

Democracy, Self-Determination and Political Membership

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Abstract

My key question is whether the collective right to self-determination justifies a right on the part of liberal democracies to exclude outsiders from entering and settling within their territorial jurisdiction, from accessing citizenship or from participating in the formulation of their 'internal' decisions or policies. I approach the research through critically analysing six different accounts of the practice and value of democratic self-determination, which can be categorised as: *liberal nationalist*, *identity liberal*, *liberal communitarian*, *multicultural/republican*, *cosmopolitan/discourse theory* and *agonistic*.

I argue that although democracy does not and cannot logically call for the extension of participatory membership to all those affected or coerced by the decisions of a state, self-determination is compatible with porous boundaries demarcating social membership and citizenship. The position I advance recognises the importance of clearly demarcated jurisdictional boundaries for facilitating democratic self-determination, but holds that the existence of those borders, and the value and practice of self-determination, which they protect, are compatible with open access to social membership and citizenship. In contrast to what has become a prevalent line of thinking with regard to the politics of membership in liberal-democracies, I argue that the value of free movement championed by liberalism is compatible with the value of self-determination championed by democrats. If valid, the upshot of my argument is that liberal-democrats should support the right to self-determination as non-interference for distinct political communities, but *not* the self-determination of their social membership and citizenship policies.

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Chapter 1

Introduction

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

American Supreme Court, *Nishimura Ekiu v United States* (1892)

1.1 Framing the problem; Three Modes of Democratic Exclusion

To what extent - if at all - does the principle of self-determination justify or entail a right on the part of liberal democracies to control admission to membership?¹ The majority of the canonical texts in liberal political theory do not tackle this particular problem; in fact it has not generally been seen as a problem at all. Until relatively recently, most liberal theorists have simply assumed the model of a bounded and territorially exclusive society for their thought experiments concerning justice.² For example, in *Political Liberalism*, John Rawls famously postulates the existence of a:

¹ I follow Abizadeh (2009) when he writes: “A state is *liberal* insofar as it respects the rights and interests of the human beings on whom it imposes its might. It is *democratic* insofar as it ultimately attributes sovereignty to the *people*, not to itself”.

² Cole (2000), p60; pp. 194-195. Notable exceptions to this trend within the liberal canon include Kant (1795) and Sidgwick (1897). The first important post-*Theory of Justice* treatment on the issue of

(...) democratic society ... as a complete and closed social system. It is complete in that it is self-sufficient and has a place for all the main purposes of human life. It is also closed ... in that entry into it is only by birth and exit from it is only by death.³

In theorising about the principles of justice that should determine the basic structure of society, Rawls assumes for the purposes of his enterprise that there is no immigration or emigration, and only limited (if any) economic, social and cultural interaction with other communities. By framing the question of justice within the context of a bounded and closed society, Rawls is able to avoid addressing the question of how and according to what normative principles the membership boundaries of a liberal democracy should be determined.⁴ Loren Lomasky notes that the assumption of the legitimacy of territorially bounded nation-states is a trend we see throughout the history of liberal thought:

(...) the rule among liberal theorists is to take states in whatever form and variety they come down to us as the relevant objects for molding in accord with precepts of justice. From Hobbes and Lock through to Rawls, the social contract is assumed to establish, and to operate within, fixed national boundaries. What lends legitimacy to those borders is less diligently examined.⁵

immigration from a liberal perspective is in Ackerman (1980).

³ Rawls (1993), p41.

⁴ Kymlicka (2001a), p252.

⁵ Lomasky (2001), p56.

However, within the last thirty years a growing number of theorists in the liberal-democratic tradition have begun to focus their attention on the boundaries of political communities and on normative issues relating to the way in which states regulate admission to their territory, access to citizenship and rights to participate in their ‘internal’ deliberations and decision making procedures. These theorists call into question the conventional assumption that the boundaries of territory, citizenship and democratic participation as defined by the nation-state can be taken for granted as historical contingencies, leaving theorists to focus on more important issues concerning justice and equality internal to particular political communities. Instead, they consider normative questions of how territorial and membership boundaries are set and negotiated to be of equal importance, if not in an important sense prior to, the question of what justice requires in terms of the duties we owe to our co-members. It could be argued against the Rawlsian approach that we cannot establish what distributive justice requires *within* a liberal democracy until we know whether, to what extent and in what ways a liberal democracy has the right to regulate access on the part of outsiders to the goods which are held within its territory, including the good of membership.

It is often said that the question of the normative basis for practices of inclusion and exclusion brings into relief a tension between two of the core commitments of liberal-democracies.⁶ On the one hand, they are committed to recognising the equal moral worth and freedom of all individuals. Joseph Carens observes that it is a “basic presupposition” of all liberal political theories that “we should treat all human beings, not just members of our own society, as free and equal moral

⁶ Abizadeh (2008); Benhabib (2005); Joppke (2005); Whelan (1983);

persons”.⁷ Recognising the equal moral worth and freedom of all individuals would seem to render all practices of membership control morally suspect; and at the very least as standing in need of a justification directed towards those who are excluded which is consistent with viewing them as inherently free and equal. Liberals are committed to ensuring the maximum sphere of personal liberty compatible with the maximum liberty of all. This would seem to translate into a presumption in favour of unrestricted individual freedom of movement.⁸ From a liberal egalitarian perspective, Carens explains that the value of freedom of movement - both intranationally and internationally - lies in: a) facilitating personal autonomy, b) reducing inequality of opportunity based on arbitrary facts or characteristics (e.g. birth place and nationality), and c) combating actual inequalities in wealth, resources and opportunities. These last two considerations also reflect social justice concerns that membership controls perpetuate global inequality - a charge that I will discuss in more detail in section 1.4:

Freedom of movement is closely connected to each of these three concerns. First, the right to go where you want to go is itself an important freedom. It is precisely this freedom, and all this freedom makes possible, that is taken away by imprisonment. Second, freedom of movement is essential for equality of opportunity. You have to be able to move to where the opportunities are in order to take advantage of them. Third, freedom of movement would contribute to a

Whelan (1988a); Taylor (2005).

⁷ Carens (1995), p256. Implicit in my acceptance of this statement is a rejection of ‘realism’ in IR theory, which holds that the only moral duty of states is towards their own citizens. On realism in this context, see Donnelly (2000).

⁸ Carens (1992), p25. See also Cole (2000); Dummett (2002); Kymlicka (2001a).

reduction of political, social and economic inequalities.⁹

Democratic theorists have also found reason to challenge the boundaries of nation-states, but in terms of the way in which they restrict the scope of democratic participation, rather than the free movement of individuals. In the face of political issues of global scale such as the environment, terrorism, the drugs trade, health concerns like AIDS, migration and international trade and finance, many theorists argue that the division of democratic constituencies into territorially bounded jurisdictions defined by nation-states with rights to self-determination and mutual non-interference is an anachronism which perpetuates injustice and domination.¹⁰ Instead, it is said that the issues that transcend the borders between nation-states should be deliberated over in democratic fora which also either transcend or are situated at a level above national boundaries.

However, liberal-democrats are also committed to the importance of collective self-determination through popular sovereignty. If we value collective self-determination and popular sovereignty then it seems that we must permit political communities to have some degree of control over the conditions and criteria for entrance to and membership within their community, as well access to a sphere of democratic decision-making free from the input of territorial

⁹ Carens (1992), p26.

¹⁰ Archibugi (1998); Archibugi (2004); Benhabib (2004a); Fraser (2008); Goodin (2007); Gould (2009); Held (1995); Marchetti (2005); Marchetti (2008); Moore (2006); Tinnevelt and Geenens (2008); Young (2000a); Young (2004); Young (2005a); Young (2007).

outsiders. The inclusion of outsiders, whether through admission to residency status, admission to citizenship or through being awarded a democratic voice, is likely to have some kind of impact on the political, socio-cultural and economic conditions in the host country, and it would seem that these are the sorts of domestic conditions over which citizens should be entitled to have some kind of democratic control. As Whelan argues:

(T)he operation of democratic institutions should amount to “self-determination”, or control by the people over matters that affect their common interests. The admission of new members into the democratic group ... would appear to be such a matter, one that could not only affect various private interests of the current members, but that could also, in the aggregate, affect the quality of their public life and the character of their community.¹¹

So the question of membership is an area where these dual normative commitments - to universal freedom and equality on the one hand, and to democratic self-determination on the other - potentially collide. Why should the liberal commitment to freedom and equality apply only to the citizens of particular states? Why not consider those principles as applying equally to all individuals, regardless of their nationality, citizenship status or territorial location? And if we do want to extend the liberal commitment to freedom and equality to all individuals, regardless of their nationality, citizenship status or territorial location, what does this entail for the right of political communities to regulate the terms for the admission of outsiders to membership? For Seyla Benhabib, the always-present tension between the universal, cosmopolitan grounding of political rights in shared humanity and the particular instances of those rights when they are

¹¹ Whelan (1988a), pp. 28-29.

embedded within differentiated political communities represents “the paradox of democratic legitimacy”.¹² She articulates this tension in the following terms:

Sovereignty entails the right of a people to control its borders as well as define the procedures for admitting “aliens” into its territory and society; yet in a liberal-democratic polity, such sovereignty claims must always be constrained by human rights, which individuals are entitled to, not by virtue of being citizens or members of a polity, but insofar as they are simply human beings (...)¹³

In this thesis I situate the issue of political membership within the perspective of liberal-democratic theory, asking what the practice of self-determination implies for the regulation of movement across territorial borders, for the rules and procedures for accessing citizenship and for the distribution of rights to democratic participation. For my purposes, ‘exclusion’ as a political phenomenon refers to the manifold ways in which individuals are “prevented from initiating and participating in democratic negotiation”.¹⁴ Does the collective right to self-determination justify or in some sense *entail* a right on the part of liberal democracies to exclude outsiders from entering and settling within their territorial jurisdiction, from accessing citizenship or from participating in the formulation of their ‘internal’ decisions or policies? We can characterise these three forms of exclusion as: exclusion from *social membership*¹⁵ (i.e. exclusion from entering and settling in the territory of a political community as a resident alien), exclusion from *citizenship* (i.e. exclusion from formal

¹² Benhabib (2004a), p43.

¹³ Benhabib (1999), p711. See also Sidgwick (1897), p295.

¹⁴ Williams and Macedo (2005), p17.

¹⁵ Carens (2009) uses the term ‘social membership’ in this way.

membership in the polity) and exclusion from *participatory membership* (i.e. exclusion from participation in deliberations and decisions undertaken by political communities of which one is neither a social member nor a citizen, but whose decisions and policies nonetheless affect one's interests). Participatory membership describes the normative goal endorsed by transnational and global democrats of re-situating rights to democratic participation in transnational or supra-national deliberative fora which transcend or supersede the divisions between nation-states.¹⁶ These three forms of exclusion are not intended to exhaust the ways in which individuals may find themselves less than equally represented in relation to other members of a political community, but they provide a framework for the normative investigation to follow.

The distinction between social membership and citizenship indicates the fact that entering and settling in the territory of a political community does not entail full membership in the sense of the complete basket of social, civil and political rights.¹⁷ Resident aliens are individuals who are social members in my use of the term; tourists, foreign students and other kinds of temporary visitors are not relevant to my project. Social membership means being legally admitted to the territory and granted residency status. I use the term 'social member' to indicate the fact that once settled, these individuals typically make a commitment and contribution to their country of residence through living, working, developing relationships in civil and political society, and so forth.¹⁸ Territorial admission is often

¹⁶ Transnational democratic interaction is democratic deliberation carried out between nation-states. Global or supra-national democratic interaction is democratic deliberation carried out at levels above the nation-state.

¹⁷ Carens (1992), p29.

¹⁸ Carens (2009).

contingent upon the possession of certain economic skills and resources - including financial independence - as evidence of the contribution that prospective migrants will make to their host society and to provide reassurance that they will not become a drain on social and economic resources. So highly skilled individuals like doctors, engineers or academics usually have greater freedom of international movement than poor, unskilled labourers. Access to social membership and citizenship is also commonly awarded more readily to individuals who have a historic or cultural connection to the destination country. For example, in the early 1960s the UK Conservative government actively encouraged immigration from Commonwealth countries.¹⁹ Israel's 'Law of Return' enacted in 1950 grants Jews and those of Jewish ancestry the right to residency and citizenship in Israel. Immigration and membership policy is thus used to consolidate Israel's goal of establishing a secure state in the Middle East and to ensure inter-generational cultural and religious continuity.

Liberal states universally award social members some set of key civil and political rights and benefits; rights to due process, for example, and to private property. But they reserve some rights, benefits and burdens for citizens alone; typically (but not universally) the right to vote and the right to hold office in high-tier positions in government, immunity against deportation and often eligibility for certain social benefits and healthcare provisions. For example, the 1996 Welfare Reform Act in the United States made access to provisions like food stamps conditional upon citizenship status. Furthermore, acquiring citizenship serves an important symbolic function in so far as it confers the status of a full member of the civil and political community. All liberal democracies grant citizenship to some

¹⁹ Hardill, Graham & Kofman (eds) (2001), p68.

individuals at birth; either through birth to parents who are citizens (*jus sanguinis*) or birth within the territory (*jus soli*). Resident aliens can acquire citizenship through naturalisation. Liberal states vary in the different conditions and criteria that have to be satisfied to naturalise, but they typically require a certain period of residency, language skills, lack of criminal record, and some degree of civic competence and knowledge of the political institutions and history of the host country.

In addition to being part of a comparatively neglected field of inquiry in liberal political theory, the question I address in this thesis is of considerable relevance to the contemporary scene of global politics. As the process of economic, environmental, industrial and technological globalisation gains speed, the significance of the boundaries of political communities – in both a territorial and a jurisdictional sense – in structuring the life-options of individuals is likely to increase. For this reason, it is incumbent upon political theorists and analysts to subject those boundaries to normative and empirical analysis. Those theorists who *have* called into question the normative basis of membership controls have most commonly been answered by appeals to the value of collective self-determination.

1.2 The Value of Collective Self-Determination

The ideal of collective self-determination refers to the value and practice of a group of individuals jointly establishing the conditions of their shared political, economic and cultural life. It is respected in international law: Article 1, section 2 of the UN Charter states that a key goal for the UN is “To develop friendly relations among nations

based on respect for the principle of equal rights and self-determination of peoples”.²⁰ Self-determination became a prevalent concept in international relations in the nineteenth century with the rise of claims to independent statehood on the part of European nationalities. During this period, the relevant unit to which rights of self-determination were ascribed was conceived in ethnic terms. The terms of the Paris Peace Accord in 1919 sought to ensure a lasting peace in Europe by awarding self-determination rights and independent statehood to ethnic groups that had previously been subsumed under the Russian, Ottoman, Austro-Hungarian and German empires.²¹ The ideal of self-determination continued to play an important role in the twentieth century in the context of the struggles for independence of colonised groups. However, after the Second World War, self-determination came to be understood in primarily *multi-ethnic* and non-nationalist terms. It is generally understood today in international law that self-determination does not entail the political independence of an ethnically or nationally homogenous group, but rather the political claim of the “right of the majority within an accepted political unit to exercise power”.²² Still, the ethnic conception has retained its relevance in the late twentieth and twenty-first centuries for indigenous groups looking to secede from central authorities in order to remedy historic injustice and/or present day social, political and economic marginalisation, to preserve their distinct culture and way of life and to establish their claims to territorial integrity, jurisdictional authority and political autonomy.²³

²⁰ UN Charter (1945), Article 1, Section 2.

²¹ Moore (1998), p136.

²² Higgins (1963), pp. 103-105; quoted in Moore (1998), p136.

²³ Dahbour (2001).

There seem to be compelling reasons why political communities should have rights to self-determination. For David Miller, an appropriate analogy that spells out the value of collective self-determination is that of individual autonomy. In the same way that individuals are entitled to a sphere of decision-making over which they should be sovereign in order to enable them to pursue their self-defined goals, so too are groups.²⁴ The most appropriate self-determining political community, for Miller, is a national group:

(...) self-determination for groups is valuable in much the same way as self-determination for individuals. Just as individual people want to be able to shape their circumstances to suit their aims and ambitions, so groups want to be able to decide how to organize their internal affairs and to dispose of their resources.²⁵

Margalit and Raz provide a similar account of the value served by national self-determination:

The idea of national self-government ... speaks of groups determining the character of their social and economic environment, their fortunes, the course of their development, and the fortunes of their members by their own actions, i.e, by the action of those groups, in as much as these are matters which are properly within the realm of political action.²⁶

However, not all theorists who affirm the importance of the self-determination of distinct groups affirm the value of nationalism or

²⁴ I follow Moore (2001, p170) in understanding a 'collective right' to refer to a "right that must be exercised in common with others".

²⁵ Miller (2000), p164.

²⁶ Margalit and Raz (1990), p440.

national identity. There is disagreement amongst theorists over the appropriate unit to which rights to self-determination should be ascribed. Iris Young, for example, rejects the idea that special moral obligations and rights to self-determination follow from shared nationality:

(...) the concept of self-determination I wish to defend detaches the concept of a people from nationalism, that is, from the claim that being a people entails rights to a distinct, contiguous and bounded territory over which the group has exclusive jurisdiction (...)²⁷

Nevertheless, she still reserves an important role in her theory of justice for the self-determination of distinct communities of 'peoples', and on similar grounds to Miller and Margalit and Raz, i.e. from the value of individual autonomy and well-being:

(...) to the extent that the well-being of individuals partly depends on the flourishing of the meanings and practices that serve as sources of their selves, then those people should have the means collectively to decide how to maintain and promote their flourishing as people.²⁸

Theorists often unpack further the value of self-determination in terms of allowing room for the development of diverse forms of political organisation and/or cultural ways of life. The relevant and deliberately alarming contrast often drawn is that of a world state without borders that would eradicate the differentiated jurisdictions within which associations of individuals collectively deliberate over, decide upon

²⁷ Young (2000a), p255.

and develop different political, economic, social and cultural systems of governance and collective organisation in accordance with their self-defined needs and interests. This is what Michael Walzer has in mind when he argues that membership controls are necessary for particular associations to be “communities of character”²⁹ with their own distinct way of life; for example, with their own health care programmes, taxation priorities or systems of cultural rights. Preventing the autonomous self-determination of political communities would in turn undermine the autonomy of individual citizens, because they would no longer be able to regard their state and its coercive laws as the political framework through which they express their particular preferences and pursue their particular goals. In order to see coercive state actions as consistent with their freedom and autonomy, citizens must be able to regard the state as acting out their democratically self-defined interests. The link between self-determination and personal autonomy is explained by Arash Abizadeh in this way when he writes that:

The democratic principle of self-determination might follow from the ideal of personal autonomy in either of two ways: either because democratic political institutions are *instrumentally* necessary for the protection of personal autonomy from coercive encroachment or because being able to see oneself as the author of the laws to which one is subject is *inherently* necessary for a justification of coercion consistent with autonomy.³⁰

It is often thought that the right to collective self-determination implies a corresponding right to non-interference from external states,

²⁸ *Ibid*, p256.

²⁹ Walzer (1983), p62. See also Whelan (1988a), p34.

³⁰ Abizadeh (2008), p42.

agencies, organisations or individuals. For example, the United Nations' Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty claims that "Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State".³¹ In this vein, Miller endorses a vision of the international order in which "nation-states are self-determining, but respect the self-determination of others through obligations of non-interference and in some cases of aid".³² Self-determination as non-interference is closely linked to the principle of national sovereignty. Ideally, sovereign political entities possess full authority to regulate political affairs within a particular bounded territory, and this authority is taken to be exclusive in the sense that it denies the right of outsiders or external states, agencies, organisations or individuals to have any kind of input or participation in those 'internal' affairs.³³

1.3 Self-determination and Inclusion/Exclusion

My key question in this thesis is whether the sphere of self-determined decision-making for liberal democracies should encompass the demarcation and distribution of any of the three forms of membership introduced above. Many authors argue that self-determination is conceptually and/or normatively inseparable from acts of exclusion. Though it appears in various different theoretical formulations, the basic claim here is that the right of a political community to control admission to membership is a *necessary* and/or *normatively legitimate*

³¹ A/RES/20/2131 (1965).

³² Miller (1995), p107.

³³ Cole (2000) p18.

function of its right to democratic self-determination. Democracy, it is often said, inherently calls for bounded jurisdictions that distinguish members from non-members. What is interesting to note as a preliminary point is that the exclusion claim is advanced from authors who otherwise have very different theoretical orientations. For example, Raffaele Marchetti states that:

(...) the very idea of a self-defining group implies exclusivity, i.e. the existence of public characteristics effectively delimiting the boundaries of a community. Every such society needs to assume a selective criterion in order to self-define its jurisdictional constituency, thus simultaneously keeping out non-members. The demarcation of group identity entails drawing a line between those who are *in* and those who are *out*, between those individuals who are recognised as equal and those who are treated unequally.³⁴

Jurgen Habermas also argues that democratic self-determination entails the existence of political communities differentiated by jurisdictional boundaries:

Any political community that wants to understand itself as a democracy must at least distinguish between members and non-members. The self-referential concept of collective self-determination demarcates a logical space for democratically united citizens who are members of a political community.³⁵

The idea that democratic self-determination is a 'self-referential' concept seems to encapsulate the thought that it is for the existing

³⁴ Marchetti (2005), p487.

³⁵ Habermas (2001), p107.

members to decide upon and shape the sphere of membership according to their self-determined goals and interests. The existing ‘self’ that is self-determining can only be demarcated by the existing ‘self’. Perhaps most famously, Walzer argues that exclusion is inherent in the very *meaning* of self-determination, since the whole point of self-determination is to preserve the distinctiveness of political communities, which would be threatened if they did not have a unilateral right to impose membership controls: “Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination.”³⁶

Walzer’s often-cited claim speaks to a point that is not only echoed by a number of other theorists but (as we will see in the following section) also reflected in international relations and in the status of national sovereignty. His claim supposes that there is something about membership decisions which means that they hold a particular significance for the practice of collective self-determination, which, in turn, means that it is of particular importance that citizens should exercise unilateral control over those decisions. A number of theorists suggest with Walzer that if political communities cannot exercise unilateral control over membership policy then they fail to qualify as fully self-determining associations. Frederick Whelan, for example, argues that:

(...) if power over this matter lay elsewhere than in the hands of the members, if the matter ... were permanently removed from the agenda, the democracy that existed would be seriously attenuated; it would not amount to self-determination.³⁷

³⁶ Walzer (1983), p62.

³⁷ Whelan (1988a), pp. 28-29.

Similarly, Jonathan Seglow argues that one of the main reasons for rejecting a policy of open borders is because:

(...) it would remove a peculiarly significant aspect of citizens' right to control their future: their very freedom to determine who becomes a member (even a citizen) and who does not. I suggest that the freedom to determine membership of the very polity which has freedom to determine its own affairs is of special symbolic importance.³⁸

Peter Meilander accounts for the source of the 'peculiar significance' of membership decisions by arguing that the question of membership raises the issue of the *identity* of the political community that the members wish to either preserve or develop:

By determining or changing the very composition of a people, questions of membership go to the heart of its basic character or identity Immigration triggers deep responses because it forces a people to address the question, Who are we and who do we want to be?³⁹

From the quotations just cited, we can see that the arguments for membership controls from self-determination typically appeal to a set of premises concerning the normative, political and conceptual relationships between collective and/or national identity, culture, democracy, popular sovereignty and territorial rights. The ways in which theorists either tie these premises together to justify exclusion,

³⁸ Seglow (2006b), p236.

³⁹ Meilander (2001), p83.

or try to pick them apart to encourage more inclusive politics, will be discussed in detail in the chapters that follow.

From the perspective of those theorists who *are* concerned to promote more inclusive forms of democratic politics, a key part of the problem with defending the boundaries around political communities is that the ‘internal’ deliberations and decisions of states - including their deliberations and decisions over their border controls and membership policies - can and often do affect those who are disenfranchised.⁴⁰

Seglow articulates this problem when he writes:

One of the freedoms that free and equal citizens ought to have is the freedom to decide on matters of common concern with their fellow citizens. The moral problem is when this collective freedom impacts upon the interests of those excluded from the ambit of decision-making (...)⁴¹

Many theorists consider it normatively significant that the processes through which states define and carry out their self-determined goals often have effects that transcend the borders between states, and so they argue that many ‘internal’ decisions - including decisions over membership - should not be the exclusive preserve of territorially bounded citizens to deliberate over and decide upon. This group of theorists - which can be broadly characterised as *transnational* or *global democrats* - typically argue that the participatory membership boundaries of political communities should be set by and (re)negotiated according to some version of the ‘all-affected’ principle. This argument is internal to democratic theory, and its basic

⁴⁰ Abizadeh (2008), p46.

⁴¹ Seglow (2005), p324.

formulation is that all those individuals who are affected by a decision of a government should have a right to participate in the making of that decision.⁴² Put simply, it makes the normative claim that the value of democratic institutions is that they enable those who are affected by the decisions of political communities and the activities of states to have a say in how coercive power is distributed and exercised, and it marries this to the empirical observation that the affects of political decisions often transcend the borders of political communities, which leads to the conclusion that democratic politics should not be confined within those communities but should be carried out either transnationally or globally. Participatory membership should therefore be re-situated in transnational or global deliberative bodies and not confined within territorially bounded, sovereign political communities. As we will see in Chapter 4, Iris Young argues that obligations of justice stem from causal connections and interdependencies. In so far as those relationships transcend the borders of sovereign nation-states, there should in her view be greater global regulation of the activities of political communities as well as access for individuals to transnational and global democratic fora: “If the scope of democratic political institutions should correspond to the scope of obligations of justice, then ... there ought to be more global institutional capacity to govern relations and interactions among the world’s peoples”.⁴³

Proponents of the all-affected principle commonly cite ecological policy as an example of a sphere of decision making that can have a profound impact on the interests of those who, by virtue of their status as non-members, are barred from participating in those decisions. The French policy of nuclear testing in its colonial territories in the South

⁴² Dahl (1970), p64.

Pacific in 1996 was a legitimate act of self-determination in so far as it was a decision undertaken by a democratically mandated government to pursue a particular goal related to national self-defence within its territorial jurisdiction. Yet the French government was never required to consult or take into account the views of the people who lived in the surrounding area and whose lives and environment were likely to be (and were) profoundly and negatively affected by the testing, since they were not part of the French *demos*.⁴⁴ The French citizens who *were* able to decide on the matter bore none of the negative effects, and presumably benefited in terms of greater national security and scientific advancement.⁴⁵ If valid, the all-affected principle supplies the normative criterion that explains why the South-Pacific Islanders have a claim to participatory membership that they hold against the French government, despite not being recognised as French citizens. More generally, it is clear that border controls and the demarcation of social membership and citizenship can have a significant impact on the interests of those located abroad who - by virtue of their territorial location and citizenship status - have no say in the making of those decisions. As Benhabib points out, one of the paradoxes of democracy and political membership is that:

(...) a shared feature of all norms of membership, including but not only norms of citizenship, is that those who are affected by the consequences of these norms and, in the first place, by criteria of exclusion, *per definitionem*, cannot be party to their articulation.⁴⁶

⁴³ Young (2000a), p9.

⁴⁴ This example is used in Karlsonn (2006), p18. See also Shachar (2007), pp. 264-265, & Archibugi (2004), p444.

⁴⁵ Archibugi (2004), p444.

⁴⁶ Benhabib (2004a), p15.

This perspective on democratic inclusion provides a normative alternative to the idea that membership control is a power that is either inherently and/or justifiably implied by the right of collective self-determination. It states that one good reason *on democratic grounds* that the existing citizens of a political community should *not* be entitled to exercise unilateral control over membership policy is because those decisions also affect outsiders. Implicit in this view is a rejection of the idea that democracy inherently presupposes a territorially bounded and exclusive *demos*.

It seems then that self-determination has normatively troubling implications for practices of inclusion and exclusion. Membership controls are (according to many theorists) necessary for and/or justified by the valuable practice of collective self-determination, yet self-determining communities often enact decisions which result in political consequences that call into question the just character of the boundaries separating members from non-members.

However, not all theorists agree that democratic self-determination necessarily implies acts of exclusion or unilateral control over membership. Iris Young, for example, develops an understanding of self-determination as non-domination, and she argues that this alternative conception shows us that self-determination can and should proceed without acts of exclusion. Benhabib also attempts to reconcile inclusive membership procedures with the practice of democratic self-determination. She argues that although the logic of democratic representation and legitimation calls for the existence of borders separating different jurisdictions, there are processes available within democratic fora - what she calls 'democratic iterations' and 'jurisgenerative politics' - that can serve to progressively widen the

circle of inclusion to encompass previously excluded or marginalised individuals.⁴⁷ Both Young and Benhabib believe that combining the all-affected principle with a federalist institutional design for the organisation and interaction of distinct political communities is the key to reconciling properly inclusive membership policies with the value and practice of democratic self-determination. The agonistic conception of democracy as political action taken in concert with strangers also suggests an alternative to culturally, nationally or economically exclusive membership policies.

This rather stark contrast between those authors who regard membership controls as either justified by or inherent in the very meaning of self-determination, and those authors who argue for more fluid, porous or issue-responsive membership boundaries because collectively self-determined decisions often have normatively relevant implications for the interests of individuals regardless of their nationality, citizenship-status or territorial location, provides the broad framework for this thesis. I approach the research through critically analysing six different accounts of the practice and value of democratic self-determination, which can be categorised as: *liberal nationalist, identity liberal, liberal communitarian, multicultural/republican, cosmopolitan/discourse theory* and *agonistic*. Each of these approaches puts forward a particular interpretation of the value of democratic freedom in relation to the rights of individuals, and each results in a different set of recommendations as to the correct principles and procedures that should govern membership practices.

⁴⁷ *Ibid.*

In the following section I provide a definition of some of the key conceptual terms that I will employ throughout the thesis. I then discuss the way in which the ‘peculiar significance’ of membership controls relates to national sovereignty in real world politics. Finally, I set some parameters for my project by briefly outlining what will *not* be taken into consideration. In the final section of this chapter, I outline the shape of the thesis, its key arguments and conclusion.

1.4 National Sovereignty and Political Membership

The state is a political apparatus with jurisdiction over a bounded territory. Nations are communities which are said to share a culture in the sense of a language, history and other common traits such as shared values, beliefs or a ‘national consciousness’ (i.e. a *belief* that all the members of the nation share something in common that distinguishes them as a group). Marchetti notes that:

While the term ‘state’ represents a legal concept describing a social group that occupies a defined territory and is organized under common political institutions and effective government, ‘nation’ depicts a social group that shares a common ideology, common institutions and customs, and a sense of homogeneity. In this sense, a nation can be seen then as a community of sentiment or an ‘imagined community’.⁴⁸

‘Democracy’, however, is challenging to define, because it is itself a contested and normative concept. To describe a regime, organisation, policy or decision as being ‘democratic’ is to judge it to be legitimate in some sense. Those who - like Walzer - define democracy as being a

form of government where all who are subject to the law (i.e. *bound* by it in the legal sense) should also be able to regard themselves as the authors of those laws find themselves in disagreement with others - such as Young⁴⁹ - who define democracy as being a form of government where all those who are *affected* by the law should be the authors of those laws. Other theorists - like Nancy Fraser⁵⁰ and Abizadeh⁵¹ - narrow down the definition further by specifying that, in a democracy, those who are *coerced* by the law should be the authors of those laws. So there is no normatively neutral or theory-innocent way of defining democracy. It will become clear in this thesis that follow that I favour the normative arguments supporting the first, Walzerian understanding, but in order not to beg the question as far as possible, I will limit myself here to defining self-determination as being democratic if it proceeds according to the practice of popular sovereignty. Popular sovereignty refers to the idea that the people that constitute a particular *demos* (whether that *demos* be defined by those who are subjected to, affected or coerced by the law, or by some other criterion) legitimate the exercise of political power through being awarded a voice in the construction of the laws under which they are governed.⁵² Its value stems partly from its protection of a sphere of political freedom and autonomy that we would lack under, say, a theocracy, monarchy or absolutist regime. That freedom arises from the fact that, in Charles Taylor's words, "we are ruling ourselves in common, and not being ruled by some agency which need take no account of us."⁵³ Democracy is rule by the people. The normative difficulty consists in specifying who should constitute 'the people'.

⁴⁸ Marchetti (2005), p493.

⁴⁹ Young (2000a).

⁵⁰ Fraser (2008).

⁵¹ Abizadeh (2008).

⁵² Benhabib (2007), p449.

⁵³ Taylor (2004), p189.

In contemporary international politics this normative question is side-stepped, as the right to control admission to membership is generally seen as an important manifestation of national sovereignty and collective self-determination. As Sarah Collinson notes, “The admission of aliens has historically been viewed as inherent in the very nature of sovereignty.”⁵⁴ States tend to regard membership policies as a means of furthering or facilitating their political, economic, social and cultural goals. As I noted above, specific groups of immigrants are often actively recruited in order to meet demands from the labour market, to provide certain skills and services or to facilitate the cultural goals of the nation.⁵⁵ Naturally, such policies are equally exclusive of those lacking the specific qualifications, cultural traits or skills which are required. For example, the immigration policy of Quebec favors French speakers and actively encourages migration from French-speaking North African countries. Immigration and membership policy is thus used to consolidate Quebec’s goal to preserve a distinct Francophile cultural identity independent of anglophone Canada. Other countries focus less on cultural integration and more on the economic attributes and potential contribution of prospective migrants. For example, the UK has recently followed Australia in introducing a selective points-based immigration system in order to meet specific needs in the domestic labour market and to reassure citizens that immigration will not have a detrimental impact on “jobs, public services and their way of life”.⁵⁶ The key message of the 2006 Home Office document outlining the new system is that

⁵⁴ Collinson (1993), p3. It is, however, important to note that the current forms of bureaucratic membership regulation enacted by sovereign states are a comparatively recent phenomenon, dating from the end of the nineteenth century with the United States’ Chinese Exclusion Act in 1882; Cole (2000), p30. See also Chapter 7, section 7.3 of this thesis.

⁵⁵ Sager (2008), p70.

citizens will be able to exercise unilateral control over immigration according to their self-defined needs and goals:

(...) this new points-based system will allow employers and those in educational institutions to take ownership of migration to this country. They, rather than just the Home Office alone, will be able to vet who comes into the UK according to the skills and talents of individuals they feel they need to enhance their sector.⁵⁷

Nation-states today are embedded in complex networks of international agreements and treaties, and they are increasingly (if only nominally) bound by forms of international legislation, such as the framework of universal human rights issued by the UN or the regulations on ecological policy agreed to under the terms of the Kyoto Protocol⁵⁸. In the sphere of membership, however, they still possess the virtually unconstrained sovereignty which they lack with regard to - say - their environmental policies. It is interesting to note with Roger Brubacker that the idea of the ‘peculiar significance’ of membership decisions, which I referred to above, is reflected in EU policy, where “citizenship is a last bastion of sovereignty; states continue to enjoy a freedom in this regard that they increasingly lack in others”.⁵⁹ Although the right to freedom of movement for EU-15 citizens is enshrined in the EU constitution, there has been little effort made to harmonise the procedures through which migrants can access citizenship.⁶⁰ As we will see in Chapter 5, Benhabib is particularly animated by the fact that whilst the Universal Declaration of Human Rights recognises a human right to *exit* a state, it imposes no

⁵⁶ Home Office (2006), p1.

⁵⁷ Home Office (2006), Foreword.

⁵⁸ Cole (2000), p21.

⁵⁹ Brubacker (1992), p180.

⁶⁰ Gunes-Ayata (2008), p4.

reciprocal obligation on any other state to grant entrance to outsiders. So in the terms laid out in what is arguably the most significant legal attempt to constrain national sovereignty according to a bill of universal human rights, states remain the final arbiters over admittance to social membership and citizenship.⁶¹

What does contemporary political theory have to say on these matters? Before I proceed to outline the shape of this thesis I want to make some caveats concerning the scope of my project. Firstly, some of the most pressing normative issues relating to immigration, citizenship and borders arise because of the vast disparities in wealth, resources, employment opportunities, political stability and just political institutions between nation-states. This normative landscape is complicated further by the acts of colonialism, slavery, empire and conquest which constitute the historical background for present day international inequalities and the particular demarcation of nation-states. It is beyond the scope of this thesis to investigate in any comprehensive sense the normative implications of global inequality and its historical background for issues relating to self-determination and political membership.⁶² The focus of this thesis is on evaluating whether the right to self-determination grounds a right on the part of liberal democracies to control admission to membership. The debate on global inequality and global justice - although importantly related - is orthogonal to the debate on democracy and political membership, because the primary normative concern in the former would seem to be inequality, rather than exclusion from membership. In other words, considerations of global inequality may pertain first and foremost to arguments for the international redistribution of wealth and resources

⁶¹ Benhabib (2004b), p130.

⁶² For detailed treatments of these issues, see the collection of essays in Barry and Goodin (eds) (1992).

rather than for opening up borders or for developing forms of democratic inclusion and participation above and beyond the nation-state.⁶³ At the same time, no lengthy normative analysis of democracy and membership can avoid taking considerations of global inequality into account, because some of the most compelling arguments *against* democratic exclusion follow from the role that membership boundaries play in perpetuating global inequality. The current system of border restrictions around nation-states help to perpetuate a global context in which some individuals enjoy enormous wealth and opportunity whilst others, by comparison, are condemned to live a life of abject poverty. Yet place or circumstances of birth - the criteria on which liberal states universally award citizenship automatically to a certain class of individuals - would appear to be paradigmatic examples of the kinds of arbitrary facts that liberals (and liberal egalitarians in particular) strongly believe should not determine a person's fundamental life opportunities.⁶⁴ I will limit my discussion of these issues to the relevant arguments in the work of the authors on which I focus; they will come to the fore primarily in Chapter 3, when I discuss Miller's account of national responsibility.

Secondly, I will not be addressing issues concerning the secession of groups from wider political communities. The focus of this thesis is not on claims *for* self-determination, i.e. the conditions under which a group aspiring to sovereign statehood should be recognised as such under international law. Whilst secession disputes do encompass

⁶³ See, for example, the discussions of the relationship between global inequality and border controls in Barry (1992) & Bader (1997). This is a claim I discuss at some length in Chapter 3, section 3.8.

⁶⁴ Hence, Carens' (1995, p230) oft-cited description of birthright citizenship as being "the modern equivalent of feudal privilege - an inherited status that greatly enhances one's life chances". For a further critique of birthright citizenship from a liberal egalitarian perspective,

pressing - and often bloody and intractable - issues relating to self-determination and political membership, my interest concerns political communities that already have a recognised right to self-determination.⁶⁵

Lastly, it is important to bear in mind that there are many different categories of migrants because people re-locate for many different reasons. As I stated above, temporary visitors such as students or holiday makers are not the focus of my discussions of admission to social membership and citizenship. Refugees and asylum seekers raise a distinct set of normative issues in relation to political membership and I will not be including them in this project. So I assume that the migrants being considered for social membership and citizenship are not fleeing war, religious or political persecution, or other threats to their immediate personal safety or human rights. I will also not be addressing the issue of illegal immigration nor family re-unification policy. The former requires separate normative analysis because it raises issues which are only tangentially related to legal immigration. I will take it as given that the latter issue is uncontroversial; other things being equal (e.g. national security would not be at threat) families and spouses should and often do have an immediate right to re-locate in order to live together.⁶⁶

see Shachar (2003); Shachar (2007) & Shachar (2009).

⁶⁵ See, for example, the discussion of the relationship between claims to secession, self-determination and political membership in Dahbour (2005) & Moore (1998).

⁶⁶ For example, Home Office (2002, p99) explains that “In June 1997, this Government abolished the ‘primary purpose’ rule which prevented foreign spouses coming to the United Kingdom where it was judged that the primary purpose of the marriage was admission to this country. We held it to be unfair and arbitrary as it caught not just bogus marriages, but also genuine arranged marriages where the

The type of migrant I will be occupied with in this thesis when discussing admission to social membership and citizenship is motivated to re-locate primarily by a desire to improve their economic well-being.⁶⁷ Economic migrants are individuals who seek to better their life options (primarily through a higher income, better employment opportunities and a higher standard of living) by settling on a long term basis in a foreign country.⁶⁸ No hard and fast definition of ‘long term basis’ is available, so I will simply assume that they seek permanent residency status potentially leading to citizenship, and aim to live out their lives for the foreseeable future in their new country

1.5 The Shape of the Thesis

The key question motivating my research is whether and to what extent the regulation of the three forms of political membership mentioned above should fall under the remit of a liberal democracy’s right to self-determination. Philip Cole summarises the normative framework for this kind of investigation as follows:

If we believe that the moral equality of persons can act as the basis of a framework of international justice and human rights, then we do believe there are limits to self-determination;

parties intended to live together permanently in the UK”.

⁶⁷ Considerations of social, linguistic and cultural climate may of course also be relevant to their choice of destination state, as well as the existence of historical ties; Seglow (2006a), p2.

⁶⁸ The vast majority of migrants fit into this category; Seglow (2005, p318) points out that in 2002, only 15 million of the world’s 185 million migrants were refugees. My typology of migration types follows that of Seglow (2006a), p2.

some matters can rightly be held to lie beyond the scope of the democratic powers of any body of people ... it could be argued that one of the most important matters that should lie *outside* the scope of the self-determining power of an association is its membership.⁶⁹

Cole does, however, concede that “it may not be impossible to make out a liberal argument for this kind of power”.⁷⁰ My aim in this thesis is to make progress in the direction that Cole gestures towards here - towards an assessment of the normative validity of arguments for the right of a liberal democracy to control its sphere of membership as a function of its right to self-determination.

The following chapters will illustrate how different conceptions of self-determination result in very different prescriptions concerning both the porosity and regulation of the membership boundaries of political communities.⁷¹ The way in which theorists view immigration, access to citizenship and the legitimate scope of participatory rights is shaped in part by their understanding of what sorts of conditions are seen as required for, justified by and/or necessary for self-determination to proceed. It follows from this that in so far as a particular account of democratic self-determination can be criticised as incoherent, contradictory, empirically inadequate or politically undesirable, we will also be armed with an objection to the particular criteria for boundary setting that are said to follow from that account. This is one of the main strategies I will employ in critically analysing the six different accounts of self-determination that I will be discussing in the chapters that follow.

⁶⁹ Cole (2000), pp. 185-186.

⁷⁰ *Ibid*, p185.

⁷¹ Meilander (2000, p171), makes a similar claim.

I will argue to the conclusion that although democracy does not and cannot logically call for the extension of participatory membership to all those affected or coerced by the decisions of a state, self-determination is compatible with porous boundaries demarcating social membership and citizenship. I use the term 'porous' to highlight the fact that I do not necessarily endorse the wholesale opening of all boundaries and borders; there may well be defensible reasons for why liberal democracies should exercise powers of membership control. But this thesis draws attention to problems with attempting to justify territorial exclusion and exclusion from citizenship from the value of self-determination. The position I advance recognises the importance of clearly demarcated jurisdictional boundaries for facilitating democratic self-determination, but holds that the existence of those borders, and the value and practice of self-determination, which they protect, are compatible with open access to social membership and citizenship.

I begin in Chapter 2 by focusing on a group of authors who put forward a justification for exclusion from social membership and citizenship grounded on a nationalist account of self-determination. The main focus of the chapter is on the liberal nationalist account put forward by Yael Tamir and the identity liberal account put forward by Andrew Tebble. The kernel of both these positions is that national majorities have a right to protect their cultural identity and shared values from being eroded through the presence in society of individuals who do not endorse or participate in the identity or values in question. They argue that the shared identity and values of the host community should provide the criteria for inclusion and exclusion, since these shared features are of crucial importance to the practice of

national self-determination and to the autonomy of individual citizens. The chapter begins by discussing how the relationship between allegedly shared national identity and democracy has recently come to play an increasingly prominent role in justifications for exclusion from social membership and citizenship in a number of liberal democratic states. This trend is most notable in the move towards ‘thickening’ naturalisation criteria by requiring the applicant to illustrate their commitment to the liberal values that are said to be shared by the members of the host community. In my response, I argue against the view that there are in fact a set of values, traits or characteristics which are shared within any national community and which can thus constitute the basis for justified acts of exclusion, and I also put forward reasons for rejecting the ideal of democracy which this view implies.

In this chapter I also discuss briefly Will Kymlicka’s position on immigration restrictions for reasons of protecting ‘societal cultures’. I argue that - as least as far as economically advanced, politically stable and prosperous liberal democracies are concerned - his position on the value of societal culture supports *internal* measures designed to ensure socio-political integration, rather than restrictions at the border.

In Chapter 3 I look at another set of nationalist justifications for exclusion from social membership put forward by the liberal-communitarians Michael Walzer and David Miller. Walzer puts forward one of the most robust set of arguments for both an inherent and normatively legitimate connection between self-determination and the right of a community to determine its own membership boundaries. He argues that exclusion is part of the very *meaning* of self-determination, and that depriving communities of their right to set

restrictive membership criteria would also deprive them of their capacity to govern themselves in accordance with their shared understandings and historic character. As such, Walzer argues that the terms of admission to social membership should be set unilaterally by the existing members, in the same way that the current members of clubs are entitled to decide upon the admission of new members. In this chapter I distinguish two different strands of argument in the case that Walzer puts forward for the right of communities to exclude outsiders from social membership; a communitarian and a democratic argument. I give reasons for rejecting both. The communitarian argument for closure from the value of diversity is belied by the evidence of regional diversity within federalist forms of political organisation like the United States. The argument for closure that appeals directly to the value of democracy and popular sovereignty succumbs to a logical paradox; which is that democracy cannot in itself tell us who constitutes the *demos* with subsequent legitimate powers to exclude.

David Miller's account of the territorial rights of nation-states and the way in which they ground their right to self-determination and control over membership avoids some of the problems I discuss in relation to Tamir, Tebble and Walzer. However, his position faces difficulties of its own. I begin my critique by pointing out some problems with Miller's justification for territorial rights on the basis of historical occupancy and cultural transformation; I argue that boundary disputes often arise precisely because of controversy concerning legitimate historical ownership. I then argue against Miller's link between territorial rights and exclusion on the grounds of equality. I explain how Miller might respond to this objection by appealing to his account of national responsibility, and I go on to give four arguments for rejecting it. Lastly, I discuss the claim that concerns about global

inequality are more relevant to the issue of the just distribution of wealth and resources rather than border controls or citizenship policy, and that nation-states can therefore ‘purchase’ the right to exclude by fulfilling their global redistributive obligations. Whilst I give some reasons for being sympathetic towards the claim that, in combating global inequality, redistributive efforts should take priority over campaigning for opening up borders, I nevertheless advance four arguments for doubting that the right to exclude can in fact be purchased in this way. The liberal nationalist, identity liberal and liberal communitarian accounts of self-determination discussed in the first two chapters face serious difficulties in justifying the exclusion of outsiders from social membership or citizenship.

Walzer also maintains that excluding resident aliens from citizenship is unacceptable on liberal-democratic grounds. What this means is that subjection to the law should provide the key criterion for access to citizenship (and therefore implicit in this argument is a rejection of the principle of inclusion to participatory membership on the basis of affectedness).⁷² This is an argument I endorse, and the reasons become clear in my discussion of participatory membership in Chapters 4 and 5, when I address the post-nationalist accounts of self-determination and global democracy put forward by Iris Young and Seyla Benhabib respectively.

