it has in fact continued to rank among mid-level or even lower-level developing states on many indicators of individual well being. Its per capita income of about \$11,535 put it below such mid-level developing states as Mexico and Argentina, at 61<sup>st</sup> place among just over 190 states. It ranked 74<sup>th</sup> in adult literacy, 87<sup>th</sup> in life expectancy, and 106<sup>th</sup> in enrollment beyond primary school (United Nations HDR 2009). Overall, Turkey ranked well below most European states in the UN’s comprehensive Human Development Index, at 71<sup>st</sup> place, and it reported a per capita income of less than half that of the EU average.<sup>18</sup> Further, it ranked 41<sup>st</sup> among 135 developing states assessed in the UN Human Poverty Index, which measures the percentage of individuals living in situations of severe deprivation, e.g., without access to clean water, adequate nutrition, health care, education. Some 8.7 percent of Turkey’s population was found to be living under such circumstances.

Thus, there are continuing gaps in the protection of economic rights for individuals within Turkey which accession could be expected to help address. In fact, as a formal accession candidate, Turkey already has received significant amounts of targeted aid to support movement toward meeting economic, political, and civil liberties standards for accession, and it has made gains in economic development. Critics such as Gates (2009) would note the relatively small proportion of EU aid that is targeted at human rights promotion, meaning primarily the protection of civil and political liberties. Yet, in the four calendar years from 2004-2007, human rights-specific aid totaled no less than €20.5 million per year, and as much as €48.6 million. In

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<sup>18</sup> The figure was announced by Turkish State Minister Cevdet Yilmaz at a cohesion policy meeting in Liege, Belgium, in late 2010. (Turkish Daily Mail 2010). Yilmaz noted that the figure was a significant increase from the 36 percent reported in 2002.

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2006, when the EU spent €20.5 million on human rights promotion in Turkey, it also spent €182 million to promote economic and social cohesion in the country.

More generally, numerous commentators have emphasized ways in which European integration has contributed to more robust protections for civil and political rights within states including Turkey (Çelik 2005; Mayerfeld 2011). Mayerfeld, for example, argues that the European human rights regime has been significantly rights reinforcing in Turkey and other states, in that it has established a system of concurrent responsibility. That is, when states fall down on their human rights obligations, supranational institutions have the remit and capacity to intervene. Tocci (2005) would give causal emphasis to domestic factors in explaining political and rights reforms in Turkey since 2001, but she also emphasizes the role the accession process has played in reinforcing momentum for such reforms.

This is not to say that concerns about protections of civil and political liberties have been fully addressed, and some efforts by the Turkish government toward rights protections have been criticized as inadequate (see LaGro and Jorgensen eds., 2007). Some have raised concerns in particular about ongoing threats to the country's sizeable Kurdish minority (Yildiz and Muller 2008). Formal accession would, however, increase the avenues available to vulnerable individuals in protecting not only their own civil and political liberties, but also their access to life resources and opportunities through regional development assistance and training programs, as well as through opportunities over time to move across national boundaries to pursue a range of employment opportunities.

In context of the latter, it can be noted that Turkish workers have long been a presence in Germany and other European countries, many under specific guest worker programs in the 1960s

and 70s.<sup>19</sup> The formalized social exclusion of workers often associated with such programs highlights additional reasons why those within Turkey could be expected to make significant gains in rights protection under formal accession and the assumption of EU citizenship. Of course, there is no blanket presumption that discrimination or exploitation against migrant workers will be eradicated simply because they bear co-citizen status, any more than discrimination against domestic workers who move internally is wholly absent. Possessing the full package of legally actionable EU citizen rights would, however, enhance the ability of migrants to challenge more forms of unfair treatment.<sup>20</sup>