Sovereignty, in Walzer and Miller’s view, implies a principle of self-determination as non-interference. In Young’s view, this account of self-determination is normatively problematic and leads to unjustifiable exclusions and domination. She argues instead for a

⁷² Excluding temporary visitors. See the discussion in Chapter 4,

principle of self-determination as non-domination combined with a federalist structure of inter-linked and overlapping democratic jurisdictions, and she claims that this shows how inclusion in self-determining political communities need not necessarily imply exclusion. This understanding of self-determination is designed to show that neither the external regulation of the membership policies of particular communities by global authorities nor the democratic participation of territorial outsiders need necessarily compromise the right of a community to self-determination. *Contra* liberal nationalists and liberal communitarians, Young argues that obligations of justice between agents spring from social, political and economic connections which are not confined within the borders of sovereign states. In contrast to Walzer's argument for subjection to the law as the mode of demarcating a constituency, Young argues that participatory membership should be defined according to the set of individuals whose interests are affected by the decision or policy under consideration. I give a number of arguments for rejecting this position on participatory membership and for maintaining the subject-to-the-law principle for demarcating citizenship. This discussion suggests, with Walzer and Miller, that democratic citizenship should remain territorially bounded and that liberal democracies can legitimately exclude outsiders from participatory membership. My argument here supports a distinction between democratic constituencies and moral constituencies; whilst subjection to the law should in my view be used to demarcate the former, normative criteria like affectedness or coercion may still be valid for demarcating the latter. Unlike social membership and citizenship, which I argue in Chapters 2 and 3 can be open to outsiders without compromising democratic self-determination, in this chapter I argue that the self-determination rights

section 4.4.

of political communities could be undermined if they lack the power to exclude outsiders from participatory membership.

In Chapter 5 I move on to discuss critically the cosmopolitan/discourse theory approach to membership put forward by Seyla Benhabib. According to Benhabib, developments in globalisation, increased migration and the fraying of nation-state sovereignty have resulted in the need for new approaches to political membership that do not rest on nationality or ethno-cultural identification. This much is consistent with my arguments against exclusion from social membership and citizenship in Chapters 2 and 3. However, for Benhabib as for Young, affectedness should be used as the criterion of demarcating participatory membership, i.e. as the criterion that should be used as a jurisdictional rule. The first part of this chapter continues to develop my critique of the attempt to use affectedness as a guide to drawing the boundaries of a democratic community. I then discuss and reject two possible responses to my objections that could be brought out of Benhabib's work.

I go on to suggest that the practice of 'enlarged mentality' (which Benhabib argues should constitute the *sine qua non* of contemporary citizenship practice) risks excluding the perspective of marginalised and/or relatively powerless individuals in society. As such, it may in fact work to silence the perspective of immigrants, even if they are formally included in the *demos*. In the second part of the chapter I consider Benhabib's position on citizenship. Benhabib argues that there is a human right to membership and that this places a moral limit on the power of a community to define its own membership boundaries. At the same time, she considers it unobjectionable that the right to collective self-determination grounds a right on the part of the

host community to set the criteria and conditions to be satisfied for access to citizenship, within certain moral constraints. I argue that this position on naturalisation is difficult to reconcile with her commitment to finding solutions to moral and political problems that are reciprocally acceptable to all parties concerned, and which embody the discourse theory norms of universal respect and egalitarian reciprocity.

In the final chapter, I argue that agonistic democratic theory offers a potentially useful way of thinking through the relationship between self-determination and political membership in light of the preceding discussions. The features of agonistic democratic theory which I discuss and endorse feed into a conception of democratic self-determination which avoids many of the problematic implications for the distribution and demarcation of political membership which I identify with the five other accounts being looked at in this thesis. Whilst agonistic theory avoids the objectionably exclusionary implications of liberal nationalism, identity liberalism and liberal communitarianism, it also resists the kind of exclusions that I argue follow from Benhabib's position on the transparency between subjects in moral reasoning and communication. I focus on the work of Chantal Mouffe and Bonnie Honig. Whilst I am critical of Mouffe's claim that her model of agonistic democracy will be more open and inclusive towards excluded individuals than rationalist or deliberative democratic models, and whilst I also resist her argument that democracy necessarily entails the exclusion of outsiders from social membership and citizenship, I believe that her account of divided subjectivity gestures towards a re-conceptualisation of democratic self-determination as political action taken in concert with strangers. This conceptual shift in turn encourages the opening of jurisdictional boundaries for greater freedom of international movement and ease of

access to social membership and citizenship; which my arguments in Chapters 2 and 3 suggest are normatively attractive goals. I develop this idea further through an analysis of Honig's recent work on the symbolic politics of foreignness, which bolsters my argument for porous borders demarcating social membership and citizenship by providing evidence of the ways in which the legitimacy of democratic regimes are often re-invigorated by the territorial admission and naturalisation of foreigners.

If open borders were to jeopardise the stability of a political association through the inclusion of those who would destroy liberal-democracy, or if free movement would threaten to create the domination of one group over another, then there may be a justifiable right to exclude. But I argue that these kinds of exclusions are not cases of collective self-determination as such, but rather self-defence or self-preservation.⁷³ My overall conclusion is that whilst self-determination does call for a collective right to non-interference - i.e. the exclusion of outsiders from participatory membership (*contra* Young and Benhabib) - it need not and should not encompass the right to exclude outsiders from social membership (*contra* Tamir, Walzer and Miller), and it in fact *mandates* inclusion to citizenship for all those who are subject to the laws of their state of residence. There may be compelling real-world reasons which justify the exclusion of outsiders from the territory of another country or from citizenship status; for example, reasons of administrative stability or public order.⁷⁴ But I suggest that appeals to collective self-determination should not be among those reasons.

⁷³ See Chapter 2, nt. 100 & Chapter 3, nt. 99.

⁷⁴ See Carens (1992) pp. 28-31; the collection of essays in Gibney (ed) (1988) & in Barry and Goodin (eds) (1992).

In the concluding chapter of this thesis, I reflect on the policy implications of my theoretical analysis by discussing two recent documents outlining UK policy on citizenship and immigration: the 2002 White Paper ‘Secure Borders, Safe Haven’⁷⁵ (which I also refer to briefly in the introduction to Chapter 2), and the 2006 Home Office document ‘A Points-Based System: Making Migration Work For Britain’.⁷⁶

⁷⁵ Home Office (2002).

⁷⁶ Home Office (2006).

Chapter 2

Liberal Nationalism, Identity Liberalism and Political Membership

2.1 Introduction

In this chapter, I discuss a liberal nationalist and an identity liberal position on self-determination and political membership, which both support culturally protectionist social membership and citizenship policies. According to the viewpoints under consideration here, the appropriate unit for political self-determination is a group of citizens bound together by a common culture, which is articulated through the idea of a national background. The collective right to self-determination follows from what is said to be the importance of shared culture to the members of the national group. In so far as their common cultural background and national identity facilitates important goals relating to collective self-determination and individual autonomy, there follows in turn a justification for the right of the community to exclude those outsiders who are deemed unable or unwilling to endorse and/or participate in the central tenets of that shared cultural identity. The focus of this chapter is on arguments for the right of liberal democracies to control admission to social membership and citizenship; arguments for the exclusion of outsiders from participatory membership are at most orthogonal to this debate, and will be addressed in detail in Chapters 3, 4 and 5.

‘Culture’ in both the liberal nationalist and identity liberal positions is formulated in non-conservative terms, i.e. it is open to change from

outside influences, it is understood as internally heterogeneous and it is seen as largely constructed through subjective identification; all of which means that membership in the national group is not necessarily closed permanently to outsiders.¹ This is what in part distinguishes liberal nationalism from conservative or illiberal nationalisms.² Nevertheless, according to the liberal nationalist and identity liberal accounts considered in this chapter, admission to social membership and/or citizenship in the liberal-democratic nation-state still requires evidence of some degree of cultural assimilation on the part of prospective members, and is contingent on the approval of the established members.

Broadly speaking, the German government has pursued this kind of approach to citizenship since the 1980s, by offering membership to foreigners on the condition of their assimilation into the German culture, in particular by learning the German language and by identifying with German values and cultural characteristics.³ Recent trends in the immigration and naturalisation policies of a number of other liberal nation-states are also predicated on, or at least seem to confirm a connection between, the importance of shared national identity - and in particular shared values and normative beliefs - and the acquisition or denial of membership. Although both the theoretical and public political discourse of liberal states have within the last few decades undergone a substantive 'cultural turn', embracing special rights, exemptions and dispensations on cultural,

¹ Barbieri (1998), p89.

² Kymlicka (2001a), p259.

³ In 1999, Germany's Alien Law was changed to allow for the transmission of citizenship from resident aliens to their children, through the adoption of the principle of *jus soli*. This is said to reflect a move away from the previously ethno-nationalist conception of German citizenship. See Anil (2005) & Benhabib (2004b), p156.

religious or other identity-based grounds, numerous liberal states – including Britain, the Netherlands and Australia - have recently taken a distinctly assimilative approach to their immigration and citizenship policies.⁴ There is an increasing drive in these states to make the inclusion of immigrants (in terms of their access to both social membership and citizenship) conditional upon their endorsement of the shared values, norms and political principles of their host nation, which are said to be characteristic of the national cultural identity, and which are in turn said to be crucial for the self-determination of the national community.

In Britain, the decision to move ‘beyond multiculturalism’ was announced in the government’s 2002 White Paper ‘Secure Borders, Safe Haven’.⁵ Whilst not wholly abandoning the multicultural strategy of accommodating differences through institutional means of representation for minority groups and accommodation for the expression of minority cultural and religious practices and beliefs in the public sphere, the paper stresses the importance for social cohesion of ensuring that immigrants are loyal to the British national identity and values. According to the White Paper, the fundamental tenets of that identity are “that we respect human rights and freedoms, uphold democratic values, observe laws faithfully and fulfill our duties and obligations”.⁶ In a similar vein, a senior official in the Australian government has recently argued for de-naturalising resident immigrants if they display resistance to core liberal values like individual liberty and democracy.⁷ In 2006, Nicholas Sarkozy

⁴ This turn is discussed in Joppke, (2004); Joppke (2005) & Tebble (2006).

⁵ Home Office (2002). I discuss this document in greater detail in Chapter 7, section 7.2.

⁶ *Ibid*, p34; Joppke (2005), p56.

⁷ Garnaut (2006); cited in Tebble (2006), p474.

(who was at the time the French Interior Minister) claimed that immigrant families should be deported if they failed to respect equal rights for women or to learn French.⁸ In the same year, the Dutch government issued a DVD to prospective citizens showing images of same-sex couples embracing in public and scenes of topless bathing, in order to highlight the kinds of values which migrants need to embrace in order to qualify for full membership.⁹

As these examples indicate, there has been a movement in Western liberal states in recent years to ‘thicken’ the criteria for admission to citizenship by making naturalisation conditional upon an affirmation of the dominant national values of the host society. There are at least two different but interrelated concerns motivating this requirement: either the preservation of a national identity and culture as a way of maintaining unity and ensuing socio-political integration amongst the members of the political community, or a concern with preventing the democratic political system from being dissolved or compromised.¹⁰ The first is a claim about the value of national cultural identity and self-determination, which we will encounter in the liberal nationalist position of Yael Tamir, and the second is a claim about the conditions required for sustaining democratic institutions and procedures, which we will encounter in the identity liberal position put forward by Adam Tebble and Dominique Schnapper. My aim in this chapter is to evaluate whether either of these claims can provide a defensible normative link between the ideal of self-determination and the practice of membership controls in liberal democracies.

⁸ <http://www.interieur.gouv.fr>; cited in Tebble (2006), p474.

⁹ Smith (2006); cited in Tebble (2006), p474.

¹⁰ Rubio-Marin (2000), p63.

I begin my critical analysis in the following section by outlining the cultural account of national identity and self-determination put forward by Yael Tamir. Tamir attempts to create a synthesis of the core features that are of value in liberalism and nationalism, “drawing from liberalism a commitment to personal autonomy and individual rights, and from nationalism an appreciation of the importance of membership in human communities in general, and in national communities in particular”.¹¹ Does Tamir’s cultural account of national self-determination ground a case for justified acts of exclusion? I begin my discussion of Tamir’s work in the following section by outlining the core features of her account of self-determination, paying particular attention to the way in which she distinguishes cultural from political rights and national self-determination from individual self-rule. In drawing attention to this distinction, I will introduce the difference between cultural and democratic self-determination; a difference that will be discussed further in relation to Walzer’s work in the following chapter. In section 2.3, I go on to discuss the way in which Tamir employs national self-determination as a mode of demarcating social membership and citizenship, i.e. the way in which the right of the host community to national self-determination functions to justify the membership boundaries of political communities. As we will see, Tamir believes that the different value commitments and normative beliefs of prospective migrants can constitute the grounds for their exclusion, because in her view permitting unacculturated immigrants to enter the association and become social members and/or citizens could threaten to dissolve the shared cultural conditions required for national self-determination.

¹¹ Tamir (1993), p35.

In section 2.4, I evaluate critically Tamir's position on the relationship between national self-determination and membership controls. I begin by arguing that it seems empirically false to suppose that national groups have a distinct shared set of values or beliefs which set them apart from other groups, and which require protection through immigration restrictions. The internal normative diversity within national groups seems to undermine the case for restrictive membership policies from the value of self-determination; if the existing internal diversity does not threaten national self-determination, then why should the differences that immigrants may bring compromise the self-determination of the host community?

Following on from this objection, I go on to discuss what seems to be a tension between Tamir's own understanding of national identity and her defence of immigration restrictions. Whilst national identity, for Tamir, exists primarily through national consciousness and is essentially a matter of subjective identification, the exclusion of outsiders on the grounds of their value commitments would seem to depend on the identification of objectively shared features of the host community as well as objectively identifiable features of would-be migrants. Whilst Tamir does state that national communities cannot exist through subjective identification alone and that there must also be a 'sufficient' number of objectively identifiable features, we will see that she does not in fact count values or normative commitments as necessarily being amongst those objectively identifiable, shared features; she claims that the unity of national communities is not threatened by internal normative diversity. This makes her defence of immigration restrictions, in order to protect the right to national self-determination, problematic.

I then go on to argue that there is a general tension in Tamir's account between individualism and nationalism, and that she errs too far towards privileging group rights over individual rights in the domain of immigration and membership policy. I argue that the monocultural, corporate conclusion she reaches in the case of immigration stands in tension with the multicultural, individualist premises with which she approaches the topic of nationalism.

Lastly, I question whether immigration controls are either appropriate or necessary for national self-determination in Tamir's sense, firstly by highlighting the option of voluntary segregation and group-based clustering in civil society, and secondly by citing examples that Tamir herself provides of national groups that seem to preserve successfully their cultural distinctiveness despite not being demarcated by either a geographical or political border. What my analysis suggests is that the tension between national self-determination and freedom of movement seems exaggerated within the terms of Tamir's position. She does not show convincingly that national self-determination should encompass the right to exclude outsiders on cultural or value-based grounds, because it is questionable that relinquishing this unilateral right to exclude will jeopardise her ideal of national self-determination.

In this initial discussion I limit my arguments primarily to the issue of whether the value commitments and beliefs of migrants can be used legitimately as the grounds for their exclusion from liberal democracies. National identities are also said to encompass characteristics such as a shared language, common participation in political institutions and a sense of collective history. As we will see, whilst Tamir does at points acknowledge a distinction between

national identity and shared values, she seems to run these two together when she argues that prospective migrants must be committed to the values underlying the national identity of the community which they seek to join, given the threat they might otherwise pose to the right to national self-determination on the part of existing members. Will Kymlicka draws a firmer and more consistent distinction between national identity and shared values, and in section 2.5 I outline briefly and discuss critically this distinction in his work and its implications for membership controls. I argue that Kymlicka's position on the importance of protecting 'societal cultures' does not support a unilateral right on the part of the existing citizens of liberal states to control membership, but instead points to the need for: a) internal integration policies designed to encourage language education and naturalisation, and b) limitations on the *pace* of immigration, so as not to overwhelm the social services required to provide these measures to aid integration.

In the final section of this chapter I consider the identity liberal position on immigration restrictions. The viewpoint here is that immigration might threaten to corrode the democratic system from within, if sufficient measures are not taken to ensure that prospective migrants and prospective citizens are loyal to liberal democratic values. The first argument I put forward in my response is that undemocratic or illiberal activities carried out by immigrants should be dealt with within the internal criminal law process rather than through enforcing border controls or by scrutinising the views and beliefs of prospective migrants, because liberal states should be committed to applying the same principles and procedures to migrants that are applied to birthright citizens. I then put forward a more political critique of assimilative immigration and naturalisation policy, suggesting that it risks creating separatism and political

instability, which are two of the potential political outcomes of high levels of immigration that identity liberals are particularly concerned to combat. The final objection I make concerns the kinds of critical practices that the identity liberal position would seem to encourage. I argue that the identity liberal approach to citizenship sustains the idea that only immigrant communities perpetuate non-liberal or illiberal views and activities, and that this is: a) an unfair and unrealistic representation of both immigrant and host communities, and b) one which overlooks the importance of context in formulating defensible evaluations of socio-cultural practices. A more nuanced and contextually sensitive approach to national identity would be one that emphasises that the members of liberal national groups also commit practices and follow norms which may be problematic from a liberal perspective. I articulate this more nuanced approach through the idea of *reciprocal critique*. My analysis suggests that neither liberal nationalism nor identity liberalism can readily accommodate the need for and critical disposition required by reciprocal critique, which provides a further objection to both positions.

2.2 National Self-Determination

The aim of Tamir's project is to illustrate how the core values of the liberal tradition - "respect for personal autonomy, reflection, and choice"¹² - and the core values of nationalism - "belonging, loyalty, and solidarity"¹³ - are not mutually exclusive but can in fact accommodate and reinforce each other. The idea of liberal nationalism corresponds to what Tamir believes are the two 'most important' features of identity for modern individuals: "the need to

¹² *Ibid*, p6.

live one's life from the inside and the need to be rooted".¹⁴ According to Tamir, membership of a national group is an "important and constitutive element of personal identity",¹⁵ and it is the importance of national membership to individual identity, autonomy and personal prosperity that grounds a right to national self-determination. Tamir's marriage of liberalism and nationalism is informed by a particular view of the self and of the conditions required for the exercise of choice and personal autonomy. The good life, in her view, requires the communal, cultural context that a relatively stable and prosperous national identity provides. As such, the right to national self-determination is a function of the individual's right to autonomy and personal self-determination. She argues that in order for individuals to attain self-determination, i.e. the ability to live an autonomous life and to exercise personal choice, they require the familiarity of a cultural context provided by their national identity, which in turn entails that their national identity must find expression in the public sphere:

(...) by nature, individuals are members of particular human communities. Outside such communities they cannot develop a language and a culture, or set themselves aims. Their lives become meaningless; there is no substance to their reflection, no set of norms and values in light of which they can make choices and become the free, autonomous persons that liberals assume them to be. Being situated, adhering to a particular tradition, and being intimate with a particular language, could therefore be seen as preconditions of personal autonomy (...)¹⁶

¹³ *Ibid.*

¹⁴ *Ibid*, p30.

¹⁵ *Ibid*, p35.

For Tamir, the state represents a particular political apparatus with the power to command obedience and loyalty from the citizen-body, whereas nations are communities whose members share ties of culture, solidarity and subjective identification.¹⁷ What is particularly important to Tamir's account is the distinction between subjective and objective accounts of national identity. According to Tamir, nation-building projects attempt to isolate a set of objective features which validate the existence of the nation in the eyes of the international community. However, all such attempts have, historically, failed, suggesting that no 'scientific' definition of the nation is available: "(...) all attempts to single out a particular set of objective features - be it a common history, collective destiny, language, religion, territory, climate, race, ethnicity - as necessary and sufficient for the definition of a nation have ended in failure".¹⁸ In other words, in Tamir's view nations have no *core* existence outside of the fact of a national consciousness. Following Benedict Anderson's definition of nations as "imaginary communities",¹⁹ Tamir maintains that a subjective national consciousness is the only *necessary* factor for a group to constitute a nation: "the nation exists only when its members consciously conceive themselves as distinct from members of other groups".²⁰ However, she does not consider a purely subjective account sufficient in and of itself to establish the existence of a nation. To qualify as a nation a group must exhibit not only 'self-awareness' but also a "sufficient number of shared, objective characteristics - such as language, history, or territory".²¹ According to Tamir, culture is what provides those features that enable the co-

¹⁶ *Ibid*, p7.

¹⁷ *Ibid*, pp. 58-69.

¹⁸ *Ibid*, p65.

¹⁹ Anderson (1983), p6.

²⁰ Tamir (1993), p8.

²¹ *Ibid*, p66.

members of a nation to identify one another.²² The value of culture is expressed in individualist terms: “When (individuals) are able to identify with their own culture in the political framework, when the political institutions reflect familiar traditions, historical interpretations, and norms of behavior, individuals come to perceive themselves as the creators, or at least the carriers, of a valuable set of beliefs”.²³

The key features of a national identity, according to Tamir, are shared “patterns of behavior, language, norms, myths and symbols that enable mutual recognition”.²⁴ For Tamir, the term ‘nation’ thus encompasses an almost unlimited range of different kinds of ethnic, religious and linguistic communities. The nation is understood as a cultural community, and the right to national self-determination is derived from the right of the existing members to protect, preserve and develop their culture in a public sphere. As such, self-determination is more than just a right on the part of individuals to participate in democratic governance - which is what Tamir calls a ‘political’ account of self-determination. National self-determination is instead a right to *cultural preservation*:

The right to national self-determination ... stakes a cultural rather than a political claim, namely, it is the right to preserve the existence of a nation as a distinct cultural entity. The right differs from the right of individuals to govern their lives and to participate in a free and democratic process ... the right to national self-determination is first and foremost a cultural claim (...)²⁵

²² *Ibid*, p68.

²³ *Ibid*, p72.

²⁴ *Ibid*, p68.

²⁵ *Ibid*, pp. 57-58.

Tamir's cultural understanding of national identity feeds into a distinction between a right to *self-determination* and a right to *self-rule*. Self-determination, on Tamir's account, concerns the right of national groups to maintain their distinct existence and to organise their affairs in keeping with their particular historic way of life; encompassing, as we have seen, their particular norms, myths, symbols and language.²⁶ Self-rule, in contrast, describes individual democratic rights, i.e the right of individuals "to participate in the governing of their lives".²⁷ It is the role, relevance and political status of culture, then, that distinguishes self-determination from self-rule in Tamir's scheme. Self-rule is in principle satisfied regardless of whether the outcome of political decisions reflect the particular culture or interests of those individuals to whom the right of self-rule is ascribed: "At the conclusion of a fair process, individuals may find themselves in a minority position, unable to influence, let alone imprint the political sphere with their culture, preferences and norms of behavior, yet they could hardly claim that their right to self-rule has been violated".²⁸ The realisation of the right to self-determination, on the other hand, requires a certain political *outcome* - namely, the successful expression of the national culture in the public sphere:

(...) the right to national self-determination is not only measured by the ability to participate in determining the cultural nature of the social and political system one belongs to, but also by the results of this process. National self-determination is said to be attained only when certain features, unique to the nation, find expression in the public sphere.²⁹

²⁶ *Ibid*, p69.

²⁷ *Ibid*.

²⁸ *Ibid*, p70.

²⁹ *Ibid*.

As such, Tamir's understanding of national self-determination is not primarily about the availability of equal rights or civil liberties, nor is it primarily concerned with the democratic participation of citizens, but rather with the status and recognition of the national culture in the public sphere. It is "the right of individuals to express their national identity, to protect, preserve, and cultivate the existence of their nation as a distinct entity".³⁰

Since self-determination is not equivalent to self-rule in Tamir's scheme, it follows that the right to national self-determination is not necessarily equivalent to a right to a sovereign state, only a public sphere that reflects the national identity of the majority of the members in a particular territory: "although it cannot be ensured that every nation will have its own state, all nations are entitled to a public sphere in which they constitute the majority".³¹ The right to national self-determination, in Tamir's view, can in principle be satisfied by a number of different political arrangements, such as "federative and confederative arrangements, local autonomies, or the establishment of national institutions".³² Tamir's liberal nationalism does not therefore constitute a justification for a system of sovereign nation-states with mutually exclusive rights to non-interference.³³

Tamir argues that the scope of rights to self-rule and self-determination should be determined functionally, i.e. "that the scope

³⁰ *Ibid*, p72.

³¹ *Ibid*, p150.

³² *Ibid*, p9.

³³ *Ibid*, p151, p165.

should correspond to their purpose”.³⁴ The right to national self-determination, as we have seen, is designed to ensure the expression and preservation of national culture in the public sphere, and for Tamir this is best achieved in a “small, relatively closed and homogenous framework”.³⁵ The principle of self-rule, on the other hand, is designed to ensure that individuals are able to participate in the formulation of the rules and decisions that are likely to have an impact on their interests. This may well require the existence of transnational or supra-national deliberative fora and regional organisations. Tamir suggests that the need for transnational political procedures and organisations is particularly apparent in the case of ecological, economic and military policy.³⁶ The realisation of national self-determination is best facilitated through a system of small, autonomous national communities nestled within a wider regional, federal or consociational framework, with a division of authority between the different levels:

(...) only by replacing the aspiration of an independent state for each nation with more modest solutions such as local autonomies, federative or confederative arrangements, could all nations come to enjoy an equal scheme of national rights. Ensuing the ability of all nations to implement their right to national self-determination would then lead to a world in which traditional nation-states wither away, surrendering their power to make economic, strategic, and ecological decisions to regional organisations and their power to structure cultural policies to local national communities.³⁷

³⁴ *Ibid*, p150.

³⁵ *Ibid*, p151.

³⁶ *Ibid*, pp. 150-151.

³⁷ *Ibid*, p151. As Cole (2000, p113) notes, it is an interesting implication of this passage that Tamir does not consider ‘economic, strategic, and ecological’ decisions to fall under the remit of a national community’s right to self-determination. Other liberal

In Chapter 4, we will see that Iris Young defends a similar federal arrangement for accommodating the right of distinct groups to self-determination without entailing national sovereignty, at least in terms of the ‘Westphalian’ non-interference model³⁸. However, in Young’s view the collective right to self-determination should *not* encompass the right to territorial exclusion. So the question I want to address is: should migration and the terms and rules for admission to social membership and citizenship in liberal democracies fall under the right to national self-determination in Tamir’s sense; i.e. should migration and membership procedures be regulated by national cultural groups as a function of their right to self-determination? It is useful at this point to recall the idea posed by Philip Cole that I discussed in the introductory chapter to this thesis, that:

(...) some matters can rightly be held to lie beyond the scope of the democratic powers of any body of people it could be argued that one of the most important matters that should lie *outside* the scope of the self-determining power of an association is its membership.³⁹

Tamir disagrees, stating that:

(...) liberal democratic principles dictate that, if a majority of its citizens so wishes, a national entity is justified in retaining its national

theorists of nationalism - David Miller for example - consider economic and ecological policies to be importantly related to the ability of a nation to pursue its cultural goals. See Miller (2007), pp. 73-74.

³⁸ The term ‘Westphalian’ refers to the Treaty of Westphalia in 1648, which established many of the key features of the current international state system; Fraser (2005), p11. See Chapter 4, section 4.2 of this thesis.

³⁹ Cole (2000), pp. 185-186.

character. On these grounds a national entity might be seen as entitled to restrict immigration in order to preserve the existence of a viable majority.⁴⁰

The question is, why should the desire on the part of national majorities to preserve their national character take precedence over the desire on the part of prospective migrants to enter the territory and become a member? Tamir's response, as we will see in the following section, appeals to the value of cultural identity.

At this stage, it will be useful to outline a three-part distinction that will help to categorise the different concepts of culture at work in the accounts of self-determination that I discuss in this chapter, and in later chapters. For simplicity, I will refer to these concepts as: A, B and C.

Concept A states that the successful functioning of liberal democracies requires citizens to accept only a very 'thin' political culture. On this account, what needs to be shared amongst the members of a liberal state is a *public* commitment to a set of abstract liberal rights, and a willingness to participate in liberal political institutions. Self-determination and social cohesion, on this account, do not necessarily require or express a shared ethnic, linguistic, religious or cultural background. Whatever 'thick' cultural commitments may be shared by the national majority can be separated from the public political culture. Therefore, according to concept A, liberal states can accommodate the fact that citizens may adhere to a multitude of 'thicker' sub-cultures, so long as they

⁴⁰ Tamir (1993), p160.

participate in the overarching public political culture. Local and particularistic cultural commitments can sit alongside the public political culture; integration and naturalisation does not require that the former be qualified or re-interpreted in any substantive sense, so long as they are compatible with the latter. Appeals to linguistic, historical or ethnic criteria as the basis for membership are therefore illegitimate.

We can understand Tamir's project as a reaction *against* the kind of neutral liberalism described by concept A. Her position accepts the key premise of Concept B, which is that political procedures and principles cannot, in fact, be divorced neatly from the particular historical background and cultural practices of distinct national communities. On this account, 'thin' concepts of social cohesion based only on a commitment to fundamental rights and a willingness to participate in shared institutions occlude the fact that all political regimes and principles inevitably reflect a particular historical, ethnic and cultural background. The abstract overarching rights and principles described by concept A will always be interpreted according to the ethnic and cultural values and historical experiences of the majority national group when they are situated in concrete political contexts. Therefore, the clarity of the distinction between culture and political culture, which concept A turns upon, is called into question. However, whilst citizens are required to participate in and respect the outcome of liberal democratic procedures, they are free to challenge and re-interpret the particularistic norms that are inevitably embodied in those procedures. No *particular* instantiation of cultural norms requires protection, and new citizens can engage with existing citizens in re-iterating the meaning of those norms, and the meaning of membership more generally. I will argue in the following section that Tamir equivocates between endorsing this position on culture,

and wanting to introduce ‘thicker’, more substantive cultural commitments as the pre-requisite for national self-determination, of the type described by concept C.

Concept C holds that the cohesion and self-determination of liberal democracies require a ‘thick’, pre-political national culture, encompassing not only a commitment to fundamental rights and principles, and not only representative of a particular history and culture, but also embodying a commitment to a particular way of life. The self-determination of political communities, on this account, rests upon the fact that citizens actively *endorse* and *participate* in a shared national culture and historical way of life; a commitment that extends beyond their participation in the public political realm. Liberal citizens do not simply participate in liberal procedures, nor do they simply move within a political world that is marked indelibly by history, ethnicity and culture. They are also advocates of a particular liberal way of life. Self-determination, on this account, both presupposes and expresses the thick affective bond that is supplied by a shared national culture. Liberal citizenship is therefore conditional upon endorsing liberal rights and principles *as they are instantiated in this particular community at this particular moment in history*. To challenge the particular concrete instantiation of liberal rights in a particular community amounts to a revocation of membership status.

2.3 Liberal Nationalism and Political Membership

According to Tamir, if liberal democracies were purely voluntary associations, grounded only on individual consent, then membership would likewise be purely voluntary. Liberal democracies would be

under an obligation to welcome as members anyone who voluntarily consented to their particular rules and regulations and who willingly identified with the community. In other words, freedom of movement would fall under the remit of an individual's right to exercise self-rule:

If liberal states are seen as based on a covenant between free individuals who have contracted among themselves to create a political framework meant to defend their rights and interests, it would seem reasonable to assume that membership will be granted to all those who actively consent to share in this covenant. Preference would then be given to those who are most committed to the agreed upon principles and ends, and who are best qualified to further the aims of the association. A liberal state resting on these assumptions would grant citizenship only to informed adults who actively request it, thereby expressing their willingness and consent.⁴¹

However, she notes that although this ideal of membership-through-voluntary-consent fits with the principled notion that liberal communities are voluntary associations, it is belied by the practice of attributing membership through birthright. Tamir argues that the dominant practice of awarding citizenship automatically through birthright in liberal democracies can only be explained with reference to the 'hidden' importance those associations attribute to national identity. The vast majority of individuals acquire their citizenship-status through the accident of the circumstances of their birth. All liberal democracies attribute citizenship primarily - though not exclusively - through *jus soli* or *jus sanguinis* (or some combination of the two). The former principle bestows citizenship on all those

⁴¹ *Ibid*, p125.

children born within the territory of the state, whilst the latter principle bestows citizenship on all those children born to citizen-parents. According to Tamir, the prevalence of these practices can only be explained by reference to the “national values hidden in the liberal agenda”.⁴² In other words, liberal associations purport to be grounded on voluntary consent, when in actual fact they more closely resemble “ongoing and relatively closed communities whose members share a common fate”.⁴³ In Tamir’s view, this is because they are in fact communities that are based on the value of shared national culture, and their membership policies are (rightfully in her view) predicated on the importance of preserving that culture: “the terms of membership set by the liberal state thus reinforce the view of the state as a distinct historical community rather than a voluntary association”.⁴⁴ What this means is that if the existing citizens do not wish to extend membership to outsiders on the grounds of the importance of preserving their shared cultural identity, then it is irrelevant whether or not the outsider wishes to join the association. The desire on the part of prospective migrants to - say - better their life prospects, seek out a higher income or pursue employment opportunities by immigrating is trumped by the desire on the part of the existing members to bar them from entering, if they regard such exclusion as necessary to protect and preserve their distinct national culture. Quoting Walzer, she writes:

Assuming that individuals have a right to preserve the uniqueness of their communal life, it would make sense to place some restrictions on membership and claim that we, who already belong, should do the choosing “in accordance with our own understanding of what membership means in our community and of

⁴² *Ibid*, p117.

⁴³ *Ibid*.

⁴⁴ *Ibid*, p124.

what sort of a community we want to have.⁴⁵

Tamir recognises that there is a tension between her understanding of national self-determination and liberalism's commitment to universal individual rights when we look at the issue of immigration restrictions and border controls, and she maintains that the "gap between the ideal of free immigration and the ideal of national self-determination"⁴⁶ cannot be bridged:

Liberal nationalism is committed to the liberal ideal of freedom of movement as well as to the right of national communities to preserve their distinctiveness. But attempts to accommodate both these ideals within a consociational setup are extremely problematic, as free immigration might threaten the national character of each segment.⁴⁷

Tamir states that "Since liberalism cannot provide a theory of demarcation, it has adopted for this purpose the national ideal of self-determination".⁴⁸ What I understand her to mean by this statement is that liberalism cannot in and of itself justify the drawing of *any* boundaries between members and non-members; liberal theory's universal commitment to individual freedom and equality mandates open borders and unfettered freedom of movement. Thus, it is national self-determination that provides the relevant justification of and criteria for drawing exclusionary boundaries between members and non-members. Tamir therefore confirms the presence in her discussion of membership of the apparent tension at the heart of

⁴⁵ *Ibid*, p127, quoting Walzer (1983), p23.

⁴⁶ *Ibid*, p159.

⁴⁷ *Ibid*, p158.

⁴⁸ *Ibid*, p121.

liberal-democratic communities discussed in the introductory chapter; namely, between the value of collective self-determination and the value of individual freedom and equality.

Given her cultural understanding of national self-determination, it is unsurprising that Tamir explicitly endorses cultural assimilation as a condition of acquiring membership: “Prospective citizens must be able and willing to be members of this particular historical community, its past, its future, its forms of life and institutions”.⁴⁹ Since, for Tamir, the unity of liberal nations rests not only on a consensus over certain values essential to its functioning “but also on a distinct cultural foundation”,⁵⁰ she argues that nations have a right to impose restrictions on membership in order to preserve their cultural homogeneity: “a state that views itself as a community is justified in offering citizenship only to those committed to respect its communal values, collective history, and shared aspirations for a prosperous future”.⁵¹ In addition to a willingness to share in the national culture and identity of the host community and to respect its communal values, Tamir stipulates “general civic competence”⁵² as a legitimate criterion for exclusion, by which she means “the readiness and the ability to communicate, argue and discuss matters with fellow citizens, and to form judgements on the basis of this dialogue”.⁵³

To summarise briefly: we have seen that Tamir advances a liberal individualist account of the value of national identity. For Tamir, individual autonomy and rational choice rests on the existence of a

⁴⁹ *Ibid*, p129.

⁵⁰ *Ibid*, p163.

⁵¹ *Ibid*, p129.

⁵² *Ibid*.

cultural framework that makes the options available to us intelligible.⁵⁴ The exclusion of prospective migrants unwilling or unable to endorse the national culture of the host community - including, as we have seen, its shared values and normative commitments - is therefore justified as a way of protecting the interest in national self-determination - and in turn the autonomy of - the individual members of that culture. This account provides one possible way of justifying in normative terms the kinds of culturally assimilative immigration and naturalisation policies that have recently become more prevalent in a number of liberal-democracies. In the following section, I develop a critical analysis of Tamir's position on immigration which leads to the conclusion that the tension she outlines between open access to social membership and/or citizenship and national self-determination may not be as intractable as she suggests.

2.4 Objections to Tamir's Cultural Exclusions

The first objection I want to raise is that Tamir's defence of membership controls from the importance of shared identity to national self-determination seems to rest on a conception of national identities that denies implausibly their internal heterogeneity. The idea that national cultural groups are unanimously united in their normative commitments, values, beliefs, patterns of behaviour or aspirations, or that they have a unique shared character that we can single out and identify, lacks empirical credibility. To return to one of the concrete examples mentioned in the introduction to this chapter, the British National Party is composed of members of a liberal national group, and yet on any plausible account they cannot be said

⁵³ *Ibid.*

to uphold the core liberal values of the British national culture as characterised in the White Paper ‘Secure Borders, Safe Haven’. Nor, it seems, would Dutch Catholics be able to assent in good faith to the kinds of values motivating the scenes of public display of homosexuality featured in the DVD shown to prospective citizens in Holland.⁵⁵ As Andrew Vincent argues in his critique of Tamir:

The problem here is how we recognize the national identity and culture of Britain, Canada, Australia, Germany, America or Israel? Is there a central public culture or distinctive set of values acknowledged by all the citizens? Taking Britain alone, there are so many cross-cutting differences of class, age, ethnicity, belief-systems and gender that such a judgement seems simply frivolous.⁵⁶

Arash Abizadeh makes the stronger, seemingly ontological claim that cultures are *necessarily* characterised by internal diversity:

Any attempt to specify the boundaries of a “shared” culture faces the insurmountable problem that further difference can always be found within the boundaries that were supposed to mark off difference, such that any cultural “entity” so specified will *inevitably* appear to the analyst to be a hybrid.⁵⁷

What this suggests is that any attempt to isolate the core shared values, beliefs or characteristics of a given nation is likely to be characterised by interminable disagreement amongst the members of that nation concerning what those values, beliefs or characteristics

⁵⁴ *Ibid*, p84

⁵⁵ The example of Dutch Catholics is taken from Fekete (2006), p4.

⁵⁶ Vincent (1997), p291. See also Parekh (1999), pp. 311-313.

are. The internal diversity within national groups undermines in turn the claim that they are entitled to restrict immigration to preserve their unique culture and distinctiveness. Since national cultures are not it seems repositories for sets of values or characteristics both specific to and shared amongst all the members of the group, a right to national self-determination cannot in and of itself ground a right to exclude on the basis of the values or characteristics held by the prospective migrant. More broadly, we can say that if there is no stable boundary demarcating the identity of a national group then the case for an immigration policy designed to police that boundary becomes far less defensible.⁵⁸

The second criticism I want to make follows on from the first, but is concerned less with empirical and ontological claims regarding the composition of national cultural groups than with the internal structure of Tamir's argument. There is a tension running throughout *Liberal Nationalism* between, on the one hand, recognising along with critics like Vincent and Abizadeh that national cultures are characterised by internal diversity and, on the other hand, defending membership practices designed to preserve one particular interpretation of the core values and beliefs of a national culture. For example, Tamir cites the US during the McCarthy years as an example of a community in which membership is predicated on shared values: "When membership is based on an overlapping consensus of shared values, then those outside the consensus can be marginalised, and their membership questioned to the point of turning them into outcasts, as was the fate of communists in the United States".⁵⁹ However, this example is not the rule for Tamir. She goes

⁵⁷ Abizadeh (2002), p502.

⁵⁸ Bader (1995), p218.

⁵⁹ Tamir (1993), p90.

on to state that “(...) in a society where social cohesion is based on national, cultural, and historical criteria, holding nonconformist views does not necessarily lead to excommunication”.⁶⁰ So we can see that Tamir does not think that communities united through “national, cultural and historical criteria” are necessarily united by a consensus on shared values or beliefs. This is a distinction we will encounter again in the following section, in the work of Will Kymlicka. But this distinction between national communities on the one hand and communities united by shared values or beliefs on the other seems to contradict her claim that national communities are justified in withholding membership status to outsiders using the shared values or beliefs of the existing members as the criteria of exclusion. It seems inconsistent to maintain that national self-determination justifies the exclusion of outsiders on the grounds of their value commitments, since we are told that national groups cannot necessarily be identified with any particular set of shared values, norms or beliefs.

In response to this objection, it could be argued that whilst there are no values, beliefs or other properties or characteristics that are shared by all the members of a national culture, there are some values or beliefs which are *not* held by *any* of the members of the culture, and it is the possession of those sorts of values or beliefs on the part of prospective migrants or prospective citizens that can justifiably constitute the grounds for their exclusion as a function of the right of the members of the host community to national self-determination. So the claim would be that whilst there are no values that must necessarily be held in order to identify with and be accepted as a member, there are certain values that are still wholly incompatible with membership in *this* particular community. For example, when

⁶⁰ *Ibid.*

the Dutch government issued a DVD showing same-sex couples embracing one another in public to prospective citizens, we could suppose that the idea behind this was not that the prospective citizen must necessarily approve of or value homosexuality, or even value a public sphere in which displays of homosexual attraction are tolerated, but that they must at the very least *not* desire the existence of a public sphere where expressions of homosexual attraction are legislated against. This would be a requirement of *compatibility* in value commitments and the interpretation of social practices that is weaker and demands less congruence amongst citizens than the requirement of *unanimous consensus*. Following Abizadeh, compatibility here could mean that “each actor’s interpretation of a particular practice, and the individual actor’s corresponding actions, be such that they can persist in the face of the actions of other individuals, who may or may not share the same interpretations”.⁶¹ Could Tamir rescue her case for restrictive immigration policies by retreating to this weaker understanding of congruence, and argue that exclusion is justified in cases where the values of prospective migrants are incompatible with the values of the host community?

The problem with this response is that it does not comport well with Tamir’s endorsement of what she calls ‘pluralistic nationalism’. She writes that “Contrary to widespread perceptions, national communities might, in some respects, be more open and pluralistic than communities in which social bonds rely on a set of shared values”.⁶² In fact, she goes further than this, and argues that “The national bond is not broken even in cases of *extreme* normative disagreements. *Since the roots of unity in national communities are outside the normative sphere, they can accommodate normative*

⁶¹ Abizadeh (2002), p500.

diversity, and in this sense be more pluralistic than groups held together by shared values”.⁶³ This quotation implies that Tamir cannot in consistency make the riposte considered above. It would seem reasonable to describe incompatible value commitments as “extreme normative disagreements”, and Tamir tells us that national communities are able to accommodate such disagreements without the “national bond” being broken. Presumably, then, the presence of extreme normative disagreements or incompatibility in value commitments or beliefs amongst the members of the national community need not threaten the exercise of the right to national self-determination. In which case, extreme normative disagreements cannot it seems constitute the link between the right to national self-determination and the justifiable exclusion of outsiders. Tamir would seem to be unable to justify *any* normative considerations being employed as criteria for exclusion as a function of the right to national self-determination, since she claims that the roots of unity in national communities do not have anything to do with unity in normative commitments.

I now want to make a broader criticism concerning Tamir’s subjectivist understanding of national culture and its relation to her defence of immigration restrictions. According to Philip Cole, Tamir’s liberal nationalism strives to present national culture as having “historical depth and authenticity” so as to conceal “the way in which it is undergoing constant reinvention, relying on fictions and forgettings, the way in which it is the product of manipulation and exclusion”.⁶⁴ But in actual fact, she is frank about the artificiality and contingency of national culture. She recognises that - given the

⁶² Tamir (1993), p90.

⁶³ *Ibid* (italics added).

⁶⁴ Cole (2000), p112.

primacy of subjective, mutual recognition in her account of national identities - it is perfectly coherent to suppose that national identities can change or wither away depending on the nature of the feelings shared by the members, thus belying the thought that national cultures necessarily possess historical depth: “(...) feelings can of course change and bring about the destruction of nations or result in the emergence of new ones. Nations exist only as long as their members share a feeling of communal membership (...)”.⁶⁵ Tamir also recognises that national identities rest on falsely homogenising the host community, and that this does involve fictions, forgettings, manipulation and exclusion: “Drawing the boundaries of a nation involves a conscious and deliberate effort to lessen the importance of objective differences within the group while reinforcing the group’s uniqueness vis-à-vis outsiders”.⁶⁶ She concedes that there is no such thing as a pristine or wholly homogenous cultural group: “the illusion that we can rely on the notion of a national character in order to set the borders of national groups, is essential to the understanding of modern nationality”.⁶⁷ Again, we are told that national groups rely primarily on subjective identification rather than objectively shared properties:

Modern nations are too large to allow all their members to encounter each other personally. Recognition of fellow members, the drawing of boundaries between members and nonmembers, thus becomes a product of human imagination, contingent on the belief that there are similarities among members.⁶⁸

There is, however, an unacknowledged tension here between Tamir’s

⁶⁵ Tamir (1993), p66.

⁶⁶ *Ibid.*

⁶⁷ *Ibid*, p67.

recognition, on the one hand, of the fluidity, contingency and artificiality of national cultures and their internal diversity, and, on the other hand, the rigid restrictions on membership that she believes may be justified on the grounds of protecting and preserving the shared values and identity contained within national cultures. If cultures are in a process of constant change and if they are characterised by such internal diversity and so many objective differences amongst the members that it requires a “conscious and deliberate effort” to lessen those differences in order to preserve a feeling of national unity, then it seems disingenuous to suggest that the differences that immigrants might bring to the national composition could seriously threaten the ability of the host community to exercise its right to national self-determination.⁶⁹ If national cultures are characterised by internal diversity amongst the existing members, and if this internal diversity does not compromise the ability of the existing individual members to enjoy their right to national self-determination, then it does not seem valid to suppose that the introduction of further diversity through immigration will necessarily threaten the exercise of national self-determination.⁷⁰

A further problem with Tamir’s approach is that she proceeds from individualist, multicultural premises to support a corporate, monocultural conclusion, and the conclusion seems to stand in

⁶⁸ *Ibid*, p68.

⁶⁹ Seglow (2005, p. 321-322) puts forward a similar criticism in relation to Walzer’s defense of immigration restrictions on the grounds of preserving cultural distinctiveness.

⁷⁰ There may, however, be a need to limit the *pace* of immigration, so as not to overwhelm the receiving country. However, this does not amount to a general justification to control membership on the grounds of self-determination. This is a point I discuss further, in relation to Kymlicka’s position on immigration and societal culture, in the following section.

tension with the premises in a way that undermines her argument for membership controls. Most liberal democracies today are multicultural in the descriptive sense of being characterised by the co-existence of numerous cultural groups. Within the terms of Tamir's individualist premises, this is presumably something to be celebrated because of the greater number of cultural options it makes available to individuals, thereby increasing their capacity to exercise their autonomy through free choice (hence, the individualist, multicultural premises). This presumption seems borne out by the following statement: "It is important to note that individuals will be unable to exercise their right to make cultural choices unless they live in a culturally plural environment".⁷¹ Indeed, she goes as far as to state that even the preservation of nonliberal cultures can be justified on individualist terms: "many individuals find the feelings of closeness, solidarity, and assurance offered by authoritarian cultures very attractive. Hence, support for the plurality of cultures is not synonymous with an attempt to eradicate all nonliberal cultural options".⁷² Yet to argue that immigration should be restricted in order to preserve a national culture is to place greater importance on the preservation of one group identity than on the interest that individuals may have in the increased number of cultural options brought about by immigration. Tamir may be correct that a rich cultural background is an important pre-requisite for exercising free choice and for leading an autonomous life, but this falls short of establishing that individuals require the cultural context provided by any *particular* national identity.⁷³ It seems quite plausible to suppose that, for some individuals, a cultural context that was the hybrid product of cultural inter-mingling through immigration may serve to provide them with a

⁷¹ Tamir (1993), p30.

⁷² *Ibid*, p31.

⁷³ Cole (2000, p112) makes a similar point, referring to Patten (1999), p6.

greater opportunity to act freely and autonomously. Likewise, a context in which an individual was exposed to many different cultures could provide them with more options to choose from, thus increasing their capacity for autonomy⁷⁴ - and as we can see from the quotation above, this is a point Tamir herself concedes. But since most liberal democratic states today are multicultural in the descriptive sense, to argue for cultural preservation through immigration restrictions in fact means that only one cultural group in any given state - presumably, the one with the greatest numbers, political power, and economic resources - gets to stamp its identity on the public sphere. Hence she reaches a corporate, monocultural conclusion that seems to stand in tension with the premises of her overall argument. Tamir recognises the problem of minorities within regions dominated by an alien national culture, and she is frank about the inevitable costs they face in terms of political and social marginalisation:

Membership in this (liberal national) entity will be more accessible to certain individuals, capable of identifying with the political entity as their own, than to others. Consequently, even if governing institutions respect a wide range of rights and liberties and distribute goods and official positions fairly, members of minority groups will unavoidably feel alienated to some extent. Alienation rather than a deprivation of rights is to be acknowledged as the main problem affecting members of national minorities.⁷⁵

It seems that liberal nationalism is inherently characterised by a tense balancing act between the two core sets of values that it attempts to marry. The more it emphasises the value to the individual of national identity, the less value it can invest in nationalism *tout court*, whilst

⁷⁴ Wilcox (2004), p568.

the more value it invests in nationalism *tout court*, the less value it can invest in individualism. In my view Tamir fails to balance these commitments in a persuasive manner. There is a general tension in her account between valuing individual freedom and self-rule, on the one hand, and valuing communal identity and national self-determination, on the other. This tension is particularly apparent in her reflections on migration and membership - a point she concedes, as we saw in the previous section, when she acknowledges a contradiction in her position between valuing national self-determination and valuing freedom of movement. Tamir writes that: "... individuals are the best judges of what cultural environment is most suited to their needs: If in their exercise of cultural choices individuals do not try to hinder others from exercising theirs, there are no grounds for preventing them from pursuing their life-plans as they see fit".⁷⁶ If we start from the perspective of the prospective migrant rather than from the perspective of the members of the host community, and if we apply the previous quoted statement to the question of immigration and national self-determination, we have the claim that individuals should be permitted to migrate to whatever cultural environment they so choose, as long as in doing so they do not compromise the ability of the existing members to belong to a self-determining national culture, thereby hindering the ability of the existing members to exercise cultural choices. The arguments I have presented above suggest that Tamir has not shown convincingly that the value commitments and beliefs that migrants bring should be considered a valid reason for their exclusion on the grounds of national self-determination. Indeed, if Tamir were to take seriously her claim that "individuals are the best judges of what cultural environment is most suited to their needs" then she would presumably be led away from endorsing political, national-level restrictions on

⁷⁵ Tamir (1993), p163.

migration in order to preserve cultural distinctiveness towards simply relying on the cultural preferences of individuals to lead to informal, voluntary segregation and group-based clustering at a more local level.⁷⁷

Following on from this last point, we can ask Tamir why restricting immigration is necessary to preserve cultural distinctiveness at all. Her claim that immigration controls are justified in order to preserve national cultures seems to be contradicted by the examples she herself provides of national groups that preserve their unique culture despite not being demarcated by geographical and/or political borders:

Cultural uniqueness is preserved in Quebec, in Belgium, and in many other places, without an actual geographical border. Scattered peoples like the Jews or the Armenians, and migrant groups such as Hispanics in Southern California, Cubans in Miami, Algerians in France, and Pakistanis in England, and religious sects like the Mormons in Utah, the Amish in Pennsylvania, or the Ultra-Orthodox Jewish community in Jerusalem, also manage to preserve their identities without tangible boundaries.⁷⁸

She goes on to state that the boundaries between different national communities are commonly ‘invisible’ and are enforced not through political measures but through erecting “ideological, religious, linguistic, and mainly psychological barriers between members and

⁷⁶ *Ibid*, p31.

⁷⁷ Chang (2007) discusses the option of voluntary segregation in relation to Walzer’s position on membership.

⁷⁸ Tamir (1993), p166.

nonmembers”.⁷⁹ But if that is the case, then it seems puzzling that Tamir is prepared to endorse the idea that national cultures are entitled to political measures like immigration restrictions to preserve their uniqueness, since the whole thrust of what she is saying here seems to be that political measures like immigration restrictions are not strictly necessary for national self-determination. Given the evidence of national groups who do not require immigration restrictions to preserve their uniqueness, and given the option and likelihood of local, voluntary cultural segregation and clustering, it would seem as if the tension that Tamir outlines between national self-determination and freedom of movement is at the very least exaggerated within the terms of her own theory. The examples she provides above and the arguments I have put forward in this section seem to mitigate the concern that relinquishing the right of communities to exclude outsiders through immigration restrictions will compromise the ability of the existing members to belong to a self-determining national community.

In the objections put forward in this section I hope to have cast doubt on the idea that Tamir’s understanding of national self-determination grounds a right to exclude outsiders on the basis of their value commitments and beliefs. But what of other allegedly core, objective features of national identity, such as a shared language, or common participation in shared political and social institutions? In the following section I outline briefly and discuss critically Will Kymlicka’s argument for restricting immigration in order to protect these features of national identity - which are encompassed under the term ‘societal culture’.

⁷⁹ *Ibid.*

2.5 Kymlicka on Societal Culture and Immigration

Kymlicka draws a distinction between shared values and cultural identity - a distinction that we have encountered in relation to Tamir, but which, as I have argued above, she seems to run together when she defends immigration restrictions to protect the shared national identity of the host community. Kymlicka writes that: “Social unity cannot be based on shared beliefs ... What matters is not shared values, but a *shared identity* ... What holds Americans together, despite their disagreements over the nature of the good life, is the fact that they share an identity as Americans”.⁸⁰ What needs to be shared amongst citizens and protected through immigration restrictions, for Kymlicka, is not a set of shared values but a societal culture, which encompasses “a common language and social institutions, rather than common religious beliefs, family customs or personal lifestyles”⁸¹ and which is “territorially-concentrated”.⁸² As with Tamir, the value of cultural membership for Kymlicka consists in enabling individuals to make autonomous choices amongst a range of intelligible options. He argues that people’s life options are culturally embedded, so that the dissolution of their cultural structure could prevent an individual from pursuing a meaningful and autonomous life.⁸³

Is the self-determination argument for exclusion any more defensible when we make explicit in this way a distinction between shared values and societal cultural identity, and stress that it is the latter that immigration restrictions are designed to protect? Kymlicka argues

⁸⁰ Kymlicka (1996), p131. Miller (2007, p224) puts forward a similar claim.

⁸¹ Kymlicka (2001c), p18.

⁸² Kymlicka (2001b), p75.

that without the right to exclude outsiders from social membership, liberal nation-states could be faced by an influx of immigrants who are so culturally different that - regardless of their values or beliefs - their presence could prove socially disruptive and could compromise the integrity of the societal culture of the existing members. He writes that “Open borders would ... make it more likely that people’s own national community would be overrun by settlers from other cultures, and that they would be unable to ensure their survival as a distinct national culture”.⁸⁴ The idea then is that their control over social membership helps to preserve the shared language and common participation in the social and political institutions that underly the societal culture, and therefore the autonomy of the existing members of the political community.

However, it seems to me that Kymlicka’s arguments for the importance of societal culture to autonomy do not in themselves support a general right of existing citizens to control membership, if we are thinking about economically advanced, politically stable and comparatively prosperous liberal states, as opposed to numerically, economically and politically vulnerable national minorities. So long as there are internal measures available to ensure the preservation of “a shared language which is used in a wide range of societal institutions, in both public and private life”,⁸⁵ it seems that border restrictions are unnecessary for the preservation of societal culture; something akin to culturally protectionist overkill. Kymlicka himself has shown convincingly that the uniquely high levels of immigration into Canada and the United States (the highest and second highest per

⁸³ Kymlicka (1995), p83.

⁸⁴ Kymlicka (2001b), p215.

⁸⁵ Kymlicka (2001c), p18.

capita rates of immigration in the world)⁸⁶ are compatible with comparatively successful societal integration and cohesion because of the way in which migrants are treated once they are territorially present. In Kymlicka's own analysis, the socio-political integration of resident migrants is achieved mainly because "public policies support large-scale immigration, provide newcomers with the rights needed to participate in the larger society, and endorse a more "multicultural" conception of citizenship that seeks to accommodate rather than suppress immigrant ethnic identities".⁸⁷ In the Canadian case, Kymlicka highlights the importance of "publicly funded language training classes ... as well as citizenship promotion campaigns".⁸⁸ Encouraging the naturalisation of resident migrants is a particularly significant factor in facilitating their societal integration:

When immigrants gain the psychological and legal security that comes with citizenship, they are more likely to put down roots, to contribute to local community initiatives, to care about how well their children are integrating, to invest in the linguistic skills and social capital needed to prosper, and more generally to develop stronger feelings of Canadian identity and loyalty.⁸⁹

This evidence leads Kymlicka to the conclusion that "(...) properly managed - immigration can be a benefit and a resource to the country rather than a threat to it".⁹⁰ But then this in turn supports the conclusion that what really matters for the preservation of societal culture and for socio-political integration in the face of high levels of immigration is not so much the right to exclude immigrants at the

⁸⁶ Abizadeh (2006), p4.

⁸⁷ Kymlicka and Banting (2006), p281.

⁸⁸ Kymlicka (2004), p197.

⁸⁹ *Ibid*, p199.

border.⁹¹ Instead, this evidence points to the need for the proper internal management of and response to immigrant communities *once they are here*, in particular through providing language training and encouraging naturalisation.⁹² Therefore, as far as membership controls go, I think that Kymlicka's argument concerning the importance of societal culture supports at most limiting the *pace* of immigration, so as not to overwhelm the internal social services required to provide these sorts of measures that help integration; they do not it seems support a unilateral right to shape membership on the part of existing members.⁹³

But this conclusion may be too quick. Is it really the case that we can successfully encourage immigrants to integrate, naturalise and to participate in liberal-democratic institutions without first ensuring that they are loyal to some recognisable interpretation of liberal-democratic values? In other words, how persuasive is Kymlicka's claim that participation in a shared liberal democratic political culture and identity need not be preceded by and grounded upon an endorsement of liberal democratic values or beliefs? In the following section, I discuss critically the identity liberal position on immigration, which claims that in the absence of measures being taken to ensure that immigrants are loyal to the common values and beliefs which are said to underlie liberal-democratic institutions *prior* to their acquisition of citizenship, those institutions are at risk of being dissolved 'from the inside'. The concern to be addressed here is

⁹⁰ Kymlicka and Banting (2006), p281.

⁹¹ Abizadeh (2006), p4.

⁹² The British Islamic advocacy group FAIR has argued that whilst the majority of asylum seekers and migrants coming to Britain are keen to undergo language training, there is insufficient governmental funding, resulting in a lack of course places available in educational institutions. FAIR (2002), p2.

that following Kymlicka's advice and providing "newcomers with the rights needed to participate in the larger society" whilst endorsing a "multicultural" conception of citizenship *without* first making sure that those newcomers are loyal to liberal democratic values could result in them using those rights to corrupt or destroy liberal democracy itself. Having outlined this position, I argue that it too has difficulty in sustaining a normative link between collective self-determination and control over social membership and citizenship.

2.6 Identity Liberalism and Democratic Exclusion

The aspect of identity liberalism I am interested in exploring here concerns its emphasis on the importance of protecting democracy, rather than preserving the distinctiveness of national cultures as an end in itself. Although the political measures they endorse in response to immigration are the same as Tamir - namely, the exclusion of outsiders using the shared values and cultural identity of the host community as the relevant criteria - identity liberals are more concerned with protecting what Tamir characterises as the right of the existing members to exercise self-rule rather than collective rights to national self-determination. In contrast to Tamir's acceptance of the value to individuals of nonliberal forms of life, identity liberalism privileges the liberal way of life above all others and regards nonliberal cultures as a threat to hard-won advances in terms of the protection of personal autonomy and individual rights.

According to Adam Tebble, identity liberalism denotes a "perspective

⁹³ Sager (2008), pp. 75-76.

that employs a progressive identity-based normative discourse typically considered to be the preserve of the multicultural left to defend a right-wing politics of assimilation".⁹⁴ What Tebble identifies as distinctive about this position is that it supports demands for the assimilation of immigrants into the dominant national culture and for tighter immigration controls not through conventional right-wing discourses of racial or ethnic purity or cultural superiority, but by appropriating the normative logic and ethical premises of multiculturalism itself. The kernel of the identity liberal's position is that national majorities have a right to protect their culture and political values from being eroded through the presence in society of groups who do not endorse the national values in question. If, as multiculturalists like Charles Taylor⁹⁵ and Bhikhu Parekh⁹⁶ maintain, our cultural identity is a significant source of our well-being, self-esteem or our capacity for autonomy, it follows that the liberal national culture should be protected from being swamped by those who reject its underlying values. Such a right comes into play in cases where non-liberal groups develop the degree of political voice and organisation within their host society for them to represent a genuine threat to the preservation of the values which support the socio-political institutions of the national majority. This right, according to Tebble, justifies the emphasis which is increasingly being placed on the need for immigrants to accept and endorse the public values of their host nation as a condition of their naturalisation. What makes this a recognisably liberal view is that the protection of the national culture is linked to the stability and permanence of liberal democratic institutions and the space for pluralism that they provide:

Identity liberals contend that the state must not

⁹⁴ Tebble (2006), p463.

⁹⁵ Taylor (1992).

⁹⁶ Parekh (2006).

only pursue assimilationism internally but must adopt policies of exclusion and, *in extremis*, repatriation with respect to communities whose values are deemed incompatible with those of the liberal national culture (...) In order to combat the destruction of cultural permissiveness, identity liberals thus concede that cultural selection with regard to immigration and assimilation are both necessary and desirable (...) ⁹⁷

Here, the question to be addressed is whether abandoning the requirement of assimilation to a set of shared cultural values as a condition of membership will result in the erosion or corruption of the democratic system from within. This is still a question concerning the relationship between self-determination and political membership, because it is a question of whether relinquishing the right of communities to exclude outsiders on the grounds of their value commitments will result in compromising the right of the existing members to be a part of a stable democratic system. If a convincing case can be made for a positive answer to this question, then assimilation, de-naturalisation, deportation or exclusion at the border may be justified in order to prevent the disintegration of the liberal democratic culture which is required for the existing members to exercise their right to collective self-determination. Rubio-Marín describes the sort of concern expressed by identity liberals when she writes:

(...) the objection would be that letting every kind of resident have a political voice would endanger a democratic system by allowing political power to be used to corrupt the very democratic structure from inside ... ensuring that immigrants will remain loyal to the fundamental values ... of the state are among

⁹⁷ Tebble (2006), p481.

the reasonable functions that many states expect immigration and naturalisation laws to serve.⁹⁸

A comprehensive answer to this kind of question in any particular case would have to take account of numerous contextual and empirical considerations - such as the size of the host community in relation to the number of prospective migrants, and the economic and employment situation in the receiving country. It *is* possible to imagine a situation in which immigration restrictions could be justified on the grounds of the absorptive capacity of the host community. If a small, economically vibrant and liberal state A was surrounded by larger, impoverished, illiberal states, and if opening up the borders of state A was likely to lead to a massive and unmanageable influx of outsiders with no commitment to any defensible interpretation of the values of liberty and equality, then it is conceivable that the argument from democratic values could justify a restrictive and/or assimilative immigration policy.⁹⁹ To consider a different (and admittedly rather unlikely) kind of case, if a prospective migrant openly declared his intention to work for the destruction of the liberal democratic system of the host community, it would seem perverse to maintain that the host community was under any obligation to permit them to enter. This argument cannot however ground a general right to control membership on the part of existing members, only a right to exclude those individuals who actually declare their intention to destroy liberal democracy from within.¹⁰⁰

⁹⁸ Rubio-Marin (2000), p65.

⁹⁹ Carens (1992), pp. 28-29.

¹⁰⁰ Abizadeh (2006), p4. Meilander (2001, p90) characterises the exclusion of hostile outsiders as an act of 'political self-preservation', which suggests that self-*determination* is not the key principle at stake in justifying such acts of membership control. So even if liberal-democracies do have a right to exclude outsiders in these sorts of cases, this is congruent with my overall argument in this thesis that

Leaving aside limiting cases such as these, I want to investigate the normative claim that restrictive immigration criteria can be seen as a justifiable measure to mitigate the risk that unchecked free movement might pose to the integrity of the democratic system of the host community.

Alongside Tebble, Dominique Schnapper also stresses the importance to democracy of a shared cultural basis, including a set of shared values. Democracy is liable to flounder, she maintains, in the absence of “national solidarity ... founded on a common political project, stemming from a common political culture”.¹⁰¹ On her account, the health and stability of liberal democracy requires a firm foundation for motivating individuals to integrate and to engage in non-strategic political activity, i.e. political activity not motivated purely by self-interest on the part of individuals or groups. This, in turn, rests importantly on the existence of shared values, norms, practices, goals and beliefs:

The process of internal integration implies ... that the common goals of the collective enterprise be defined and accepted, that individuals share a certain number of common practices and beliefs (...) In the case of the nation, it is a matter of political goals, practices and beliefs.¹⁰²

For Schnapper, then, the existence of nationally shared characteristics is what motivates the citizenry to act beyond the domain of strategic

self-determination does not ground a right to exclude outsiders from social membership or citizenship. See also Sager (2008), pp. 73-74, and Chapter 3, nt. 99 of this thesis.

¹⁰¹ Schnapper (1994), p. 40; quoted in Abizadeh (2002), p499.

¹⁰² *Ibid.*

action and is what ensures their integration. If, as she maintains, the health and stability of democracy rests on the existence of common collective goals, beliefs, norms and values, we have a plausible *prima facie* case for ensuring that membership in the polity is extended only to those who are prepared to endorse those collective attributes, i.e. for assimilative immigration and naturalisation criteria. As Rubio-Marín observes:

Scrutinizing and testing those who cannot be assumed to have acquired the attachments, abilities and knowledge that make the system work ... might be justified as a preventative measure against the erosion of democracy. Ensuring that immigrants who are to join the body politic are fully loyal to the system ... could precisely be seen as this kind of preventative measure.¹⁰³

It has been argued that it is simply empirically false to claim that democracy and political stability necessarily require cultural homogeneity, given the evidence we have of enduring and relatively stable multicultural democratic states like Britain and the United States.¹⁰⁴ But we should note that the claim being considered here is that a shared *political* culture is an important pre-requisite for the stability and preservation of a liberal democratic system. Political culture encompasses adherence to political principles and procedures, rather than national cultural features like a shared language, religion or sense of collective history. This is where the identity liberal position may be relevant to the argument for restrictive immigration and citizenship policies, because its core claim is that, *contra* Kymlicka, multiculturalism and permissive immigration policies can result in incompatible political cultures co-existing under one national

¹⁰³ Rubio-Marín (2000), p71.

roof. These mixtures can then prove corrosive of the democratic system. Tebble cites a number of recent examples of politically disruptive activities undertaken by Islamic groups that seem to support the idea that scrutinising the loyalty of prospective migrants to democratic values to ascertain their commitment to the liberal-democratic political culture should be a valid condition of their inclusion:

(...) in the UK during the 2005 general election campaign ... religious fundamentalists took over the election press conference of a national body representing the Muslim community, claiming that voting was sinful. A day later a pro-Iraq War Labour candidate was forced to abandon canvassing in her constituency after she was verbally abused by a gang of Muslim males and had her car pelted with eggs and its tires slashed. On the same day in the same constituency, even the press conference of an *anti-war* Respect Party candidate was invaded by a mob that attacked the attendees and threatened the candidate with death threats, claiming that voting was un-Islamic.¹⁰⁵

Whilst it is of course true that these are examples of acts committed by Muslims that are disruptive of the democratic process, it seems to me that characterising these as problems of *immigration* or of *citizenship* rather than as problems of *criminality* begs the question at hand, in a way that enables Tebble to reach a conclusion regarding membership controls to which he is not necessarily entitled on liberal grounds.¹⁰⁶ Given that liberals are typically opposed to drawing

¹⁰⁴ Wilcox (2004), pp. 568-569.

¹⁰⁵ Tebble (2006), p473.

¹⁰⁶ The Muslim advocacy group FAIR disputes the drawing of *any* connection between the civil disturbances in Britain in the summer of 2002 and notions of loyalty, belonging, immigration and citizenship policy, by pointing out that the majority of individuals involved in the

distinctions amongst individuals on the basis of their ascriptive characteristics, surely the politically and normatively relevant features of the acts described by Tebble are that they are against the law and are undemocratic, not that they are illegal and undemocratic acts *committed by Muslims*? These examples therefore seem to me to lend support not to tighter immigration restrictions or thicker naturalisation criteria, but instead support for the state claiming a “monopoly of legitimate force for itself”.¹⁰⁷ Since liberal states are perfectly able to enforce the law against citizens who act illegally and who act to seriously disrupt the democratic process, and since liberal states are also nominally committed to universal equality, we must ask why it should not take the same approach to resident immigrants and naturalised citizens as it takes towards birthright citizens and deal with any offences the former commit through the internal criminal law process, rather than through enforcing preemptive, restrictive border and citizenship controls? Rubio-Marin supports this focus on internal measures in place of exclusionary membership controls when she argues that “the fact that some immigrants may hold undemocratic or illiberal views does not leave them in a position essentially different from that of rebellious or dissenting citizens”.¹⁰⁸

From a liberal perspective, what I think is particularly objectionable about Tebble’s presentation of the issue of undemocratic activities carried out by Muslims immigrants is the idea that their conduct might constitute valid grounds for their ‘repatriation’. Liberal states

unrest were British-born citizens. *Contra* Tebble, they emphasise economic exclusion and a lack of equal rights and opportunities, rather than ethnic segregation, as the key factors in dissolving social cohesion and encouraging civil unrest in the UK. FAIR (2002), pp. 2-3.

¹⁰⁷ Weber *et al* (2008), p156.

¹⁰⁸ Rubio-Marin, (2000), p71.

do not deport citizens who have acquired their membership through birthright, regardless of any criminal or undemocratic acts they might go on to commit or beliefs they might go on to express. We should question then why immigrants who have acquired their membership status through naturalisation should be vulnerable to this threat within a political society committed to universal equality.¹⁰⁹ Indeed, it seems difficult on liberal grounds to justify applying to *any* procedures or policies towards resident migrants if those procedures and policies are not seen as applicable to the existing members of the host community, precisely because doing so involves compromising the liberal commitment to the universal equality of all individuals.¹¹⁰ So I concur with Rubio-Marín when she states that: “As a general principle, one could say that whatever the requirements found to be compelling for the survival of a democratic society, they should apply equally to all its members”.¹¹¹

A second, more political problem with the assimilative approach to naturalisation is that it seems to preclude the possibility that newly established citizens could contribute to shaping or changing the existing political structure within their host society by articulating their perspective on a particular issue. If access to citizenship is dependent upon affirming a set of national values, this suggests that all the important work of constructing, defending and implementing

¹⁰⁹ Walzer (1983, pp. 56-61) argues that the threat of deportation which hangs over resident aliens runs contrary to the normative logic of democracy. In the following chapter I discuss Walzer’s understanding of democratic inclusion according to ethical territoriality and the subject-to-the-law principle of demarcation. See also Cole (2000), pp. 142-143.

¹¹⁰ For similar claims, see Cole (2000), and Wilcox (2004), pp. 580-581.

¹¹¹ Rubio-Marín (2000), p72. Seglow (2009, p791) defends a similar claim when discussing what he calls a ‘symmetry principle’.

those values has already been done prior to the arrival of new immigrants. As Iris Young points out, “assimilation always implies coming into the game after it is already begun, after the rules and standards have already been set, and having to prove oneself according to those rules and standards”.¹¹² As such, newly established citizens are in a position of acquiescence in a present system rather than one of active political engagement to formulate new ones. Moreover, given that the condition of their naturalisation will have been to display loyalty to the core values underlying the national culture, those immigrants who do go on to challenge the existing arrangements in their host nation are liable to be portrayed as treasonous and/or politically disruptive. The upshot of this is that if immigrant groups do not feel that they have a genuine opportunity to contest and change existing arrangements in their host nation then any subsequent feelings of frustration they might have with the present state of politics are less likely to be channeled through public, political and democratic means. Those grievances are instead more likely to be articulated in private associations. Chantal Mouffe, whose work I discuss in detail in Chapter 6, argues that if deep-seated differences of opinion are not allowed to be aired within a democratic forum it is likely that they will instead be pressed into the service of conservative and anti-democratic movements.¹¹³ Rather than combating political separatism and destabilisation, the assimilative approach to naturalisation and immigration favoured by identity liberalism may encourage just that state of affairs.

A further, related problem with the identity liberal and liberal nationalist position is that it risks suppressing the need for immanent criticism within the liberal nation state. If the national culture is

¹¹² Young (1990), p103.

associated in a straightforward way with a set of liberal democratic values, then the practices, norms and attitudes of the native citizenry are unlikely to come under the same degree of critical scrutiny as practices maintained by sections of immigrant communities. In other words, if the national culture is painted in homogenous terms as upholding a core set of liberal democratic values, then it may become harder to criticise those who belong to the national culture for not embodying those values in their activities or opinions. Conversely, it may become easier to associate the practices of immigrant communities in a straightforward way with oppression or social injustice. This is because, on the identity liberal position, the behaviour or norms of the non-immigrant population is taken as the standard against which the behaviour or norms of potential citizens are evaluated. I think that Young has something similar to this in mind when she points out that “the goal of assimilation holds up to people a demand that they ‘fit’, be like the mainstream, in behavior, values, and goals”.¹¹⁴

In this way, the identity liberal position sustains an over-simplified picture of the relationship between freedom and national identity which fails to do justice to the contextual and multi-dimensional nature of emancipatory and oppressive practices. Practices that are common within a national group expressly committed to autonomy and emancipation are not obviously autonomous or emancipatory for that reason alone. Joseph Carens points out that “one could make a plausible case that French *haute couture*, by constructing female identity in terms of a woman’s ability to dress in ways that are attractive to men, has contributed more to the subordination of

¹¹³ Mouffe (2000a), p104.

¹¹⁴ Young (1990), p317.

women ... than the *hijab* ever did".¹¹⁵ Carens' assertion here is bolstered by the evidence that the veil has in fact served liberating and politically empowering ends for women within certain historical and political contexts. For example, Leila Ahmed argues that for professionally ambitious Muslim women in contemporary Egypt wearing the veil serves a politically empowering function in that it aids their transition from their rural backgrounds "to emerge socially into a sexually integrated world".¹¹⁶ What this implies is that a judgment about the emancipatory or oppressive nature of a given practice or norm should take account of the surrounding social, political, historical and cultural circumstances and should not simply proceed by way of comparison to the practices which occur in liberal national groups. A key problem with the identity liberal position, in my view, is that it undermines the need for this kind of contextual approach by perpetuating the idea that there is a homogenous body of core liberal values shared and endorsed by all citizens of the nation state. I think that Bonnie Honig has a similar point in mind when she writes in her criticism of Susan Okin's approach to multiculturalism and female rights that:

Her faith that Western liberal regimes are furthest along a progressive trajectory of unfolding liberal equality prevents her from engaging in a more selective and comparative analysis of particular practices, powers, and contexts that could well enlighten us about ourselves and heighten our critical awareness of some of the limits as well as the benefits of liberal ways of life.¹¹⁷

This is not to suggest that the host community is never justified in

¹¹⁵ Carens (2000), p159.

¹¹⁶ Ahmed (1992), pp. 223-224; quoted in Honig (2001a), p64.

¹¹⁷ Honig (1997); in critique of Okin (1999).

passing judgment on the practices maintained by certain sections of immigrant communities. The point is rather that our critical eye should be equally attuned to potentially problematic practices or norms within our own community. We can call this a principle of *reciprocal critique*: charges or criticisms leveled at minority groups should, in the interest of evenhandedness and in awareness of the internal differences within national groups, be accompanied by an interrogation of potentially problematic practices or norms within the host country which bear relevance to the same sphere. In a discussion of Iris Young's work, Penny Enslin puts forward a similar suggestion when she argues that:

(...) denouncing dowry murder has to be accompanied by ongoing attention to the incidence of murder of American women by men with guns. Western women's acceptance of images of beauty that lead them to undergo cosmetic surgery should accompany calling attention to genital surgeries.¹¹⁸

The principle of reciprocal critique also implies that liberal criticism should not be disproportionately focused on any one particular community. So, for example, criticism of homophobic or patriarchal practices or norms within certain sections of Islamic communities should be accompanied by attention to similar norms or practices maintained within certain sections of, say, Judeo-Christian and Afro-Caribbean communities. If this principle is defensible, it suggests that one important way in which the differences of immigrants could function as a resource within the democratic process is in providing occasion to re-examine practices or norms commonly held within the host nation that may be problematic from a liberal perspective. Fulfilling that potential, however, would require that receiving states

demonstrate: a) a degree of fallibilism about the unanimous endorsement and full realisation in practice of liberal values amongst the citizenry, and b) a willingness to address the cultural and political differences of immigrants *within* the democratic process, rather than attempting to filter them out as a condition of their inclusion. Neither of these conditions can be reconciled straightforwardly with Tebble's identity liberal nor Tamir's liberal nationalist position on immigration and citizenship.

Would an immigration policy that was more permissive towards the cultural and political differences of immigrants risk undermining the social bases of trust, solidarity or fellow-feeling which may be either necessary or instrumental in sustaining democratic structures of governance? In essence this is an empirical matter and so not open to theoretical validation. However, as we will see in Chapters 4 and 6 respectively, republican/multicultural theorists (represented by Young) and agonistic democrats (represented by Mouffe and Honig) suggest that there are modes of belonging to a polity that do not necessarily require cohesion in the thick sense of a shared national identity or set of values. Young, for example, argues that participation in the activity of democratic politics alone provides sufficient bonds of solidarity to sustain the functioning of the liberal democratic polity:

(...) workable democratic politics requires of citizens some sense of being together with one another in order to sustain the commitment that seeking solutions to conflict under circumstances of difference and inequality requires ... Political co-operation requires a less substantial unity than shared understandings or

¹¹⁸ Enslin (2006), p65.

a common good (...) ¹¹⁹

For Honig, democratic self-determination is not about the consolidation or expression of communally shared identity, nor is it primarily to do with the erection of frontiers between insiders and outsiders. Instead, she argues that:

(...) democracy is always about living with strangers under a law that is therefore alien (because it is the mongrel product of political action - often gone awry - taken with and among strangers). Even at its very best, or especially so, democracy is about being mobilized into action periodically with and on behalf of people who are surely opaque to us and often unknown to us. ¹²⁰

What Honig suggests here is that the ideal of popular sovereignty is illusory or at best a regulative fiction that could never be realised. In her view, democracies can never fulfill the ideal of matching policies to a shared collective will of the people simply because there is no shared collective will to which such policies could correspond. Given Tamir's acknowledgement of the artificiality, contingency and heterogeneity of national identities, she would seem to be committed to a similar view. But if this is the case, then, as I argued in section 2.4, the tension between national self-determination and freedom of movement that informs her endorsement of restrictive social membership and citizenship policies seems less intractable than she suggests.

¹¹⁹ Young (2000a), p110.

¹²⁰ Honig (2001a), p39.

2.7 Conclusion

I began this chapter by noting that a number of liberal democracies have in recent years taken a more assimilative approach to their immigration and citizenship policies. Liberal nationalism and identity liberalism are two theoretical orientations that may help to justify in normative terms these kinds of restrictive membership controls. For Tamir, the unilateral right to determine the policy of border control and the criteria for membership is a function of the right of the existing members to national self-determination, which is in turn an important pre-condition for their exercise of free choice and autonomy.

In section 2.4 I questioned the normative link that Tamir tries to establish between national self-determination and control over membership. If, as I argued, the evidence is that national groups are characterised by internal diversity in the beliefs, norms and characteristics held by the members, then the case for an immigration policy designed to protect the shared identity of the host national community appears to be misguided. I then went on to argue that there is a general tension within Tamir's position itself between recognising the diversity within national communities and the contingency and artificiality of national identities whilst at the same time arguing for restrictive membership policies in order to preserve national homogeneity. I then argued that there is a tension in Tamir's position between the individualist and multicultural premises she adopts and the corporatist, monocultural conclusion that she reaches in the case of immigration restrictions. I suggested that if Tamir were to take seriously her commitment to individual autonomy, as well as her claim that individuals are the best judges of what cultural

environment is suited to their needs, then she would back away from endorsing formal immigration restrictions at the national level. Lastly, I argued that, faced with the evidence of national groups which preserve their unique culture despite not being demarcated by geographical borders, it seems difficult for Tamir to defend immigration restrictions on the grounds of national self-determination.

In section 2.5 I discussed Kymlicka's argument for restricting immigration on the grounds of protecting 'societal cultures'. I argued in my response that Kymlicka's own analysis of immigration integration in Canada and the United States suggests that the proper *internal* management of immigrants can be sufficient to ensure their socio-political integration, and therefore border restrictions do not seem strictly necessary for the preservation of societal cultures. At most, Kymlicka's argument supports restrictions on the *pace* of immigration, not a general right to control membership on the grounds of self-determination.

In section 2.6 I discussed an opposing viewpoint, put forward from the perspective of identity liberalism. Identity liberals are concerned that the democratic system may be corroded from within if sufficient measures are not taken to ensure that immigrants are loyal to liberal-democratic values. In my response, I argued that undemocratic or illiberal activities carried out by immigrant groups should be dealt with through the internal criminal law process rather than through enforcing border controls or exclusionary citizenship policies. This is the approach taken towards native-born citizens, and a society committed to universal equality should be prepared to apply the same standards to immigrants that are applied to native citizens. I then

argued that assimilative naturalisation and immigration criteria threaten to create political instability and separatism, so that the identity liberal approach may turn out to be self-defeating. Lastly, I argued that identity liberalism perpetuates the idea that only immigrants hold views or carry out practices which are problematic from a liberal perspective, and that this fails to do justice to the internal diversity within national groups, and undermines the need for reciprocal critique.

In the following chapter, I address the arguments from self-determination for control over social membership put forward by Michael Walzer and David Miller. We have seen in this chapter that Tamir's account of national self-determination is concerned primarily with the status and representation of shared culture in the public political sphere, rather than the democratic participation of citizens. Likewise, although Tebble and Schnapper want to protect liberal democracy, they do so primarily via endorsing measures designed to protect the national culture of the host society. Walzer and Miller, on the other hand, stress to a far greater degree the role of democratic legitimacy in drawing a normative link between self-determination and control over membership (although their arguments also incorporate importantly a concern with the protection of national identities). Does their focus on democratic considerations overcome the problems identified in this chapter with justifying control over membership purely on the basis of cultural self-determination? This question will partly form the focus for the following chapter.

Alongside his arguments for the exclusion of outsiders from social membership, Walzer also maintains that resident migrants have a right to citizenship which is grounded on the 'subject-to-the-law'

principle of democratic inclusion. If my critique in section 2.7 is valid, this may provide a favourable alternative to the exclusive citizenship policies endorsed by identity liberals.

Chapter 3

Michael Walzer and David Miller on Political Community, Territoriality and Membership

3.1 Introduction

Michael Walzer's chapter on membership in his *Spheres of Justice*¹ represents one of the seminal treatments in contemporary political philosophy on the relationship between political membership and democratic self-determination. Though written in 1983, his reflections in *Spheres* on the right of sovereign nation-states to control membership continues to influence many of the themes and arguments in the current critical dialogue in political theory on immigration, membership and the ethics of political community.² In that text, Walzer puts forward a robust defence of the right of nation-states to choose to exclude outsiders from social membership as a function of their right to self-determination. As we saw in the introductory chapter, he goes so far as to claim that the right to exclude is inherent in the very *meaning* of self-determination, so that if citizens cannot exercise unilateral control over social membership then they fail to belong to a fully self-determining nation-state. David Miller has also recently provided a defence of immigration restrictions based on the values of and relationships between the territorial rights of nation-states, democratic self-determination and national responsibility.

¹ Walzer (1983).

² See, for example, the discussions of Walzer's position in Barbieri (1998); Bader (1995); Benhabib (2004); Cole (2000); Meilander (2001), & Seglow (2005).

There is an important cultural element to the accounts of national self-determination put forward by both theorists, and this cultural dimension contributes to their defence of membership controls. Miller states that “the general justification for immigration restrictions involves an appeal to national self-determination and in particular a people’s right to shape its own cultural development”.³ He holds that a morally defensible position on the relationship between immigration and self-determination will be one that aims to achieve an acceptable balance between “the interests that immigrants have in entering the country that they want to live in and the interests that national communities have in maintaining control over their own composition and character”.⁴ From Walzer’s liberal-communitarian perspective, political communities operate on the basis of a shared understanding of the meaning, purpose and correct ordering of social goods amongst their members. They are culturally distinct entities with a right to preserve their unique character in keeping with the shared sentiments, values and traditions of the existing members, and this is achieved partly through imposing restrictions on social membership. For both Miller and Walzer, decisions about membership are seen as a core feature of national self-determination because they impact directly upon the shared culture, distinct character and collective goals of receiving countries. In their view, without the ability to shape membership through immigration controls and through the exclusion of the voices of outsiders, the citizens of nation-states would be deprived of a key feature of their collective freedom; namely, the freedom to determine the shared cultural, political and economic conditions within which democratic self-rule proceeds. I shall argue in this chapter that neither theorist establishes a convincing case for

³ Miller (2007), p228.

thinking that social membership controls are a justifiable feature of collective self-determination.

Whilst Walzer supports the right of political communities to exclude outsiders from territorial admission, he regards the acquisition of citizenship for resident migrants as a right that follows from the logic of democratic principles. Admission to citizenship lies outside of the scope of the self-determining powers of a political community to grant or withhold as they so choose. His position on membership has therefore been described as ‘hard-outside/soft-inside’.⁵ He thinks that the distribution of social membership is a unilateral communal right (subject to some important constraints, outlined in section 3.3 below), whereas access to citizenship is a right that individuals hold against their state of residence. “Immigration,” he writes, “is both a matter of political choice and moral constraint. Naturalization, by contrast, is entirely constrained: every new immigrant, every refugee taken in, every resident and worker must be offered the opportunities of citizenship”.⁶

I begin my discussion in the following section by giving an account of Walzer’s understanding of political community and national sovereignty. In section 3.3 I outline his position on naturalisation and the democratic right to citizenship for all settled residents. I discuss how Walzer appeals to the subject-to-the-law principle of democratic inclusion and ethical territoriality in substantiating his position on citizenship, and I give an account of the normative logic behind it. As we will see, it provides an important alternative to the culturally

⁴ *Ibid*, p230.

⁵ Bosniak (2007), p396.

⁶ Walzer (1983), p62.

exclusive citizenship policies endorsed by Tamir, Tebble and Schnapper.

In section 3.4 I move on to discuss the ‘hard-outside’ aspect of his position, and I argue that we can discern two distinct arguments or themes in Walzer’s justification for the right to exclude outsiders from social membership. The first is grounded - as with Tamir’s account - on the value of tradition and the preservation of distinct cultures, whilst the second is based on the value of popular sovereignty and democratic self-determination.⁷ The first argument defends state sovereignty over territorial admissions in order to preserve the distinctiveness of the traditions and cultures on which political communities are said to be established. Having outlined this argument, I raise the objection that preserving the diversity of political communities does not seem to necessarily require closure in the form of state-level immigration restrictions given the evidence of regional diversity across the United States and across the signatory states of the EU.

In section 3.5 I move on to discuss Walzer’s second main argument for excluding outsiders from social membership, which is democratic in character and defends state sovereignty over admissions in order to respect the integrity of the process of democratic will-formation. The democratic argument avoids the problems with culturally protectionist policies of membership control, which I have raised in the previous chapter, and which I develop further in section 3.4. However, I argue

⁷ Laegaard (2007, pp. 293-294) also discusses this distinction between cultural and democratic self-determination. She takes her cue from Seglow (2005)pp. 319-324.

that it results in an infinite regress of constitutive decisions - what is known as the 'boundary problem' in democratic theory.

In section 3.5 I go on to look at Miller's recent arguments for the exclusive territorial rights of nation-states and for collective national responsibility.⁸ Miller's argument for territorial rights from historic occupancy and the cultural transformation of the land avoids the logical paradox described by the boundary problem because it does not appeal directly to democratic criteria to demarcate the political unit that has a right to self-determination and, subsequently, legitimate powers of exclusion. Miller also avoids the problems with the purely cultural account of rights to national self-determination put forward by Tamir (and Walzer in his more communitarian and less democratic moments), since he does not appeal to a shared culture in any thick sense or shared normative commitments in order to demarcate and justify the exclusionary boundaries of political communities.

However, his position generates difficulties of its own. The first problem I discuss, with the attempt to demarcate political boundaries and territorial rights by reference to historic occupancy and land transformation, is that often disputes over boundaries arise precisely *because* of controversy surrounding claims to historic entitlement. A further objection to Miller's account is that it is vulnerable to liberal egalitarian critiques of distributive inequality and the arbitrary distribution of economic resources and social goods in general across the globe. However, Miller is armed with an important response to this objection, which appeals to collective national responsibility.

⁸ Miller (2007).

Having discussed this response, I then put forward four arguments for disputing the closeness of the ‘fit’ between the actions of democratic states and the collective will of the members of nations, which in turn challenge Miller’s defence of national responsibility. This discussion suggests that Miller’s argument from collective national responsibility fails to show that self-determination trumps egalitarian considerations in favour of greater ease of access to social membership leading to citizenship.

However, Walzer, Miller, Tamir, as well as a number of other theorists, all argue that global inequality is more relevant to arguments for the international redistribution of wealth and resources than for greater ease of access for impoverished outsiders to social membership and citizenship in wealthier countries. In the final section of this chapter, I address the argument that holds that the right of self-determining states to decide to exclude outsiders is justified in so far as those states combine their domestic policy of (at least partially) closed borders with foreign policies designed to ensure that those who are excluded are not denied sufficient rights, options and resources in their home country. A pre-requisite for the moral legitimacy of democratic exclusion, according to this argument, is that prosperous nation-states have met their obligations of justice or of aid to those who are denied entrance, through such measures as the provision of resources, the re-distribution of wealth or through humanitarian or military intervention. Miller complements this position when he argues that so long as individuals have adequate options within their own countries, they do not have a general right to freedom of international movement that outweighs the right that nation-states have to territorial closure as a function of their right to self-determination. I discuss the way in which the idea of ‘purchasing’ the right to exclude by compensating those who are excluded is one

possible way of providing a positive answer to the following question posed by Philip Cole: “(...) can we draw a boundary that constitutes insiders and outsiders in a way that embodies the principles of equal respect and concern for humanity as such - not only insiders - that many regard as the central commitments of liberal theory?”⁹

I suggest that this line of argument does have merit in so far as economic redistribution is arguably a more effective strategy for combating global inequality than (just) opening up borders. So Walzer, Miller *et al* may be correct in thinking that social justice concerns about global inequality are more relevant to the question of the just international distribution of wealth and resources than an account of just membership practices. Nevertheless, I put forward four arguments for thinking that redistributive efforts do not justify the exclusion of outsiders from social membership. Firstly, the purchase argument is difficult to reconcile with the account of moral contextualism that Walzer and Miller employ to justify in part their positions on the exclusive dimension of national self-determination, in the first place. Following on from this, I argue that even if we reject moral contextualism, it will be virtually impossible to justify the exclusion of an outsider on the grounds that they have been compensated because of the difficulties in valuing the goods and opportunities being denied, in comparison to the goods and opportunities available in their home country. A third difficulty with justifying exclusion via compensation is that often it is not merely a lack of goods, wealth or resources that are the primary causes of poverty and migration pressure but corrupt governments and senior officials. Simply redistributing wealth in these cases is liable to

⁹ Cole (2000), p60.

benefit only ruling elites and is unlikely to ‘trickle down’ to the world’s poorest. Lastly, even if all of these problems were overcome, the likelihood is that it would still take many years for redistributive efforts to make a real difference to global inequality. This means that if the compensation argument is used to justify democratic closure, those individuals who are excluded in the interim period are not counted in the moral register. So if compensation or redistributive efforts are combined with and used to justify closed borders, Cole’s charge mentioned above will not have been met convincingly.

3.2 Walzer on Political Community and National Sovereignty

In the introductory chapter, I noted that the majority of the major texts in liberal political theory focus on the question of justice within bounded communities, and thus avoid addressing the question of how and according to what sorts of constraints membership is acquired, regulated or withheld. In contrast, Walzer argues that the question of the distribution of membership is prior to all other questions of distributive justice.¹⁰ What is of particular significance about shared membership for Walzer is that it provides the political framework for many of the most significant and far-reaching obligations of distributive justice that we are required by the state and by morality to assume. Whom we deem as members and whom we deem as outsiders to our community “structures all our other distributive choices, from whom we require obedience and collect taxes, to whom we allocate goods and services”.¹¹ On this account, membership

¹⁰ Walzer (1983), p31. Cole (2000, p60) & Bader (1995, p213) also point out that Walzer (1983) represents a notable exception to the traditional silence in liberal political theory on the subject of membership controls.

¹¹ Walzer (1983), p31.

represents a commitment to exchanging and sharing goods with like-minded individuals; the members of a political community are those people who are “committed to dividing, exchanging and sharing social goods, first of all among themselves”.¹² Since shared membership structures all the subsequent distributive decisions that are made within a political community, we can see why Walzer maintains that the question of membership must be addressed before we can turn to other questions of distributive justice.

The relevant unit of analysis for Walzer’s reflections on membership is the nation-state, understood as a political apparatus with sovereign authority over a bounded territory through which a historic community decides upon and acts out its self-determined goals. Unlike Tamir, who rejects the idea that successful national self-determination necessarily entails independent statehood, Walzer is a staunch internationalist in the sense that he supports - ideally speaking - the formation of an independent state for each independent nation.¹³ For Walzer, the political community that expresses its will through a sovereign state represents a world of shared meanings, understandings and practices. In his scheme, the nation-state thus represents the political expression of the shared culture and distinctive way of life of the members of a political community.

Walzer’s globe is composed of comparatively self-enclosed nation-states and the guiding principle of international relations, in his view, should be to respect the territorial sovereignty of those states (perhaps most importantly with regard to their membership and immigration policies). His argument for national sovereignty and the non-

¹² *Ibid.*

interference rights of states is partly due to his brand of moral contextualism. In his earlier work *Just and Unjust Wars*¹⁴ Walzer maintains that, very often, foreigners will be insufficiently attuned to the particular history, culture and society of other political communities to be able to judge whether there is a 'fit' between state policy and the common political life of its citizens: "they don't know enough about its history, and they have no direct experience, and can form no concrete judgments of the conflicts and harmonies, the historical choices and cultural affinities, the loyalties and resentments, that underlie it".¹⁵ For Walzer, there are no universal standards of morality or of justice. Moral standards and judgements are local and contextual; they are specific to the shared understandings of the members of particular communities.¹⁶ If, as Walzer maintains, one must be an existing member of a political community in order to be able to pass coherent and defensible judgments concerning its policies, practices and values, then any attempt to regulate or pass judgement on the admissions policies of nation-states by external individuals, organisations, states or agencies is bound to represent a distorted and unjustified imposition of alien norms and principles.

When defending national sovereignty and self-determination as non-interference, Walzer draws an analogy with individual autonomy. Just as liberal states regard individuals as entitled to a sphere of decision-making free from external interference, so too should nation-states be left to determine their own communal destiny (short of limiting cases such as regimes that engage in genocide or other flagrant abuses of human rights):

¹³ Walzer (1987), p229.

¹⁴ Walzer (1977).

¹⁵ Walzer (1980), p212.

¹⁶ Walzer (1983).

When we describe individual rights, we are assigning to individuals a certain authority to shape their own lives, and we are denying that officials, even well meaning officials, are authorised to interfere. The description of communal rights makes a similar assertion and a similar denial. In the individual case, we fix a certain area for personal choice; in the communal case, we fix a certain area for political choice. Unless these areas are clearly marked out and protected, both sorts of choices are likely to become problematic.¹⁷

If political communities have a collective existence through the presence of a “shared history, communal sentiment (and) accepted conventions”,¹⁸ then their political life should proceed without interference or participation from outsiders. For Walzer, compromising the sovereignty of nation-states by sanctioning the external interference or the regulation of their affairs by (for example) a transnational or supra-national body would be to dissolve the space within which communal self-determination takes place: “communal life and liberty requires the existence of “relatively self-enclosed arenas of political development””.¹⁹ So in Walzer’s view, the value of and the preconditions for the exercise of collective self-determination preclude the external regulation of immigration policy or the democratic participation of outsiders in the ‘internal’ affairs of political communities. It is for the members to decide unilaterally upon their economic, social and political goals, including whom to admit and whom to exclude, subject to some important qualifications. I will discuss these qualifications in the following section, having first

¹⁷ Walzer (1980), p224.