### **4) Possible Objections**

#### *4.1 The Problem of the Founding*

Before examining possible objections around shared rule and ‘cultural fit,’ I want to take up a more basic problem: that of the founding, or initial production of a constitution. That is, even if we presume that a polity is appropriately bounded, the constitutional principles under which it will govern itself cannot initially be produced through some procedure of shared decision making, because there would already have to be in place some constitution-like document specifying the appropriate procedures for the exercise. Habermas (2001; see Zurn 2010) and Olson (2007) offer generally complementary arguments that such a paradox can be overcome through a fluid, ongoing process of inclusive deliberation within a given society (cf. Honig 2001). Such accounts tend, however, to elide important questions about initial boundaries (see Näsström 2007, 647-50; Goodin 2007, 44, fn. 10). The adoption of a developmental or regulative

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<sup>19</sup> More than 3.8 million Turks were living in European Union states as of 2004, with some 2.6 million of those in Germany (Independent Commission on Turkey, 2004, 31).

<sup>20</sup> Freer movement within such a system helps to answer important questions around exit within a democratic frame (see Warren 2011).

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ideal of legitimacy cannot fully answer questions around the exclusions that tend to flow from initial boundaries and be perpetuated by them in the current system.

I will suggest here that a rights-based approach which gives due emphasis to actually protecting individuals' vital interests offers a means of greatly mitigating the founding problem. It does so by offering guidance on which sorts of rights should be protected. We can note first that even the most basic rights will require secondary and tertiary rights to be adequately secured. A right to life, for example, likely will entail a right to adequate housing, meaning housing that provides protection from the elements, animals and diseases they bear, easy predation by other persons, etc. That in turn entails a right to secure legal tenure in housing, which implies rights, or at least entails a need for, appropriately empowered police and legal bodies capable of enforcing those rights, and so on.<sup>21</sup>

It cannot be claimed that rights to housing are *strictly* necessary to a right to life, given that it is clearly possible to live out of doors and survive, as millions of homeless persons around the world do. It would be more difficult, however, to argue that such persons are adequately protected from generalizeable threats, especially exposure to elements and predation. The adequate protection of even the most fundamental rights will require the creation of institutions capable of enacting and protecting secondary, tertiary and quaternary rights directly linked to the core right (see also Caney 2007, 154-63; Nickel 2007, 87-90).<sup>22</sup> If that is so, then some form of constitutional protection for the entailed rights also is strongly implied, and they are to some extent choice insensitive, although that does not mean that there should not be contestation

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<sup>21</sup> Such 'rights chain' logic provides an important counter to claims that constitutionalized rights represent little more than the opinions of some about objective value (Waldron 2001, 164-87; see Zurn 2010, 211-13).

<sup>22</sup> See Caney (2007) for a nuanced taxonomy of the types of connections identifiable between core and subsidiary rights. The claim offered here is for a specific type of empirical connection, where the most basic rights are seen as strongly implying secondary, tertiary, quaternary rights, etc.

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around the most appropriate or effective means of actually ensuring the core rights, or that legal systems and related institutions must be absolutely uniform worldwide.<sup>23</sup>

### *4.2 Cultural Fit Objections*

Let us return to President Sarkozy's claim that current EU citizens and their representatives should have exclusive rights to determine regional participation boundaries.<sup>24</sup> Turkey had been admitted to formal accession negotiations with EU executive body the European Commission in 2005, amid the mostly eastward expansion of the union from 15 to 27 members. However, French leaders, as well as some German and other EU political elites, have since vigorously resisted full membership in favor of enhanced cooperation or some form of advanced partnership (Simsek 2010).<sup>25</sup> Many of their concerns have centered on the question of whether Turkey, with its large Muslim majority and the bulk of its territory lying beyond the Bosphorus Strait, belongs to Europe properly conceived. Further, some surveys have found that perceptions of ethnic difference can figure strongly in determining support for or opposition to Turkish membership by non-elites (McLaren 2007; see Emery 2007).

Such perceptions connect closely to general objections around the fit of prospective participants in shared rule. That is, attributes ascribed to them, as in Category 2 of the Boundary Setting Practices in Table 1, are said to make it inappropriate to integrate them into an existing democratic polity. David Miller has offered the most formidable and nuanced such objection in

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<sup>23</sup> Democratic deliberation certainly would have a role to play in publicizing the insights of all persons in a polity regarding the identification and provision of important rights protections. It is not possible again to specify precisely the threshold of choice sensitivity for all issues, but in a rights-based frame, the balance would be tipped to protections, and those would be expected to become more firm the closer to vital interests the provision is (see Benhabib 2009).