¹⁸ *Ibid*, p228

¹⁹ *Ibid*; quoting Beitz (1979), pp. 422-423.

outlined Walzer's position on citizenship and naturalisation; the 'soft-inside' aspect of his theory of membership.

3.3 Walzer on Naturalisation

Walzer's account of the right to citizenship for all settled residents provides a normatively attractive alternative to the culturally exclusive citizenship policies endorsed by Tamir and Tebble. In contrast to the liberal nationalist and identity liberal positions which were discussed and criticised in the previous chapter, Walzer argues for a strictly territorial account of the moral basis for distributing citizenship: "the state owes something to its inhabitants simply, without reference to their collective or national identity".²⁰ He maintains that whilst the citizenry of a particular state are entitled to bar outsiders from becoming social members as a function of their collective right to self-determination, this discretion does not extend to naturalisation. The host community has no right to decide to exclude permanently any resident from acquiring the political and social rights that are required for them to participate in the process of collective self-determination: "second admissions (naturalisation) depend on first admissions (immigration) and are subject only to certain constraints of time and qualification, never to the ultimate constraint of closure".²¹ He argues that since all those who reside on a permanent basis within the territorial jurisdiction of a state are subject to its authority, they must have an equal say in the decisions undertaken and the policies pursued by that state: "the processes of self-determination through which a democratic state shapes its internal life must be open, and equally open, to all those men and

²⁰ Walzer (1983), p43.

²¹ *Ibid*, pp 60-61.

women who live within its territory, work in the local economy and are subject to local law”.²² What this means in practice is that if the host community does decide to permit outsiders to enter the territory - say, for example, if they decide to offer financial incentives to attract guest-workers or other categories of economic migrants - then, once they have become settled residents, those migrants cannot be confined to a position of permanent alienage or other forms of second-class citizenship but must instead be set on a quick path to formal membership in the polity through naturalisation. Walzer supports this position on naturalisation on the grounds that granting social membership to outsiders but denying them citizenship constitutes a form of political tyranny, since it creates a sub-class of residents who are ruled by the existing citizens; the state then becomes “like a family with live-in servants”.²³

Another way of expressing this point is to say that guest-worker programs create a democratic legitimacy gap, since - ideally speaking in Walzer’s view - legitimacy in democratic procedures and policies calls for the consent and equal participation of the governed, which is precisely what is lacking in cases where residents are denied access to citizenship. In keeping with his moral contextualism discussed in the previous section, Walzer puts forward an immanent criticism of this kind of scenario, in that his objections appeal to the self-understanding of democratic communities. He argues that the logic of democracy calls for all those who are subject to the law to have an equal say in its formulation. In so far as liberal-democratic communities deny political rights to a particular sub-set of residents who are nevertheless subject to the law, those communities fail to honour the ethical principles from which their mode of governance

²² *Ibid*, p60.

derives its normative legitimacy. Walzer thus employs the ‘subject-to-the-law’ principle as his chief mode of demarcating citizenship boundaries: “Men and women are either subject to the state’s authority, or they are not; and if they are subject, they must be given a say, and ultimately an equal say, in what that authority does”.²⁴

Linda Bosniak has argued that Walzer is only able to justify his combination of inclusion to citizenship within the territory with exclusion from social membership at the border by regarding the inside and the outside of the territorial boundaries of nation-states as distinct normative spheres and by applying different principles and practices to them: “ (...) in (Walzer’s) view, border and interior are distinct regulatory and social domains whose governing logics are entirely separate. His approach relies on a conception of border and interior as divided jurisdictions, with different normative practices applying to each”.²⁵ This seems mistaken to me, since the same principle - self-determination - is what justifies the territorial exclusion of outsiders whilst also calling for the inclusion to citizenship of social members. The reason that Walzer argues that outsiders can be excluded justifiably from social membership is because those inside the territory of a political community have a right to self-determination. Likewise, the reason he argues that those who are inside the territory must have citizenship rights is again because the existing members have a right to self-determination. In her discussion of Benhabib’s *The Rights of Others*²⁶, Rainer Baubock asks: “is (self-determination) a principle that enables democratic polities to determine their own boundaries? Or does it only entail a

²³ *Ibid*, p53.

²⁴ *Ibid*, p61.

²⁵ Bosniak (2007), p395.

²⁶ Benhabib (2004a).

claim of equal citizenship within already predetermined boundaries?”²⁷ If my interpretation is correct, then in Walzer’s view self-determination performs both roles. The value of self-determination performs a double-movement in Walzer’s theory of membership, in the sense that the same value that underlies the claim in justice for the inclusion to citizenship of those situated within the territory also underlies the justification for the exclusion of those situated outside the territory.

Walzer’s position on citizenship embodies a principle of *ethical territoriality*.²⁸ For Walzer, the physical fact of being present within the territorial jurisdiction of a particular state is what supplies the criterion for allocating political rights (though of course in Walzer’s view residency depends on the prior criterion of being allowed into the territory by the existing members). This territorial conception of citizenship rights treats residency status within the territorial jurisdiction of the nation-state as sufficient grounds for attributing full membership status. Ethical territoriality aims, ideally, for inclusivity and equality. The preservation of differential, gradient or status-based levels of inclusion and membership (for example, denizenship, second-class or permanent alien status) is rejected in favour of universal franchise for all those subject to the laws of the nation-state in which they reside. It purports, therefore, to counter the democratic legitimacy gap that occurs when the structure of membership attribution results in a permanent sub-class of residents who live, work and base their lives within a nation-state but are systematically prevented from having a political voice in determining the conditions of their residency. Since all those who reside within the territorial jurisdiction of a state are subject to the power and authority of the

²⁷ Baubock (2007), p11.

government and are therefore legally bound by its decisions, all should be equally entitled to the full basket of rights in order to both protect them from abuses at the hands of that government and to enable them to have a say in the construction of the rules by which the monopoly of legitimate power and authority in their society will be exercised. Ethical territoriality speaks to the liberal democratic intuition that there is something morally suspect in systematically preserving a class of long-term political outsiders within the boundaries of the national community.²⁹ For example, the introduction of territorial rights by the United States Supreme Court in the late 19thC was seen as a blow struck in the name of equality against the exclusion and subordination of Chinese immigrants: “(rights) are not confined to the protection of citizens ... These provisions are universal in their application to all persons within the territorial jurisdiction”.³⁰ Ethical territoriality is embodied in US law, as all individuals who are territorially present - regardless of their legal status - are awarded a set of constitutional, common law and statutory rights. Likewise, the legislation and rights outlined in the Canadian Charter of Rights and Freedoms applies to “every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law”.³¹

Ethical territoriality and the subject-to-the-law mode of demarcating citizenship have the important *prima facie* advantage of granting

²⁸ Bosniak (2007); Bosniak (2008).

²⁹ Bosniak (2007), p393.

³⁰ Yick Wo vs. Hopkins, 118 U.S. 356, 369 (1886), quoted in Bosniak (2007), p393.

³¹ Canadian Charter of Rights and Freedoms; quoted in Bosniak (2008), p3. This is not to say that there are no differences in the rights awarded to residents and those awarded to citizens. See Chapter 1, section 1.1 of this thesis.

individuals a stable and equal body of democratic rights in a stable and determinate democratic community. As Baubock argues:

Liberal democracy presupposes stable territorial boundaries for defining who is entitled to be a member in a self-governing political community. Democratic government involves a dual structure where legislation represents citizens as members of a political community, but where laws are valid for everybody within a territory.³²

In the following two chapters, we will encounter two opposing views. Proponents of the ‘all-affected’ and ‘all-coerced’ principles of democratic inclusion argue that democratic legitimacy in fact calls for participatory membership to be extended to territorial outsiders who are either affected or coerced by the decisions and actions undertaken by political communities. This may require temporary, deterritorialised and issue-responsive *demoi* to be formulated and dissolved depending on the particular decisions at stake. I endorse Walzer’s territorialist position on citizenship and a corresponding rejection of extending participatory membership to affected or coerced outsiders. The reasons will become clear when I address directly the all-affected and all-coerced principles of democratic inclusion in the following two chapters. In particular, I will argue that the clarity and stability of the territorialist position, as noted by Baubock, helps it to avoid some of the key difficulties with using affectedness or coercion as principles of democratic inclusion.

In addition to placing the right to naturalisation for permanent residents outside of the scope of the self-determining powers of

³² Baubock (2004), p25. See also Baubock (1994), p178.

political communities, there are a number of other important constraints that Walzer sets to the right of communal discretion in formulating membership and admissions policies. His position on the right of political communities to closure falls short of establishing that political communities have both liberty and licence to formulate *any* criteria for entrance they deem fit. He states that “one can argue about particular admissions standards by appealing, for example, to the condition and character of the host country and to the shared understandings of those who are already members”.³³ So, in keeping with his moral contextualism, Walzer thinks that admissions policies should be constrained by the shared values and self-understanding of the existing members.

We can see from the following quotation that, for Walzer, the process of self-determination through which a community shapes itself must also honour certain constraints to do with their history and the actual internal ethnic, racial, cultural, and religious make-up of the current society. This is a function of his more general claim that all territorial insiders must count equally and be represented equally:

The claim of American advocates of restricted immigration (in 1920, say), that they were defending a homogenous white and Protestant country, can plausibly be called unjust as well as inaccurate: as if non-white and non-Protestant citizens were invisible men and women, who didn't have to be counted in the national census! Earlier Americans, seeking the benefits of economic and geographic expansion, had created a pluralist society; and the moral realities of that society ought to have guided the legislators of the 1920s.³⁴

³³ Walzer (1983), p40.

The collective right to shape admissions policies is also qualified by the principle of ‘mutual aid’ for necessitous strangers. Those whose life prospects would be significantly worsened or their human rights put in jeopardy if they were not permitted to leave their country of origin have a claim (but not a *right*) to be admitted into wealthier or more politically stable countries. However, the force of this claim is ‘uncertain’, according to Walzer, because it has to be weighed against the shared understandings of membership maintained within destination communities. Walzer believes that nation-states have a special obligation to take in refugees of the same ethnicity as the national group: “Greeks driven from Turkey, Turks from Greece, after the wars and revolutions of the early twentieth century, had to be taken in by the states that bore their collective names”.³⁵ In cases like these, Walzer claims, the analogy of states to families seems both helpful and accurate: “(states) don’t only preside over a piece of territory and a random collection of inhabitants; they are also the political expression of a common life and (most often) of a national “family” that is never entirely enclosed within their legal boundaries”.³⁶ In Chapter 6, we will see that this is directly contrary to Bonnie Honig’s understanding of democracy as being at its most vital when it consists in co-ordinated political activity taken in conjunction with and of behalf of individuals who are often unknown and/or opaque to us.³⁷

³⁴ *Ibid.*

³⁵ *Ibid.*, p42.

³⁶ *Ibid.*

³⁷ Honig (2001a), p39. Miller (2007, pp. 227-228) rejects the ‘family’ model because it seems contrary to the principle that liberal states should be ethnically and culturally neutral.

For Walzer, the democratic right to citizenship makes control over territorial admissions a particularly significant feature of self-determination. Given that all those who are admitted as residents have a subsequent right to citizenship, territorial admissions threaten to impact upon the shared collective life of the existing citizens by changing the composition of formal membership. In the following section, I discuss critically Walzer's two-pronged defence of the right of political communities to control admission to social membership. I argue that neither his communitarian nor his democratic account sustain unproblematically a normative link between self-determination and control over membership.³⁸

3.4 Cultural Distinctiveness and Exclusion

Take the following quotation from Walzer's article 'The Moral Standing of States', where he defends the sovereignty of states as derivative of "the rights of contemporary men and women to live as members of a historic community and to express their inherited culture through political forms worked out among themselves".³⁹ I think we can discern the basic outline of the two strands of his argument for control over social membership in this sentence; I will address the democratic theme in the following section. The communitarian argument comes out in the reference to a "historic community" and "inherited culture", suggesting the normative value of cultural conservation, respect for tradition and the preservation of shared meanings. The proposition here seems to be something like this: national sovereignty derives its legitimacy from the fact that the

³⁸ This distinction is drawn and discussed in Seglow (2005); Seglow (2006a) & Laegaard (2007)

³⁹ Walzer (1980), p211.

state exists to preserve the rights of the members of a political community to live in a certain way and within a certain kind of tradition or culture that has been handed down to them by their ancestors. Therefore, states have a responsibility to take the measures necessary to preserve the distinctive character of the public culture of the political community they preside over, which may entail restricting immigration or closing borders altogether. This theme is borne out by statements such as the following:

Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.⁴⁰

So, as with Tamir's liberal nationalism, Walzer's communitarian defence of immigration restrictions appeals to the idea that unchecked freedom of movement could undermine the cultural distinctiveness of political communities. "The distinctiveness of cultures and groups", he writes, "depends upon closure and, without it, cannot be conceived as a stable feature of human life. If this distinctiveness is a value, as most people ... seem to believe, then closure must be permitted somewhere".⁴¹ In Walzer's view, without the unilateral right to exclude outsiders the members of political communities would be deprived of their right to belong to a self-determining association, since freedom of movement would threaten to dissolve their shared identity and culture: "the restraint of entry serves to defend the liberty and welfare, the politics and culture of a group of people committed

⁴⁰ Walzer (1983), p62.

⁴¹ *Ibid*, p39.

to one another and to their common life”.⁴² Walzer thinks that the drive to exclude from our common life those who are different from us, and to thus preserve a socio-political setting where we co-exist and share goods and resources with like-minded and culturally similar individuals, is a stable feature of human nature. This is borne out by his claim that, absent state-level restrictions on immigration, individuals would inevitably seek to impose closure at more local levels. In other words, if states did not have rigid border controls then neighborhoods would erect their own barriers against outsiders in order to “defend their local politics and culture against strangers”.⁴³ In Walzer’s memorable formulation, he states that “To tear down the walls of the state is not ... to create a world without walls, but rather to create a thousand petty fortresses”.⁴⁴

Even if we grant Walzer all of the above, however, we can still question why the current number and size of national “fortresses” is preferable from a normative point of view to a “thousand petty fortresses”, i.e. neighbourhoods or local communities with a distinct character, which are bonded together solely through people’s *will* rather than through formal political boundaries. Why are restrictions on movement less problematic at the national level than at the local, residential level?⁴⁵ Walzer gives two answers. Firstly, he claims that local mobility is more important for individual choice than international mobility,⁴⁶ and secondly, that the “politics and the culture of a modern democracy probably requires the kind of largeness, and also the kind of boundedness, that states provide”.⁴⁷

⁴² *Ibid.*

⁴³ *Ibid*, p38.

⁴⁴ *Ibid*, p39.

⁴⁵ Chang (2007), p31.

⁴⁶ Walzer (1983), p39.

⁴⁷ *Ibid.*

The first argument concerning the greater importance of local over international mobility for individual choice presumes that there are sufficient social, economic and political goods accessible within one's locality to negate the need for international migration, and the very fact of migration pressure from poorer to wealthier countries makes it clear that this is not the case for a great number of individuals.⁴⁸

Walzer's second argument seems to beg the question at hand, which is that democratic self-determination rests on the kind of *impenetrable* "boundedness" that large nation-states provide.⁴⁹ Democracy may well rest on boundedness, but the need for a boundary demarcating a constituency tells us nothing about how porous that boundary should be.⁵⁰

Walzer would claim in response that opening up national boundaries would result in the dissolution of the distinctiveness and cohesiveness of national groups. He bolsters this claim further by attempting to forge a normative connection between cultural homogeneity, immigration restrictions and democracy by arguing that freedom of movement feeds authoritarian regimes. According to Walzer, these sorts of regimes "thrive in the absence of communal cohesion".⁵¹ However, I noted in the previous chapter that Tamir provides a number of examples of cases where the cultural distinctiveness and cohesion of cultures and groups - and, therefore in Walzer's terms, safeguards against authoritarian government - is preserved in the absence of formal, exclusive territorial boundaries: "(...) the Jews or the Armenians, and immigrant groups such as Hispanics in Southern California, Cubans in Miami, Algerians in France, and Pakistanis in

⁴⁸ Chang (2007), pp. 12-13.

⁴⁹ *Ibid*, p34.

⁵⁰ Abizadeh (2008), p43.

⁵¹ Walzer (1983), p34.

England ... manage to preserve their identities without tangible boundaries".⁵²

In response to these examples, Walzer might reply that whilst these sorts of groups do not have tangible territorial boundaries, they still have rigid membership boundaries; one cannot of course become Cuban by stating a desire to do so, nor by moving into a predominantly Cuban neighborhood. Likewise, there are rigid criteria for becoming a member of the Jewish religion.⁵³ So even in the examples above, "closure" is still taking place "somewhere", but not at a territorial border. However, we can push this objection further by taking into account examples of diversity amongst *political* communities being preserved in the absence of *any* membership restrictions, whether territorial, ethnic or ascriptive. Walzer's broader claim that immigration restrictions at the level of the nation-state are justified to protect the distinctiveness of political communities is belied by the evidence of regional diversity across the United States.⁵⁴ Clearly, there are significant differences in the character and general socio-political culture of the different states. Simply put, the state of New York is not the same as the state of Alabama. Federal states are distinct political communities with their own elected officials, taxation priorities, legislation, and so on. Yet they cannot impose any formal restrictions on the freedom of movement of US nationals. This regional diversity is therefore primarily a result of the voluntary preferences of individuals. Broadly speaking, those who wish to live in a comparatively liberal political and cultural environment tend to either stay in or re-locate to the East of the United States. Those who prefer a more culturally and politically conservative environment tend

⁵² Tamir (1993), p166.

⁵³ Cole (2000), p74.

⁵⁴ Carens (1995), pp. 245-246; Abizadeh (2008), pp. 3-4.

to stay in or re-locate to certain Southern states or 'Red' states. In turn, the residents of those states elect state officials with whom they can identify and whose political agenda they (more or less) endorse, which in turn contributes to the distinctive character of the regional political community. Why is voluntary segregation and clustering in this way not sufficient from Walzer's point of view to meet whatever needs individuals may have for living in distinctive communities? Why insist on restrictions on immigration at the level of the nation-state?⁵⁵

At this point, Walzer might respond that the regional diversity across the United States is only preserved in the absence of internal restrictions on freedom of movement because those states are sheltered by the restrictions on movement into the nation (similarly, he might add that the distinctiveness of the Jewish people is maintained without a territorial border because of the existence of restrictions on entry to the *religion*). It could be argued that the only way in which associational diversity can be determined at a local level purely by people's preferences is if the state is able to shape the wider sphere of social membership by controlling entry at the level of the border. But then this argument is in turn belied by the evidence of national diversity within the EU. Signatory nation-states have very little control over the admission of individuals from other signatory states, and yet France still has a distinctive socio-political culture in comparison to, say, the United Kingdom. Walzer might then push the argument back another stage, by claiming that national diversity is preserved amongst signatory states because they are sheltered by the still wider restrictions on entry that apply to individuals from outside the EU. But the core point here is that it is not the case that the UK

⁵⁵ Chang (2007).

fails to achieve cultural self-determination (in Walzer's understanding) because its sovereignty over social membership controls is constrained. Preserving the diversity of political communities does not it seems require the state-level border controls that Walzer defends.

The only large-scale migratory movements within the EU have occurred in response to large disparities in wealth and employment opportunities across signatory states; as was seen, for example, in the case of the recent influx of Polish migrants into the UK. This in turn suggests that what immigration restrictions primarily function to preserve is *not* the cultural distinctiveness of different political communities, but rather their economic privileges and employment opportunities.⁵⁶ It would seem then that what the defender of immigration restrictions from the value of self-determination needs is an independent argument for why the members of nation-states have a right to exclusive preserve over their economic advantages and resources. As we will see in section 3.6, David Miller has supplied arguments to that effect on the basis of legitimate territorial control and collective national responsibility.

3.5 Democratic Self-Determination and the Boundary Problem

I now want to discuss the second theme in Walzer's case for communal closure. In the quotation cited at the start of the previous section, when Walzer refers to the process of citizens *expressing* their

⁵⁶ Seglow (2005, pp. 322-323) points out that “.. most migrants do not move in pursuit of Millian, ‘experiments in living’, but simply in order to improve their economic welfare”.

“inherited culture through political forms *worked out among themselves*”, the emphasis shifts from the preservation of cultures and traditions to their possible revision or re-interpretation through the participation of individuals in the democratic process. Here the stress seems to be laid upon preserving a space for democratic participation; change over conservation. In this voice, I think what Walzer wants to do is not freeze cultural traditions nor try to invoke the idea of a cohesive community necessarily united in voice, values and purposes, but rather respect the integrity of the process of democratic self-determination. In his discussion of sovereignty in *Just and Unjust Wars*, one of his main claims in support of a principle of sovereignty as non-interference is that he is prepared to defend politics against “the traditional philosophical dislike for politics”⁵⁷ displayed by some of his critics, which is revealed by their desire “to press international society toward a kind of reiterated singularity – the same government or roughly the same sort of government for every political community”.⁵⁸ Walzer maintains that international society should respect the internal political processes of other societies because people have a right to be governed by a state of their own in accordance with the shared understandings amongst the members concerning the nature and purposes of their association. Ideally, this process will be carried out democratically, but its results should be respected regardless (short of limiting cases like genocidal regimes):

My own preference for democracy doesn't extend to a belief that this preference should be uniformly enforced on every political community. Democracy has to be reached through a political process that, in its nature, can also produce different results. Whenever these results threaten life and liberty, some kind of intervention is necessary, but the don't

⁵⁷ Walzer (1980), p228.

⁵⁸ *Ibid*, p216.

always do that, and when they don't the different political formations that emerge must be given room to develop (*and change*).⁵⁹

Although this discussion occurs in the context of an argument concerning military non-intervention, it helps to flesh out Walzer's argument for respecting the outcome of processes of collective self-determination. In contrast to the communitarian argument discussed in the previous section, the proposition here seems to run something like this: if we value the political participation of citizens, then we have to be prepared to listen to their collective voice. For democratic states, internal legitimacy is bound up with the idea that the people have an equal say in their political life. Since the character of their society is something that the members of the *demos* will presumably want to have some kind of control over, and since admissions and membership procedures can, in certain conditions, have an impact for better or worse on the character or identity of their society, we should be prepared to give citizens a say in how those procedures are carried out: "as citizens of such a country, we have to decide: whom should we admit? Ought we to have open admissions? Can we choose among applicants? What are the appropriate criteria for distributing membership?"⁶⁰

Walzer states that when evaluating a particular naturalisation or immigration policy, the members of a political community need to ask themselves whether that policy actually represents their shared understanding of the good of membership and how it should be distributed. This introduces a dynamic, deliberative element to Walzer's account of national identity. National identities are not

⁵⁹ Walzer (2000), p8 (*italics added*).

necessarily set in stone, and the existing members are not under an obligation to preserve them over time in their current form (unless, of course, they assume such an obligation). Instead, the identity of the political community and the subsequent terms of membership are proper objects for discussion and debate amongst the citizenry: “ (...) the distribution of membership in American society, and in any ongoing society, is a matter of political decision What kind of community do the citizens want to create? With what other men and women do they want to share and exchange social goods?”⁶¹ This is the relevant sense in which states are like private clubs, Walzer argues, since membership in clubs is something that is decided upon by the existing members in accordance with the kind of purposes they want the club to serve and the sorts of individuals they want to share in their collective enterprise. Outsiders may wish to join the club, and they may be able to give better or worse reasons as to why they should be admitted, but they have no *right* to join and thus cannot freely choose to enter and acquire membership. Analogously, immigrants are free to apply for membership in any state they wish, but they have no right of entry that states are under an obligation to recognise, and the authority of the existing members to choose to accept or reject them is authoritative and final.⁶²

The core problem I want to raise here though is that Walzer cannot specify - in terms that are consistent with the elementary principles of democratic legitimacy that, as we have seen, he himself appeals to - why *this* group of individuals is entitled to constitute itself as a bounded *demos* that has a subsequent right to exercise powers of exclusion. As Arash Abizadeh argues, Walzer’s direct appeal to self-

⁶⁰ See also Whelan (1988a), pp. 28-29.

⁶¹ Walzer (1983), p 40.

⁶² *Ibid*, p41.

determination to ground the right of a community to exclude outsiders “begs the question of who the relevant collective ‘self’ rightly is”.⁶³ This is the ‘boundary problem’ in democratic theory that has been discussed at length by Frederick Whelan.⁶⁴ The key problem with purely democratic accounts of the collective right to self-determination is that “... (Democracy) cannot be brought to bear on the logically prior matter of the constitution of the group itself, the existence of which it presupposes”.⁶⁵ Walzer states bluntly that the original members of the *demos* are simply those individuals who voluntarily recognised one another as members and thus formed a political association: “Initially, at least, the sphere of membership is given: the men and women who determine what membership means, and who shape the admissions policies of the political community, are simply the men and women who are already there”.⁶⁶ Walzer’s account of boundary-constitution thus invokes the idea of a set of ‘founding fathers’ who brought a political community into being simply through an act of volition and mutual recognition, and who subsequently have a legitimate right to set the terms and conditions for future membership as a function of their right to democratic self-determination: “only the founders choose themselves (or one another); all other members have been chosen by those who were members before them”.⁶⁷

But the matter of the initial constitution of a democratic community is not as straightforward as this. Walzer’s appeal to ‘founding fathers’ assumes what the self-determination argument is supposed to demonstrate; that there is a group of individuals with legitimate

⁶³ Abizadeh (2008), p49.

⁶⁴ Whelan (1983).

⁶⁵ *Ibid*, p40; quoted in Abizadeh (2008), p46.

⁶⁶ Walzer (1983), p43.

democratic authority to demarcate a jurisdictional unit and shape the subsequent sphere of membership through practices of exclusion. The original founders cannot, as Walzer seems to suggest, have democratic authority to choose one another as members, because that kind of authority can only come from being a member of the *demos*; but the *demos* is brought into existence *after* the founders have chosen one another. This paradox seems to recur for every subsequent membership decision that is made by reference to democratic criteria, because each subsequent membership decision raises the issue of the constitution of a new *demos*. As Ayelet Shachar notes, the democratic self-determination argument for membership controls “presupposes precisely what is at issue here: namely, the existence of an already legitimately defined political community whose members can then justly determine to whom to distribute membership entitlements in the future”.⁶⁸

We have seen that Walzer argues that the question of the terms and conditions for membership must be settled before all other questions of distributive justice. But according to the objection being considered here, there is in fact a more elementary question, or rather infinite series of questions, concerning the constitution of the group that then decides upon the terms and conditions for membership. Any attempt to answer boundary disputes or membership decisions by reference to democratic criteria results in an infinite logical regress, because before we can answer the question of the constitution of the *demos*, we have to know who is entitled to decide upon the constitution of the *demos*, but before we can answer that question we need to know who is entitled to decide upon who is entitled to decide upon the constitution of the *demos*, and so forth *ad*

⁶⁷ *Ibid*, p41.

infinitum. As Baubock observes, “The question of how to demarcate a constituency that will then decide about its own borders produces a vexing self-determination paradox that has been stated succinctly by Ivor Jennings Letting the people decide “was in fact ridiculous because the people cannot decide until someone decides who are the people”.⁶⁹ Similarly, Robert Goodin observes that “Logically, constituting the demos - in the very first instance, at least - cannot itself be a product of ordinary democratic decision making ... The initial membership of the demos, at least, must itself be constituted according to some principle independent of any decision of the demos (...).”⁷⁰ The boundary problem leads Carol Gould to suggest that democratic self-determination cannot in and of itself be appealed to directly to demarcate legitimately the sphere of membership: “(...) issues of membership in a *demos* (or citizenship), as well as more general questions of who has rights to participate in collective decision making, require an appeal to concepts beyond those of self-determination or self-rule per se”.⁷¹

There are two responses that Walzer could make here. Firstly, he could bypass democratic arguments for self-determination, and fall back on the idea of protecting the shared culture and identity of the host community, and appeal to this as the justification for a right to closure. But this would bring us back to the objections in section 3.2 above. Walzer’s second possible response to the boundary problem could be to appeal to the subject-to-the-law principle of demarcation. According to this response, the scope of the *demos* is defined simply by those who are subject to the laws of the state in question. But this

⁶⁸ Shachar (2009), p139.

⁶⁹ Baubock (2004), p21; quoting Jennings (1956), p56.

⁷⁰ Goodin (2007), p43.

⁷¹ Gould (2004), pp. 174-175.

does not bring the logical regress described by the boundary problem to a halt, because it simply presupposes the existence of a bounded territorial unit, and tells us nothing about why the laws of that unit are legitimate expressions of the democratic will of that particular *demos*. As Johann Karlsonn points out, “the subject-to-the-law principle offers no real solution to the boundary problem, since it merely presumes that there is already a state in place to maintain the laws and do the subjecting”.⁷² In the remainder of this chapter, I discuss critically David Miller’s recent work on immigration, which attempts to supply a normative argument for the territorial rights of states that does not appeal directly to democratic criteria, and so may be more successful than Walzer in justifying practices of membership control.

3.6 Miller on the Territorial Rights of Nation-States

In contrast to Tamir’s non-statist account of national self-determination, Miller regards the state as the best vehicle for national self-determination, claiming that “it is valuable for the boundaries of political units (paradigmatically, states) to coincide with national boundaries”.⁷³ National identity, for Miller, describes a language, a common set of political practices and principles, a general belief amongst the members that they share something in common that sets them apart from the members of other nations, and a shared aspiration for collective self-determination.⁷⁴ Miller argues that nations have a public culture, which consists in “a set of ideas about the character of the community which ... helps to fix responsibilities”.⁷⁵ Elsewhere,

⁷² Karlsonn (2006), p24.

⁷³ Miller (1995), p82.

⁷⁴ Miller (2007), pp. 118-120.

⁷⁵ Miller (1995), p68.

he describes public culture as “a set of understandings about how a group of people is to conduct its life together”.⁷⁶ In Miller’s view, nations are ethical communities, which means that we owe more extensive obligations of justice to fellow-nationals than to human beings as such.⁷⁷

Unlike Tamir, Kymlicka, Tebble and Walzer (in his more communitarian moments), Miller has in the past denied that considerations of protecting national identities should be of particular importance to debates on immigration restrictions. Drawing a distinction between the existence of a national identity and the preservation of national identity *in any particular form*, Miller argues that immigrants cannot be justifiably excluded simply on the grounds that they may bring about changes to the dominant national culture: “Why should immigrants pose a threat to national identity once it is recognized that that identity is always in flux?”⁷⁸ *Contra* liberal nationalists, identity liberals and liberal communitarians like Walzer, national groups “need not ... select as new members only those who already share the existing national identity”.⁷⁹

Despite his resistance in the past to identity and culture based arguments for exclusion, Miller is critical of arguments for opening up borders on the grounds of either egalitarian justice or from the value of freedom of movement. He claims that neither sort of normative consideration sustains the conclusion that control over membership should be removed from the self-determining powers of

⁷⁶ *Ibid*, p26.

⁷⁷ Miller (1995); Miller (2007).

⁷⁸ Miller (1995), p128.

⁷⁹ *Ibid*, p129.

liberal-democracies. I will discuss his response to the egalitarian critique of closed borders in the following section, when I look at his account of national responsibility. In this section I focus on his arguments against open access to social membership from the value of freedom of movement, and on his account of the territorial rights of nation-states.

Miller denies that there is a human right to unlimited freedom of movement, so on his account the right to self-determination on the part of liberal-democracies trumps the interest that prospective migrants may have in being able to freely enter their country of choice. If his argument for this conclusion is successful, it suggests that respecting universal liberal rights and commitments may be compatible with defending a right to communal closure on the part of nation-states as a function of their right to self-determination. If Miller is correct in arguing that the liberal commitment to the value of freedom of movement can be constrained in *scope* without being wholly compromised, then we may not be faced by an inherent and necessary tension between liberalism and the value of free movement on the one hand and democracy and the license of citizens to determine the boundaries of membership on the other.

Miller's account begins with a discussion of the normative basis for the right of states to wield authority over a determinate and bounded territory. He claims that this question is in an important sense prior to the question of the legitimacy of immigration restrictions:

How can states justify their claim to decide who resides on a particular part of the earth's surface and who does not, particularly in view of the somewhat murky historical processes by which

state boundaries have usually been established? People might have a right to migrate simply on the grounds that states have no right to exclude them from their territory.⁸⁰

Miller's argument for the territorial rights of nation-states appeals to the interplay between historic occupancy and the mutually transformative impact of national cultures on the territory of the land they occupy. When the members of a national group reside on an area of land, over time they inevitably shape the territory according to elements of their shared culture, and in turn the character and conditions of the land inevitably shapes the shared culture of the national group. Materially, the group adds value to the territory by building roads, bridges, irrigation systems and so forth. Symbolically, the territory will be the site of events of particular cultural and historic significance for the group, such as battles, burials or events of religious importance. The group's culture is in turn shaped by the character of the territory. For example, Native American hunting practices can be seen as the result of their adaptation to the physical realities of their land. There is inevitably a mutually transformative interaction between the culture of the national group and the land that they occupy, and in Miller's view it is this interaction that accounts for the special significance that the land holds for the members of the national group and that lays the foundation for the right of the group to claim and exercise territorial control:

The culture must adapt to the territory if the people are to prosper: it matters whether the climate is hot or cold, the land suitable for hunting or agriculture, whether the territory is landlocked or open to the sea, and so forth. But equally the territory will in nearly every case be shaped over time according to the cultural

⁸⁰ Miller (2007), p202.

priorities of the people, as fields are marked out and cultivated; irrigation systems are created; villages, towns, and cities are built; and so forth ... It has become the people's home, in the sense that they have adapted their way of life to the physical constraints of the territory and then transformed it to a greater or lesser extent in pursuit of their common goals.⁸¹

By denying territorial rights to a national group, we deprive them of the material and symbolic value that the territory holds for the members of that group. The value of the interaction between the group's culture and the land is *embodied exclusively* in the territory in the sense that it can only be enjoyed on that particular piece of land.⁸² An obvious example of this is the special symbolic significance that the Temple of Jerusalem holds for many members of Israel, and the poverty in that group's view of suggestions to the effect that the value of worshiping in other places could be of comparable significance.

However, this argument in itself falls short of establishing that states are morally justified in excluding prospective migrants from entering the territory. Miller departs from the Walzerian democratic account of the relationship between collective self-determination and membership when he denies the validity of the 'club' model as an accurate or useful analogy for the membership procedures of political associations. A state cannot, in Miller's view, simply hold "that it is entirely at liberty to choose who comes in and who does not".⁸³ It does not have this kind of unaccountable unilateral discretion, firstly, because the consequences for an individual of being excluded from a state are potentially much graver than the consequences of being

⁸¹ *Ibid*, p218.

⁸² *Ibid*.

excluded from a club in civil society, and secondly because excluded immigrants are not free to simply start up their own political association, unlike the case of individuals who are excluded from private clubs, who, in principle, have the freedom to set up a club of their own. Miller thinks that his account of the justification for territorial control from historic ownership and cultural impact is sufficient to establish that states have a *right* to exclude. Establishing that they *ought* to do so in any particular case - that they are *morally justified* in doing so - requires further argument.⁸⁴ This further step requires states to offer a justification for exclusion that takes into account the potentially significant needs and interests that may be served by the prospective migrant's entry into the political community - such as increased wages, better employment opportunities or a wider and more satisfying range of social, political or cultural options - and to show why the exercise of exclusive territorial rights trumps those interests in such a way that justifies their exclusion.⁸⁵

It is at this juncture in his argument that Miller appeals to the value of collective self-determination. Self-determination provides the bridge in Miller's account between the legitimate possession of territorial rights and the justification for exercising those rights in such a way as to exclude prospective migrants. Miller puts forward what is essentially a consequentialist account of the value of self-determination.⁸⁶ That is, self-determination is presented as being valuable because it protects the political community's collective goals regarding - for example - its "education system ... health care system,

⁸³ Miller (2007), p223.

⁸⁴ Angeli (2007), p12.

⁸⁵ Miller (2007), p221.

⁸⁶ Angeli (2008), p10.

and ... other social services".⁸⁷ The idea is that the best way to respect the importance to individuals of participating in a self-determining political association and exercising autonomous choices amongst different social, cultural and political options is to award the members of that association the unilateral right to control membership, in so far as unchecked immigration may threaten to undermine the pursuit of the goals that they have collectively decided upon, by altering the demographic composition of the community:

An adequate explanation (for the exclusion of a prospective migrant) will be one that links immigration policy to the general goals of the society in question. These goals will reflect existing national values and will ideally be set through a continuing process of democratic debate. Immigration on any significant scale will invariably have an impact on these goals ... It will, for example, change the age profile of the country ... the mix of skills available in the workforce, the demands made on the education system, the health care system, and the other social services ... All of these are legitimate concerns of public policy, and depending on the priorities set by each political community, they may count either for or against admitting particular groups of immigrants.⁸⁸

For Miller, the territorial rights of states are derived from the collective history as well as the present-day values and interests of the members of their nations. The right to territorial control then grounds the subsequent right to control the sphere of social membership, because unchecked immigration may jeopardise the pursuit of the goals collectively decided upon by the citizens by altering the internal composition of the *demos*. So Miller's argument avoids the regress of

⁸⁷ Miller (2007), p229.

⁸⁸ *Ibid*, pp. 222-223.

constitutive decisions that was discussed in relation to Walzer's position, because it does not appeal directly to democratic considerations to justify the initial territorial authority of a particular self-determining *demos*. This is not to deny the importance of democracy to Miller's account of self-determination and exclusion. What I am drawing attention to is that the juncture in Miller's argument where he appeals to democratic considerations enables him to avoid the regress of constitutive decisions described by the boundary problem, because the question of the boundaries of the *demos* has already been answered by appeal to the argument concerning the territorial rights that follow from historic occupancy and cultural transformation.

Unlike Tamir's cultural account of national self-determination, at this point it is no objection to Miller's position that the members of a national community may have heterogeneous values and political preferences that lead to divergent views on the goals that they wish their state to pursue. All his position turns on is the idea that the members share a common interest in those goals being set through properly inclusive democratic procedures. Accepting that interest also entails accepting that any given individual is liable to find him or herself in the minority on certain issues, and in the majority on other issues, including immigration and citizenship policy:

(...) although different individuals and groups are likely to disagree about the priorities that their political community should pursue, they have a common interest in being able to set those goals through democratic debate, and this of course entails being willing to accept majority decisions reached through proper procedures.⁸⁹

⁸⁹ *Ibid*, p224.

We might agree with all of this and yet still contend that self-determination does not ground a right to control immigration. That is, we could grant Miller the argument, concerning territorial rights and self-determination, but still maintain that the issue of social membership should not be encompassed under those territorial rights. A straightforward liberal egalitarian argument to this effect would be to suggest that, whilst a group does have a right to decide collectively upon the goals they wish to pursue on a determinate area of land, in the interests of equality of opportunity and the value of freedom of movement, they have no right to exclude outsiders from wishing to enter the territory, contribute to those goals and thus reap the material and symbolic rewards, since the boundaries around political communities are arbitrary from a moral point of view.⁹⁰ The next stage in Miller's argument is to establish that in principle the territorial rights of national groups trump the interests that individuals may have in migrating, so that the symbolic and material values that the territory holds for the group not only justify their right to territorial control, but also to exclude outsiders from entering. This requires an argument to the conclusion that the interest that prospective migrants have in being free to enter the country of their choice is in principle of insufficient normative weight to ground a right to unlimited freedom of movement and to thus trump the right of states to control membership.

Miller's core objection to unlimited freedom of international movement is that if individuals have options in their home country that are adequate to secure their basic interests and welfare, then their

⁹⁰ Carens (1995).

need to migrate is not sufficiently compelling to put other states under an obligation to permit them to enter.⁹¹ According to Miller, the right to immigrate should be understood as “a derivative right, justified only as a means to protect other rights such as the right to subsistence”.⁹² He observes that freedom of movement is valuable only in so far as it enables the individual to pursue other valuable ends: for example, to pursue a new career, to find a marriage partner, or to benefit financially from tax exemptions. These are the sorts of considerations that are relevant to the question of the *scope* of the right to freedom of movement; that is, the area over which an individual should be able to range freely in pursuit of valuable ends. Miller notes that in practice liberal states regard a consequentialist approach to the scope of the right to freedom of movement as unproblematic when considering movement *within* bounded communities. States put into place restrictions on people’s internal freedom of movement in order to protect all manner of different socially valuable projects, institutions and rules. We cannot, for example, move freely into other people’s private property, traffic regulations prevent us from driving wherever we may please, the police regulate our movement up and down streets, and so on.⁹³ “The point here”, Miller explains, “is that liberal societies in general offer their members *sufficient* freedom of movement to protect the interests that the human right to free movement is intended to protect”.⁹⁴

Seen from this perspective, Miller suggests that unlimited freedom of international movement starts to look like an expensive preference. In other words, a good that individuals may strongly desire, but not a

⁹¹ Miller (2007), pp. 204-209.

⁹² *Ibid*, p202.

⁹³ *Ibid*, p56.

⁹⁴ *Ibid*, p206.

good that is necessarily of such significance to their basic needs and human rights that it imposes either a positive duty on others (and other *states*) to act to secure it, or a negative duty not to interfere with its exercise: “ (...) although people certainly have an *interest* in being able to migrate internationally, they do not have a basic need of the kind that would be required to ground a human right. It is more like my interest in having an Aston Martin than my need for access to *some* means of physical mobility”.⁹⁵ Another way of putting the point would be to say that there exists a qualified right to freedom of international movement and access to membership which is a *remedial* right in that “its existence depends on the fact that the person’s vital interests cannot be secured in the country where she currently resides”.⁹⁶

In the following section, I evaluate the force of Miller’s arguments for membership controls. Firstly, I note the way in which Miller’s defence of territorial rights seems able to account for the claims of indigenous groups to have independent statehood and to close their borders in cases where they are in danger of being ‘swamped’ by outsiders. Whilst Miller’s argument for membership controls based on territorial rights does have some advantages over the culture, political-diversity and democratic justifications for exclusion put forward by Tamir, Tebble and Walzer, his position generates difficulties of its own. Firstly, disputes over claims to territorial control often revolve around which group has the legitimate rights based on historic occupancy, and in such cases Miller’s account may beg the issue at hand. I then discuss an equality objection, which is that Miller’s position on territorial rights and exclusion from social membership seems to restrict arbitrarily the life options of individuals

⁹⁵ *Ibid*, p207.

according to their respective lines of cultural descent. Miller's account of national responsibility is designed to overcome this sort of objection, but having outlined his position I raise four arguments against the idea that the borders of wealthy nation-states can be closed justifiably on such grounds.

3.7 National Responsibility and Global Inequality

One advantage of linking historic occupancy and cultural transformation to territorial rights and self-determination is that it provides a plausible account of the normative force of the claims of indigenous groups to have territorial rights over a particular area of land. As Margaret Moore explains, “ (...) it is because a particular group has been in place for a long time - or since time immemorial - that they have come to care about the land; their myths and behavior patterns are bound up with the land, its seasons, its topography, and so on; and through this, they have greater claim to it than any other group”.⁹⁷ As a corollary of this, Miller's argument seems to provide a convincing account of what is morally wrong with coercive state interference in the territorial control of minority national groups, such as the Chinese state's policy of 'swamping' Tibet with large numbers of Chinese settlers and thus politically dispossessing native Tibetans.⁹⁸ We seem to have here a clear case for the moral legitimacy of recognising the Tibetan right to self-determination, including the right to close their borders to outsiders who seek to exercise political domination, in order to preserve their control over territory that holds a special historic, symbolic, cultural and material

⁹⁶ *Ibid*, p206.

⁹⁷ Moore (2001), p191.

⁹⁸ I have borrowed the example of Tibet from Sager (2008), p74.

value for native Tibetans.⁹⁹ It should be noted that Miller's political and state-centred understanding of national self-determination seems to account for the harm being committed and the political measures needed to rectify it in the case of Tibet, more comprehensively than Tamir's cultural, non-statist understanding. It seems evident that what Tibetans require in order to be self-determining in the face of aggressive Chinese expansion is political control over a determinate area of land and independent statehood, and not just the ability to practice their culture and religion in a public sphere.

It is interesting to note that some cosmopolitan critics of nationalist accounts of self-determination and political membership endorse the legitimacy of membership controls in the case of politically and numerically vulnerable minority groups. Abizadeh, for example, when considering the most plausible arguments commonly put forward for the right to communal closure, concludes that "if the point of borders is to protect an entrenched minority from being overrun by foreigners who would end up dominating the polity and fundamentally transforming its character, then it is conceivable that ... democratic legitimacy would require at least *some* unilateral discretion in closing borders".¹⁰⁰ In keeping with this general line of argument, Michael Dummett considers the minority-culture situation to give rise to one of only two morally valid justifications for exclusion. Immigration restrictions are defensible in cases where "a relatively small population, with a distinct but vulnerable culture, is in

⁹⁹ Moore (2001), pp. 192-193. I follow Sager (2008, p73-74) in characterising the justification for membership control in cases like Tibet as based primarily on self-*preservation* or self-*defence*, against the aggression of outsiders. So my defence of independent statehood and membership controls for native Tibetans is compatible with my overall objection to arguments for membership control from the value and practice of self-*determination*. See also Meilander (2001), p90, and Chapter 2, nt. 100 of this thesis.

¹⁰⁰ Abizadeh, (2008), p53.

danger of being submerged by the entry of a large number of people with a more robust culture”.¹⁰¹ So even authors who argue for a strong presumption in favour of open borders recognise that freedom of movement can become a shield for the dominance of numerically, politically or economically vulnerable minority groups, and that in such cases it may be overridden justifiably.

However, although Miller seems to provide a convincing account of the normative geography of cases like Tibet, his defence of territorial rights generates difficulties of its own. One possible objection to Miller’s attempt to ground territorial rights on historic occupancy and cultural transformation is that often, boundary disputes arise precisely because of disputes over historic entitlement, given the complexity of patterns of historic migration. In other words, controversy over historic occupancy and cultural entitlement can often be the issues that give rise to boundary disputes, and so occupancy and cultural entitlement cannot always be invoked to solve them. For example, Moore points out that we can understand the conflict over territorial jurisdiction in Northern Ireland as being:

(...) settler-native in origin, and implicit in that conception is the view that the Gaelic-speaking Irish people are indigenous (native) to Ireland, and that the Ulster Protestants, who form a majority in the north-east part of the island, are ‘settler’ people who dispossessed the native Irish and oppressed them.¹⁰²

In cases like these, Miller’s argument for territorial rights on the basis of historic occupancy and cultural transformation would seem to beg

¹⁰¹ Dummett (2004), p119. See also Baubock (2009), p14.

¹⁰² Moore (2001), p187.

precisely what is at issue - namely, which group has a right to occupy and transform the territory grounded on historic ownership and attachment to the land - and so cannot be the basis for establishing the proper jurisdictional boundaries of the right to self-determination that the disputing groups possess. Depending on where we start from in history (and *whose* account of history we accept as valid), different groups may have legitimate territorial rights according to Miller's position, and it may be difficult to justify the thought that the chosen starting point is non-arbitrary.¹⁰³ Miller recognises that the patterns of migration, colonialism, aggressive expansion, occupancy and secession that constitute the historic background for today's particular demarcation of nation-states and their jurisdictions muddy the waters as far as the legitimacy of claims to historic ownership are concerned. But his argument for territorial rights on the basis of occupancy does not make a straightforward appeal to the authenticity of claims to *original* occupation. Instead, he claims that “ (...) occupancy and use of land over a long period eventually (trumps) the territorial claims of the original possessors”.¹⁰⁴

I now want to put forward an objection from the value of equality and distributive justice. We can imagine an indigenous nomadic national group A that requires a vast area of land in order to live according to its historic and cultural traditions. The nomadic culture, on Miller's account, has developed because the group has over time adapted itself and added value to the territory it finds itself living upon. Imagine then another national group B nearby whose territory cannot support the group's members in the way they would wish. Say, for the sake of argument, that their territory has become overpopulated or that the fertility of the land is rapidly deteriorating. We can add to this

¹⁰³ Moore (1998), p145.

example the observation that natural resources - minerals, precious stones, oil, and so on - are distributed across the globe arbitrarily, and that nation-state A has been far more fortunate in the amount of resources they possess in their territory in relation to nation-state B.¹⁰⁵ Also assume for the sake of argument that the members of B cannot be described justifiably as refugees, and that they meet Miller's threshold for a decent life, which is an aspect of his position I will return to below. Still it would seem counter to liberal principles of equality of opportunity to maintain that the members of this second group have no claim to be admitted into the territory of the first group purely on the grounds that the first group requires exclusive access to this particular piece of vast, uninhabited and bountiful land in order to practice their traditional nomadic culture and way of life. It seems counter to liberal principles that the life prospects of the current members of the two groups should be so heavily determined by the arbitrary fact of their lines of cultural descent and the actions of their ancestors.¹⁰⁶ If valid, what this objection suggests is that Miller's argument concerning territorial rights can at most establish that national groups have a just claim to preserve in perpetuity their *access* to areas of historic and cultural significance to them. In itself, it falls short of establishing that they have a right, that liberals should recognise, grounded on historic occupancy and cultural transformation, to exclude outsiders from entering their territory (notwithstanding limiting cases like Tibet).

Iris Young defends this kind of non-exclusive access arrangement as a way of recognising the legitimate aspiration of groups to attain self-

¹⁰⁴ Miller (2007), p220.

¹⁰⁵ Beitz (1979); Carens (1995); Pogge (2002); Young (2000a), pp. 246-247.

¹⁰⁶ Moore (1998), p144.

determination without thereby entailing the territorial exclusions and rights to non-interference implied by nationalist conceptions of group identity and self-determination:

(...) in principle the implementation of self-governance institutions often should recognize the importance of land, resources, and place without assuming that self-determination requires exclusive control over a large and contiguous bounded territory.¹⁰⁷

The option that Young defends for accommodating the importance of particular areas of land or sites of historic and/or cultural importance for a group without entailing exclusive territorial control is to situate those groups within “interlocking federal arrangements”.¹⁰⁸ Young’s views on federalism, self-determination and the politics of membership will be discussed in detail in the following chapter. At this stage I want to note that Young’s idea of accommodating the right to self-determination of political communities within a shared jurisdictional context suggests a further criticism of Miller’s argument for exclusive territorial control based on cultural/historic significance. The problem here (a difficulty which Young’s federal vision is designed partly to be responsive to) is that Miller’s argument seems to have difficulty in accounting for situations where a particular area or site is of special cultural or historic significance to two or more groups. In the case of the city of Jerusalem, for example, do Palestinians or Israelis have a right to exclusive control over that site and the surrounding territory?¹⁰⁹ To appeal to cultural or historic significance to settle this matter would seem to beg the question at hand since both groups are able to claim legitimately that Jerusalem is

¹⁰⁷ Young (2000a), p261.

¹⁰⁸ *Ibid*, p261.

¹⁰⁹ *Ibid*, p262. See also Moore (2001), pp. 196-198.

of particular symbolic and religious significance to them. It seems that in the context of these sorts of conflicting but legitimate group claims, Miller's account cannot tell us which group has the legitimate right to exercise territorial control and powers of democratic exclusion. Young's position, which will be discussed further in the following chapter, is that a system of shared federal jurisdiction is the most practical and normatively defensible response to cases like these.

Leaving aside the problem of how Miller would account for conflicting group claims to a single site of historic or cultural significance, I want to return to the equality objection. This brings us to Miller's views on national responsibility. What Miller would presumably want to say in response to the hypothetical example given above and the objection from equality that it supports is that the current economic, cultural and social situation of groups A and B - i.e. the circumstances that have led to migratory pressure for the members of group B - are *not* due to factors that are purely arbitrary from a moral point of view, in so far as there are circumstances in which it makes sense to attribute collective responsibility to national groups, and in so far as those circumstances apply to the background conditions informing the example. The proper attribution of collective *outcome responsibility* removes any just obligation on the part of other groups to offer forms of assistance beyond humanitarian aid. Most importantly for my purposes here, it removes any obligation from principles of egalitarian justice to open up borders to the members of poorer countries. Other national groups do not bear *remedial responsibility* i.e. a responsibility to alleviate the burdens

facing other groups.¹¹⁰ Consider, Miller asks us, the situation of the following kind of ‘like-minded’ national group:

Their members subscribe to a common public culture, despite individual differences in belief and value, and they participate in mutually beneficial practices whose shape they have a chance to influence. The more strongly these conditions obtain, the more appropriate it is to hold nations responsible for their political actions, and the consequences that flow from these.¹¹¹

In Miller’s view, the members of democratic nation-states with a shared underlying public culture can properly be held responsible in the outcome sense for the actions and the consequences of the decisions of their state because states - ideally speaking - are “agents of the people they are supposed to serve”.¹¹² Naturally, the wider the democratic legitimacy gap in a given society the less sense it makes to attribute collective outcome responsibility for their state’s actions to the members of the nation. The members of a national group under colonial rule, for example, can hardly be said to be collectively responsible for the actions and decisions of the foreign empire ruling them. However, the closer the nation-state approximates the ideals of

¹¹⁰ In Miller’s use of these terms, ‘outcome responsibility’ refers to the proper attribution of moral blame due to causal responsibility. If it is my fault that x occurred and that I should bear the consequences of x, then I have outcome responsibility in the relevant sense. If a child is drowning in a lake because I pushed him in, then I have outcome responsibility. ‘Remedial responsibility’ is a form of responsibility that ignores causality and blame and focuses solely on future-oriented capacities; so I have responsibility in the remedial sense to save a child from drowning because I have the capacity to do so without incurring serious harm. Whether I am causally responsible for the child being in the lake in the first place is irrelevant to attributions of remedial responsibility in this case. Miller (2007), Chapter 4.

¹¹¹ *Ibid*, p136.

democratic accountability, transparency, and legitimacy, the more sense it makes in Miller's view to regard states as the political apparatus through which nations - i.e. the people who constitute the *demos* - act out their collectively agreed upon decisions and pursue their collective goals, in keeping with the common sentiments and shared public culture of the individual members, and thus the more sense it makes to attribute responsibility for the state's actions and their consequences to the individual members of the nation: "the policies pursued by the state can reasonably be seen as policies for whose effects the citizen body as a whole is collectively responsible, given that they have authorized the government to act on their behalf in a free election".¹¹³

The link that Miller forges between democratic self-determination and collective national responsibility is the theoretical move that leads him to propose a two-level account of global justice. Unlike proponents of global egalitarianism, Miller advocates splitting the responsibility for social justice between nation-states and the international community. It is the responsibility of states to ensure social justice amongst their citizens, whilst the international community is charged with creating the global conditions which will enable states to meet their internal responsibilities.¹¹⁴ Miller rejects the idea that global justice implies global egalitarianism - i.e. equalising freedoms, opportunities and resources across all nation-states - on the grounds that the members of different political communities will have different ways of ranking and evaluating benefits and burdens: "people in different communities will want to

¹¹² *Ibid*, p111.

¹¹³ *Ibid*, p128.

¹¹⁴ The characterisation of Miller's position as 'two-level' is in Levy (2008b), pp. 485-486.

have these advantages distributed in different ways. In particular, they will attach different relative weights to different components of the bundle'.¹¹⁵

Even if it were possible to establish an objective baseline for equality of opportunity across political communities, in Miller's view justice would not dictate that opportunities should be equalised globally because it will often make sense to attribute responsibility for inequalities between and within different political communities to the choices and cultural preferences of the members of national groups.¹¹⁶ Respecting the processes of self-determination internal to "culturally distinct communities each enjoying some degree of autonomy"¹¹⁷ thus weighs heavily against equality of opportunity or open borders as an ideal of global justice. Whilst all individuals are entitled in justice to a minimum set of goods and resources, beyond that baseline the members of nations can properly be said to be collectively responsible for both the benefits and the burdens that their chosen policies result in. Miller takes this argument further by arguing that the current members of a nation-state can be held collectively responsible for the benefits and burdens generated by the actions of *past* members, so that even when seen from a historic perspective the current predicament that the members find themselves in bears no weight in favour of global redistributive justice, substantive equality of opportunity or open borders.¹¹⁸ For Miller, the contextual nature of values and goods combined with the appropriate attribution of national responsibility means that immigrants from poor countries do

¹¹⁵ Miller (2004), p125.

¹¹⁶ Miller (2004); Miller (2007), Chapter 5. Benhabib (2004, Chapter 3) also objects to global egalitarianism on the grounds that it would compromise collective self-determination.

¹¹⁷ Miller (2004), p125.

¹¹⁸ Miller (2007), Chapter 6.

not have a claim to be admitted to wealthier nations on the basis of egalitarian distributive justice.

My aim now is not to try to establish against Miller that global equality is a condition of global justice. That would require an extended discussion which is beyond the scope of this thesis. Instead, my aim is the more limited one of showing that considerations of global inequality count more in favour of greater ease of access for individuals from poorer states to social membership leading to citizenship in wealthier states, than is suggested by his account of national responsibility and democratic self-determination.

The first objection I want to make concerns the closeness of the ‘fit’ between the actions of states and the collective will of the members of the nations that they encompass. Even purportedly democratic states often act autonomously and in ways that pay no heed to the voice of their electorate.¹¹⁹ Moreover, even when the members of the *demos* are given the opportunity to voice their collective will, states are often free to simply ignore them and pursue policies directly contrary to those that the majority wills. A well-known recent example of this was the British invasion of Iraq. Evidence shows that a majority of UK citizens were opposed to the war, and in February 2003 hundreds of thousands gathered in London to protest the invasion.¹²⁰ Yet the British state ignored their collective will. In this case, it seems perverse to hold the members of the British nation collectively responsible for the actions of the British state purely because Britain has a nominally liberal democratic government. This example applies

¹¹⁹ Levy (2008b), p488.

¹²⁰ Angus Reid Global Monitor (2006), April; <http://www.angus-reid.com/polls/view/11447>

to the debate over global inequality and freedom of movement in so far as it highlights the general problem of ascertaining that the will of nation A has ‘passed through’ to the actions of its state in such a way as to attribute collective outcome responsibility to the members of nation A (rather than to their state), and to thus remove remedial responsibility from other nations in the form of opening up borders, should the members of A feel pressure to migrate due to their domestic circumstances.

The second reason to chip away at the connection Miller wants to forge between states and nations in order to derive an account of collective national responsibility concerns the role and political and economic power of non-state actors in the international arena. Miller’s view of global politics in the account he gives of national responsibility for the outcome of processes of self-determination is blinkered in that it seems to take into account only inter-state and intra-state relationships. Yet the political, economic, and social conditions of nation-states are often heavily influenced by the actions of NGOs, global financial organisations such as the IMF and the World Bank, and unaccountable multinational corporate entities that operate independently of the democratic will of the members of nations. Given that these organisations are not democratically organised, and given that they can and do exercise a significant amount of political and economic leverage over nation-states that may be impeccably democratic themselves, it seems that the members of nations cannot be held solely collectively responsible for the conditions in their countries. In the following chapter, we will see that proponents of the ‘all-coerced’ principle of democratic inclusion call for transparency and democratic accountability in the structure of these organisations.

What is particularly damaging for Miller's position is the fact that the nation-states that are most vulnerable to economic exploitation by both external state and non-state actors are those that are least equipped to mount effective democratic opposition. As Jacob Levy points out, "democracy has been especially rare among poor countries, making the attribution of poverty-maintaining policies to the nations particularly problematic".¹²¹ Sune Laegaard makes a similar point when she argues that global poverty is not primarily a result of the collective choices of democratically organised peoples. Instead, it is "more often the result of bad (undemocratic) governance, elite driven political conflict and exploitation, unfair international trade and the like".¹²² This casts doubt on the argument that collective national responsibility trumps considerations of equality that weigh in favour of open migration. If it is primarily states, competing political elites, and/or non-state actors like international corporations that are responsible in the outcome sense for the domestic conditions in a given country, including employment opportunities, relative wealth and so on, then it seems that the idea of collective outcome responsibility does not make a real difference to egalitarian considerations in favour of opening up borders to the members of *nations*, since these individuals are not members of the units to which collective outcome responsibility for domestic conditions should properly be ascribed.

In addition to the argument for collective national responsibility from democratic self-determination, Miller also claims that the cultural disposition or collective frame of mind of a nation constitutes sufficient grounds to attribute collective responsibility to nation-

¹²¹ Levy (2008b), pp. 489.

states.¹²³ So if the members of nation A are culturally predisposed to pursue spendthrift policies through the state, and if the members of nation B are culturally predisposed to pursue generous social welfare policies through the state, the members of each nation can be held legitimately collectively responsible for their relative wealth at the later time T. This removes any obligation on the part of the members of A to assist the members of B beyond what is necessary to ensure their basic minimum welfare; in particular, it removes any obligation to allow the members of B to seek a better life by migrating to A.

The problem with this argument is that it is a matter of considerable historic, social and political contingency which cultural norms, choices or predispositions will be conducive to economic success and stability at any given moment in history. This means that the charge of arbitrariness, that I earlier leveled at the way in which Miller's account of exclusionary territorial rights seemed to perpetuate global inequality, might stick. As Levy points out:

(...) there seem to be real accidents of luck and timing concerning *which* habits and norms are conducive to wealth, and when. Rapid population growth may deplete resources and create poverty at some moments and at some levels of population density. At others, it creates economies of scale, generates a working-age population able to take advantage of productive capital that needs sufficient labour (...)¹²⁴

Following on from this point, attributions of outcome responsibility usually turn on a sufficient degree of epistemic awareness on the part

¹²² Laegaard (2007), p290.

¹²³ Miller (2004); Miller (2007), Chapter 6.

¹²⁴ Levy (2000b), p489.

of the relevant agent. Naturally, there is considerable room for debate concerning how much awareness is sufficient to attribute what degree of responsibility. But intuitively, it seems that the greater the degree of complexity involved in being able to predict the outcome of a decision or dominant cultural norm, the less sense it makes to hold those making the decisions or acting in accordance with those norms responsible for the outcome. Miller himself holds that, in the case of individual responsibility, “we hold people responsible for the consequences of their actions that a reasonable person could have foreseen (...)”.¹²⁵ But as Levy’s point above indicates, the degree of complexity and the number of contingent factors involved in the historic and contemporary political and social issues that determine the respective levels of wealth and economic stability across states would seem to entail that this epistemic condition is impossible to satisfy in a way that would sanction attributing collective outcome responsibility for those levels to nations.

The final argument that Miller makes against opening up borders to social membership in order to combat global inequality, is that it would undermine national self-determination. Miller holds that without the unilateral right to close their borders, national self-determination would be “hollowed out” because the unrestricted entry of strangers with different preferences might threaten to compromise the capacity of nations to carry out their self-defined goals and collective projects:

(...) we might permit nations to continue making autonomous decisions in areas such as resource conservation and population control, but then require them to provide free access to anyone who wants to join ... It is easy to see,

¹²⁵ Miller (2007) p116.

however, that this would also undermine self-determination ... For decisions about admission to citizenship are inseparable from other decisions about the kind of society one wants to build. Some nations setting out on a path of rapid economic growth may welcome all-comers ... Other nations with demanding environmental objectives may pursue policies aimed at reducing population growth ... An unlimited right to free movement would preempt policy choices of this kind, and ... hollow out the idea of national self-determination.¹²⁶

But as Leif Wenar points out, this characterisation has an unreal ‘all-or-nothing’ character.¹²⁷ I think that national self-determination would only be undermined by open borders in the fundamental sense suggested to by Miller if there was: a) unanimous agreement amongst the citizenry concerning the policies they wanted their state to pursue; b) unanimous agreement amongst the set of migrants choosing to relocate concerning the policies they wanted their destination state to pursue; c) if the policies favoured by the existing citizenry and those favoured by the migrants were mutually contradictory, and d) the migrants outnumbered the original citizens. So if all the current members agreed on a certain ecological policy, for example, and if the free entrance of outsiders meant that that policy was *impossible* to fulfill because it would result in the entrance of a group of migrants not only unanimously united in their support for an ecological goal contradictory to the (universally agreed upon) policy preference of the existing members but also numerous enough to form a majority, then every single pre-migration member would find that their self-defined political interests in the domain of ecological policy - and, therefore, to an extent their political autonomy - had been compromised. In this

¹²⁶ *Ibid*, pp. 73-74.

¹²⁷ Wenar (2008), p408. Wenar does not however substantiate this claim with the argument I advance here.

extreme scenario, we might want to say that the pre-migration community was no longer self-determining in the domain of ecological policy.

However, the more realistic picture is of a group of citizens internally divided over the policies it wants the state to pursue and a group of migrants similarly divided in their preferences for state policy. We have seen above that Miller accept this; “ (...) different individuals and groups are likely to disagree about the priorities that their political community should pursue (...)”.¹²⁸ He claims that his argument in defence of membership controls from democratic self-determination does *not* “assume a homogenous national culture in which all participants share the same goals”.¹²⁹ It only assumes that they have a common interest in their state’s policies being set through an inclusive democratic process. But - notwithstanding the extreme scenario outlined above - the unimpeded entry of outsiders is only realistically going to alter the balance of the net priorities in the society, rather than render the pre-migration preferences of the political community completely and permanently null and void as far as state policy is concerned. Granted, in an exceptional case opening up borders may result in what was once a minority preference in the pre-migration community for a certain ecological policy (for example) becoming a majority preference. Some of the native citizens may find that the result of free migration was that their preferred ecological policy becomes state policy, or perhaps gains regional influence. Equally, though, free migration might result in a situation where the majority come to be persuaded of a different viewpoint on a given policy because of the presence within the *demos* of the new members and the arguments they put forward. This could even, in

¹²⁸ Miller (2007), p224.

principle, result in a policy being adopted that is more just, more efficient, more attentive of the needs of the disadvantaged, etc, than the policy that was pursued in the pre-migration days. Why should all this not simply *reflect* the on-going process of democratic self-determination, rather than be understood to undermine or “hollow out” self-determination? In direct contrast to Tamir’s ‘outcome’ oriented account, for Miller self-determination requires only a democratic *process* in which members can *express* their preferences and have those preferences taken into account by their state. He states explicitly that it does not require the *satisfaction* of any particular preferences.¹³⁰ Even if free migration meant that my preference, which was in the majority in the pre-migration period, came to be in the minority, I am still a member of a self-determining nation-state in Miller’s sense, because finding oneself in the minority on some issues and in the majority on others is part and parcel of the process of democratic self-determination *as he understands it*, and because my concerns and interests are still going to be taken into account by the state when it comes time to deliberate over issues in the democratic process. Miller acknowledges all this: “ (...) I may disagree with the current language policy of my state, but it is to my advantage nonetheless that the policy is the subject of a democratic process that takes my concerns into account, and that on other occasions will generate policies that I favor”.¹³¹ Unless we support a normative goal whereby democratic self-determination implies permanent majorities (and it is clear from the previous quotation that this is not Miller’s view), I don’t see that the alteration that free migration might make to the current set of democratically defined (but *internally disagreed upon*) goals is sufficient reason in itself for excluding outsiders.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

If the objections put forward in this section have force, they suggest that Miller's arguments from collective national responsibility and democratic self-determination do not outweigh egalitarian considerations in favour of greater ease of access for outsiders to social membership leading to citizenship. However, even if Miller's account of collective national responsibility fails to fully assuage liberal egalitarian concerns about global inequality, might it be the case that the real problem is the inequality, rather than the exclusive membership policies of wealthy nation-states?¹³² In other words, why should we assume that egalitarian considerations of distributive inequality and the arbitrary distribution of wealth and resources are relevant first and foremost to the question of *membership*? If it were possible to rectify global inequality by means other than opening up borders, might that be sufficient to not only meet the objections raised above but also to justify including control over social membership amongst the self-determining powers of liberal-democracies? In the following section, I discuss the idea of 'purchasing' the right to exclude through redistributing wealth and resources and by taking measures to ensure that democracy and human rights are secure across all nation-states.¹³³ Note that if my arguments against Miller's account of national responsibility have force, they suggest that wealthy states may have obligations in distributive justice that are more extensive than merely ensuring a basic minimum of welfare for all. What those obligations may consist of is, again, beyond the scope of this thesis. But I think the arguments of the following section need only turn on the point that those obligations are more extensive than Miller thinks.

¹³² Carens (1992), pp. 34-35.

¹³³ I have borrowed the description of 'purchasing' the right to exclude from Bertram (unpublished manuscript), p3.

3.8 The Purchase Argument for Democratic Closure

The ‘purchase argument’ is common to a number of liberal nationalist and communitarian theorists, and it is present in one form or another in the work of Tamir, Walzer and Miller. The basic thought is that if restrictions on immigration do not have a sufficiently negative impact on the interests of those who are denied entrance because they have sufficient options and secure political and human rights in the state in which they currently reside, then exclusive acts of democratic self-determination need not necessarily stand in contrast with the liberal commitment to universal freedom, equality and human rights. Prosperous states have to compensate those who are liable to be harmed through being excluded by redistributing wealth and resources to poorer states and by taking steps in general to ensure that human rights and democracy are well established across the globe. They can then close their borders, secure in the knowledge that they have met their obligations to those who have been kept out.

Walzer puts forward a version of this argument in the context of his discussion of mutual aid and the extent of the obligations of wealthy nations to immigrants from poorer areas. He maintains that a “(...) community might well decide to cut off immigration ... if it were willing to export (some of) its superfluous wealth”.¹³⁴ Although Miller rejects global egalitarianism, he does regard shared humanity as sufficient to generate an obligation to ensure that the basic human rights of all individuals are respected, so that closing borders must be accompanied by efforts to ensure that the exclusion of prospective migrants does not cause or perpetuate severe harm. This may require

¹³⁴ Walzer (1983), p48.

redistributive efforts, humanitarian aid or foreign political intervention and activity. For Miller, the offer of refuge is a last resort when all other alternatives have been exhausted:

(...) a state that claims legitimate authority over a territory must also take reasonable steps to protect the human rights of those whose position is worsened by the boundaries it defends - which might mean, in special circumstances where there is no alternative, allowing them to come in (in other circumstances the state might, for instance, offer them protection in the place where they now reside). In other words, it cannot, ethically speaking, defend its boundaries and do nothing else in a world where human rights are in many places insecure.¹³⁵

It seems that the 'purchase' argument is an inherent corollary of liberal nationalism on the subject of membership controls. However, in contrast to Walzer and Miller, a number of authors claim that the redistributive efforts that would be required to fulfill the conditions set by the terms of the purchase argument (and to therefore justify democratic exclusion) are more extensive than merely ensuring a basic level of welfare for all, and they express their argument not in terms of humanitarian aid but within the language of equality and distributive justice. For example, Will Kymlicka claims that "if states do meet their obligations of international justice, then it is permissible for them to regulate admissions so as (sic) preserve a distinct national community".¹³⁶ Similarly, Kok-Chor Tan argues that "border restrictions on the part of well-off countries can be justly maintained only in a context of a global arrangement (of distributive justice) that

¹³⁵ Miller (2007), p221.

¹³⁶ Kymlicka (2001a), p271; quoted in Seglow (2005), p238.

those kept out can reasonably accept as reasonable”.¹³⁷ Rainer Baubock agrees when she argues that “(...) closing borders to the less fortunate ones ... can be justified on grounds of democratic self-determination only if democratic states also take credible efforts to fight global distributive injustice”.¹³⁸ Lastly, Tamir follows this trend when she states that:

Restricting immigration in order to retain the national character of a certain territory, is only justified if all nations have an equal chance of establishing a national entity ... Liberal nationalism thus implies that it is justified for a nation to seek homogeneity by restricting immigration only if it has fulfilled its global obligation to assure equality among all nations.¹³⁹

Democratic theorists, too, have found reason to endorse a variant of the ‘purchase argument’. Goodin, for example, argues that compensating those excluded from a decision-making procedure who have a genuine claim to have their voice heard is a ‘third-best’ alternative to either a wholly inclusive franchise (i.e. a global *demos*) or a global *demos* sub-divided into federal jurisdictions: “the price of not enfranchising everyone we ideally should is that we would have to pay them off for any harms we inflict upon them and accede to their demands for fair recompense for any benefits we derive from the wrongfully disenfranchised”.¹⁴⁰

¹³⁷ Tan (2004), p176; quoted in Seglow (2005), p328.

¹³⁸ Baubock (2007), p401.

¹³⁹ Tamir (1992), p161.

¹⁴⁰ Goodin (2007), p68. See also Steiner (2001).

What this argument supplies is one possible way of responding to Cole's position that all strategies of membership control are fundamentally illiberal because they fail to apply the same liberal principles and procedures to both insiders and outsiders. He argues that "the exclusion of outsiders necessary to establish free and equal citizenship for insiders will, in practice, make the free and equal citizenship for all an impossibility".¹⁴¹ If valid, the 'purchase' argument (at least the stronger version that appeals to distributive justice) implies that Cole sets up a false dichotomy here. It draws attention to the fact that the exclusion of outsiders necessary to establish free and equal citizenship for insiders will, in practice, make free and equal citizenship for all *in one particular political community* impossible. Outsiders who are excluded are not necessarily deprived of free and equal citizenship and some measure of equal opportunity and economic welfare in *some* community, and the idea is that if states combine their policies of exclusion with efforts to ensure this then they can in fact implement policies of membership control that are consistent with viewing both insiders and outsiders as inherently free and equal. Whelan suggests this point when he argues that democratic particularism can be combined with the universal liberal commitment to freedom and equality by proposing that:

(...) statism, democracy and community are themselves universal principles: no one should be stateless, everyone can and should enjoy democratic citizenship and community membership, somewhere ... one's own participation in the life of a group need not preclude, and ought not to be pursued at the expense of, other people's doing the same.¹⁴²

¹⁴¹ Cole (2000), p11.

¹⁴² Whelan (1988a) p34.

Similarly, Tan argues that a consistent liberal nationalist regards self-determination as a universal right and must therefore be committed to its realisation for all individuals: “as long as one is genuinely committed to the principle of national self-determination as a universal ideal, one must also, to be consistent, be committed to bringing about the preconditions that make self-determination possible”.¹⁴³ She goes on to argue that this would require a radical egalitarian redistribution of wealth and resources across the globe, because “one important precondition (for self-determination) is that of economic equality between nations”.¹⁴⁴

In terms of efficiency in combating global inequality, there are some practical advantages to redistributing wealth and resources rather than (just) opening up borders. Firstly, in order to be able to migrate in the first place, a would-be migrant needs sufficient financial resources to allow them to leave their country of origin. As such, those who would need to migrate for reasons of extreme poverty are in fact unlikely to be in a position to take advantage of a policy of open borders. The policy becomes self-defeating in that instance. As Castles and Miller point out: “ (...) it is rarely the poorest people from the least-developed countries who move to the richest countries; more frequently the migrants are people of intermediate social status from areas which are undergoing economic and social change”.¹⁴⁵ Moreover, if open borders resulted in only comparatively privileged, wealthy and/or skilled individuals from developing nations migrating,

¹⁴³ Miller (2007, p74, nt. 22) agrees that “an ethically acceptable form of nationalism must treat self-determination as a universal value”.

¹⁴⁴ Tan (2004), p123.

¹⁴⁵ Castles and Miller (1998), p21; quoted in Cole (2000), p29. See also Miller (2007), p203 and Seglow (2006a), p6.

then free movement could potentially worsen the economic conditions in poor countries and exacerbate global inequality.

Secondly, opening up borders places the burden of improving their situation solely on the shoulders of would-be migrants.¹⁴⁶ *They* are the people who have to leave their country of origin and construct a new life for themselves in a potentially strange cultural, social and political environment. The difficulty of doing so, especially under conditions of poverty, racial or political persecution or social marginalisation, for example, should not be underestimated. Carens - one of the most prominent advocates of open borders - recognises that:

(...) most human beings do not love to move. They normally feel attached to their native land and to the particular language, culture and community in which they grew up and in which they feel at home. They seek to move only when life is very difficult where they are.¹⁴⁷

When discussing the significance of the right to exit a state in comparison to the importance of the right to entry, he states that the former carries greater moral weight because of the importance to individuals of their connections to their locality and place of residence: "All of the ties that one creates in the course of living in a place mean that one normally (though not always) has a much more vital interest in being able to stay where one is than in being able to get in somewhere new".¹⁴⁸ This leads Carens to the suggestion that combating global inequality through economic redistribution should

¹⁴⁶ Seglow (2006a), p4.

¹⁴⁷ Carens (1995), p250.

¹⁴⁸ Carens (1992), p29.

take priority over campaigning for greater porosity in borders. He also observes that:

In struggling against injustice, it is a bad strategy to make the admission of new immigrants to rich countries a priority, because restrictions are a symptom, not a cause, of the real problems, because immigration can never be a solution for more than a relatively small number ... and because this focus on people who want to move ... may perpetuate neo-colonial assumptions about the superiority of the First World.¹⁴⁹

Carens himself has recognised four strong reasons in favour of redistributing wealth and resources from wealthier to poorer countries instead of simply opening up borders then sitting back to see who decides, or is able, to come.¹⁵⁰ So there are good reasons why social justice concerns about global inequality may be more relevant to arguments for the global redistribution of wealth and resources than the redistribution of membership; primarily because opening up borders is, arguably, a comparatively inefficient way of combating the grossest forms of global poverty and injustice.¹⁵¹

However, for my purposes, the key question is: once wealth and resources are being redistributed in the preferred way (whatever that may be), do nation-states *then* have a right to close their borders? Can the right to exclude be ‘purchased’ in this way? I want to raise four arguments against this conclusion. For the reasons given above,

¹⁴⁹ *Ibid*, p35.

¹⁵⁰ This is not to suggest that opening up borders and redistributing wealth are contradictory or mutually incompatible goals; Carens (1992), p35.

¹⁵¹ Seglow (2005), pp. 326-328; Seglow (2006a), p9.

greater porosity in national borders would not obviate the whole topic of the redistributive obligations of wealthy nations. But I now want to argue against the view that the fulfillment of their redistributive obligations entitles states to a right to exclude outsiders from social membership.

Firstly, the account of the ethics of community and moral contextualism that is put forward in similar versions by Tamir, Walzer and Miller seems to imply that they lack the epistemic resources to implement with any kind of confidence the global aid or benefit policies that the ‘purchase’ argument would require if it were to overcome the case from egalitarian justice for opening up borders. We have seen that both Walzer and Miller strongly dispute the coherence of attempts to establish an objective baseline for equality in goods and harms across all communities. Walzer thinks that outsiders are insufficiently attuned to the internal ways of ranking different goods and harms within other communities to be able to evaluate their policies correctly: “they don’t know enough about its history, and they have no direct experience, and can form no concrete judgments of the conflicts and harmonies, the historical choices and cultural affinities, the loyalties and resentments, that underlie it”.¹⁵² Likewise, we have seen that Miller argues against global egalitarianism on the grounds that different communities have different ways of assessing benefits and burdens. But this moral contextualism also seems to imply that outsiders cannot know how to redistribute wealth and resources in a way that would be sufficient to offset the harms caused and the inequalities perpetuated by their prevention of migration, because the accurate weighing of harms and benefits is something that is culturally contextual. Walzer and Miller seem to deny the

¹⁵² Walzer (1980), p212.

availability of the cross-communal vantage point from which valid judgements concerning effective foreign aid would need to be made from for the purchase argument to succeed in justifying democratic exclusion.¹⁵³

Following on from this point, even if we reject moral contextualism there is still a vast space for theorists and policy makers to disagree over how to implement foreign aid or redistributive policies in such a way that would be sufficient to offset whatever harm might be caused to prospective migrants by their exclusion from other countries. Christopher Bertram describes the virtually insurmountable difficulties in calculating whether any given individual is sufficiently compensated to justify their exclusion from another country when he points out that:

The valuation of the denied opportunity will be nearly impossible because of the enormous indeterminacy about the nature of what is being valued. If a person is denied access to a country wealthier than their own, we should need to know the value of their opportunities back home and the value of the opportunities back home (sic) in order to reach a net figure and the value of the opportunity denied will depend on whether we assess it against the background of what this person might expect if they were allowed in (and everything else held constant) or whether we ask what their opportunities might have been under an open borders policy where all those similarly situated would also have a right of immigration.¹⁵⁴

¹⁵³ It is important at this point to bear in mind that I hope to have shown in the previous section that there are serious difficulties with Miller's argument from national responsibility that wealthy nations will have fulfilled their global obligations by merely bringing all individuals up to a basic minimum level of welfare.

¹⁵⁴ Bertram (unpublished manuscript), p12. Notice, with the objection

The defender of the purchase argument needs to have a robust account of equality and global justice that enables them to demonstrate that these values can be realised through redistributive means. But the core point here is that the relationship between equality, global justice and practices of membership control is far more conceptually and normatively ambiguous than the purchase argument allows for. Therefore, the conclusion that Miller *et al* draw is by no means as straightforward as they would have us believe. A third reason for doubting that border controls can be justified via redistributive means is that lack of money or resources in their country of origin may not be the key factor that leads an individual to seek out a better life elsewhere. They may be fleeing a corrupt government or a system of tribal law which they find culturally suffocating or politically archaic. Simply providing foreign aid, wealth or resources in these cases could mean that ruling elites get wealthier and more powerful whilst the poor and dissatisfied in society continue to suffer. According to Giles Bolton, this has been the general fate of foreign aid programs to African states in the post-colonial era.¹⁵⁵ To really follow through the logic of the purchase argument in a way that would be sufficient to override individual preferences to migrate, it would seem that prosperous nation-states that wanted to close their borders would have to involve themselves in innumerable armed conflicts or other kinds of foreign intervention to impose liberal democracy and the rule of law across the globe. This would involve precisely the kind of ‘overriding’ of local meanings, values, political practices and national sovereignty that Walzer is explicitly opposed to, and which I think Miller would also be uneasy with given his deference to contextualist accounts of goods and

previous to this one, that Walzer and Miller’s moral contextualism implies that it would be impossible to perform the kind of valuation described by Bertram.

¹⁵⁵ Bolton (2007).

values and the sanctity of national sovereignty and self-determination as non-interference.

Lastly, even if the epistemic and political problems raised above were overcome, so that the necessary global redistributive principles were justified beyond reasonable disagreement and put into place and corrupt governments had been ousted and the rule of law established across all nation-states, global disparities in wealth and resources would still be prevalent for many years to come. Seglow observes that “Trade barriers can be lowered, aid increased, skills and expertise exported, and it will still be some time to come before pressure to migrate from the poor world to the rich would significantly reduce”.¹⁵⁶ The purchase argument for democratic closure seems to ‘sign off’ from the moral register the huge number of individuals who would still face greatly reduced equality of opportunity and economic welfare in the interim period before the ‘purchasing’ or the ‘compensating’ had begun to make a substantive difference to global inequality and to ‘trickle down’ to the world’s poorest. The advantage of opening borders, by contrast, is that it provides individuals with the option (notwithstanding the difficulties noted above in terms of personal, financial and emotional cost, etc) of migrating to a prosperous country, and therefore may help to rectify the substantive inequality suffered by any given prospective migrant and his or her family, perhaps in the course of one or two generations. As Seglow notes, “Until poorer states’ economic and welfare infrastructures are substantially improved, migration from poorer states provides migrants and their families with resources of a quality not available in their own state, and their remittances assist a wider community back

¹⁵⁶ Seglow (2006a), p9.

home”.¹⁵⁷ In my view, the previous four objections suggest that the ‘purchase’ argument does not defeat considerations from social justice for greater ease of access to social membership leading to citizenship.

3.9 Conclusion

In this chapter I have argued that neither Walzer nor Miller have shown convincingly that liberal democracies should have a right to control the admission of outsiders to social membership as a function of their right to self-determination. Walzer puts forward a communitarian and a democratic defence of territorial exclusion, and I have offered objections to both. As for the former argument, the distinctiveness of the federal states in the US and the member states of the EU attests to the fact that the diversity of political communities can be preserved in the absence of formal restrictions on movement and membership. As for the latter, the idea that membership controls can be justified purely by appeal to democratic self-determination invites the question: ‘by what democratic authority does *this* group of individuals assert control over membership?’, which results in a logical regress of constitutive decisions.

David Miller’s defence of membership controls from the value of self-determination avoids this logical paradox because he supports the self-determination of political communities not directly from democratic considerations but from the legitimacy of the territorial rights of nation-states. Nevertheless, I have highlighted some

¹⁵⁷ *Ibid.* As Carens (1992, p35) states, “we have to consider the moral

difficulties with his position. Firstly, it seems unable to give clear guidance in settling controversial jurisdictional disputes such as the case of Northern Ireland, because the legitimacy of the jurisdictional claims of either Protestants or Catholics according to Miller's analysis seem to depend on where we start from in history. I then put forward a criticism from the perspective of liberal egalitarianism. Miller's account of national responsibility is designed to counter those who argue for freedom of international movement from the value of equality. However, I have raised four objections against Miller, which, taken together, lead to the conclusion that considerations of global inequality in favour of free movement cannot be deflated easily by the idea of national responsibility.

In the final section of this chapter I discussed the claim that global inequality is more pertinent to the question of the just distribution of wealth and resources rather than of free movement or the acquisition of citizenship. The 'purchase' argument for democratic closure builds on this insight, and holds that the exclusion of outsiders on grounds of self-determination is justifiable in so far as those who are excluded have sufficient rights, resources and opportunities in their home country. Where such rights, resources and opportunities are lacking, wealthier nation-states that wish to close their borders must compensate those migrants who are liable to be harmed through being excluded, be it through the provision of foreign aid, redistributive efforts or military intervention. I have advanced four arguments against the idea that the right to exclude can be purchased in this way.

claims of those we encounter here and now”.

We have seen that Walzer also defends a right to citizenship for those migrants who *are* permitted residency status by their host community. In section 3.3 I discussed the way in which Walzer appeals to ethical territoriality and the subject-to-the-law principle of democratic inclusion in supporting this position on citizenship, and I have given an account of the democratic and egalitarian normative logic behind it. In the following chapter I outline and discuss critically an opposing viewpoint put forward in the later work of Iris Young. In place of an exclusively territorial conception of citizenship rights, Young argues that formal democratic inclusion should be defined according to the set of individuals whose interests are affected by a decision or policy. In this chapter and the previous one, I have raised difficulties with attempts to justify the exclusion of outsiders from social membership and citizenship on the grounds of self-determination. Should we follow Young and attempt to push democratic inclusion even further, by opening up the jurisdictional boundaries around political communities to allow not only for the free movement and resettlement of individuals, but also for the representation and participation of affected outsiders? This question is the main focus for the following chapter.

Chapter 4

Self-Determination Without Exclusion?

4.1 Introduction

We have seen in the previous two chapters that Tamir, Walzer and Miller believe that national political communities fall short of achieving genuine self-determination if they are denied the right to implement and enforce membership controls unilaterally. In response, I have advanced arguments to the conclusion that neither democratic nor cultural self-determination justifies the exclusion of outsiders from social membership for the reasons that these authors give. They embrace the exclusionary implications of nationalism precisely because they regard membership controls as a justifiable feature of collective self-determination; and justice as only having coherent application within the context of shared citizenship and nationality. Moreover, Walzer and Miller both explicitly defend a principle of national sovereignty that implies self-determination as non-interference; which is to say that in their view democratic self-determination calls for a sphere of decision-making that is exclusive of the voices of non-members. Implicit in this view is a rejection of the idea that participatory membership should be extended to outsiders, regardless of whether their rights or interests may be affected by the ‘internal’ decisions and policies of other nation-states. This much is clear from Walzer’s argument that it is those who are subject to laws, that should have an equal say in their making. We have also seen that David Miller endorses a vision of the international order in which “nation-states are self-determining, but respect the

self-determination of others through obligations of non-interference and in some cases of aid”.¹

Iris Marion Young’s later work provides an important alternative to these nationalist accounts of self-determination. Throughout her career, Young often sought to illustrate how challenging the conventional meaning and use of political concepts - such as ‘impartiality’, ‘neutrality’, and ‘the common good’ - could be used to further emancipatory ends. The critical analyses of these terms in her earlier work was designed to show how their conventional usage worked to subordinate difference and to reinforce the dominance of the social and political perspective of privileged and powerful groups.² In her later work, Young turned to issues of self-determination and sovereignty and performed a similar critical exercise, in order to reveal what she saw as arbitrary and morally unjustifiable inequalities, harms and exclusions embodied in the familiar use and application of those concepts.

In Young’s view, the current system of nation-states and the dominant principle of sovereignty as non-interference is responsible for the related ideas that self-determination is an inherently and justifiably exclusive enterprise at the territorial border and that political communities should be free to order their internal affairs without external regulation, interference or participations from outsiders:

(...) the nation-state system enacts exclusions that are sometimes grave in their consequences yet widely accepted as legitimate. States claim the right to exclude non-citizens who wish to live

¹ Miller (1995), p107.

² Young (1990); Young (1995); Young (1997a).

within their borders. They also claim a right against interference from other states or international bodies concerning the actions and policies they take within their borders.³

Young's goal was to develop an alternative "normative and social-theoretical account"⁴ of self-determination that "preserves a space for the positive valence of the distinctness of peoples without endorsing the exclusions typical of nationalism".⁵ Her vision of 'diverse democratic federalism'⁶ is designed to show that, *contra* Tamir, Walzer, and Miller, group differences and collective self-determination can and should co-exist with open borders and radically inclusive democratic politics. Borders demarcating distinct self-determining political communities still exist in Young's ideal vision of global society, but in her view those borders should not prevent the free movement of peoples, nor should they demarcate impermeable jurisdictions for democratic participation. Young's later work can therefore be understood as a reaction to the cultural, nationalist and democratic accounts of self-determination-as-exclusion and as non-interference that I have discussed in the previous two chapters.

Young's attempt to re-conceptualise self-determination in a way that meets the justifiable need for the political autonomy of distinct groups without entailing the atomistic form of independence entailed by self-determination as non-interference, hinges on her marriage of the republican ideal of non-domination with a federalist structure of overlapping democratic jurisdictions. Her core institutional proposal is

³ Young (2000a), p236.

⁴ *Ibid*, p252.

⁵ *Ibid*.

⁶ Young (2007), pp. 32-38.

that “we need to envision a more federated system of global governance with both stronger global regulation than currently exists and more regional and cultural autonomy”.⁷ One important element of Young’s project is to replace the “substantial” ontology of group differences characteristic of nationalism with an account of individual and collective identity that is based on the idea of “relational autonomy”.⁸ Another important move that Young makes is to replace the ideal of ethical territoriality and the subject-to-the-law principle of democratic inclusion that we have encountered in Walzer’s work with an approach, to drawing participatory membership boundaries, that appeals to affected interests. Relationships of justice and rights to participatory membership, on this view, stem not exclusively from co-nationality, shared citizenship, cultural affinity or subjection to the law but from social, economic and political connections. In so far as these connections transcend the borders of political communities, there should be transnational, supranational or global democratic institutions in place to enable individuals to press their claims and defend their interests in the context of a shared decision-making structure, where all have an equal opportunity to influence the outcome of deliberation. This way of distributing participatory membership is designed to puncture the exclusivity of the Westphalian nation-state and to usher in a post-sovereignty and global form of democratic deliberation. Young claims that by making these conceptual, normative and institutional shifts, we can divorce the idea of self-determination from its nationalistic and exclusionary implications, which will not only serve the interest that groups have in being recognised as distinct and autonomous political entities, but of justice and non-domination for all self-determining peoples in general.

⁷ *Ibid*, p26.

⁸ Young (2000a), p258.

In the previous two chapters I have raised a number of objections against arguments from national self-determination for the exclusion of outsiders from social membership and citizenship. Young agrees that the jurisdictional boundaries around political communities should be open in terms of allowing the free movement and re-settlement of people, and that this is compatible with collective self-determination. But she also claims that those boundaries should be open to revision according to the all-affected principle, partly in order to prevent the domination of one political community over another: “autonomous governance units should be institutionalized as *open*, in both a territorial and a jurisdictional sense”⁹. The main focus for the critical discussion in this chapter will be Young’s arguments for extending participatory membership to affected outsiders, which is a key aspect of her ideal of self-determination as non-domination. I will be arguing *against* this position. Alongside a number of other difficulties, there are good reasons to think that collective self-determination does call for a determinate, clearly demarcated and stable *demos*, which could be dissolved by a thoroughgoing commitment to the all-affected principle of democratic inclusion.

The chapter is divided into four sections. In section 4.2, I outline the key elements of Young’s approach to self-determination and political membership, paying particular attention to her accounts of relational autonomy and non-domination. Although Young avoids some of the shortcomings of nationalist, communitarian and democratic arguments for territorial exclusion from the value of self-determination, I have a number of reservations about the way she uses affectedness as a mode of demarcating a *demos*. I discuss these reservations in section 4.3. I begin by arguing that the principle of democratic inclusion according to affected interests is an unhelpful jurisdictional rule because it seems to

⁹ *Ibid*, p268.

result in an infinite regress of constitutive decisions. Following on from this objection, I argue that affectedness can only be applied to decide the appropriate constitution of the *demos* for any given decision through the use of substantive normative judgement on the part of an external organisation, agency or individual(s). I go on to argue that, for this reason, Young's earlier critique of the ideals of impartiality and neutrality and her general reflections on the risk of the powerful and privileged oppressing and dominating the weaker and less powerful should have given her reason to hesitate before endorsing affectedness as a jurisdictional rule. The upshot of this discussion is that the earlier Young seems to paint the later Young into a corner. In her vision of the global order, endorsing special representation for the numerically smaller and politically vulnerable units of self-determining peoples, seems instrumental in insulating them against the threat of oppression and domination at the hands of more numerous and powerful units. However, such measures seem to take her back to the principle of self-determination as non-interference that she wanted to move beyond by recommending self-determination as non-domination in the first place.

The problems that I highlight with affectedness as a jurisdictional rule lead me to re-consider in section 4.4 the merits of the subject-to-the-law principle of democratic inclusion. I will argue that its clarity, determinacy and stability help it to overcome some of the problems I identify with the all-affected principle. I go on to defend the principle against the charge that it extends membership to transients and temporary visitors, and so is an unhelpful and indeterminate boundary rule. A more pressing objection, however, is that it seems at first glance unable to account for Young's important insights regarding the spill-over effects of the self-determining activities of political communities. In order to meet this objection, I discuss the possible

advantages of formulating subjection as a criterion of democratic inclusion in a more expansive sense, to encompass not just subjection to formal law but to *governance structures*. On this more expansive account, subjection to coercive power generates a right to participatory membership. However, whilst this ‘all-coerced’ principle has some advantages over the all-subjected principle, in particular by addressing directly the coercive activities of non-statist international organisations and by calling for transparency and democratic accountability in their structures, it seems to fall foul of the same problem concerning the burden of substantive normative judgement that I note with the all-affected principle.

To move beyond this impasse, I put forward a way of combining the all-subjected principle with the all-affected and all-coerced principles, in a manner that is designed to reap the benefits of the clarity and determinacy of the former without overlooking the normative insights captured by the latter two. I propose that the all-subjected principle can be deployed to indicate *which* political community has to be negotiated with in cases where their actions may impact negatively on the rights of outsiders or subject them to coercion, whilst affectedness and coercion suggest two possible norms that can be deployed in the course of those negotiations. What this proposal turns on is the thought that the criteria from which we derive transnational or global obligations of justice can and should be separated from the criteria used to demarcate a democratic constituency. Proponents of the all-affected and all-coerced principles confound the two, which is to say that they believe that the scope of obligations of justice should correspond to the scope of democratic political institutions. In so doing, they run into logical paradoxes and problems of authorisation. I support further my position on subjection to the law as a jurisdictional rule by pointing out that it does not entail that there could or should be no transnational or global

regulation of the ‘internal’ affairs of political communities, nor does it preclude transnational and supranational democratic activity. However, I end the chapter by noting that the normative validity of my proposal is put into question by the fact of initial imbalances in power, wealth and resources between political communities.