<sup>24</sup> The claim was offered in response to a speech made by US President Barack Obama in which he urged EU states to permit full Turkish accession (Vogel 2009).

<sup>25</sup> Leaders in other states, including the United Kingdom, Spain, Italy and Sweden, have expressed continuing support for Turkish accession, while leaders in Austria and Greece also have been consistently opposed.

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the recent boundary literature. He gives significant emphasis to the empirical conditions ostensibly necessary for a demos to function well internally, especially whether individuals to be enfranchised with the polity “can be expected to display the relevant qualities, and relate to other members in appropriate ways” (2009, 212). The key issues here are how such relevant qualities are to be defined, who would be excluded on grounds of not possessing them, and to some extent whose definition of the relevant qualities would be accepted as authoritative.

Miller observes that understandings of relevant qualities, and thus democratic boundaries, will vary with conceptions of democracy. He attempts to demonstrate that the two most widely influential conceptions -- Liberal and Rousseauian, or ‘radical’ – both would support relatively restrictive participation boundaries based in relevant characteristics. For example, effective democracy for the Rousseauian is said to hinge on four criteria. First, participants sympathetically identify with others in their demos, rather than viewing them as obstacles to achieving political objectives. Such mutual identification is seen as going beyond a recognition of core or human rights, to special attachments or attitudes of caring. Second, members of the demos hold common ethical principles or convictions, meaning ones “that the political community recognizes” as valid (2009, 208). Interpersonal trust is the third criterion, expressed both as a willingness to be on the losing side of some issues, and the ability to trust that others’ positions are sincerely held, rather than instrumentally and possibly temporarily held in order to achieve an objective. This implies the final criterion, Miller says, which is that a demos must be stable in its membership over time, so that sincerity can be gauged and trust developed (2009, 209).

Miller asserts that it is not necessarily the case that a Rousseauian Democrat must favor very small democratic communities in the name of effectiveness: the emergence of the General

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Will, or the outcome that would be chosen by all if they were genuinely choosing in accordance with the good of the community, won't necessarily be served by conformity of opinion. Yet, any such diversity of opinion is likely to be bounded fairly narrowly by the communally recognized ethical principles cited in the second criterion. Given that the first criterion indicates that demos co-participants extend recognition to one another that goes well beyond respect for core human rights, and that the second criterion makes clear that debate will revolve around those ethical principles already recognized by the community, it is not clear how a Rousseauian approach would accommodate or incorporate a genuine diversity of viewpoints. That is not to say that viewpoints which reject the fundamental equality, etc., of other persons must be given equal footing in a set of shared political institutions. It is to say that the approach does not appear equipped to admit viewpoints that fall too far outside of what may be accepted within a given demos as it is constructed at a given time. Thus, participation boundaries are effectively to be taken as found.

### *4.3 Polity Size*

Secondly, Miller argues that, in fact, the Rousseauian's foundational good of collective self-determination may not be best achieved in small political communities. He highlights longstanding concerns in democratic theory around striking a balance between meaningful individual participation and influence, and system capacity, or the ability of a political system to actually implement its demos' commands. Thus, for example, a city-state could rate well on the solidaristic characteristics that are emphasized as relevant qualities for the effective practice of democracy, but it would not have the capacity to independently address larger problems. And we can think again about the well-founded fears of some island states about being submerged under

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ocean waters as a result of states' contributions to climate change (IPCC 2007, Ch. 16). Yet, rather than demonstrating that Rousseauian democracy has inclusionary tendencies, the capacity issue may simply highlight the inadequacy of such a conception of democracy to address issues of larger scale and impact. The kind of sympathetic identification and deep, people-specific agreement on right principles ascribed to a Rousseauian demos would seem likely to be stretched far beyond sustainability if democratic boundaries themselves were stretched far enough to satisfactorily address some shared global problems.

### 4.4 4.5 *Difference and Democratic Fit*

Alternately, Liberal democracy is said to be focused on the means of protecting individuals against powerful societal factions and the potential misuse of government power. Miller gives significant emphasis to J.S. Mill's claim that a democratic people must be united by "common sympathies" in order to effectively check power. A prerequisite for such sympathies, or more specifically the possibility of developing a united public opinion on specific issues, is said to be a shared language and the means of publicly disseminating ideas in it (2009, p211-12). For Miller then, effective democracy, even in the Liberal tradition, appears to be strongly correlated with shared nationality. He defers engagement with the question of transnational democratic expansion, but he implies that if some form of, for example, fully global democracy were possible, it likely would not be an effective democracy (cf. List and Koenig-Archibugi, 2010).

The possibility of such unified public opinion, however, is likely oversold (see Follesdal 2000). In any case, the types of shared characteristics emphasized in Miller's account are far less applicable to the numerous democratic states which are multinational, multilingual and otherwise



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marked by deep diversity (Koenig-Archibugi 2010).<sup>26</sup> The rights-based alternative developed above will be better able to highlight ways in which difference is, to a significant extent, what polities, their elected leaders, news media (De Vreese and Boomgaarden, 2006), and the individuals who comprise their membership, make of it (Barry 2000, p24-25; Spinner-Halev 2008). It can be taken to describe an insurmountable barrier to shared rule, or the object of exclusionary attitudes that are and should be subject to challenge.<sup>27</sup>

We need not only think in terms of only national or cultural difference here. Many kinds of difference have been cited as reason why it would be inappropriate to extend democratic boundaries, and it will be instructive to consider again one form that received significant emphasis in past debates. Women in numerous states were long said to be so different from men in their possession of the qualities relevant to democratic participation that it would be inappropriate to extend the franchise to them. For example, common anti-suffragist arguments of the 19<sup>th</sup> and early 20<sup>th</sup> centuries cited women's "natural frailty," smaller brain size; their primarily domestic role in society, which itself was seen as conditioned and dictated by natural nurturing tendencies that made them unsuitable to help determining outcomes related to warfare and other issues of high politics. Such arguments were, of course, met by powerful counter-arguments from suffrage supporters, many drawn from Mill's own *The Subjection of Women* (Mill 1869 [1988]; see Lewis 1987; Nym Mayhall 2001), which ultimately won out in the large majority of states.

In the case of extending EU political boundaries to include Turkey, I will suggest that any discussion of relevant characteristics should be focused not on perceived cultural differences but

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<sup>26</sup> Koenig-Archibugi notes an extensive empirical literature finding that many states have made transitions to democracy despite high levels of ethnic fractionalization.

<sup>27</sup> See Emery (2007), for a discussion of how some political elites, including Sarkozy, can be seen as responding to or reinforcing perceptions of deep difference in their opposition to Turkish accession (see Emery 2010)

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on demonstrated commitments to meeting the economic benchmarks, and especially the rights and democratic practice standards, outlined in the EU's Copenhagen Criteria for accession (see Redmond 2007, 310).<sup>28</sup> This emphasis flows not primarily from empirical claims about the necessary preconditions of shared rule, but from consistency with the foundations of a rights-based approach to boundaries. If the point of political institutions is to protect core individual rights, it would be inconsistent to incorporate as a full member some state in which the rights of a minority group or women were systematically denied. It is appropriate also to consider an acceding polity's external actions, and its willingness to observe rights and related standards, as in Turkey's actions in the ongoing Cyprus conflict.

It might be observed here that such a claim is in tension with the foundations of a boundary approach based in individual rights. If actions by a relatively few governing elites were to put Turkey at odds with rights standards, and that prevented movement toward full accession, it could be an instance of punishing all for the actions of a few. In fact, that is one further reason to support incremental but significant steps toward accession, including freeing the movement of some workers across borders, and thus enhancing their life opportunities, in the absence of full accession.<sup>29</sup> The essential point is that the practicability of full membership accession in a rights-based frame is primarily concerned with the willingness and ability, with ongoing assistance, of those in an acceding polity to be incorporated within rights-respecting political institutions. Practicability concerns also would extend to the ability of a system to effectively incorporate

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<sup>28</sup> The fact that a state is able to meet the criteria should not be understood as equivalent to its being able or willing to provide full rights protections for all in its territory. Rather, membership enhances the ability of less-affluent states to provide such protections, and the operation of suprastate courts and institutions gives individuals some important means of challenging rights rejections.