4.2 Sovereignty, Non-Interference and Non-Domination

The ‘Westphalian’ understanding of sovereignty describes the right of states to wield “central and final authority over all the legal and political matters within a determinate and strictly bounded territory”.¹⁰ This understanding of sovereignty includes a principle of non-interference: “for a state to have final authority implies that no other state and no other transnational body has the authority to interfere with the actions and policies of that sovereign state”.¹¹ On this view, the right of nation-states to decide unilaterally upon their internal political affairs is a fundamental expression of their status as autonomous political entities in the international political system. Sovereignty understood as non-interference implies that states have full power and authority to rule on affairs within their bounded territory, including the terms and conditions for the admission of foreigners and their legal status once they have entered the territory. States are morally justified in pursuing an immigration policy which is designed to further their own interests and are free to rule exclusively over the ways in which outsiders can gain access to membership. We saw in the introductory chapter that in practice this is generally accepted at the level of international relations. Canadian immigration policy, for example, explicitly states that its membership policies are “designed and administered in such a way as to promote the domestic and

¹⁰ Young (2007), p26.

¹¹ *Ibid*, p27.

international interests of Canada”.¹² This view also encapsulates the thought that borders are morally significant because they define the boundaries within which both principles of justice and rights to democratic participation are to apply. Those outside the territory have no claim in justice to access the territory and capitalise on the resources within the jurisdiction of other states or to participate in their internal decision-making procedures. Although Young concedes that the Westphalian ideal of sovereignty as non-interference may not and may never have actually existed in practice - given the density of economic and political interconnections between nation-states throughout history - she claims that it still carries weight as a *normative ideal* for many theorists and political leaders, and so still constitutes a valid unit of analysis and critique.¹³

Following F.H. Hinsley,¹⁴ we can identify an ‘internal’ and an ‘external’ aspect of this understanding of sovereignty. The former provides an answer to the problem of locating and understanding the nature of legitimate political authority *within* a political community, whilst the latter provides an answer to the question of how *external* relations between different political communities should be regulated. Internal sovereignty describes a central, final and absolute source of political authority over a strictly delineated territory and over a strictly delineated population. External sovereignty, on the other hand, describes a relationship of independence between different sovereign nations. Inter-state relations are to be governed by the mutual recognition of the internal sovereignty of other nations. It has been argued that the conceptual coherence of internal sovereignty rests on the presence of this external, reciprocal recognition between states.

¹² Canadian Immigration Act (1985), section 3 (h).

¹³ Young (2007), p27.

¹⁴ Hinsley (1986).

Anthony Giddens, for example, claims that sovereignty “only has meaning in the context of a reflexively regulated system larger than any one state”.¹⁵

Young argues that the concept of autonomy underlying the ideal of sovereignty and self-determination as non-interference is predicated on an ontologically and normatively inadequate understanding of freedom and identity. Non-interference presumes that individuals and groups are free and autonomous when they operate within a domain of activity which is independent of the influence or input of others. The only obligations or relationships that occur between autonomous actors are those into which they enter voluntarily. Absent such voluntary relationships, a self-determining actor should be “left alone to conduct his or her affairs over his or her own independent sphere”.¹⁶

Young’s key objection to the ideal of self-determination as non-interference stems from the fact of causal relations in the form of social, economic and political connections between insiders and outsiders. Since the actions of those within territorially bounded states can and do affect the rights and interests of those outside, and vice-versa, she argues that we need to think of democracy and justice as being applicable not just within the cultural and institutional structure of an autonomous sovereign nation-state and between co-members of a political community, but both transnationally and globally.¹⁷ This view stands in direct contrast to the nationalist accounts of self-determination and of obligations of justice put forward by Walzer and Miller. We have seen that these theorists support the view that in

¹⁵ Giddens (1987), p281.

¹⁶ Young (2007), p46.

¹⁷ Young (2000b), p247.

order to achieve genuine self-determination political communities require rights to non-interference in the sense of being free to collectively decide upon and pursue their political, cultural and economic goals without input, interference or regulation from outside individuals, agencies or organisations (perhaps most importantly in the domain of their membership and admissions procedures). Moreover, they hold that shared nationality constitutes the framework for obligations of justice. Young argues that the ideal of non-interference underlying this concept of self-determination is normatively problematic and potentially a cause of injustice and domination. Since the causal relationships, interdependencies and interactions between the insiders and outsiders of a political community generate benefits and burdens, in Young's view those actors are implicated in a relationship of justice:

Wherever people act within a set of institutions that connect them to one another by commerce, communication, or the consequences of policies, such that systematic interdependencies generate benefits and burdens that would not exist without those institutional relationships, then the people within that set of interdependent institutions stand in relations of justice.¹⁸

Young sought to develop an alternative understanding of self-determination that could accommodate the need for the external regulation of interdependent political communities and co-deliberation between the citizens of different political communities over issues that jointly impact upon their respective interests without thereby compromising their status as autonomous, self-determining political entities. Young argues that if we replace sovereignty and self-determination as non-interference with an alternative account

¹⁸ Young (2000a), p242.

focussed on relational autonomy and non-domination, then it is possible to understand how groups united around a distinctive social perspective can be constrained in their activities (including their discretion over border regulations and citizenship acquisition)¹⁹ without losing either their distinct character or their capacity for self-determination. Her core proposal is usefully summarised as follows:

I propose that a principle of self-determination for peoples should be interpreted along the lines of relational autonomy or non-domination, rather than simply as independence or non-interference (...) Because a people stands in interdependent relations with others ... a people cannot ignore the claims and interests of those others when the former's actions potentially affect the latter. In so far as outsiders are affected by the activities of self-determining people, those others have a legitimate claim to have their interests and needs taken into account even though they are outside the government jurisdiction. Conversely, outsiders should recognise that when they themselves affect a people, the latter can legitimately claim that they should have their interests taken into account in so far as they may be adversely affected.²⁰

Although they disagree on the relationship between self-determination, group identity and political membership, both Young and Tamir want to detach the idea of self-determination from the idea of a nation-state, and in so doing to dispute the nationalist ideal of one state for every nation, i.e. “the claim that being a people entails rights to a distinct, contiguous, and bounded territory over which the group has exclusive jurisdiction and with which others may not interfere”.²¹ Young

¹⁹ *Ibid*, p267.

²⁰ *Ibid*, p259.

²¹ *Ibid*, p255.

encourages a view of collective self-determination not in terms of mutually exclusive nation-states with rights to non-interference but in terms of a structure of small federal units characterised by a political relationship of “relational-autonomy”, with access to global democratic fora and regulations. “Federalism”, she explains, “is the general name for governance arrangements between self-governing entities in which they participate together in ... cooperative regulation”.²² Relational-autonomy describes a political relationship between subjects as well as federal units in which each subject and unit is able to “pursue their own ends in the context of relationships in which others may do the same”.²³ Relational autonomy means that relationships between actors should be arranged to maximise the ability of all to achieve their goals.²⁴ In Young’s vision of “diverse decentred democratic federalism”,²⁵ this means that power is taken away from nation-states and is dispensed ‘upwards’, to global regulatory bodies, and ‘downwards’, to local federal units. The regional locales will have access to global authorities in order to limit the power of other units of self-determining peoples to dominate them: “I imagine a global system of regulatory regimes to which locales, regions and states relate in a nested, federated system’ .²⁶

Relational autonomy is intended to replace the “atomized”²⁷ form of autonomy which in Young’s view informs the ideal of self-determination as non-interference. As we have seen, on this latter view individual and collective freedom consist in a sphere of activity

²² Young (2007), p67.

²³ *Ibid*, p47.

²⁴ *Ibid*.

²⁵ *Ibid*, pp. 32-38.

²⁶ *Ibid*, p34.

²⁷ Young (2000a), p258; Young (2007), p33.

free from all outside interference.²⁸ Relational-autonomy, by contrast, is designed to capture the importance of both individual and collective choice and autonomy whilst also accommodating the normative significance of the fact that individuals and groups are embedded in a complex series of largely unchosen relationships, “by virtue of kinship, history, proximity, or the unintended consequences of actions”.²⁹ Relational autonomy and self-determination as non-domination for groups implies only a *prima facie* right to non-interference. Insofar as the activities of a group and the interconnected relationships they find themselves in have the potential to affect others outside the group, those outsiders have a right to make claims and to pursue collectively some kind of settlement or agreement on the issue at hand.³⁰

The ontology of group identity that accompanies Young’s concept of relational autonomy stands in contrast to the picture of national identity underlying Tamir and Walzer’s defence of immigration restrictions.³¹ According to Young’s view, groups do not possess a coherent, unified or pristine identity, or a shared culture or character that warrants protection through membership controls. Instead, Young argues that groups develop and shift their identity in response to the range of structural relationships that they find themselves in:

(...) groups should be understood not as entirely other, but as overlapping, as constituted in relation to one another and thus as shifting their

²⁸ Young (2007), p45.

²⁹ Young (2004) p184.

³⁰ Young (2007), p51.

³¹ Young (2000a, p252) endorses what she regards as Tamir's 'non-essentialist' account of national identity. However, she does not pursue the critique I developed in Chapter 2, section 2.4, which challenged the consistency between Tamir's non-essentialist and pluralistic account of national identity and her defence of membership controls on the grounds of self-determination.

attributes and needs in accordance with what relations are salient.³²

The liberal nationalist and identity liberal claim that there is a shared national culture, the protection of which legitimises the exclusion of those outsiders deemed unable or unwilling to endorse its central tenets, is a clear example of the demand for homogeneity that Young criticises. Her claim that “a rigid conceptualization of group differentiation both denies the similarities that many group members have with those not considered in the group, and denies the many shadings and differentiations within the group”³³ obviously applies as much to the politics of national majority groups as it does to minority groups. Young charges nationalists with erroneously defining group identity - and therefore political membership - in essentialist and exclusionary terms, and she argues that this not only denies the internal heterogeneity of groups but also insulates political communities from recognising their obligations in justice to outsiders. This is not to say that Young refuses to recognise any group-based differences. According to her conception of relational autonomy, “group differentiation”³⁴ should be thought of “as a matter of degree” rather than as an “either/or conception”.³⁵ In other words, although the members of groups are likely to feel some affinity with one another due to a shared social perspective, the nature and the degree of that affinity will change in response to the circumstances facing the individual members of the group and the particular structural relationships they find themselves in:

On this view, social difference may be stronger or weaker, and it may be more or less salient,

³² Young (1993), pp. 123-124.

³³ Young (2000a), p89.

³⁴ *Ibid.*

³⁵ *Ibid*, p253.

depending on the point of view of comparison ...
Those I affirm as like me in one respect are
different in others, and I may perceive
similarities with those whom I affirm as
distinct.³⁶

Given this relational picture of collective identity, Young acknowledges that it is not self-evident whether a group of individuals warrant rights to self-determination.³⁷ However, she recognises that vagueness at an *ontological* level about group boundaries makes no difference to the fact that in the real world many people attach considerable importance to achieving independent political rights for their membership group:

(...) ambiguities about membership (do not) negate the fact that self-government and autonomy are important to many who consider themselves members of distinct peoples because they find such collective autonomy important for their own freedom and well-being.³⁸

There are two circumstances that in Young's view call for self-determination rights to be awarded to a group. The first is concerned with culture and identity. When a group of people "gain a particular joy and sense of stability from symbols, practices, monuments, sites, and texts"³⁹ associated with a particular culture, "then those people should have the means collectively to decide how to maintain and promote their flourishing as a people".⁴⁰ At the front of

³⁶ *Ibid.*

³⁷ *Ibid.*, p257.

³⁸ *Ibid.*

³⁹ *Ibid.*, p256.

⁴⁰ *Ibid.* Importantly, she notes that "this does not mean that those positioned as members of the group all have the same attitude towards that membership".

Young's mind here is the case of indigenous groups.⁴¹ The second circumstance when it is appropriate to award a group self-determination rights is when those rights may be instrumental in protecting the members from harmful relationships which they may suffer at the hands of other, more powerful or numerous groups: "institutions of self-government can serve as a means to resist exclusion, discrimination, exploitation, or minority status".⁴² When minority "historical and cultural groups"⁴³ suffer domination and exploitation at the hands of other groups with state power behind them, those minorities may warrant separate governmental institutions as a means of insulating themselves from further harm. I believe Young saw the legitimacy of the calls for the self-determination of the Palestinian people as being grounded on this second set of circumstances.⁴⁴

The case of Israel/Palestine served for Young as a clear example of the need for a shared federal system of governance, with territorially interspersed groups which should have rights to non-domination rather than non-interference. The territory shared by the two groups includes sites of symbolic importance and natural resources which are crucially significant for both; most obviously the city of Jerusalem and the watershed of the Jordan river respectively. In Young's view, a two-state solution to the current situation where both groups have legal and political autonomy with a right to non-interference would be unable to accommodate the fact that both groups require and are entitled to access these sites and resources. Nor would it be equipped to

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid*, p257.

⁴⁴ Young (2005a). It is important to note that in neither circumstance does Young state explicitly that self-determination rights should include control over the admission of outsiders to social membership or citizenship.

accommodate the “spatial togetherness”,⁴⁵ economic interdependence, mutual vulnerability to the natural environment, and unequal military and political power of the Israelis and Palestinians. Young proposes instead that each group be recognised as being composed of a number of small and territorially dispersed units, each of which would be entitled to exercise “political, cultural and local resource autonomy”.⁴⁶ The members of each unit would have equal civil and political rights and would be required to participate in negotiation and shared rule with other units to reach agreement over specific issues with implications for all, such as the local environment or economy.

So Young substitutes the idea of relational autonomy for autonomy and the idea of self-determination as non-domination for self-determination as non-interference in order to derive an account of justice that is more attuned to the interdependent global context, but which also resists the move towards a unified world state as the only possible alternative to the ideal of Westphalian sovereignty. She argues that as long as the activities of political communities are regulated or interfered with by supranational or global authorities on grounds that are *non-arbitrary*, their status as free and self-determining associations is not thereby compromised. According to Young, interference in the affairs of self-governing political communities is not arbitrary if “its purpose is to minimize domination, and if it is done in a way that takes the interests and voices of affected parties into account”.⁴⁷ So the kind of affect that legitimises interference in the affairs of self-determining communities is domination.

⁴⁵ *Ibid*, p23.

⁴⁶ *Ibid*, p8.

⁴⁷ Young (2000a), p259.

Young's vision of self-determination as non-domination is derived from Philip Pettit's version of republicanism. On Pettit's account, non-domination understands freedom as the lack of arbitrary constraints on the ability to achieve one's projects or goals, but not necessarily independence or non-interference in the sense of a sphere of decision-making activity free from external regulation. An agent interferes with another when they block, restrict or direct their actions or change their range of options in such a way that impacts negatively on their choice situation. Domination occurs when an agent interferes with another in a way that is arbitrary, i.e. *without* taking into account the interests or voices of those affected. However interference is not a necessary condition of domination; an agent dominates another when they have the *power* or *capacity* to interfere with their actions arbitrarily. Freedom, on this view, implies that agents do not stand in these relations of domination to one another.⁴⁸ This entails that institutional interference in the affairs of both individuals and self-determining collectives in order to *combat* domination can be used to *bring about* freedom, rather than necessarily compromising freedom, as the non-interference model would suggest.⁴⁹

If political communities refuse to recognise their inter-relations and causal connections with other communities, their self-determined activities and decisions can end up creating domination and injustice for individuals who, by virtue of their geographic location and citizenship status, are not armed with rights to defend their interests. *Self-determination* can be a misleading term, then, in so far as it is coupled with a right to non-interference, as this can result in domination where the will of one political community is imposed arbitrarily upon another, or where one political community is *able* to

⁴⁸ *Ibid*, pp. 258-259, citing Pettit (1997).

⁴⁹ Young (2000a), p260.

interfere arbitrarily with another. Seen from Young's republican perspective, such cases are better described as *other-determination*.⁵⁰

According to Young, one important way in which the domination of the members of one political community over another can be avoided is through including the voices of affected outsiders in a shared decision-making structure when a given policy or decision is liable to have consequences that exceed the jurisdictional boundaries of a particular self-determining body. Affectedness, for Young, triggers a legitimate claim to democratic inclusion when it describes a negative impact; individuals "should have their interests taken into account in so far as they may be *adversely* affected".⁵¹ As an example, she discusses the case of *Goshutes v. Utah*. In the late 1990's, the Goshute tribe used its legal right to self-determination to offer to lease out part of their reservation land to the federal government, for the purpose of storing radioactive nuclear waste. Since the decision threatened to impact negatively on the welfare and safety of those living not just within the reservation but also in the surrounding federal states, Young argues that self-determination as non-interference for the Goshute in this case would give the tribe unjustifiable discretionary power to harm outsiders, without having any obligation to take their interests or voices into account and without incurring any legal consequences.⁵²

The all-affected principle as a mode of demarcating the boundary of those entitled to participate in a democratic process is the direct antithesis of the all-subjected principle of inclusion and the normative ideal behind ethical territoriality discussed in relation to Walzer in the

⁵⁰ I have borrowed the term 'other-determination' from Gould (2006), p54.

⁵¹ Young (2000a), p259.

⁵² Young (2007), pp. 53-56.

previous chapter. *Contra* Walzer, Young argues that territorial presence and subjection to the law cannot in and of itself account for why we should consider someone a member of a political community with a right to participate in its decision making procedures, because the political borders around different states seem arbitrary from a moral point of view: “How can it be that one day a person is not a member of the society because he is in Tijuana, but when he has arrived in San Diego, he is a member? Surely entering the boundaries of a sovereign state does not itself make one a member of a society”⁵³. Seen from Young’s perspective, ethical territoriality as a guide to drawing democratic boundaries can be criticised for being both under and over-inclusive. It is under-inclusive because it seems to exclude individuals outside the state who may nevertheless have a genuine claim in justice to have their voice heard because their interests are affected by the decisions enacted by the members of that state. It is over-inclusive in so far as it seems to attribute membership ties between people within a state who may have little or no politically relevant connections to one another. For Young, obligations of justice and rights to democratic participation spring from social, political and economic connections, and these connections are not confined within the borders of sovereign states and are not necessarily predicated on either shared subjection to a system of governance or geographical proximity: “The social and economic connections between people in Mexico and Central America and the Southwestern United States are wide and dense, arguably denser than my connection with either region as I sit here in Pittsburgh”.⁵⁴

Since the all-subjected and all-affected principles appeal to potentially contradictory guidelines to legitimise particular jurisdictional

⁵³ Young (1998), p2.

⁵⁴ *Ibid.*

boundaries, they will often result in drawing radically different participatory membership boundaries. One can be affected by a law or a policy without being subject to it, as is the case with the South Pacific Islanders who bore the main brunt of the environmental impact of the French nuclear testing but were not subject to French law - because they did not have French citizenship status - and therefore had no right to participate in the formulation of French law and policy. Likewise, one can be subject to a law without being affected by it: for example, I am subject to the immigration laws of the United Kingdom but they do not currently have a direct impact on my interests (although that may of course change, say for example if I met a marriage partner abroad and sought to secure residency status for her in the UK).⁵⁵

If Young is correct that affectedness is the criterion of inclusion that liberal-democrats should endorse to demarcate a constituency for a given decision, and if she is also correct that self-determination should be understood as non-domination, then this would imply that democrats have good reason to jettison their commitment to the unilateral discretion of political communities to control their membership policies and should adopt instead a more fluid, negotiable and issue-responsive approach to demarcating participatory membership.

However, I will argue in the following section that Young's substitution of affectedness for subjection to the law as a jurisdictional rule raises a number of difficulties, some of which are specific to her overall project. My first objection is that the principle of democratic inclusion according to affected interests results in a logical regress of constitutive decisions. I go on to discuss two possible solutions to this

⁵⁵ Karlsson (2006), p23.

problem - the first being that we can simply invoke the idea of ‘founding fathers’ to settle the matter of the initial constitution of the *demos*, the second being the idea that a ‘boundary court’ could be set up to pass judgement on who is affecting who to the degree sufficient to trigger a right to inclusion. I argue that this latter proposal should have been particularly unpalatable for Young, given her earlier critique of the ideals of impartiality and neutrality. I go on to suggest that Young could have responded to these difficulties by invoking the idea of special representation for vulnerable or less powerful units of self-determining peoples. This response, however, seems to take her back to the logic of exclusion and the ideal of self-determination as non-interference. The upshot of this discussion is that affectedness as a criterion of democratic inclusion raises some dilemmas peculiar to Young’s work, suggesting that her earlier position on group representation stands in tension with her later reflections on self-determination and participatory membership. Lastly, I argue that non-domination as a jurisdictional rule risks dissolving the capacity of political communities to make any decisions for themselves at all. This suggests that there are good reasons to think that - *pace* Young - self-determination could be undermined if it does not include a right to exclude outsiders from participatory membership, even though those outsiders may be affected by a particular policy or decision.

4.3 The All-Affected Principle and Self-Determination as Non-Domination

The all-affected principle generates some paradoxical questions when it is used to draw democratic boundaries. Firstly, a logical difficulty arises when we try to specify the constitution of those affected by a decision in terms that are consistent with the all-affected principle itself. The problem is that for every question concerning the constitution of

the *demos* that involves an appeal to those who are affected, we have to pose the prior question of who is entitled to decide upon the relevantly affected parties. But, since that decision will also affect individuals, that question too must be answered by those who are going to be affected by the decision, and so on, *ad infinitum*. As Whelan argues:

Before a democratic decision could be made on a particular issue (by those affected) a prior decision would have to be made, in each case, as to *who* is affected and therefore entitled to vote on the subject - a decision, that is, on the proper bounds of the relevant constituency. And how is this decision, which will be determinative for the ensuing substantive decision, to be made? It too should presumably be made democratically - that is, by those affected - but now we encounter a regression from which no procedural escape is possible Thus to say that those who will be affected by a given decision are the ones who should participate in making it is to ... propose what is a logical as well as a procedural impossibility.⁵⁶

Torbjorn Tannsjo and David Held have both suggested ways of rescuing the all-affected principle from the logical regress noted by Whelan.⁵⁷ Tannsjo, with traces of the Walzerian take on the original constitution of self-determining political communities, suggests that the “solution to the boundary problem may well be reached in a democratic manner”⁵⁸ if we appeal to “some founding mothers and fathers, to draw up the constitution for us”.⁵⁹ I have discussed and rejected a similar proposal when looking at Walzer and the democratic boundary problem in the previous chapter. I will not dwell on it further

⁵⁶ Whelan (1983), p19; Baubock (2009), p17.

⁵⁷ Karlsonn (2006, pp. 10-11) also discusses these responses to problems with the all-affected principle.

⁵⁸ Tannsjo (2007), p6.

⁵⁹ *Ibid.*

here, except to note that Walzer and Tannsjo's 'response' to the boundary problem is no real response at all, if we consider Goodin's complaint that one of the reasons that political theorists have not in general had a great deal to say on the matter of the constitution of a *demos* is precisely because they (like Walzer and Tannsjo) simply "take it for granted that a people has already constituted itself. How a people accomplishes this mysterious transformation is therefore treated as a purely hypothetical event that has already occurred in prehistory or in a state of nature".⁶⁰ For the theorist who takes seriously the problem of how to *democratically* constitute a *demos*, historic appeals like this will be unsatisfactory.

David Held's more interesting proposal is that "issue-boundary forums or courts will have to be created to hear cases concerning where and how 'significant interest' in a public question should be explored and resolved".⁶¹ What Held's institutional proposal draws attention to is the fact that deciding upon the constitution of those relevantly affected or dominated by a particular policy requires a decision on the appropriate jurisdiction by some external actor or ruling body. We cannot logically include all *actually* affected parties in a particular decision. We cannot know who is actually affected by a decision until it has been made and carried out, because the making and carrying out of the decision will affect people, and so all those actually affected by the decision cannot logically take part in making the decision.⁶² So it seems that taking the

⁶⁰ Dahl (1970), p61

⁶¹ Held (1995), p237.

⁶² Goodin (2007), p52. There is a question to be addressed here about how we should interpret Young's application of the concept of 'affectedness'. On the one hand, she states that "a people cannot ignore the claims and interests of those others when the former's actions *potentially* affect the latter" (Young (2000a), p259 (emphasis added)). But the very next sentence seems to suggest that in her view all those who are *actually* affected by a policy or decision have a claim to

all-affected principle seriously as a jurisdictional rule *would* in fact require there to be in place some kind of external ruling body or institution to decide upon the relevant constituency for any given decision. As Jacob Levy points out, self-determination as non-domination (which, as we have seen, incorporates a principle of inclusion according to affected interests) requires:

(...) some (crucially) unspecified actors to decide whether a polity's decision create domination over others ... in order to decide whether the decision may be left to the polity or must be negotiated in shared institutional settings with those others. In other words, that outside actor must pass judgement on all proposed actions taken by the self-determining polity, in order to decide whether the polity may act unilaterally.⁶³

Why should this necessarily be an objection to the all-affected principle of democratic inclusion and self-determination as non-domination?

The real problem is that deciding upon the appropriate constituency for any given decision according to affectedness cannot it seems be simply a procedural, neutral or empirical matter. Deciding upon the appropriate jurisdiction in fact involves making a substantive judgment on the *merits* of the issue at hand. Affectedness in itself is a vague concept; if it is to do any useful work in drawing democratic boundaries we have to specify what *kinds* of affect are necessary or sufficient to trigger a claim to participatory membership. This in itself will be a matter of controversy.⁶⁴ In turn, drawing a boundary around

inclusion: "In so far as outsiders *are* affected by the activities of self-determining people, those others have a legitimate claim to have their interests and needs taken into account". However, as I argue in the main text, this latter condition for marking the boundaries of a *demos* is logically incoherent.

⁶³ Levy (2008a), p70.

⁶⁴ Karlsson (2006).

the relevantly affected parties in any particular case must involve normative reflection, historic analysis and social-scientific theorising because otherwise the all-affected principle is vulnerable to what Nancy Fraser calls the ‘butterfly effect’. The problem is that appealing solely to empirical evidence of causal connections to set the *demos* would seem to lead to the conclusion that virtually everyone, virtually everywhere is in some sense affected by the actions of virtually everyone else, virtually everywhere else: “one can adduce empirical evidence that just about everyone is affected by just about everything”.⁶⁵ Relationships of justice and the democratic obligations they entail would therefore become wildly indeterminate and the all-affected principle would be impossible to apply. Therefore, in order to decide who is affected and causally related in a way that is necessary or sufficient to trigger a right to democratic inclusion, we cannot simply appeal to objective empirical criteria but must make a substantive judgment on the merits of the policy, issue or decision at hand.

This point becomes clearer if we consider as an example the issue of a state’s immigration legislation and attempt to apply the all-affected principle to demarcate the boundary of those entitled to have a say in the matter. If it is decided that only the interests of existing citizens are relevantly affected, rather than prospective migrants, then we have actually decided upon the substantive moral and theoretical question of whether or not immigration should be considered a matter purely of democratic self-determination or of individual rights to freedom of movement and equality. Alternatively, we may want to argue that the interests of family members located abroad are affected more profoundly by restrictive immigration policies than, say, economic migrants, so they should be given priority in having a say in

⁶⁵ Fraser (2005), p27.

determining the admissions policy of a particular state. But, again, this requires some agency or ruling body to decide that family re-unification is a more pressing normative concern than economic migration. It seems then that no agency or individual could possibly decide upon the correct constitution of a *demos* in any particular case according to criteria of affectedness or non-domination without thereby making a normative assessment of the issue or policy at hand. Levy argues on these grounds that the ideal of non-domination that underlies Young's commitment to the all-affected principle is an unhelpful mode of demarcation, because it entails that deciding the merits of the case has to precede the decision about the appropriate jurisdiction. But the members of the constituency are supposed to be the agents who deliberate over the merits of an issue: "Rules about jurisdiction and self-government concern who gets to decide the merits of a question. Non-domination as a jurisdictional rule requires getting things backward: deciding the merits prior to deciding the authority".⁶⁶

For Young, it is particularly problematic that the decision about relevantly affected or dominated parties cannot proceed without substantive normative judgment. Young claims that decisions made by outsiders about when and how to intervene in the affairs of political communities in order to combat domination, or when to sanction and oversee co-deliberation between federal units, would be illegitimate if it proceeded "according to their judgement of what way of life is best".⁶⁷ We can understand this as a function of her general concern to limit the potential for abuses of power and domination and her scepticism towards allowing authorities to decide upon a unitary conception of the 'common good' (more on this below). But the idea that decisions about relevantly affected or dominated parties could in

⁶⁶ Levy (2008a), p70.

⁶⁷ Young (2000a), p259.

principle proceed *without* making a substantive normative assessment seems to turn on the possibility of the kind of neutrality and impartiality in deliberative procedures and reasoning that Young spent much of her earlier career working to discredit as an impossible ideal which is fundamentally ideological. Since, in her view, individuals cannot help but reason and deliberate from the perspective of their particular social background and relational context, it follows that the attempt to follow ‘neutral’ rules of discussion and adjudication serves typically as a shield for the dominance of the perspective of more powerful and privileged groups. In *Justice and the Politics of Difference*, she writes that:

(Impartiality) is ... an impossible ideal, because the particularities of context and affiliation cannot and should not be removed from moral reasoning ... (T)he ideal of impartiality serves ideological functions. It masks the ways in which the particular perspectives of dominant groups claim universality, and helps justify hierarchical decision-making structures.⁶⁸

The decision by an external actor about who is affecting who or dominating who to the degree required to trigger a right to inclusion cannot it seems be a neutral or impartial procedure, but must involve a judgment on the merits of the issue at hand. The worry from Young’s point of view must therefore be that that judgement will reflect the perspective of power and privilege from which that external actor surveys the situation. This problem is compounded by the fact that, as Saward notes, investing an external actor or governing body with the authority to decide upon the relevantly affected parties in any given case would put “enormous powers”⁶⁹ into the hands of “unelected

⁶⁸ Young (1990), p97.

⁶⁹ Saward (2000), pp. 42-43.

authorities”.⁷⁰ Young’s discussion of social perspectives and the necessary partiality of all forms of moral reasoning would suggest that these ruling authorities will almost inevitably make jurisdictional decisions that reflect their own position of ‘enormous power’. Young’s earlier work has provided good reasons to be sceptical that they will be able to make jurisdictional decisions which would benefit or reflect adequately the needs and interests of the weaker and less powerful federal units.

Saward observes in connection with his critique of the principle of inclusion according to affected interests that “agenda-setting is a primary means to power”.⁷¹ This point is also present in Young’s work. She argues that, particularly in circumstances of socio-economic inequality, the common good is likely to be defined in such a way as to reflect the particular perspective of more powerful and privileged groups, thus excluding or marginalising the point of view of weaker minorities

The relative power of some groups often allows them to dominate the definition of the common good in ways compatible with their experience, perspective and priorities. A common consequence of social privilege is the ability of a group to convert its perspective on some issues into authoritative knowledge without being challenged by those who have reason to see things differently.⁷²

Furthermore, Young’s position on social perspectives, group identity and relational ontology and her critique of neutrality and impartiality in deliberative procedures imply that communication and understanding across both individual and group boundaries will always be difficult

⁷⁰ *Ibid.*

⁷¹ *Ibid*, p43.

⁷² Young (2000a), p108.

and fraught with the potential for misunderstanding, distortion and domination⁷³. The public sphere, for Young, is not a “comfortable place of conversation among those who share language, assumptions and ways of looking at things”.⁷⁴ There is some broad similarity then between Young’s view of communication and the public sphere and the view promulgated by the agonistic approach to democratic theory and collective identity, which I discuss in Chapter 6. The reservations that she expresses about the difficulty of achieving transparency and impartiality in deliberation at an intranational level seem hard to reconcile with her faith that negotiation at a global level will be effective at combating domination. I think we can argue that Young’s concerns about the threat of the dominance of the perspective of privileged and powerful groups will be multiplied when deliberation is relocated to a transnational, supranational or global context. Arguably, according to the terms of Young’s position, there will be a greater threat of powerful and privileged parties dominating weaker parties because of the lack of face-to-face interaction, the difficulty of reaching balanced judgements concerning events occurring far away from the site of deliberation, and the difficulty of taking into account a sufficiently expansive range of different perspectives to ensure that domination on a global scale is being minimised. All of these factors make it more likely that considerations of power and privilege - rather than balanced reason, argument, and the equal representation of different social perspectives - will influence the outcome of deliberative democratic procedures.

Moreover, it seems that stable and long-established democratic states (or units of self-determining peoples) would have an important advantage over non-democratic states or units of peoples, or states or

⁷³ *Ibid*, pp. 136-137.

⁷⁴ *Ibid*, p111.

units in which democracy is fragile or a comparatively recent accomplishment, when deliberating over affectedness or non-domination in transnational or global forums, simply because the members of stable and long-established democratic states will be better versed in presenting their arguments in a democratic forum.⁷⁵ This much should also be evident to Young, given her acknowledgement that when an individual knows the conventional ‘rules of the game’ in deliberative procedures and the dominant modes of argumentation and reasoning, they are more likely to have their perspective heard and attended to, than those who may argue and reason in more esoteric or emotional ways.⁷⁶

Young could have perhaps responded to these charges by falling back on her earlier position on group representation put forward in *Justice and the Politics of Difference*. She might have argued that since in her view the powerful often dominate the weaker through the medium of purportedly impartial discursive procedures, those units of self-determining peoples in her vision of decentralised federalism that are economically and politically weaker would warrant special, guaranteed political rights of representation in transnational or supranational deliberative fora, such as reserved seats or veto rights on certain issues of particular importance to the members of the group, to ensure that their perspective is heard and their collective interests are respected. This was precisely Young’s position in *Justice and the Politics of Difference* on the issue of land policy for indigenous North American tribes, which she put forward as a clear example of a legitimate “group veto power regarding specific policies that affect a group directly”.⁷⁷

⁷⁵ Enslin (2006), pp. 62-63.

⁷⁶ Young (2000a), Chapter 2.

⁷⁷ *Ibid*, p184; quoted in Levy (2008a), p61.

However, this response seems to take us back to the logic of sovereignty as non-interference that Young wanted to avoid by recommending global democratic fora, relational autonomy and non-domination in the first place. In order for a group to have special rights of representation, it seems that there must be a clear distinction between those who are and those who are not members of that group with a right to participate in its internal affairs. In *Inclusion and Democracy*, Young “brackets”⁷⁸ the “particularly controversial”⁷⁹ issue of veto power for minority groups, and partially retracts her earlier argument for reserving seats for minority groups in representative bodies on the grounds that “Reserving seats for particular groups can tend to freeze both the identity of that group and its relations with other groups in the polity”.⁸⁰ She goes on to note that the policy is problematic in that it requires a determinate conception of who is and who is not a member of the group and thus who has a right to choose representatives to take up the reserved seats: “If only the members of the group have a right to choose for the reserved seats, furthermore, this method generates difficult problems of determining who has the right to choose those representatives”.⁸¹ So Young seems to face a dilemma. These passages confirm my point that whilst special representation in deliberative fora - be it regional, national or global - may be an important method for combating illegitimate exclusion and domination, it requires the kind of clear and determinate jurisdictional

⁷⁸ Young (2000a), p144, n27. This is also noted in Levy (2008a), p62.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, p149. I say ‘partially’, because although Young recognises these problems with reserved seats as a mode of special representation, she acknowledges that it may still be a necessary tool to facilitate inclusion, but only as a “last resort and temporary option”; Young (2000a), p150.

⁸¹ *Ibid.*, p150.

boundary around a group that Young's accounts of relational autonomy and self-determination as non-domination are designed to overcome.

In contrast to her earlier endorsement of special representation for minority groups, in her later work on self-determination, Young claims that "Political principle must be content with a "(...) vague and ambiguous set of intuitions about when a group of people have sufficient affinities and cultural projects to warrant distinction".⁸² However, the concern is that for oppressed and less powerful groups, vagueness and ambiguity concerning their participatory membership boundaries could turn into a shield for their exploitation at the hands of more powerful and numerous majority groups. In fact, the threat of minority groups being 'swamped' by outsiders and outvoted on matters of particular political or cultural significance to them, has in the past been a key normative claim in favour of a politics of difference that recognises self-government rights for national minorities, that includes the right to exclude outsiders from their internal decision making procedures. Will Kymlicka, for example, argues on these grounds that justice for national minorities requires their recognition as a "political unit substantially controlled by the members of the national minority and substantially corresponding to their historical homeland or territory".⁸³ In her earlier work on group representation, Young endorsed a similar claim when she wrote that her version of the politics of difference accepts "as a basic principle that members of oppressed groups need separate organizations that *exclude others, especially those from more privileged groups*".⁸⁴ This kind of claim is difficult to reconcile with her later attempt to defend "local self-determination ...

⁸² *Ibid*, p255.

⁸³ Kymlicka (1995), p30.

⁸⁴ Young (1990), p167 (italics added).

without sovereign borders”.⁸⁵ By Young’s own admission, then, the implementation of her idea of self-determination as non-domination could undermine the right to self-determination of minority groups.

It seems that if we took the all-affected principle and non-domination seriously, as jurisdictional rules, there is a risk that they would dissolve the capacity of the weaker and numerically smaller units in Young’s federated picture of the global order to make any decisions for themselves at all. Levy brings out this point in relation to Native American tribal sovereignty. As a criticism of Young, this argument extends beyond the example of indigenous groups because she uses contemporary Native American tribal sovereignty as the initial model and norm for her overall vision of democratic federalism.⁸⁶ Levy argues that if the tribes did not have a right to non-interference, i.e. if they were unable to exclude outsiders from participatory membership, then their right to self-determination could be undermined because virtually no decision could ever be made by the tribes without first involving protracted negotiation around defining the appropriate constituency. The greater the amount of negotiation involved in deciding upon the constitution of the *demos* in any particular case, the greater the potential there is for inequalities in power to influence the outcome. According to Levy, “a conception of self-determination such as Young’s that lacks ... legal rigidity and clarity, one that emphasizes negotiation over the question ‘who holds the rights’ ... unavoidably tends to multiply initial power imbalances”.⁸⁷ Since Native American tribes are typically surrounded by federal states with greater numbers and political power, this process of negotiation could result in either political inertia or the outright suppression of the ability of the tribe to

⁸⁵ Young (2007), p33.

⁸⁶ *Ibid*, p43.

⁸⁷ Levy (2008a), p72.

act politically. This suggests that - unlike control over social membership and citizenship - collective self-determination does require the exclusion of outsiders from participatory membership:

(...) if every use of reservation land that might have some effect on non-tribe members - which is to say almost every use of reservation land, given the expansive understanding of interconnectedness suggested in Young's discussion of relational autonomy - is subject to negotiation over who gets to decide, then the more-populous and more-powerful surrounding states could negotiate tribal governments to death⁸⁸.

At this point, however, there may be an objection to my overall position. I argued *against* Miller in section 3.7 of the previous chapter, that open access to social membership and citizenship would not compromise democratic self-determination for the reasons he gives, partly because of the internal diversity in the preferences for state policy amongst the members of the pre-migration community. So why should the inclusion of the (similarly diverse) voices of affected outsiders compromise self-determination? Don't many of the same arguments that I made in support of opening up access to social membership and citizenship also support opening up access to participatory membership according to affected interests? I do not think so. The reason is that in the case of open access to social membership and citizenship, there is still a clear and determinate constituency that is demarcated according to procedural criteria (i.e the subject-to-the-law principle). The individuals *counted within* the constituency will change due to migration, but the boundary of the constituency itself is stable, determinate and projected into the future. This constituency can make democratically self-determined

⁸⁸ *Ibid*, p73.

decisions.⁸⁹ But if affectedness or non-domination are used as jurisdictional rules, the making of a decision is postponed until negotiation over the appropriate constituency has been settled, and it *this* negotiating process that threatens to undermine self-determination. If the boundaries of a constituency are permanently open to being challenged by outsiders raising a claim to inclusion on the grounds of affectedness or domination for any given issue (rather than just the *individual members counted within the constituency* changing over time due to open migration), then this could it seems threaten to undermine the existence of differentiated, territorial self-determining political communities whose actions and decisions are projected into the future. As affected outsiders raised their more and less legitimate claims for inclusion in any given case, territorial political communities could find themselves unravelled and unable to make any decisions for themselves. This difficulty is compounded by the problems of indeterminacy with the all-affected principle noted earlier; because the principle cannot provide a clear guideline for inclusion, negotiation around who is affected in any given case could be protracted to the point where no decision could be made at all. I think Margaret Moore has a similar point in mind when she argues that territorial self-governing democratic communities cannot co-exist easily with issue-specific democratic bodies with different bases of inclusion because “Non-territorial inclusion threatens the very decision-making capacity of the kind of political community that most people care about”.⁹⁰

Given the objections I have raised with deploying the all-affected principle as a criterion of democratic inclusion, I think it may be worth

⁸⁹ Notwithstanding the issue of ‘swamping’ discussed above and in Chapter 3, section 3.7.

⁹⁰ Moore (2006), p36. See also Baubock (2009), p18.

reassessing the merits of the subject-to-the-law principle as a jurisdictional rule. This is the task of the following section. I begin by discussing the advantages of the principle in comparison to the difficulties I have raised with the all-affected principle, and I defend subjection-to-the-law against the charge that it has the counter-intuitive implication of awarding membership rights to temporary visitors. A more thorny problem is that it seems at first glance to be unable to secure any means of addressing, democratically, the potentially harmful affects generated by self-determining political communities. So a risk with endorsing subjection to the law as a jurisdictional rule is that we forego completely the important normative insights raised by Young's critique of the Westphalian conception of sovereignty and self-determination as non-interference. This leads me to consider expanding the concept of subjection to encompass subjection to coercive power. This expanded account, which is put forward in similar versions by Nancy Fraser, Arash Abizadeh and Linda Bosniak, has some normative advantages over the narrower subject-to-the-law principle. However, I will argue that the 'all-coerced' principle of inclusion succumbs to one of the key difficulties I have raised with the all-affected principle, which is that using the scope of coercive power to define the boundary of a *demos* involves judging the merits of an issue in order to decide upon who gets to 'decide' upon the issue. Faced with this objection, I propose a way of combining the advantages of the clarity and determinacy of the subject-to-the-law principle with the normative insight that negative affects, inequalities, coercion and trans-boundary harms will often need to be addressed through co-operation, interaction and negotiation between self-determining political communities. This move requires prising apart the scope of the *demos* from the scope of obligations of justice. Finally, I support my position further by arguing - *contra* Young - that the subject-to-the-law principle and self-determination as non-interference are compatible with transnational and supranational democratic

activity, as well as a recognition on the part of states of obligations to outsiders.

4.4 Subjection Re-Visited

Dahl refers to the all-subjected principle as the ‘principle of full inclusion’, and his formulation runs thus: “The demos must include all adult members of the association except transients and persons proved to be mentally defective” where *adult members of the association* refers to “all adults subject to the binding collective decisions of the association”.⁹¹ Rubio-Marín provides a similar description when she writes that “(...) states claiming to be committed to liberal democracy ought to regard as full members of their organized political community, all those who reside in their territory on a permanent basis, being subject to the decisions collectively adopted there (...)”.⁹² The democratic credentials of the subject-to-the-law principle consist in the type of congruence that it describes in the political relationship between rulers and ruled: namely, that those bound by laws through the coercive power of the state should have a say in their formulation; or in Dahl’s similar formulation, “the moral axiom that no person ought to be governed without his consent”.⁹³ I will defend the principle in the course of the following section, then suggest a possible way of combining it with the all-affected principle in a way that avoids some of the main difficulties I have noted with appealing directly to affectedness as the criterion for demarcating a democratic constituency.

⁹¹ Dahl (1989), p129.

⁹² Rubio-Marín (2000), p20.

⁹³ Dahl (1997), pp. 112- 113; quoted in Goodin (2007), p49, nt. 19.

As a preliminary point for this discussion, it seems that the subject-to-the-law principle of democratic inclusion complements the ideal of self-determination as non-interference. Awarding participatory membership rights to those long-term residents who are subject to the exercise of a state's power leads to the kind of clear, stable and determinate demarcation of jurisdictional boundaries according to territorial location that sustains a right of political communities to non-interference from outsiders. Subjection to the law as a guide to democratic inclusion preserves the clear jurisdictional boundary between inside and outside that non-interference calls for. Therefore subjection-to-the-law as a mode of demarcating a *demos* complements self-determination as non-interference in the same way that affectedness as the criterion for inclusion complements self-determination as non-domination.

I argued in the previous section that when affectedness is used as a jurisdictional rule, it risks dissolving the stability of the democratic rights of individuals, because the boundaries of the constituency for each decision may change depending on who puts forward a claim to be affected. Some cosmopolitan theorists of global democracy welcome this radical implication of the principle. Daniele Archibugi, for example, argues that:

(...) democratic procedures and norms need to be tailored to the issues concerned: for example, what are the appropriate constituencies to settle problems involving two local communities of separate states but located on opposite sides of the same river, for problems involving regional settlements, or for problems of global concern?

Quite clearly, the forum will be different in each of these cases.⁹⁴

Likewise, Ian Shapiro observes that the all-affected principle would require a dynamic conception of democratic participation and legitimacy, whereby the *demos* would be (re)defined “decision by decision rather than people by people”.⁹⁵ The arguments of the previous section suggest that there are good reasons - partly from the value of self-determination - to resist this perpetual process of re-casting jurisdictional boundaries according to the set of those who are affected by the policy or decision at hand. A key normative point in favour of the subject-to-the-law principle, in contrast, is that it sets out clear, stable and determinate jurisdictional boundaries, so it is more easily satisfied and applied than the all-affected principle.⁹⁶ As Michael Saward argues, workable democratic politics and rights rest on secure membership in a clearly demarcated territorial unit whose constituency is stable:

(...) if the constituency can and must change for each decision, then the rights of ‘members’ are not fixed, or immutable, from one decision to the next ... Membership is only secure, because the grounds of citizenship and rightful political participation can only be clear, in a territorial entity.⁹⁷

Importantly, deciding who is subject to a law is a matter of fact and does not involve the kind of normative judgement that affectedness or non-domination require when they are used to draw democratic boundaries. The all-subjected principle seems to successfully avoid

⁹⁴ Archibugi (1998), p209.

⁹⁵ Shapiro (2002), p222; cited in Baubock (2005), p686.

⁹⁶ Karlson (2006), p24.

⁹⁷ Saward (2000) p38. See also Moore (2001), p298.

both the difficulty of the burden of substantive normative judgement as well as the ‘butterfly effect’ noted by Fraser, because we can appeal to objective, empirical criteria to demarcate the legitimate constituency for any given decision. Although it is no better than the all-affected principle at providing a solution to the regress of constitutive decisions described by the boundary problem,⁹⁸ it has the important advantage of legal clarity and stability. If my criticisms in the previous section have force, they suggest that Young in particular should have been concerned with legal clarity in membership boundaries and stable jurisdictions for the rule of law because of her concern with protecting minorities from domination at the hands of more numerous and privileged groups.

Goodin considers the merits of the all-subjected principle as a possible response to the boundary problem that may enable democrats to bypass some of the difficulties with appealing to affectedness as a jurisdictional rule. He writes that the “thought might be that all and only those persons who are (legally) obliged or (morally) obligated to obey a body of laws ought to be entitled to membership in the *demos* making those laws”.⁹⁹ However, he finds the principle normatively problematic because it seems to be over-inclusive when taken to its logical conclusion, attributing membership to individuals like temporary visitors:

(...) there turn out to be all sorts of people who are legally and morally obligated to obey our laws but who are not (and rightly not) entitled to membership in our *demos*: the captain of a foreign ship anchored in our harbor; any visitor to our shores; or indeed any alien illegally living among us. All are rightly bound by our laws, but

⁹⁸ Karlsson (2006), p24.