<sup>29</sup> Some such movement has been permitted in recent years, for example, from Morocco (Haddadi 2002). It can be noted that one conceivable outcome of an accession process would be for a majority of those in the acceding state to reject full membership, if it were put to a referendum. In that case, the extension of free movement noted above – for those who might want to move -- would also be an appropriate action, rather than some forcible accession in the name of protecting rights, given that the latter could well jeopardize the security of many individuals' rights.

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new members economically. Such concerns will give reason to reject claims that more affluent states or sets of regional institutions should simply open their borders and accept all comers in the immediate term. Such a move likely would overwhelm the ability of political institutions to actually protect against threats to individual rights.

The claim is distinct, however, from opposition based in claims of ethnic or other forms of difference. A full critique of such an approach to the distribution of the good of membership is not possible here (see Follesdal 2000; see also Kleingeld 2000). It can be noted, however, that in the European context, the already thin claim that current states provide a cohesive and discrete cultural identity for each of their members is stretched probably beyond applicability. Cultural variation among the EU's 27 states and 500 million individuals spread among hundreds of recognized cultures already is vast, and distinctions that are commonly drawn between Turkey and existing EU member states often are overdrawn. As Diez (2007) highlights, claims that Turkey, as a majority Muslim country, is significantly different than majority Christian EU states in terms of political or societal institutions can quickly fall into contradiction.

The picture that emerges is one of a still predominantly religious society, a picture that would not only offend many Turks, but also employs double standards when evaluating EU member states: what, one wonders, would the evaluation be, if Turkey's Head of State was also the Head of Turkish sect of Islam (in analogy to the United Kingdom), or if the Turkish state collected taxes on behalf of Islam (Germany)? ... One cannot help but feel that this is a prime case of "Othering." the representation of something else as different (and inferior) in order to represent European values as much more unified and positive than they really are (Diez 2007).

If it cannot so easily be demonstrated that the accession of Turkey would represent a significant departure in European expansion, then claims about the dangers to some clearly cohesive and morally significant European identity or way of life also are on shaky ground. Concomitantly, if the urgency of permitting individuals within existing states to vote directly on

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accession, or to express their will through a leadership veto at the European level, is not based in a substantive threat to some cohesive identity and related stability, then the possibility is raised again that participatory rights in this case could be grounded in no more than forms of ethnic discrimination, or possibly in a plain self-interest in rejecting duties related to Turks as full members. The duties incumbent on leaders of member states then, would be not to channel or transmit popular opposition to accession, but to work to minimize domestic resistance to it on the way to full membership.

### **Conclusion**

I have offered here a rights-based solution to the boundary problem. The approach shares with all affected and all subjected accounts an overarching concern with outputs: the protection of individuals' vital interests. Both of those approaches, however, give their actual emphasis to aggregative democratic inputs, which can be at odds with the provision of rights protections, especially in the case of persistent minorities. A rights-based approach would tip the balance farther toward the constitutionalization of key rights, with emphasis on ways in which the most basic rights strongly imply secondary and tertiary rights in order to be reliably protected.

Many practical questions would remain, of course, around the actual expansion of participatory boundaries. In some cases, such as Turkish accession, practical challenges are relatively straightforward and there is extensive existing dialogue and research on how they might be met. In other cases, including the possible expansion of participatory inclusion in North America (see Pastor 2011), the practical challenges appear more daunting in the near term. Even there, however, a rights-based approach can fundamentally inform immigration and other policy areas relevant to boundaries. It offers a challenge that must be addressed by those advocating

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rigidly exclusionary immigration and citizenship policies in the domestic frame, as well as a set of principles capable of providing guidance for the development of more appropriately inclusionary policies over time.

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