⁹⁹ Goodin (2008), pp. 128.

none is (or ought to be) entitled to a vote in making them.¹⁰⁰

Gustaf Arrhenius raises a similar objection when he argues that the scope of those legally bound by the laws of a particular state is too “unclear” for it to constitute a useful jurisdictional rule, and like Goodin he mentions temporary visitors as an example that flags up the indeterminacy and counter-intuitive implications of the all-subjected principle: “I’m in a sense legally bound by the laws of South Africa since I spend a week there every year. Does that mean that I should have a right to take part in the South African elections?”¹⁰¹ The obvious response to the objection raised by Goodin and Arrhenius would simply be to stipulate - along with Dahl and Rubio-Marin - that the subject-to-the-law principle does not extend to certain classes of territorial insiders, including transients. But I think there is a more interesting retort to be made. In practice, liberal states do award guests and temporary visitors political rights that are considered sufficient to protect their basic interests and human rights whilst they are territorially present (such as rights to due process, rights to private property, rights to police protection, and so on). Doing so seems consistent with the logic of the subject-to-the-law principle because, whilst they are territorially present, guests and temporary visitors are indeed subject to most of the laws of the state. But temporary visitors like tourists or the sea captain in Goodin’s example are not subject to *all* of the laws of the state they are visiting. They are not required, for example, to obey whatever laws may be in place concerning taxation,

¹⁰⁰ *Ibid*, pp. 128-129. I will leave aside the issue raised by Goodin concerning whether or not illegal aliens are entitled to membership on the grounds of their subjection to the laws of the state whose jurisdiction they reside within. For an extended discussion of the normative issues surrounding illegal immigration, see Rubio-Marin (2000).

¹⁰¹ Arrhenius, p10.

inheritance, or military service. For that reason alone, it makes sense - in keeping with the normative logic behind the subject-to-the-law principle - to attribute them rights that fall short of full citizenship whilst they are territorially present. What Goodin and Arrhenius overlook, it seems, is that being subject to laws and being a social member of a political community need not necessarily be considered an all-or-nothing situation; there can be and are degrees of subjection and degrees of social membership. Goodin and Arrhenius' examples do not therefore show that there is anything incoherent or normatively suspect about the subject-to-the-law principle of demarcation.

But wouldn't endorsing the all-subjected principle as a jurisdictional rule mean ignoring the arbitrary inequalities generated and perpetuated by the division of the globe into autonomous and self-determining political entities? Wouldn't it also mean that the potentially harmful trans-boundary spill-over effects of the policies enacted by self-determining communities could go unchecked? This concern is what underlies Goodin's further complaint that the all-subjected principle is also open to the charge of *under*-inclusiveness when he writes:

Imagine a German law that requires polluting factories there to build chimneys tall enough to ensure that their emissions fall to 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.¹⁰²

¹⁰² Goodin (2007), p50.

Would endorsing the subject-to-the-law principle as a mode of demarcating political boundaries mean simply accepting the cross-border harms generated by the self-determined activities of political communities? Not necessarily. If it can be shown that individuals are subject to laws enacted by transnational or supranational political institutions, then the subject-to-the-law principle would dictate that they have a legitimate claim to have their voice heard and their interests taken into account by those bodies. The all-subjected principle would, for example, strongly support the democratisation of the European Union, since the EU is able to enact laws that are binding for the members of signatory states.¹⁰³ If other transnational or global law-making institutions were created and empowered to address or regulate problems of international concern such as the environment, nuclear power or global finance, then individuals would have a legitimate right to be included in the decision making procedures undertaken by those institutions. This is just to say that the subject-to-the-law principle in and of itself is silent on the question of what kind of governing body and at what level of governance the particular laws, to which individuals are subject, are issued. Likewise, the subject-to-the-law principle can be agnostic about the issues being legislated. They need not be issues that are internal to a particular political community. So the subject-to-the-law principle is not necessarily inhospitable to the notion of democratic politics taking place beyond the confines of the nation-state, in order to address issues that are transnational or global in the scope of those individuals whose interests may be affected by them.¹⁰⁴

However, this response leads to a further objection, which is that the subject-to-the-law principle seems unable to account for the need to

¹⁰³ Karlsonn (2006), p25.

¹⁰⁴ As Post (2000, p7) points out, “Just as a person can be required to obey the constraints of domestic law, so can a democratic state be required to obey the constraints of international law”.

hold non-governmental and non-statist organisations democratically accountable. In the international sphere, there are organisations - for example multinational corporations like Shell and Coca-Cola, NGOs and global finance institutions such as the World Bank - that do not in themselves have the authority to enact binding laws but - as I pointed out in the final section of the previous chapter - still exercise political and economic power in ways that can impact negatively on the rights and interests of individuals, particularly in poorer countries, thereby exacerbating and perpetuating global inequality and inhibiting the equal self-determination of all political communities. Carol Gould puts forward this criticism when she claims that the all-subjected principle cannot address fully the need for transnational or global democratic accountability because in this context many of the key actors who exercise political leverage over the lives of individuals are institutions and organisations that are not law-making and are not bound by standards of democratic procedural legitimacy or transparency. Outside of the context of the nation-state, Gould points out:

(...) there are no established polities, or clearly demarcated demoi or publics for whom democratic participation and representation are clearly relevant. Yet, as already suggested, the effects of decisions by the organizations of global governance, especially the WTO, the World Bank, and the International Monetary Fund, are felt by those at a distance, and their decisions profoundly affect the conditions of existence and the life chances of many millions, if not billions, or people around the globe.¹⁰⁵

One way of accommodating this point could be to formulate the idea of subjection in a broader and more expansive sense than simply subjection to the laws of a formal governmental or institutional body.

¹⁰⁵ Gould (2007), p33.

Fraser makes this suggestion when she argues that the all-subjected principle should be interpreted as referring to *subjection to governance structures* understood as “encompassing relations to powers of various types”.¹⁰⁶ This idea of subjection goes beyond subjection to the laws of a state or other legislative body and extends to any organisation or agency that “generate(s) enforceable rules that structure important swaths (sic) of social interaction”.¹⁰⁷ We can see from this quotation that a key difference between Fraser’s more expansive understanding of subjection and the understanding we have been working with so far is the substitution of ‘rules’ for ‘laws’. “Not restricted to formal citizenship”, writes Fraser, “or even to the broader condition of falling within the jurisdiction of a state, this notion also encompasses the further condition of being *subject to the coercive power of nonstate and trans-state forms of governmentality*”.¹⁰⁸ As Michael Blake observes, coercion represents “an intentional action, designed to replace the chosen option with the choice of another ... coercive proposals violate the autonomy of those against whom they are employed; they act so as to replace our own agency with the agency of another”.¹⁰⁹ This understanding of subjection covers the potentially economically exploitative and coercive activities of NGOs, unaccountable global financial institutions such as the WTO and the IMF, transnational bodies governing environmental or nuclear power policy, and so on, as well as formal law making institutions. The all-coerced principle would, for example, support a right to participatory membership in the American decisional structure on the part of African farmers who are subject to the coercive power of trade laws deliberated over and

¹⁰⁶ Fraser (2008), p412.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid* (italics added).

¹⁰⁹ Blake (2001), p272. Blake bases his interpretation of coercion on Raz’s (1986) three-pronged account of autonomy, as does Abizadeh (2008).

enacted by US Congress.¹¹⁰ Subjection to coercion is therefore the key criterion of inclusion to participatory membership for Fraser, which is a more expansive and fluid mode of demarcation than the subject-to-the-law principle.

Arash Abizadeh advances a similar criterion of democratic inclusion according to the scope of coercive power, arguing that rights to be included in the decision-making procedures of a particular *demos* should be awarded to all those who are subject to coercion by the state in question.¹¹¹ An implication of his argument is that a given state's regime of border controls should be jointly negotiated over between existing citizens and prospective migrants in a transnational or global deliberative forum. According to Abizadeh, the all-coerced principle dictates that the justification of a state's immigration controls is owed to both insiders and outsiders because border controls subject both groups to state coercion. In Abizadeh's view, preventing an individual from crossing a border amounts to an act of political coercion, no less than, say, the imposition of taxation laws on citizens. Since the principle of democratic legitimacy calls for governmental coercion to be justified to those over whom it is exercised, democratic considerations themselves call for (porous) borders under joint control by existing citizens and foreigners.

Lastly, Linda Bosniak appeals to subjection to governmental power in order to advocate extending participatory membership to those situated outside a political community when she writes:

¹¹⁰ Seglow (2006a), p25.

¹¹¹ Abizadeh (2008).

(...) it is unclear why those noncitizens located abroad who are subject to the exercise of a sovereign's power are not entitled to protection against that sovereign ... Many states wield power in ways that affect people outside the territorial boundaries of their states and yet deny obligations to them. Arguably, those so affected should enjoy protections from its exercise irrespective of their geographical location as well their citizenship status.¹¹²

Although Bosniak and Abizadeh only refer to being subject to the coercive power of a state, their arguments could easily and consistently be extended to cover subjection to the coercive power of non-state organisations: *the exercise of coercive power must be justified to all those over whom it is exercised*. For simplicity, I will refer to the principle advocated by Fraser, Bosniak and Abizadeh as the 'all-coerced' principle, and will continue to use the terms 'all-subjected' and 'subject-to-the-law' to refer to the practice of attributing democratic rights based on subjection to formal law. Coercion is a form of affect, as we can see from Bosniak's equivocation in the passage cited above, between being subject to coercive governmental power and being affected. However, the all-coerced principle is more limited and therefore easier to apply than the all-affected principle as it signifies more clearly and more narrowly the type of affective relationship which is of the kind of moral significance required to generate a right to inclusion in democratic deliberation. The all-coerced principle therefore seems less vulnerable to the butterfly objection raised against the all-affected principle.

It could be argued that the all-coerced principle provides a description of the underlying normative basis for the subject-to-the-law principle

¹¹² Bosniak (2007), pp. 408-409.

of demarcation. One could argue that it is by virtue of formulating and then requiring individuals to obey laws that states subject individuals to coercive power, and therefore individual citizens must be armed with rights to defend their interests and have their perspective taken into account. The subject-to-the-law principle is therefore a limited and state-centric instance of the more general all-coerced principle. Following this, the proponent of the all-coerced principle could claim that their preferred mode of demarcation is to be endorsed over the subject-to-the-law principle, as coercion pays no heed to the arbitrary division of the globe into independent nation-states with separate legislative institutions, and the all-coerced principle is equipped to account for that fact, whilst the subject-to-the-law principle is not. Moreover, they might add that, unlike the subject-to-the-law principle, the all-coerced principle recognises the need to hold non-statist organisations democratically accountable to those whom they subject to coercion.

The problem with Fraser, Abizadeh and Bosniak's proposal, in my view, is that it seems to take us back to the problem of the burden of substantive normative judgment that was discussed in relation to the all-affected principle. The problem is that, as with the all-affected principle, the all-coerced principle as a mode of demarcation seems to require investing some unspecified actor with the authority to pass judgement on whom is coercing whom to the degree and in the manner required to trigger a claim to democratic inclusion. This problem is exacerbated by the fact that - somewhat paradoxically - coercion is *both* enabling of and restricting of individual freedom and autonomy. Coercive state actions limit the range of choices available to an individual, but at the same time, some degree of state coercion is necessary to ensure the stable social and political conditions required for individuals to autonomously plan and act out their lives. As Blake

argues, “Without some sort of state coercion, the very ability to pursue our projects and plans seems impossible. Settled rules of coercive adjudication seem necessary for the settled expectations without which autonomy is denied”.¹¹³ Moreover, according to Joseph Raz’s well-known account of autonomy (which Abizadeh appeals to), the degree to which an agent is coerced is a function partly of the degree to which the options available to them, after the fact, are sufficient for them to live an autonomous life.¹¹⁴ For the democratic theorist, both of these points raise the issue of who decides what degree and what forms of coercion are *necessary* for autonomy; and who decides what degree and what forms of coercion *infringe* on autonomy?¹¹⁵ The all-coerced principle as a mode of demarcation therefore seems to bring us back to the problem of having to decide the merits of a particular issue prior to deciding wherein lies the jurisdictional authority to ‘decide’ upon the issue.

A different, more promising suggestion which is responsive to the usefulness of the subject-to-the-law principle can I think be brought out by a reading of Levy.¹¹⁶ In responding to Young, Levy points out that the principle of self-determination as non-interference does not entail that there could or should be no interaction, negotiation or deliberation between communities and between communities and non-statist organisations in order to address issues of mutual concern or self-determined policies that have trans-boundary or global implications and effects. On Levy’s reading, Young sets up a false dichotomy between self-determination as non-domination and inter-communal interaction on the one hand and self-determination as non-interference and communal isolationism, chauvinism or autarky

¹¹³ Blake, (2001), p280; cited in Valentini (2009), p4, nt. 9.

¹¹⁴ Raz (1986), pp. 154-155, p369; cited in Abizadeh (2008), pp. 39-40.

¹¹⁵ Karlson (2008, p80) makes a similar point.

¹¹⁶ Levy (2008a).

on the other. All that self-determination as non-interference and the subject-to-the-law-principle entail is that interaction between communities will take place *after* the fact of a decision having been made by one of them, rather than *before*, as is the case under the all-affected and all-coerced principles of demarcation: “outsiders can have their interests taken into account and negotiations can take place, *after* the rights have been allocated in the preferred way”.¹¹⁷ So if community A decides to build a power plant close to the border of community B, and if doing so is liable to have a negative environmental impact on community B, the government of community B will have to bargain, negotiate, ‘log-roll’, offer financial incentives, etc, if they want to influence the government of community A not to proceed. The point is that if A and B are self-determining entities with a right to non-interference, and if the members of A and B respectively have a stable body of democratic rights that follow from their location of residency *as the ethical territorialist and the subject-to-the-law principle would have it*, then it is clear with *which* community negotiation is necessary, in any given case.

What this analysis suggests to me is that we need not regard the all-subjected on the one hand and the all-affected and all-coerced principles on the other as mutually exclusive when thinking through the relationship between self-determination and political membership. The subject-to-the-law principle and self-determination as non-interference indicates with *which* political community negotiation is necessary in cases where self-determined decisions are likely to impact negatively on the interests of outsiders, whilst the all-coerced and all-affected principles and the ideal of non-domination suggest possible standards or norms to be employed in the course of those negotiations.¹¹⁸ The key

¹¹⁷ *Ibid*, p73.

¹¹⁸ Saward (2000, p38) suggests that “innovative efforts to

advantage of this proposal is that it avoids the problem of the burden of normative judgement that arises when we try to appeal directly to affectedness or coercion, as the criteria of inclusion, whilst also acknowledging that the division of the globe into separate self-determining political communities can generate harmful inequalities and cross-border effects, which may call for negotiation and deliberation. The upshot of this discussion, to my mind, is that it illustrates that whilst it may well make normative sense to appeal to criteria like affectedness, domination or coercion in order to mark the relationships of justice that extend beyond the borders of self-determining political communities (and nothing I have said here disputes this), that does not necessarily mean that those same criteria constitute either appropriate or coherent rules for demarcating a democratic constituency. When states negotiate, they should be bound by norms of non-coercion and non-domination. Rather than providing a guideline for drawing the limits of democratic accountability, on my account these norms substantiate moral obligations on the part of states and international institutions.

If this argument is valid, it suggests that theorists of transnational or global democracy who appeal to criteria of inclusion, such as affectedness or coercion, can be charged with committing something akin to a category error. That is, they confound the grounds for deriving transnational obligations of justice with the criteria for allocating democratic rights. Separating the two may enable the transnational or global impacts that can emerge from the self-determining activities of political communities to be addressed democratically in a more efficient and effective manner because we bypass some of the logical

institutionalize the all-affected principle ... become more attractive once territorially-based mechanisms are conceded at the primary level”.

paradoxes and the risks of power misuse (or indeed *abuse*) that arise when we import substantive normative assumptions to demarcate a democratic constituency. Young begins the chapter on ‘Self-determination and Global Democracy’ in *Inclusion and Democracy* by posing the question: “what is the proper scope of obligations of justice to which political institutions ought to correspond?”¹¹⁹ What the previous objection suggests is that the scope of obligations of justice should not necessarily correspond to the scope of democratic political institutions.¹²⁰

I think that the interpretation of affectedness as a moral judgement better captures the kind of harm being caused in cases such as the French nuclear testing in the South Pacific, than the interpretation of affectedness as a jurisdictional rule. If the French state *had* decided to include the South Pacific Islanders in the policy debate over whether or not to explode nuclear devices under the Mururoa Atoll, and if the islanders had subsequently been outvoted by French citizens so that the testing went ahead as a democratically legitimate decision, I think that we would still want to condemn that decision on *moral* grounds.¹²¹ If this is the case, then it seems that the harm being caused in the case of the French testing is *not* primarily to do with the democratic exclusion of a group of affected individuals at all, but rather the scale of the environmental destruction, the health problems later suffered by the islanders, and so on. This seems to support the point that affectedness is best understood as describing a relationship of justice rather than of democratic accountability.

¹¹⁹ Young (2000a), p238.

¹²⁰ As such, I do not want to read as putting forward what Young (2000a, p239) calls ‘the positivist’ account of obligations of justice, which holds that obligations of justice follow exclusively from shared subjection to a structure of governance.

¹²¹ Karlsson (2006, pp. 19-20) argues that the all-affected principle weakens the force of moral claims.

A problem with Levy's proposal, however, arises from the distorting role of the initial imbalances in power, wealth and resources between different political communities. If we consider Levy's suggestion that transnational interaction can and should take the form of inter-communal negotiation, bargaining, log-rolling and so forth after and not before the allocation of democratic decision-making rights, it seems clear that those political communities with greater wealth, resources and power will be far better placed to influence the self-determined activities of politically and economically weaker communities, should they consider themselves relevantly affected or dominated by its decisions and policies. Conversely, political communities without much wealth or resources will of course have far less to offer other communities as incentives to influence their internal decision-making should they regard their interests as relevantly implicated. The state of Utah is clearly better placed financially to influence the internal self-determining activities of the Goshute tribe than the Goshute are of the state of Utah.¹²² It is strange that Levy does not address this problem, given his own criticism of Young's position for affording too much leeway for initial imbalances of power and resources to affect the outcome of deliberation over democratic rights-claims. If, as Levy claims, the differences in power and resources between communities are liable to influence the outcome of protracted negotiation around the *allocation* of democratic rights, surely those differences will be at least as influential in the course of protracted negotiation and bargaining concerning the way in which a particular community *exercises* its democratic rights? We might reasonably suppose that those inequalities between self-determining communities will be *more* determining of the outcome of negotiation in

¹²² See, for example, the account of the impoverished circumstances of the Goshute in Herr (2008), p52.

Levy's sense, as he introduces an economic component¹²³ that is (at least nominally) absent from the process of deliberation over allocating rights to democratic participation. So a condition for the normative feasibility of Levy's argument is that wealthy states take credible efforts to combat global inequality.

If we take another look at Walzer - perhaps the pre-eminent ethical territorialist and proponent of the all-subjected principle - it is clear that he is by no means opposed to transnational interaction to address issues of concern that cross political borders. He argues that accepting the "moral usefulness of the (nation-) state and the solidarity it generates"¹²⁴ does not require wholesale acceptance of the "'drastic inequalities' of international societies".¹²⁵ What it does mean, however, is that "the fight against those inequalities begin within existing political communities",¹²⁶ rather than involving the perpetual re-structuring of boundaries demarcating participatory membership, as Young and proponents of the all-affected principle would have it. Aside from the fact that Walzer's commitment to moral contextualism would lead him to deny that obligations to combat global inequalities should be articulated within the language of justice, the passage cited above sounds remarkably similar to Young's claim that "while there may be reason to say that commitments in justice *begin* in ... local and particularist relationships, that does not imply that they should end there".¹²⁷ When reciting the policies he would be prepared to endorse for the sake of greater international equality, Walzer lists:

¹²³ Levy (2008a) p72.

¹²⁴ Walzer (1995), p249.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ Young (2000a), p242

(...) increased foreign aid, economic unification and co-operation across borders; multilateral political and, if necessary, military interventions for humanitarian purposes, extensions of sovereignty to stateless peoples; experiments in regional devolution and transnational agency.¹²⁸

The quotation above makes it clear that whilst Walzer accepts the legitimacy of nation-state borders, he is by no means opposed to forms of political engagement that extend across borders and that compromise the nation-state as the sole site of citizen allegiance and political and democratic activity. Again, this shows that, *contra* the overall thrust of Young's argument, advocating the subject-to-the-law principle of democratic inclusion and self-determination as non-interference need not necessarily entail a commitment to isolationism or national chauvinism, nor a wholesale rejection of international obligations, interdependencies or transnational and global democratic activity.¹²⁹ Young is incorrect therefore to argue that self-determination as non-interference implies an "atomized" picture of identity and individual and collective autonomy where "agents simply mind their own business and leave each other alone".¹³⁰ Likewise, her claim that the non-interference model of self-determination implies that "each self-determining entity has no inherent obligations with respect to outsiders"¹³¹ is an exaggeration. As we saw in the final section of the previous chapter when looking at the 'purchase argument', even nationalist theorists like Miller who

¹²⁸ Walzer (1995), p249

¹²⁹ Post (2000, p9) points out in a similar fashion that self-determination as non-interference is "not necessarily inconsistent either with a democratic state's recognition of the rights of third-parties or with its participation in international dispute settlement mechanisms".

¹³⁰ Young (2000a), p258.

¹³¹ *Ibid*, p257.

strongly advocate the non-interference rights of states concede that comparatively wealthy countries have an obligation to ensure a minimum standard of welfare across the globe and to help lay the foundation for the self-determination of all nations.

4.5 Conclusion

Iris Young argues that individual and collective autonomy and self-determination should be modelled according to a republican ideal of freedom as non-domination rather than non-interference, and she believed that this alternative conception could accommodate the practice and value of the self-determination of distinct groups without entailing the illegitimate and harmful exclusions which are in her view perpetuated by nationalist approaches to group identity and democratic freedom. According to her understanding of self-determination as non-domination, when the social, political or economic decisions of political communities are liable to affect the members of other communities, those decisions should be made in a shared democratic forum in which all relevantly affected parties have an equal opportunity to influence the outcome. I have advanced a number of reasons for resisting this line of argument and for preserving the subject-to-the-law principle of democratic inclusion and a corresponding understanding of self-determination as non-interference. Self-determination as non-domination and the principle of democratic inclusion according to affected interests not only encounter logical paradoxes of authorisation, they risk undermining the capacity of groups to achieve effective self-determination.

I have argued that the subject-to-the-law principle of inclusion avoids some of the key difficulties with the the all-affected principle, primarily because it offers a way of drawing democratic boundaries which is empirical and procedural, and which delivers clearly demarcated, stable and determinate jurisdictional boundaries. *Contra* Young, self-determination as non-interference *is* compatible with recognising the need for transnational and supra-national democratic deliberation, accountability and negotiation, but it dictates that such deliberation and negotiation take place *after* democratic rights have been allocated according to the subject-to-the-law principle. Whilst I have criticised those authors who recommend using affectedness or the scope of coercive power to define the *demos* in any given case, I have argued that these criteria may still be appropriate as moral guidelines when delineating obligations of justice. An implication of my argument is that criteria like affectedness or coercion, which may be appropriate for defining transnational or global moral obligations, may not be appropriate as criteria for drawing democratic boundaries.

Seyla Benhabib's cosmopolitan/discourse theory approach to political membership shares a number of the key features of Young's republican position. Like Young, she argues that a principle of affected interests should be used to draw the boundary around the set of individuals whose voices and interests should be taken into account by liberal democracies when formulating their 'internal' policies. However, she reserves a more important role than Young in her theory of membership for the territorially bounded state and for the right of political communities to set the terms for admission to membership in those states. She agrees partially with the line of argument that I have defended in this chapter; which is that democratic self-determination calls for clearly demarcated territorial jurisdictions. For Benhabib, the task of a discourse theory approach to political membership is to

mediate the tension between the democratic rights to collective self-determination that are owed to individuals in virtue of their membership within bounded political communities and the cosmopolitan rights that are owed to individuals in virtue of their shared humanity. This may involve drawing the kind of distinction between moral obligations and democratic rights discussed in the final section of this chapter. Can these dual commitments be balanced in a way that delivers a defensible position on political membership if they are formulated within the terms of a discourse theory approach to moral reasoning? This question is the focus for the following chapter.

Chapter 5

Cosmopolitanism and the ‘Paradox of Democratic Legitimacy’

5.1 Introduction

In her recent work on cosmopolitanism and political membership, Seyla Benhabib argues that there is an “inherently conflictual”¹ relationship between the rights of political communities to shape their domestic circumstances through a process of democratic self-determination and the universal rights of individuals *qua* human beings. She claims that the right of liberal democracies to determine their membership and admissions policies on the one hand and the universal right of individuals to have political membership on the other generates a theoretically and politically urgent tension between democratic and liberal-cosmopolitan understandings of rights and political legitimacy. According to Benhabib, we can see this tension at work quite clearly in the current status of international law concerning migration; whilst the Universal Declaration of Human Rights recognises a human right to *exit* a state, it imposes no reciprocal obligation on any other state to *receive* migrants. Thus universal human rights stand in tension with the rights of political communities to exercise sovereign authority over a bounded territory, including the right to regulate admission to social membership and citizenship.² Benhabib resists the urge to reduce this dilemma to either of its constituent parts, preferring instead a strategy of mediation. Her approach relies in part on drawing a distinction between the “principle of rights”, which accrues to all individuals in recognition of their

¹ Benhabib (2004a) p93.

² Benhabib (2004b), p130.

humanity *as such*, and the various different “schedules of rights”,³ which are the product of democratic will-formation and subject to legitimate variation across different political communities.

For the purposes of this chapter I will use the term ‘cosmopolitanism’ to refer to an orientation towards political morality that takes as its subject individual human beings rather than individual citizens. Broadly speaking, a cosmopolitan outlook invites individuals to see themselves as citizens of the world, rather than of individual states.⁴ A cosmopolitan approach to morality denies the Tamir/Walzer/Miller view that co-nationality provides the basis for obligations of justice. Cosmopolitan norms are said to be binding on all individuals, regardless of their group membership.⁵ Institutionally, cosmopolitans favour modes of political organisation which are consistent with their moral universalism. This may imply forms of political membership that either transcend or are situated above the level of nation-states, as institutional cosmopolitanism attempts to undermine the normative basis of membership policies that are grounded exclusively in nationality, ethnicity or shared culture.

According to Benhabib, political membership should be encompassed within international human rights regimes. This raises a dilemma of how to reconcile this right to membership with the necessary and legitimate existence of bounded, self-determining democratic communities:

Sovereignty entails the right of a people to
control its borders as well as define the

³ *Ibid.*

⁴ Miller (2007), p25.

⁵ Miklos (2007), p408.

procedures for admitting “aliens” into its territory and society; yet in a liberal-democratic polity, such sovereignty claims must always be constrained by human rights, which individuals are entitled to, not by virtue of being citizens or members of a polity, but insofar as they are simply human beings ... Can claims to sovereign self-determination be reconciled with the just and fair treatment of aliens and others in our midst?⁶

Benhabib agrees with Young that developments in globalisation, the rise of an international human rights regime, and increased international migration have frayed nation-state sovereignty, resulting in the need for new approaches to political membership that do not rest exclusively on national ties or ethno-cultural identification: “New modalities of membership have emerged with the result that the boundaries of the political community, as defined by the nation-state system, are no longer adequate to regulate membership”.⁷ However, Benhabib’s moral and political cosmopolitanism still reserves an important role for the territorial state in terms of facilitating democratic representation and accountability. In place of national, ethnic or cultural criteria for citizenship, Benhabib encourages a citizenship of residency in liberal democracies that stresses the importance of the affective bond between the individual and the local, regional and transnational institutions which should ideally represent their interests.⁸

One of Benhabib’s core claims is that whilst the tension she identifies between universal cosmopolitan rights and democratic self-determination cannot ever be solved or overcome, its impact can be

⁶ Benhabib (2002), p152.

⁷ Benhabib (2004a), p1.

⁸ Benhabib (2004c), p66.

progressively mitigated over time.⁹ If - as she also claims - there are some forms of membership control that do not *necessarily* contradict universal cosmopolitan human rights, then it would seem that democratic equality predicated on the existence of practices of closure and exclusion can, in certain circumstances and within the context of certain moral constraints, be compatible with liberal-cosmopolitan equality, understood as delineating a class of rights that are owed to individuals in virtue of their shared humanity. According to Benhabib, there is a *tension* but not an outright *contradiction* between cosmopolitan universalism and democratic particularism. ‘Democratic iterations’ and ‘jurisgenerative politics’ are the two key conceptual innovations that Benhabib employs in order to mediate these potentially conflicting understandings of rights and legitimacy.

Having outlined the core tenets of Benhabib’s position in section 5.2, I begin section 5.3 by discussing a problem of interpretation concerning her position on jurisdictional rules. Whilst Benhabib agrees with Young that the moral conversation should take into account the interests and voices of all affected parties regardless of their geographic location or citizenship status, she maintains that democratic rule and representation are irreducibly territorial. Democratic closure, for Benhabib, is unavoidable due to the logic of representation and territorial jurisdiction. But this conceptual claim seems to run counter to her normative conviction that decisions and norms are only morally valid in so far as they are the outcome of deliberation amongst all affected parties. As such, it seems that Benhabib endorses both subjection to the law *and* affectedness to mark a democratic constituency and rights to participatory membership. I suggest that a way of rescuing Benhabib from the charge that she endorses contradictory jurisdictional rules would be to posit a similar distinction

⁹ Benhabib (2002), pp. 150-151.

in her work to that which I introduced and defended in the previous chapter; between a democratic community and a moral community, with subjection to the law defining the former and affectedness being used to demarcate the latter. Whilst this response does draw some interpretative support from Benhabib's work, I argue that, ultimately, it is ambiguous whether she wants to make the democratic community co-extensive with the community of the affected.

Following on from this interpretative conclusion, I discuss the coherence of using affectedness as a jurisdictional rule for participatory membership within Benhabib's discourse theory approach to moral reasoning and democratic deliberation. The problem of the normative basis for judgements of affectedness that was discussed in the previous chapter is a difficulty for Benhabib as much as it is for Young. If - as Benhabib states - we cannot know the answer to normative questions in advance of an inclusive dialogue amongst all affected parties, and if we cannot decide upon the relevantly affected parties that should be deliberating *without* importing normative assumptions, then it follows that the decision concerning who gets to participate, necessarily lacks the stamp of normative validity that discourse theory demands.

Having outlined this criticism, in section 5.4, I canvas two possible responses to this boundary problem that could be brought out of Benhabib's work. The first response would be that democratic iterations and jurisgenerative politics mark the fact that democracy contains an internal self-correcting logic, so that no matter where or how we start the process of deliberation and democratic rule, we are bound to end up with the properly inclusive composition that universal hospitality demands. This 'teleological' or 'chrono-logical' response to the boundary problem would render the logic paradoxes of

authorisation normatively irrelevant by positing certain features inherent in the process of democratic self-determination itself.¹⁰ Reassuring as this response would be, Benhabib would not be comfortable with it as it would require faith in a “Hegelian teleology of reconciliation”¹¹ to which she is (nominally) opposed. Nevertheless, I use this section as an opportunity to discuss the problems with what I think is an undeniably teleological strain in Benhabib’s thought, which is betrayed by her repeated use of a temporal vocabulary and evolutionary language to describe democratic iterations, jurisgenerative politics, the spread of cosmopolitan norms and the rise of an international human rights regimes. These objections - which I put forward partly from the perspective of Bonnie Honig’s agonistic democratic theory - suggest that we should be wary of investing too much faith in democratic iterations and jurisgenerative politics to soften what Benhabib regards as tensions between cosmopolitan human rights claims and exclusionary moments in democratic politics.

The second possible response from Benhabib’s perspective to the logical problem of authorisation involved with using affectedness as a jurisdictional rule would be to emphasise hypothetical over actual processes of inclusion and deliberation. In discussing the idea of practicing an ‘enlarged mentality’, which is a condition of discourse theory moral reasoning, when individuals reflect imaginatively on the validity of norms or decisions from the standpoint of others, Benhabib states that it is not strictly necessary that actual deliberation take place amongst concrete individuals. It is sufficient, in Benhabib’s view, to enact a hypothetical conversation and to place oneself in other’s shoes. This suggests that *actually* including all *actually* affected parties in

¹⁰ The description of Benhabib’s position as ‘chrono-logical’ is in Honig (2008).

¹¹ Benhabib (2004a), p143.

deliberation is unnecessary for reaching morally defensible conclusions as to how to act. If hypothetical consent is all that is required then we need not worry about the logical problems involved in including all *actually* affected parties. However, I go on to criticise this move from Young's perspective on deliberative democracy, arguing that Benhabib's faith in the reversibility of perspectives and hypothetical deliberation risks calcifying existing inequalities in power and status, and excluding the perspective of marginalised individuals. If valid, this objection suggests that hypothetical or imaginative reasoning may result in 'internal exclusions', and so the process of collective self-determination may not honour fully the normative logic behind the subject-to-the-law principle of democratic inclusion, as some citizens and social members may find their perspective and voice under-represented.

These problems with Benhabib's use of affectedness as a jurisdictional rule lead me to consider in section 5.5 whether her position on membership is more persuasive if we emphasise instead her commitment to the subject-to-the-law principle and a territorially based citizenship of residency. In supporting this move, I suggest that proponents of de-nationalised citizenship like Benhabib should welcome the focus on the local, territorial aspect of social membership as the basis for attributing citizenship, as this shifts the emphasis away from nationality and legality of status. However, there are problems too with Benhabib's use of the ideal of public autonomy (which is the term she uses to describe the principle that the authors of the law should also be its subjects). My first concern is that Benhabib attributes democratic citizens a degree of control over naturalisation policy that seems to run counter to the normative logic behind the all-subjected principle and the idea of a right to political membership. Secondly, Benhabib introduces a distinction between ascriptive and elective criteria for

admission to citizenship which is unstable. She states that unchosen features of individuals such as their age, race, religion, language community or sex, are morally indefensible criteria for exclusion, whilst elective features such as their job skills, training, qualifications, civic competencies, and so forth, are defensible selection criteria. These are the sorts of admissible variations in the different schedules of rights enacted within self-determining political communities. Benhabib thinks that it is particularly important that political communities have a right to employ economic criteria in their admissions procedures. However, I argue that economic criteria cannot be divorced neatly from the ascriptive criteria that Benhabib wants to take off the table, so there is a risk that Benhabib's attempt to mediate the tense relationship between universalism and democratic particularism via democratic iterations slides into the kind of unilateral, club-based model of self-determination as exclusion put forward by Walzer, but at the level of *citizenship* rather than at the territorial border.

5.2 Cosmopolitanism and Political Membership

For Benhabib, the key aim of a discourse theory of political membership is to show how communities may legitimately and democratically shape their own character whilst respecting the universal human rights of those outside the community who seek social membership and/or citizenship. The question of the rights of migrants, refugees and asylum seekers brings to the fore the puzzle of how to balance respect for the will of self-governing communities with respect for the rights of individuals. As Rousseau famously articulated, one of the key problems for democratic theory is the fact that listening to the will of the *demos* may lead to policies that are legitimate but unjust. The difficulty, for Rousseau, is therefore how to ensure that the general will

(the true interests that all citizens share in common) is coterminous with the will of all (the aggregation of self-interested voting preferences).¹² We can see a similar problematic at work in Benhabib's approach to democracy and liberal-cosmopolitanism. From a liberal-cosmopolitan standpoint, not every decision taken or policy enacted by a democratic community is morally legitimate, just in so far as it is democratically sanctioned. From a democratic standpoint, the imposition of a particular set of norms appears procedurally illegitimate if they are imposed 'from above' and not subject to and therefore the outcome of democratic debate, contestation and decision. For Benhabib, the dilemma is this: "How can the will of democratic majorities be reconciled with norms of cosmopolitan justice? How can legal norms and standards, which originate outside the will of democratic legislatures, become binding upon them?"¹³

Benhabib sets out to mediate the "fraught relationship"¹⁴ between democracy and cosmopolitanism as it pertains to the issue of political membership via the application of a discourse theory of political morality. For Benhabib, the constraints on the collective will of democratic communities that are dictated by a conception of 'just membership' entail:

(...) recognizing the moral claim of refugees and asylees to first admittance; a regime of porous borders for immigrants; an injunction against denationalization and loss of citizenship rights; and the vindication of the right of every human being "to have rights", that is, to be a legal person,

¹² Rousseau (1993), cited in Benhabib (2004a), p44; Benhabib (2004b), p132.

¹³ Benhabib (2004b), pp. 116-117.

¹⁴ *Ibid*, p117.

entitled to certain inalienable rights, regardless of the status of their political membership.¹⁵

Whilst Benhabib is critical of the current status of membership policy in international law whereby territorial admissions and naturalisation procedures are considered to be a more or less unchecked sovereign prerogative, she resists embracing wholesale the federal solution proposed by Young in which restrictions on movement and access to citizenship are dissolved altogether in favour of open yet autonomous jurisdictional units. As such, we can see her position as straddling a divide between nationalistic defenders of state sovereignty in admissions and membership procedures like Walzer and Miller and those theorists like Young and Carens who encourage the removal of restrictions on international movement altogether.¹⁶ However, Benhabib agrees with Young that the scope of obligations of justice - and of democratic accountability - extend beyond the confines of bounded nation-states: “territorial boundaries and state borders are not coterminous with those of the moral community”.¹⁷ As with Young, Benhabib substantiates this claim by appealing to a principle of democratic inclusion according to affectedness, and she claims that this gives rise to the need for issue-responsive and shifting deliberative bodies: “Discursive communities can emerge *whenever* and *wherever* human beings can affect one another’s actions and well-being, interests or identity”.¹⁸

¹⁵ Benhabib (2004a), p3.

¹⁶ She characterises her position as steering a “middle course between the radical universalism of open-borders politics on the one hand and sociologically antiquated conceptions of thick republican citizenship on the other”, Benhabib (2002), p153.

¹⁷ *Ibid*, p147.

¹⁸ *Ibid* (emphasis added).

In contrast to liberal nationalists, identity liberals and communitarians, Benhabib's conception of self-determination makes no appeal to national homogeneity in the form of shared values, beliefs or characteristics. She stresses instead the conflictual and potentially antagonistic dimension of deliberative procedures amongst the existing citizen body. Like Young, Benhabib regards cultural groups as internally heterogeneous and defined relationally. An appropriate understanding of cultural identity, for Benhabib, "would emphasize that cultures are formed through complex dialogues and interactions with other cultures; that the boundaries of cultures are fluid, porous, and contested".¹⁹ She therefore stands opposed to membership policies that would seek to draw firm and impermeable boundaries around individuals or groups on identity-based or cultural criteria.

Benhabib shares with Tamir, Miller and Walzer a suspicious attitude towards proposals of global governance or the wholesale abandonment of jurisdictional boundaries²⁰. However, she is more prepared than any of those theorists to bind the will of self-governing communities closely to universal moral standards. This is because Benhabib approaches the question of political membership from the standpoint of a revised version of Habermasian discourse theory. Her strategy is to ask what norms governing membership procedures would be reciprocally acceptable to all affected individuals under special discursive conditions. *Contra* Tamir, Miller and Walzer, Benhabib argues that there is a human right to membership that ultimately trumps the democratic will of political communities:

(...) to insist that the right to membership - that is, to naturalization - follows from a discourse-ethical standpoint seems to bind the

¹⁹ *Ibid*, p184.

²⁰ Benhabib (2004d).

will of the sovereign in accordance with a specific concretization of rights ... the “human right of membership” is more general than the specific citizenship legislation of this or that country.²¹

Institutionally, cosmopolitanism need not necessarily imply world government or the abolition of nation-state borders.²² Benhabib agrees with Walzer that territorial borders demarcating political jurisdictions are a necessary and inherent feature of democratic self-determination. However, whilst Walzer most commonly appeals to the importance of cultural distinctiveness and shared values to justify a right to communal closure, Benhabib emphasises instead the role that territorial and membership boundaries play in securing democratic legitimacy and accountability: “the will of the democratic sovereign can extend only over the territory that is under its jurisdiction”.²³ She argues that the logic of democratic representation calls for borders to separate different legal jurisdictions. Democracies need boundaries otherwise it would not be clear where the jurisdiction of different communities began and finished: “Precisely because democracies enact laws that are binding on those who authorise them, the scope of democratic legitimacy needs to be circumscribed by the demos which has bounded itself as a people on a given territory”.²⁴ Moreover, democratic representatives must be held accountable to a specific group of people, and this entails a territorially bounded *demos*: “democratic rule, unlike imperial dominion, is exercised in the name of some specific constituency and binds that constituency alone”.²⁵ This does not mean, however, that those territorial boundaries are immutable or that they should be fixed according to nationalist, ethnic or cultural criteria. All individuals have

²¹ Benhabib (2004a), pp. 140-141.

²² Miller (2007), p67.

²³ Benhabib (2004a), p45.

²⁴ *Ibid*, p219.

²⁵ Benhabib (2004b), p133.

a right to have political membership, and so those who present themselves at the borders of other communities must have their interest in migrating weighed fairly against the right of political communities to determine the conditions of membership.

Benhabib's 'cosmopolitan federalism' emerges in part through a re-reading of Kant's essay 'On Perpetual Peace', the third article of which reads 'Cosmopolitan Right shall be limited to Conditions of Universal Hospitality'.²⁶ According to this moral principle, each individual is possessed of the right to present themselves before others, to seek out and make contact with other lands and peoples and to be met without hostility. This, naturally, imposes a reciprocal duty upon the traveller not to conduct himself in such a way as to be hostile toward his hosts or to exploit their hospitality. Kant makes it clear that the right to hospitality is a right that all humans possess simply in virtue of being human: it is not to be reduced to an act of grace or generosity on the part of sovereign states. However it is important to note that, for Kant, the right to hospitality does not automatically guarantee a right to membership, only temporary resort or visitation. The stranger remains alienated from the rights, benefits and burdens of citizenship unless and until the sovereign decides to grant full membership status. In other words, in Kant's view political communities are under no moral obligation and should be under no legal obligation to naturalise resident aliens. Moreover, Kant considered it unobjectionable to refuse entry altogether if doing so would not cause the prospective migrant's 'destruction'. It seems to me that one way of explaining this qualification is to assume that Kant is making a similar point to the one that was discussed in relation to Miller in Chapter 3: that is, he is suggesting that the right to hospitality must be fulfilled by *some*

²⁶ Kant (1795), p328, V111: 357 PP; Benhabib (2004a), Chapter 2; Benhabib (2004b), pp. 119 - 126.

community but that in and of itself that right cannot secure admission to and hospitality within any *particular* community.

Benhabib takes issue with this qualified cosmopolitanism, arguing instead that states are morally bound to make citizenship available to all residents. What is required, in her view, is an account of moral reasoning and discursive rationality that provides constraints on the acceptable range of criteria that a self-determining community can employ to control membership and admissions procedures. She asks “which norms and normative institutional arrangements would be considered valid by all those who would be affected if they were participants in special moral argumentations called discourses”.²⁷ For Benhabib, moral discourse that issues universally valid and binding injunctions presupposes both *universal moral respect* and *egalitarian reciprocity*:

Universal respect means that we recognise the rights of all beings capable of speech and action to be participants in the moral conversation; the principle of egalitarian reciprocity, interpreted within the confines of discourse ethics, stipulates that in discourses each should have the same rights to various speech acts, to initiate new topics, and to ask for justification of the presuppositions of the conversations.²⁸

Accepting the strictures of discourse ethics places significant limitations on morally permissible practices of political membership. When formulated under the rubric of universal respect and egalitarian reciprocity, the human right to membership precludes from consideration criteria that would exclude others on the grounds of

²⁷ Benhabib (2004a), pp. 131-132.

²⁸ *Ibid*, p13.

ascriptive or non-elective characteristics such as “race, gender, religion, ethnicity, language community or sexuality”.²⁹ The act of excluding someone from political membership must be justified by reasons that are, or would be, “reciprocally acceptable”³⁰ to all concerned; any given citizen offering grounds for exclusion would accept those grounds if they themselves were in the position of a migrant seeking admission to a state. The reasons must, in other words, be capable of generating a moral consensus. On the other hand, factors such as “length of stay, language competence, a certain proof of civic literacy, demonstration of material resources, or marketable skills”, as well as certain “qualifications and competencies”³¹ can in Benhabib’s view be stipulated as conditions for membership and can vary legitimately between democratic communities.

Given the inevitable existence of differentiated democratic communities, each individual must rely upon a concrete and particular set of political institutions to recognise and uphold their civil and political rights. On the other hand, these particular political institutions are to be judged by the extent to which they recognise and uphold universal rights that accrue to individuals just insofar as they are members of the human race. This paradox of democratic legitimacy calls for an attempt to mediate democratic territorial control with pre-political universal human rights. The question of who is and who is not a member of the political community brings to the fore the problem of the *scope* of the moral conversation, or in other words, who gets to participate and on what terms. For the discourse theorist, the paradox of democratic legitimacy has particular bite because their universalist commitment to allowing all to speak and be heard seems to run sharply

²⁹ *Ibid*, pp. 138-139.

³⁰ *Ibid*, p139.

³¹ *Ibid*.

up against the boundaries of democratic communities. All must have the right to speak and be heard, and yet speaking and listening take place within territorially circumscribed communities that seem to require the exclusion of the voices of some *as a condition of* including the voices of others. Particular communities are required to enact and protect human rights, and yet for the discourse theorist those human rights can only be formulated legitimately through a moral conversation that takes all individuals into account: “Since the discourse theory of ethics articulates a universalist moral standpoint, it cannot limit the scope of the *moral conversation* only to those who reside within nationally recognized boundaries; it views the moral conversation as potentially including all of *humanity*”.³² If communal closure is a necessary feature of democratic practice, part of Benhabib’s task is to show how her theory of discourse morality, which champions universal inclusion, can be relevant to formulating a normative account of membership in differentiated political communities, as opposed to membership within the community of those entitled to speak and be heard in the moral conversation, i.e. all of humanity. Part of the problem for Benhabib is this:

Membership norms impact those who are not members precisely by distinguishing insiders from outsiders, citizens from noncitizens. This then gives rise to a dilemma: either a discourse theory is simply *irrelevant* to membership practices in that it cannot articulate *any* justifiable criteria of exclusion, or it simply *accepts* existing practices of exclusion as *morally neutral* historical contingencies that require no further validation. But this would suggest that a discourse theory of democracy is itself chimerical insofar as democracy would seem to require a morally justifiable closure which discourse ethics cannot deliver.³³

³² Benhabib (2004b), p118.

³³ *Ibid*, pp. 118-119.

Benhabib argues that whilst this tension can never be fully overcome, it can be progressively mediated over time through the twin phenomena of ‘democratic iterations’ and ‘jurisgenerative politics’. These concepts are used to describe democratic political processes that mediate the conflictual relationship between universal norms mandating the inclusion of all, and practices of democratic self-determination: “The relationship between cosmopolitan norms and democratic will-formation can be conceptualized as a process of democratic iterations, often resulting in jurisgenerative politics”.³⁴ For Benhabib, these processes show how this relationship can be *productive* of rather than fatal to a viable discourse theory approach to political membership. One of her key conceptual claims is that the dilemma between universal human rights and democratic particularism can be mitigated through re-interpreting and re-situating universal human rights principles in concrete, democratically differentiated scenarios: “the precise interpretations of human rights and the content of citizen’s rights must be spelled out in light of the concrete historical traditions and practices of a given society”.³⁵

Democratic iterations are “complex processes of public argument, deliberation, and learning through which universalist rights claims are contested and contextualized, invoked and revoked, throughout legal and political institutions as well as in the public sphere of liberal democracies”.³⁶ ‘Jurisgenerative politics’ are political processes through which “the democratic people shows itself to be not only the *subject* but also the *author of its laws*”.³⁷ These are the concepts that Benhabib employs to show how bounded communities can respect

³⁴ *Ibid*, p118.

³⁵ Benhabib (2004a), p123.

³⁶ *Ibid*, p19.

³⁷ *Ibid*, pp. 19-20.

universal personhood and the rights of individuals to hospitality and political membership without thereby sacrificing their right to self-determination. Put simply, Benhabib's response to the dilemmatic relationship between cosmopolitan universalism and democratic particularism is to point out that it is possible - through these processes of iteration and jurisgenerativity - for a democratic people to choose to respect the universal human right to membership of migrants, asylum seekers and refugees, thereby bringing cosmopolitan norms into line with popular sovereignty and democratic self-determination: "it is the people themselves who, through legislation and discursive will-formation, must adopt policies and laws consonant with the cosmopolitan norms of universal hospitality".³⁸ When a self-governing *demos* decides, for example, to expand the franchise by extending voting rights to resident aliens, or to develop more inclusive procedures for accessing citizenship, they illustrate the fact that a self-governing body can voluntarily change its constitution and composition in line with respect for universal personhood: "the democratic *demos* can change its self-definition by altering the criteria for admission to citizenship".³⁹ The alteration to the German citizenship laws in 1999, which permitted all long-term residents the right to naturalise and introduced birthright citizenship according to a *jus soli* model (i.e. automatic citizenship for all children born within the jurisdictional boundaries of the German state), is one of Benhabib's key examples of an instance in which democracy served cosmopolitan ends.⁴⁰ In this case, the previous ethnic conception of membership, where the German people were viewed by their state as "a political community of fate",⁴¹ with citizenship being predicated on the ties of blood, shared history and national identity, was transformed into a democratic conception, which recognised the legitimacy of the claims of resident migrants and

³⁸ *Ibid*, p177.

³⁹ *Ibid*, p206.

⁴⁰ Benhabib (2004b), pp. 156-157.

⁴¹ *Ibid*, p154.

their offspring to have a right to citizenship. This transformation in the German consciousness and public discourse on membership received clear expression in the city-state of Hamburg, when it criticised the previous ethnic conception by declaring that:

The Federal Republic of Germany has in fact become in the last decades a country of immigration. Those who are affected by the law that is being attacked here are thus not strangers but cohabitants, who only lack German citizenship. This is especially the case for those foreigners of the second and third generation born in Germany.⁴²

Benhabib acknowledges that democratic iterations do not always “yield positive results”.⁴³ Moreover, the validity of norms are not *dependent* upon these processes; democratic iterations are not self-validating. Ideally, what these processes do is re-situate independently valid cosmopolitan norms in concrete political situations: “productive or creative jurisgenerative politics results in the *augmentation of the meaning of rights claims* and in the *growth of the political authorship of political actors*, who make these rights their own by democratically deploying them”.⁴⁴ Through these processes of iteration and jurisgenerativity, the boundaries between inside and outside, between ‘us’ and ‘them’, ‘foreigner’ and ‘native citizen’, are shown to be permeable, and the supposedly natural and pre-political division of individuals into cultural groups, and of nations into separate self-determining states, is revealed as political, contingent, arbitrary, and therefore permanently susceptible to democratic (re)negotiation: “The line separating citizens and foreigners can be renegotiated by the

⁴² BVerfG 83, 60 II, Nr. 4, p68; cited in Benhabib (2004b), p156.

⁴³ Benhabib (2004a), p113.

⁴⁴ Benhabib (2004b), p140.

citizens themselves”.⁴⁵ In other words, self-determination can lead to inclusion rather than exclusion:

While the demos, as the popular sovereign, must assert control over a specific territorial domain, it can also engage in reflexive acts of self-constitution, whereby the boundaries of the demos can be readjusted and democratic sovereignty itself can be disassembled or reaggregated.⁴⁶

As I understand her, Benhabib’s point is that international migration and the fraying of Westphalian sovereignty needn’t necessarily be thought of as having a negative impact on democratic self-determination and popular sovereignty. Instead, we should view these developments as providing an occasion for their reinvigoration, through the re-interpretation of the meaning of membership in a particular political community.

Against Carl Schmitt and his contemporary followers like Chantal Mouffe, Benhabib believes that “the moral equality of individuals *qua* human beings and their equality as citizens are imbricated in each other”.⁴⁷ According to Benhabib, the democratic understanding of equality which calls for the extension of the franchise to all adult members of the political association is parasitic upon the liberal-cosmopolitan understanding of universal equality:

The modern social contract of the nation-state bases its legitimacy on the principle that the

⁴⁵ *Ibid*, p155.

⁴⁶ Benhabib (2007), p450.

⁴⁷ Benhabib (2002), p175. For a discussion of Mouffe’s relationship to Schmitt in this context, see Chapter 6, section 6.2 & section 6.4 of this thesis.

consociates of the nation are entitled to equal treatment as rights-bearing persons precisely because they are human beings; citizenship rights rest on this more fundamental moral equality, which individuals enjoy as persons.⁴⁸

Contra Schmitt and Mouffe, for Benhabib the key conceptual difficulty for liberal-democracy is not that universal human rights and democracy necessarily belong to different historic traditions with contradictory conceptions of equality.⁴⁹ The difficulty is rather that liberal-cosmopolitanism and democracy have different *standards of procedural legitimacy* that may conflict or stand in tension with one another: the former appealing to universal human rights, the latter appealing to the will of a democratic legislature. However, Benhabib's use of democratic iterations and jurisgenerative politics is designed to mark the fact that these different standards of legitimacy can in fact be congruent in their political implications, thus belying the Schmittian conviction that liberal-democracy is destined to collapse under the weight of its own internal contradictions.⁵⁰

It is clear that Benhabib's use of democratic iterations and jurisgenerative politics to mediate cosmopolitan universalism and democratic particularism is ultimately reliant upon the deliberation and decisions undertaken amongst citizens of territorially bounded political communities. In Benhabib's view, the *demos* should undertake to expand its own moral and conversational boundaries to encompass the interests of all affected parties. However, at the same time she maintains that democratic rule is irreducibly territorial and bounded due to the logic of representation and democratic jurisdiction: "The core of democratic self-governance is the ideal of public autonomy,

⁴⁸ *Ibid.*

⁴⁹ Schmitt (1985); Mouffe (2000a).

⁵⁰ Schmitt (1985).

namely, the principle that those who are subject to the law should also be its authors”.⁵¹ As such, I think there is an ambiguity here about whether Benhabib thinks that the moral community *and* the democratic community should be demarcated according to affectedness, or whether territoriality and the subject-to-the-law principle should mark the former and affectedness the latter.⁵² This is a distinction that I introduced and defended in the previous chapter. I begin my discussion in the following section by arguing that Benhabib - as with Young - ultimately wants affectedness to demarcate both, so that the moral community is co-extensive with the democratic community. I then go on to raise a problem with Benhabib’s use of affectedness as a jurisdictional rule. I argue that the normative basis for decisions about who is relevantly affected is problematic for Benhabib because of her commitment to deliberation to uncover normatively valid principles. In section 5.4 I outline two possible responses from Benhabib’s perspective to this boundary problem. The first response situates democratic iterations within a teleological narrative according to which democracy contains a self-correcting internal dynamic that leads to properly inclusive membership boundaries. The second possible response appeals to hypothetical rather than actual processes of deliberation, iteration and the discursive validation of norms and decisions. My critical analysis suggests that neither of these responses is convincing, which leads me to consider in section 5.5 whether Benhabib should abandon her commitment to affectedness as a jurisdictional rule and emphasise instead subjection to the law as a mode of demarcation, and the territoriality of democracy.

⁵¹ Benhabib (2004a), p217.

⁵² Aleinikoff (2007, p427) gestures briefly towards this ambiguity.

5.3 Affectedness and Deliberative Exclusion

According to the principle of discourse ethics, all individuals who are affected by a norm, policy or decision should be involved in its validation through an inclusive dialogue. If norms, policies or decisions have an impact that extends beyond the boundaries of a political association, it follows that the sphere of inclusion must also extend beyond the confines of bounded political communities.

However, as we have seen, Benhabib also claims that democracy is irreducibly territorial because democratic law is authorised by a specific group of people, and because representatives must be held accountable to their constituencies: “(...) the will of the democratic sovereign can extend only over the territory that is under its jurisdiction ... democratic rule, unlike imperial dominion, is exercised in the name of some specific constituency and binds that constituency alone”.⁵³ Thus, she claims that “there is no way to cut (the) Gordian knot linking territoriality, representation and democratic voice”.⁵⁴

The first point of criticism I want to raise, then, concerns Benhabib’s position on jurisdictional rules. Her conceptual conviction that democratic rule and representation are irreducibly territorial and inherently bounded seems to run counter to her normative conviction that decisions and norms are legitimate only in so far as they are the outcome of free and unconstrained democratic deliberation amongst all relevantly affected parties. I argued in section 4.3 of the previous chapter that the value of social membership and citizenship in terms of facilitating democratic self-determination could be compromised by a commitment to extending the scope of participatory membership via

⁵³ Benhabib (2004b), p133.

⁵⁴ Benhabib (2004a), p219.

the criterion of affectedness. As I have noted before, it seems that taking the all-affected principle seriously would require the existence of fluid and issue-responsive *demoi* that would have to be perpetually (re)formed and dissolved as a function of the particular issues being addressed at a given time. Benhabib accepts this when she states that the group of individuals party to a deliberative process will change depending on who can claim to be affected by the norm or policy under consideration:

The moral domain of the conversation involves all those who are affected by a norm, a law, a practice ... this discourse principle is necessarily indeterminate in that the circle of its addressees always needs to be adjusted according to who can raise the claim of being affected by a norm and its potential consequences.⁵⁵

But this seems to entail that - absent the possibility of a state making no decisions and taking no actions with trans-boundary or global implications - a *demos* could not possibly be tied permanently to one particular territorial jurisdiction under the terms of the all-affected principle. It seems that the all-affected principle is designed precisely to be able to account for the *problematic implications* of conceptualising democracy in terms of territorially bounded jurisdictions. To appropriate the terminology that Benhabib uses in the quotation above, the problem to which the all-affected principle is designed to be responsive is that the will of the democratic sovereign *can* and often *does* extend over and beyond the territory that is under its jurisdiction. This is why proponents of the all-affected principle are unhappy with the practice of demarcating participatory membership according to whom is bound to what territorial constituency. There seems to be an ambiguity then about whether Benhabib wants to endorse subjection or

⁵⁵ Benhabib (2007), pp. 451-452. See also Benhabib (2004a), p218.

affectedness as the mode of demarcating a constituency.⁵⁶ Consider the fact that other advocates of the all-affected principle like Young welcome the idea that democratic rule can and should be deterritorialised: “(...) institutions of governance ought not be defined as exclusive control over territory and what takes place within it. On the contrary, jurisdictions can be spatially overlapping or shared, or even lack spatial reference entirely”.⁵⁷ I therefore find it hard to see how Benhabib thinks that her commitment to the relationship between territoriality and democracy on the one hand and her commitment to the all-affected principle on the other are compatible. Isn’t the whole normative point of the all-affected principle to *cut* the ‘Gordian knot linking territoriality, representation and democratic voice’?

One possible way of defending Benhabib, against the charge that she endorses potentially incompatible jurisdictional rules, would be to suggest that she is making a similar distinction to that which I defended in the previous chapter; between a democratic constituency and a moral constituency, with territoriality and subjection to the law being used to demarcate the former and affectedness demarcating the latter. This response draws some interpretative support from Benhabib’s discussion in her article ‘Democratic Exclusions and Democratic Iterations’,⁵⁸ of whether the Iraqi people should have been party to the debate over the American invasion given how deeply their interests were implicated by the decision to go to war. Benhabib supports the view that the Iraqis should have been “part of the moral as well as policy conversation of the US, though they are not part of the *decisional structure* of US institutions”.⁵⁹ The distinction here would be between an electoral constituency (comprised of all those formally

⁵⁶ Baubock (2007), p403; Aleinikoff (2007), p427.

⁵⁷ Young (2000a), p261.

⁵⁸ Benhabib (2007).

⁵⁹ *Ibid*, p452.

recognised as US citizens with standing in the decisional structure given their territorially-based membership rights) and a moral constituency (comprised of all those affected by the decisions undertaken by the US citizenry). In the previous chapter, we saw that Young argues for conflating these two categories: in her view the moral community consisting of all those affected by a decision ought to be co-extensive with the formally enfranchised decision-making community; in other words democratic institutions should correspond to the scope of moral obligations of justice defined according to causal relationships and interdependencies. I put forward a number of reasons for resisting this line of argument and for keeping these two categories separate. In the case of Benhabib, however, there is an ambiguity about whether she wants to endorse a similar position to Young's on this issue. In the quotation just cited, is she suggesting that by bringing the Iraqis into the moral and policy debate, they should have also been brought into the democratic decisional structure, or is she claiming that whilst they should remain outside of the democratic decisional structure, they should nevertheless be part of the moral and policy debate?⁶⁰ The latter interpretation fits with my distinction, whilst the former suggests with Young that we should attempt to bridge that distinction. Benhabib seems committed to the first interpretation, given her claim that the work of the discourse theorist is to reduce the "hiatus between the discourse community of *all those* whose interests are affected by legislation and the circle of formally recognized democratic citizens".⁶¹ Similarly, she states that "Making the exercise of democratic voice dependent upon one's nationality status alone ... flies in the face of the

⁶⁰ See also Benhabib (2007, p455), where she draws a distinction between a "demotic community", i.e. all those who are formal citizens and residents of a jurisdictional system, and other more fluid and unstructured communities of conversation which can involve international and transnational human rights organizations such as Amnesty International, various UN representative and monitoring bodies, and global activist groups such as Medecins San Frontiers".

⁶¹ *Ibid*, p450.

complex interdependence of the lives of peoples across borders and territories”.⁶² This suggests that the ultimate goal of a discourse theory of political membership is to make the democratic community co-extensive with the moral community, comprised of all those whose interests are affected. Therefore it would seem that affectedness, for Benhabib as for Young, should ideally be used as a jurisdictional rule for defining the scope of participatory membership, and not just as a moral and policy guideline.

This criticism may not be particularly consequential. The link between territoriality and democracy may not be a key aspect of Benhabib’s position in comparison to her commitment to the all-affected principle. This is suggested by the fact that she abandons that link when discussing the importance of transnational democratic institutions like the EU, which she cites as evidence that “democratic citizenship can also be exercised across national boundaries and in transnational contexts”.⁶³ National boundaries are constituted partly by territorial boundaries, so the fact that democratic citizenship can be exercised across them entails that democratic rule can be deterritorialized.

My aim is not to pronounce one interpretation more authentic or accurate than the other. Rather, I want to consider the implications of both, in turn. In the remainder of this section and in the section that follows, I focus on the interpretation that commits Benhabib to the co-occurrence of moral obligations and the scope of democratic accountability, through her use of affectedness as a jurisdictional rule. In 5.5, I discuss critically the implications of following the alternative

⁶² Benhabib (2004a), p215.

⁶³ Benhabib (2002), p183.

interpretation, which reads her as holding on to the territorial basis for ascribing membership.

I want to focus now on Benhabib's commitment to affectedness as a jurisdictional rule. As I have argued in the previous chapter, using affectedness to demarcate a constituency seems to require investing some unspecified actor(s) or governing body with the authority to decide upon the relevant constituency for any given case. To re-cap: we cannot just include all those *actually* affected, since who is affected by a decision depends on the outcome, and the outcome depends on who is included, i.e. who is affected. Furthermore, unless we include virtually everyone in virtually every decision made virtually anywhere, deciding who is and who is not relevantly affected by a decision cannot be an objective, empirical or neutral procedure; using affectedness as a jurisdictional rule requires making a normative judgment on the merits of the issue at hand. However, as with Young, this normativity is a problem for Benhabib, though the way in which the problem plays out is different. Whereas for Young the difficulty arises in part because of her scepticism of claims to neutrality and impartiality in moral reasoning and deliberative procedures and her general concern to limit the potential for abuses of power and privilege, for Benhabib the problem stems from her commitment to deliberation to uncover normatively valid principles.

As we have seen, the principle of discourse ethics holds that the correct answers to normative questions cannot be known in advance of an inclusive discussion taken amongst all those relevantly affected. But if I am correct to hold that deciding upon the boundary of those affected must itself involve normative judgement on the merits of the issue at hand, then it follows that the decision concerning who is relevantly

affected in any given case *necessarily* lacks the stamp of normative validity that the discourse theorist demands, precisely because the decision concerning who is relevantly affected cannot logically be mandated according to the criteria that all those affected have been party to its articulation. It is ironic, I think, that Benhabib criticises global egalitarians on the grounds that implementing the necessary principles of redistribution would “have to rely on coercive enforcement agencies whose democratic credentials are questionable”.⁶⁴ It seems that, on pain of regress, those outside actors, who would have to be empowered to decide upon the boundary of those relevantly affected by a given decision, cannot have credentials that are democratically legitimate according to the terms of the all-affected principle itself.

I now want to canvass two possible counter-arguments that Benhabib could make in response to this boundary problem. The first is a teleological or ‘chrono-logical’ response that appeals to features inherent in the process of democratic self-determination itself. The second appeals to a distinction between hypothetical and actual processes of deliberation and the discursive validation of norms and decisions. I will argue that neither response rescues the coherence of using affectedness as a jurisdictional rule within the terms of Benhabib’s position.

5.4 Two Responses to the Boundary Problem

Benhabib’s discussion of the *demos*-expanding potential of democratic iterations and jurisgenerative politics can, I think, be understood as a

⁶⁴ Benhabib (2004a), p113.

possible way of avoiding the boundary problem described in the previous section. If there are deliberative mechanisms in place within democratic procedures that generate an inevitable (and moreover *morally correct*) extension of the franchise, then it may not matter how and according to what sorts of criteria the *demos* is initially constituted. Benhabib's faith in relying on the will of the *demos* to soften the dilemma between cosmopolitan universalism and democratic particularism seems to fit roughly with Goodin's speculations on the implications of there being "some internal dynamic within democratic decision-making processes that naturally leads the *demos* to be changed over time in such a way as to include all those and only those who ought to be included".⁶⁵ If we had sufficient reason to invest faith in the presence of such an internal dynamic, Goodin claims, we simply would not need to worry about the source of the legitimacy of border and membership controls or chicken-and-egg boundary problems, because:

(...) thanks to those internal dynamics of democratic decision making, you always end up settling on precisely the right composition of the *demos*. Were all that true, we need not worry about how the *demos* is initially constituted. We could constitute that initial *demos* on any basis whatsoever, and set democratic process underway to refine it (...).⁶⁶

It may be reassuring for those democratic theorists who are animated by the boundary problem to suppose that democracy does contain this kind of self-correcting internal dynamic, as it would mean that the logical paradoxes of authorisation involved in drawing the boundaries of a democratic regime (whether it be according to affectedness, or some other criterion) are normatively irrelevant. The thought would be that, eventually, the gap, between those with a right to participate in the

⁶⁵ Goodin (2008), p131.

⁶⁶ *Ibid.*

making of political decisions and those receiving the consequences of those decisions, will be bridged, as cosmopolitan norms of hospitality and human rights take root more and more firmly in the overall *ethos* of liberal-democratic citizens. However, Benhabib claims that her position does not entail any “Hegelian teleology of reconciliation”,⁶⁷ by which she presumably means just such an appeal to an inevitable movement in democracy towards a universal end-state of inclusion. As we have seen, Benhabib cautions against seeing democratic iterations and jurisgenerative politics as self-validating. Democratic iterations don’t always result in the morally and democratically correct outcome and Benhabib does not want to abandon the moral vantage point outside of procedures of democratic will-formation that enables the discourse theorist to point out when and how they have gone wrong.

But this fallibilism sits awkwardly in the context of her repeated use of a temporal and evolutionary vocabulary. Time and again, Benhabib uses a temporal register and invokes evolutionary language to describe the emergence of cosmopolitan norms and universal human rights principles, the disaggregation of citizenship rights, and the fraying of Westphalian sovereignty. Consider, for example, her description of the trial of Adolf Eichmann in Jerusalem as standing at “the beginning of the evolution of cosmopolitan norms, the full implications of which have only become clear in our time”,⁶⁸ and her faith that this new “era of cosmopolitan norms”⁶⁹ marks the “end of the unitary model of citizenship”,⁷⁰ so that nationalism represents a “vanishing ideology”.⁷¹ The use of this language seems to suggest not only that we (‘we’ being the citizens of liberal-democratic societies) *can* but that we *are* in fact

⁶⁷ Benhabib (2004a), p143.

⁶⁸ Benhabib (2004b), pp. 119-120; p115.

⁶⁹ *Ibid*, p138.

⁷⁰ *Ibid*.

⁷¹ *Ibid*, p155.

moving progressively towards an end-state where all individuals will be included or excluded according to criteria that are congruent with universal laws of cosmopolitan hospitality.⁷²

Further evidence of Benhabib's teleological position on the development of democratic rights claims can be found in her discussion of the French headscarves affair. Benhabib applauds the manner in which the schoolgirls from Criel were able to "talk back to the state"⁷³, and she suggests that it is likely that one day the girls will embrace democratic-cosmopolitan citizenship more thoroughly by learning to 'talk back to Islam', i.e. by contesting the meaning of traditional Islamic practices.⁷⁴ In this way, Benhabib seems to position their actions within a temporal maturation narrative. According to Honig, Benhabib evaluates the schoolgirls' actions from the perspective of "the backward-looking gaze of a (still) future cosmopolitanism perched on a normative, linear temporality".⁷⁵ Consider again the following statement, this time in its entirety:

The political philosopher as discourse ethicist is committed to further the democratic dialogue such that the hiatus between the discourse community of *all those* whose interests are affected by legislation and the circle of formally recognised democratic citizens, while it can never be eliminated, can nonetheless be reduced through processes of ever more widening public representation and participation.⁷⁶

⁷² Johnston (2007, p18) gestures towards this teleological element of Benhabib's position.

⁷³ Benhabib (2006), p67; Benhabib (2004a), p157.

⁷⁴ *Ibid.*

⁷⁵ Honig (2008), p94.

⁷⁶ Benhabib (2007), p450.

This statement provides evidence of the way in which Benhabib situates what she regards as the constitutive tension between liberal-cosmopolitan rights and democratic self-determination within a temporal, evolutionary narrative, whereby she anticipates, and judges the present from the perspective of, a posited future in which that tension is overcome. Universal cosmopolitan rights lie ahead and particularity in the form of Westphalian sovereignty lies in the past.⁷⁷ How convincing is this teleological or chrono-logical way of conceptualising the trajectory of democratic inclusion, as a way of avoiding the logical paradox of demarcation discussed above?

The key problem with positioning democratic rights claims within this sort of chrono-logical or evolutionary narrative is that this positioning overlooks the contingent, non-linear and precarious way in which democratic rights are won, lost, won again in different forms and contexts or not at all, and so forth. It seems misguided, for example, to regard, as Benhabib does, contemporary forms of alien suffrage as the latest development in an evolutionary trajectory of rights expansion, given the fact that voting rights for resident aliens was widely practiced and endorsed in pre-First World War America, only to be revoked in the face of post-war xenophobia.⁷⁸ Moreover, the EU cannot simply be seen as ushering in a new era of cosmopolitan hospitality divorced from national particularism and exclusion/hostility. As I noted above, Benhabib endorses the way in which the German citizenship laws were revised in 2000 to introduce birthright citizenship according to a *jus soli* model, thereby marking a distinct break with the previous ethnic conception of citizenship transmission by *jus sanguinis*. However, elsewhere in Europe this process has been reversed. The citizens of the Irish Republic, for example, recently voted to *abolish* citizenship by

⁷⁷ Honig (2008), pp. 94-95; Johnston (2007), p18.

⁷⁸ Honig (2008), p95.

birth in the territory, in an effort to combat what was seen as ‘birth tourism’ (i.e. pregnant women entering the territorial jurisdiction of the state in order to secure citizenship and its attendant benefits for their expected offspring).⁷⁹ So we cannot know that cosmopolitan rights and universal hospitality will win out over democratic particularity and exclusion in the cut and thrust of actual political life.

Honig takes issue with the chrono-logical element of Benhabib’s philosophical system; her presupposition of “a certain linear and progressive temporality”⁸⁰ which “reassures us that continued developments along the trajectory of rights will take us to a desirable democratic outcome”.⁸¹ This is one instance of the broader agonistic critique of rationalism, which I will discuss in more detail in the following chapter. From Honig’s perspective, the danger of embedding democratic iterations within a chrono-logical narrative is that the exclusions which inevitably accompany those iterations may become insulated from further contest. We risk becoming blind to those “remainders” which “will always result from every political-legal settlement, no matter how progressive or expansive”.⁸² Honig takes particular exception to the way in which Benhabib champions the EU as a welcome sign of cosmopolitan-moral progress in the form of the disaggregation of citizenship rights and the concomitant waning of the

⁷⁹ Baubock (2006). Other examples of previously inclusive immigration policies being reversed include the introduction in 1996 of the US-American Welfare Reform, which denied legal resident aliens access to means-tested welfare programs, and the introduction in Australia of lengthy waiting periods before immigrants are eligible for welfare benefits. In the last decade, Austria, Italy and Denmark have all voted into power governments whose agenda emphasises the restriction of immigration as well as the rights of resident aliens. These examples are cited in Baubock (2002), p5, nt. 4.

⁸⁰ Honig (2006), p111.

⁸¹ *Ibid.*

⁸² Honig (2006), p111.

era of unchecked nation-state sovereignty - as precisely just such a sign of “ever more widening public representation and participation”. The disaggregation of citizenship rights, for Benhabib, describes “institutional developments that unbundle the three constitutive dimensions of citizenship, namely, collective identity, the privileges of political membership and the entitlements of social rights and benefits”.⁸³ In Honig’s view, by focusing on developments that seem to be congruent with laws of universal hospitality (as Benhabib characterises them) like “Europe’s newly porous borders, ... new recognition of extracitizen human rights and alien (but still membership-based) suffrage, and ... extrastate fora to which state-based injustices can be appealed”,⁸⁴ Benhabib overlooks or underestimates the way in which these developments themselves not only harbour new and pernicious forms of exclusion and domination, but also work to reinforce alternative forms of national sovereignty. For example, whilst it is true that the borders of many European nations have in recent years become more porous, freedom of movement is still ultimately dependent on membership in a signatory state. Moreover, national membership is a necessary requirement for being able to vote in European elections and to participate in the ratification of the EU Constitution Treaty⁸⁵. Therefore, paradoxically, being a member of Europe not only enables an individual to *transcend* the significance of their nationality for the purposes of migration and participatory membership, it also *reinforces* the political salience of their nationality. This vindicates Honig’s point that the EU both attenuates nation-state sovereignty *whilst also* shoring it up in alternative forms; it illustrates her point that the EU “is a vehicle whereby national belonging is transcended, but also a way to rescue national belonging ...”.⁸⁶

⁸³ Benhabib (2004b), p136.

⁸⁴ Honig (2006), p108.

⁸⁵ Urbinati (2005).

⁸⁶ Honig (2006), p114. Urbinati (2005) makes a similar point.

The rhetoric adopted by EU policy makers confirms the point that Union citizenship is a derivation of, and not a substitution for, national citizenship in signatory states. For example, the 1997 Amsterdam Treaty states that “citizenship of the Union shall *complement and not replace national citizenship*”⁸⁷ and that “the Union shall respect the national identities of its member states”.⁸⁸ Therefore Benhabib’s optimistic claim that “nationalism” is a “vanishing ideology”⁸⁹ and that the EU represents a “decoupling of national and cultural origin from the privileges of political membership”⁹⁰ seems misleading. The significance of national belonging in the context of the EU is also bolstered by the increasingly exclusionary treatment of the undocumented; the greater hospitality shown towards citizens of EU member states has been accompanied by greater hostility towards asylum seekers and refugees. For Honig, this provides an apt empirical illustration of the Derridean thesis that unconditional hospitality always contains a trace of conditional hospitality which - being conditional - necessarily involves an element of hostility and exclusion: “The new porousness of territorial borders among EU countries has been accompanied in recent years by the erection of new, not at all porous borders inside the EU. The hosts are not only welcoming; they are also hostile”.⁹¹

We can see a similar double-movement of inclusion/exclusion at work in decisions to ‘disaggregate’ citizenship by awarding rights to long-term residents. Whilst it may in one sense be progressive and in

⁸⁷ The Treaty of Amsterdam (1997), p25 (italics added); cited in Baubock (2006).

⁸⁸ The Treaty of Amsterdam (1997), p6; cited in Baubock (2006).

⁸⁹ Benhabib (2004a) p207.

⁹⁰ *Ibid*, p155.

⁹¹ Honig (2006), p108; Derrida (2000).

keeping with norms of cosmopolitan hospitality to award rights and social benefits to resident aliens, at the same time this can also be read as a tool for perpetuating their exclusion from full and equal citizenship.⁹² If resident immigrants are awarded rights independently of citizenship status then they are less likely to demand full incorporation into the polity. Benhabib applauds disaggregation but does not note the way in which it can simultaneously reduce *and* shore up the political salience and exclusive dimension of nationalism. In Honig's view, the key advantage of an agonistic over a discourse theory conception of democracy is that the former is more likely to engender critical attentiveness towards forms of exclusion and domination which might otherwise go unnoticed: "If we expect hospitality always to harbor a trace of its double - hostility - then proponents of hospitality will always be on the lookout for that trace and its remainders".⁹³ Conversely, faith in the teleological or chrono-logical expansion of rights generates a certain myopia; political developments are liable to be seen as progressively inclusive, regardless of whether they harbor alternative forms of exclusion. To my mind, the fact that Benhabib does not see the double-movement of inclusion/exclusion perpetuated by the disaggregation of citizenship rights, regarding it only as a tool of inclusion and de-nationalisation, provides a neat illustration of this point.

The upshot of the previous discussion is that democracy cannot be relied upon to solve boundary problems for itself. An alternative way that Benhabib could respond to the difficulty of employing affectedness to mark the boundaries of the *demos* would be to emphasise the importance and feasibility of *hypothetical* over *actual* processes of

⁹² Kymlicka (2001a), pp. 138-139.

⁹³ Benhabib (2006), p111.

discursive validation.⁹⁴ The logical paradoxes involved in deploying affectedness as a jurisdictional rule seem to arise because of the assumption that the all-affected principle is being used to define the group of actual individuals who have a right to take part in actual deliberation. The idea is that real people who are relevantly affected should be communicating with each other in a real deliberative forum. But if it were possible for an individual to *enact* or *imagine* hypothetically the conversation that would take place amongst all relevantly affected parties, and without distorting the interests or voices of those other parties through importing their own personal preferences, prejudices, preconceptions, and the like, then it would seem that the logical paradoxes of demarcation would be avoided. There would be no need to worry about who gets to decide who is relevantly affected if an individual was in principle possessed of both the ability to reason from the standpoint of all relevantly affected parties as well as the capacity to enact a hypothetical conversation amongst those parties characterised by universal moral respect and egalitarian reciprocity, thereby leading to a just and legitimate conclusion as to how to act democratically. Given the huge numbers of individuals across the globe who may potentially be affected by a given norm, policy or decision, it may be that the very coherence of the all-affected principle as a moral and policy guideline in fact relies crucially upon the ability of individuals to reason and deliberate imaginatively in this way. Since bringing all-affected parties together to deliberate face-to-face may often be impossible, hypothetical deliberation is a necessary second-best alternative.⁹⁵

⁹⁴ A similar distinction is discussed in Abizadeh (2008), p41. He points out that whilst liberals argue that coercive state acts be *justifiable*, democrats argue that they should be *justified*. Liberals are concerned with the *content* of the justification, whilst democrats are concerned with the *process* of justification.

⁹⁵ For a defense of hypothetical deliberation, see Goodin (2008), Chapter 3.

This response to the problem of affectedness fits neatly with Benhabib's discussion of practicing an 'enlarged mentality', i.e. a capacity to reason from the standpoint of all relevantly affected parties. Benhabib states that it is not strictly necessary for reaching morally defensible conclusions that we engage in debate with an actually existing interlocutor:

I want to suggest that we must think of ... enlarged thought as a condition of actual *or simulated dialogue*. To 'think from the standpoint of everyone else' is to know 'how to listen' to what the other is saying, *or when the voices of others are absent, to imagine oneself in conversation with the other as my dialogue partner.*⁹⁶

It is interesting to note in connection with this point that two of Benhabib's key examples of democratic iterations leading to jurisgenerative politics - the recent expansion of the franchise in Germany to include all children born within the territory, regardless of the citizenship status of their parents, and the way in which during the French 'headscarves affair' the Muslim schoolgirls were able to re-appropriate the symbolic importance of the veil and to thereby "talk back to the state"⁹⁷ - are processes of democratic iteration that took place between *existing* members of the polity. The voices of those lacking official citizenship status are notably absent from Benhabib's examples, and it is significant in the present context that she does not seem to consider it important to reflect on ways of including non-citizens in debates over membership rights or - for example - the meaning of religious symbols in the public sphere. In the following chapter, I will discuss the way in which Bonnie Honig encourages the disenfranchised - those individuals who are "so far outside the circle of

⁹⁶ Benhabib (1992), p137 (italics added).

⁹⁷ Benhabib (2004a), p210.

who ‘counts’ that they cannot make claims within the existing frames of claim making”⁹⁸ - to “take rights on (their) own behalf”, in contrast to the state-centric and ‘top-down’ model of franchise expansion that provides the framework for Benhabib’s thoughts on membership, where the migrant is always positioned as - in Honig’s words - “an object of charity or hospitality”.⁹⁹

Benhabib’s hope is that democratic citizens will engage in iterative deliberations that will result in their state extending the privileges of citizenship to resident aliens, as well as affected outsiders. But, for Benhabib, the process of deliberation over such policies is always ultimately a conversation amongst those *already enfranchised*. To return to a quotation cited above, notice that although the status of foreigners and resident aliens is what is at issue, Benhabib’s faith is that “The line separating citizens and foreigners can be renegotiated *by the citizens themselves*”.¹⁰⁰ On these grounds, Nadia Urbinati criticises Benhabib for failing to explain how “migrants can be the protagonists of democratic negotiations on an issue (immigration) in relation to which they have no voice, either as individuals or as members of a recognized community”.¹⁰¹ Similarly, Megan Kime is unsatisfied with Benhabib’s focus on democratic iterations that take place amongst individuals who are already located within the territorial boundaries of a democratic community and already armed with the rights that are necessary to have their voice heard and their interests represented. This internal focus, according to Kime, belies the discourse theorists’ commitment to the universal scope of the moral conversation, by leaving the voices of those located abroad unrepresented:

⁹⁸ Honig (2001a), p101.

⁹⁹ *Ibid*, p61.

¹⁰⁰ Benhabib (2004b), p155 (italics added).

¹⁰¹ Urbinati (2005).

(...)(Benhabib) pays almost no attention to ... the case of individuals who have not crossed borders and are therefore completely excluded from wealthy bounded communities. Benhabib has high hopes for the possibility of resident aliens being able to transform their own status using the democratic process, but it is hard to see how this can help those many more who are excluded from affluent bounded societies not only by law but also by geographical distance.¹⁰²

However, in my view Urbinati and Kime's criticisms, as they stand, are misplaced. Benhabib's silence on including the voices of foreigners and non-citizens is not so much an oversight on her part but rather a structural implication of her faith in the reversibility of perspectives and the capacity for individuals to practice an enlarged mentality. As we have seen, these normative guidelines make listening to and deliberating with *actual concrete individuals* sufficient but not necessary for discourse theory moral reasoning.

The kind of objection I want to make now can be brought out through the work of Iris Young.¹⁰³ Young agrees with Benhabib that a virtue of citizenship practice is the ability to transcend private, "self-regarding" political interests and to adopt a "broader, more objective view".¹⁰⁴ However, she disagrees with the idea that seeking out this more objective viewpoint should involve role-reversing or mutual identification. According to Young, the assumption that we can represent the situation and perspectives of others within our own framework of intelligibility often fails to do adequate justice to the

¹⁰² Kime (2008), p226.

¹⁰³ Hutchings (2005) also looks to Young in order to criticise Benhabib, though in the context of a different kind of debate and for different purposes to mine.

¹⁰⁴ Young (1996), pp. 126-127; Simpson (2000), p432.

fundamental *alterity* of others. This is a consequence of her views on group-specific experiences and perspectives. As we saw in the previous chapter, Young maintained that different individuals are structurally placed in different roles and positions in society, and that this positioning results in location-specific perspectives on socio-political issues:

(...) even when they find their relations defined by similarly socially structured differences of gender, race, class, nation, or religion, individuals usually also find many ways that they are strange to one another. Individuals bring different life histories, emotional habits and life plans to a relationship, which makes their positions irreversible.¹⁰⁵

This ontological claim regarding the impossibility of practicing an enlarged mentality feeds into a normative claim regarding its undesirability. Young argued that purportedly neutral discursive procedures often serve to reinforce the dominance of the perspective and interests of more privileged social groups. Where there is a pre-existing asymmetrical power-relation, inviting discursive participants to think from the standpoint of others threatens to result in the imposition and dominance of the perspective of the powerful and the privileged:

When members of privileged groups imaginatively try to represent to themselves the perspective of members of oppressed groups, too often those representations carry projections and fantasies through which the privileged reinforce a complementary image of themselves.¹⁰⁶

¹⁰⁵ Young (1997a), p347.

¹⁰⁶ Young (1997b), p48.

Since we cannot ever fully transcend our location-specific perspective and think from the standpoint of all others, when we attempt to do so we risk imposing illegitimately our own perspective and interests onto others. If we approach moral reasoning on the basis of the assumption that others are sufficiently similar to enable us to see the world from their point of view, we risk silencing their voices and assimilating them to the image we have of ourselves and of our political or moral world. According to Young, this threat of assimilation becomes particularly acute and dangerous when we are dealing with the case of relatively powerless and vulnerable groups like newly arrived migrants, asylum seekers and refugees. When we attempt to do justice to the interests of the socially marginalised or disempowered through practicing an enlarged mentality, the concern is that we will simply reproduce existing inequalities and power-relations. Moreover, when individuals and groups are engaged in minoritarian struggles, attempting to reverse perspectives with them could lead to an outright denial or suppression of their particular problems or interests: “if you think you already know how the other people feel and judge because you have imaginatively represented their perspective to yourself, then you may not listen to their expression of their perspective very openly”.¹⁰⁷ To assume that all different social locations can be read from one particular position is to assimilate difference to sameness and to do violence to the importance of attending to the actual *voices* of those who are differently placed in society.

If this objection is valid, it turns out that insisting upon the practice of enlarged mentality as the *sine qua non* of the practice of citizenship in liberal democracies risks creating illegitimate exclusions and entails an unappealing vision of democratic deliberation¹⁰⁸. Iris Young refers to

¹⁰⁷ Young (1997a), p350.

¹⁰⁸ Benhabib (2002), p171.

this as ‘internal exclusion’, a term which “refers to the way that some people’s ideas and social perspectives are likely to dominate discussion and decision making even when a forum has diversity in the room”.¹⁰⁹ This means that the internal process of self-determination may not be equally open to the input of all territorial insiders in the way that is called for by the subject-to-the-law principle of inclusion to which, as we have seen, Benhabib is also committed.

Given the difficulties I have discussed with using affectedness as a principle of democratic inclusion and the inadequacy of both the teleological and the hypothetical-deliberation responses, in the following section I consider whether we should abandon that horn of Benhabib’s position and emphasise instead her commitment to the territorial basis of democratic inclusion. However, here too we encounter a number of difficulties. Firstly, Benhabib allows political communities a degree of unilateral discretion over naturalisation criteria that seems to stand in tension with the principle of public autonomy. Secondly, I argue that her policy recommendations on naturalisation fail to meet her own strictures of universal respect and egalitarian reciprocity, partly because they apply different membership procedures to immigrants and birthright citizens. Furthermore, there is a risk - acknowledged in part by Benhabib - that her position could turn into an apology for national chauvinism. Finally, I argue that her distinction between ascriptive and elective criteria for membership is unstable, and that this instability threatens to collapse her position into a normatively problematic version of the club-based model of self-determination as exclusion put forward by Walzer, but at the level of citizenship rather than social membership.

¹⁰⁹ Fung (2004), p49.

5.5 Benhabib on Naturalisation

Benhabib's discussion of subjection to the law as a jurisdictional rule is designed to promote a citizenship of residency over citizenship as ethno-cultural identification or shared nationality. Her hope is that by stressing the importance of shared subjection to the law for generating an entitlement to democratic voice, resident aliens and the undocumented will be brought within the circle of the addressees of rights claims, by being offered the opportunity to naturalise. One advantage of stressing the importance of the territoriality of democracy is that it offers a non-nationalist conception of membership rights that takes the emphasis away from the relevance of *status* for the attribution of rights and towards the affective ties that are generated by living in a certain place, participating in its institutions and contributing to its shared life. This is one way in which legality of status may come to be seen as irrelevant for structuring attributions of rights and social benefits. As Aleinikoff points out, "If citizenship is conceived of as a lived, local practice rather than a formal national category, then the legality of one's immigration status may matter little in recognizing societal membership".¹¹⁰

However, despite her claim that there is a universal human right to membership, and despite her criticisms of Kant and Arendt for their willingness to concede sovereign authority over determining the conditions of hospitality and statehood to independent nations, Benhabib herself remains rooted in the democratic tradition of thought, whereby the terms of access to citizenship fall under the remit of a political community's right to self-determination. Unlike Young, who

¹¹⁰ Aleinikoff (2006), pp. 6-7.

wants to transfer the authority to regulate migration and citizenship policy away from states and ‘upwards’, to global regulatory bodies, Benhabib regards the will of the *demos* as the final and necessary arbiter in the domain of membership policy. Her hope is that political communities will be guided by the cosmopolitan norms that are derived from her version of discourse theory, so that their democratic iterations will lead to jurisgenerative politics, whereby their self-determined choices will create a gradual expansion of the franchise. She claims to have proceeded beyond the Kantian position on naturalisation in the direction of a more thoroughgoing cosmopolitanism by arguing that, on her account, “the sovereign discretion of the democratic community is circumscribed: once admission occurs, the path to membership ought not to be blocked”.¹¹¹ But, at the same time, “the terms and conditions under which long-term membership can be granted remain the prerogative of the republican sovereign”.¹¹² Presumably then, the real difference between Benhabib and Kant is that the former insists that there must be *some* procedure for naturalisation, whereas in Kant’s formulation a resident alien could be denied membership in perpetuity.¹¹³

Benhabib resists embracing the full implications of a territorial conception of membership. The ideal of ‘public autonomy’ (which is the term that Benhabib uses to describe the principle that the subjects of the law should be their authors) seems to stand in tension with her commitment to allowing the citizenry of a community to determine unilaterally the conditions and criteria to be satisfied by prospective migrants in order to access citizenship. By permitting the *demos* to set unilaterally the conditions to be satisfied in order to naturalise,

¹¹¹ Benhabib (2004a), p140.

¹¹² *Ibid*, p42.

¹¹³ *Ibid*, p141.

Benhabib allows for a class of residents to be subject to the law and yet still be denied authorship of those laws, should they be unable or unwilling to satisfy those conditions¹¹⁴. By contrast, a consistent and thoroughgoing commitment to the all-subjected principle would permit resident immigrants to have a say in the formulation of citizenship policy. As Corey Robin observes, “(...) if those who are subject to the law should be its authors, why shouldn’t immigrants have a say in formulating those laws? Surely no one is more subject to those laws than they”.¹¹⁵ Members of the republican sovereign are *not* the ones who are subjected to immigration laws: which means that giving citizens unilateral control seems to contradict the subject-to-the-law principle, even if that control is framed within certain moral constraints like ‘no ascriptive or non-elective criteria’.

This point would not be particularly consequential if the conditions set by the host community were minimal and largely procedural - for example, if only a certain period of residency was required. That would entail that the hiatus between those subject to the law and those with rights to participate in the authorship of those laws would last only as long as it took for the resident in question to pass the time qualification. However, the more substantive the requirements for passing naturalisation procedures, the more significant this objection becomes. What I now want to argue is that Benhabib awards political communities more leeway in formulating criteria for naturalisation than seems congruent with the strictures of universal respect and egalitarian reciprocity to which her version of discourse theory is committed.

¹¹⁴ Baubock (2007), p7.

¹¹⁵ Robin (2006).

What is particularly problematic in my view is Benhabib's claim that setting economic criteria for membership and criteria based on the skills and qualifications of migrants is unobjectionable from a moral point of view informed by discourse theory. It seems untenable that a prospective migrant would concede to their exclusion from citizenship on the grounds of their professional qualifications anymore than they would concede to their exclusion on the grounds of their ethnic background or skin colour, because these sorts of criteria as conditions for accessing membership could reasonably be interpreted as dehumanising. As Aleinikoff questions, "Is it really true that denying one a place in the conversation on these grounds (i.e. skills, language and the like) is any less dehumanizing than denying a place on ascriptive grounds?"¹¹⁶ Seglow agrees that using purely economic criteria to evaluate the claims of outsiders to have political membership betrays a lack of respect for their personhood: "The message sent to guest-workers is that they are merely economically useful and no more ... Guest workers may not wish to become citizens, but to prohibit them from becoming so seems to me a significant failure of respect".¹¹⁷

In a reply written to prominent critics of *The Rights of Others*, Benhabib rehearses this objection and in responding to it she re-iterates the claim that economic exclusions and exclusions based on a lack of skills or resources are justified from her perspective because these are factors that are chosen, and so are not arbitrary from a moral point of view.¹¹⁸ However, this response seems to deny a key, further point, which is that the exclusion of individuals from citizenship on the basis of economic or professional criteria represents a failure to treat that

¹¹⁶ Aleinikoff (2007), p427.

¹¹⁷ Seglow (2008), p26.

¹¹⁸ Benhabib (2007), pp. 452-453.

individual as the moral equal of native citizens. As I argued in Chapter 2, it seems that no criteria for naturalisation can be consistent with showing all individuals equal moral respect in so far as those same criteria are not applied to members of the host community.¹¹⁹

According to Benhabib's version of discourse ethics, "freedom can be restricted only through reciprocal and generally justifiable norms applying *equally to all*".¹²⁰ Yet nowhere does Benhabib suggest that existing citizens should have to prove themselves qualified for membership through their possession of skills, resources or civic competence, or that their freedom (to exercise citizenship rights) should be granted or restricted on such grounds. If, as Benhabib claims, "the obverse side of the injunction against denaturalization"¹²¹ is a right to citizenship, why is she content to accept that this right is unconditional for birthright citizens but conditional for migrants? It seems that Benhabib's policy recommendations on naturalisation may not satisfy her own stringent moral guidelines.

Moreover, this view on naturalisation risks becoming fuel for the kind of national chauvinism according to which immigration policy should primarily be seen as a way of furthering the interests and values of the nation; which is precisely one of the cornerstones of the Westphalian conception of international politics that Benhabib wants to dismantle by situating political membership within the terms of universal human rights. We have to note that Benhabib is discussing admission to citizenship here, rather than admission to territory. At points, Benhabib suggests that whilst the territorial borders demarcating different jurisdictional units should be open in a physical sense - ("While democratic self-governance involves the demarcation of jurisdiction, it

¹¹⁹ This is a central argument running throughout Cole (2000). See Chapter 2, section 2.6 of this thesis.

¹²⁰ Benhabib (2004a), p133 (*italics added*).

¹²¹ *Ibid*, p135.

ought not to prohibit the flow of peoples across borders in both directions”¹²²) - acquiring citizenship can be predicated legitimately on the possession of certain skills or qualifications to be set by the host community. But we have seen in the discussion of Walzer than the combination of ‘open borders-but-exclusive-citizenship’ can become a shield for the social and political exclusion and economic exploitation of guest workers. A possible implication of Benhabib’s position is to reinforce the kind of immigration policy adopted in Germany in the 1960s and 70s, where foreign labourers were invited to perform menial, dangerous or unpleasant work for little pay, and were denied the political voice to defend their interests (for example a right to family re-unification), or to press for better wages, better working conditions or a better job. It also seems congruent with the current UK approach to immigration that seeks to attract skilled foreign workers to meet gaps or pressures in the domestic labour market whilst excluding the poor and unskilled.¹²³ Benhabib acknowledges the point that her position could “merely leave an extremely unjust and inegalitarian world pretty much as it is”,¹²⁴ but does not provide any response to it.

Given her stated commitment to universal respect and egalitarian reciprocity, Benhabib would not endorse explicitly these forms of democratic exclusion. But I think that there is a risk of her position sliding into a version of Walzer’s club-based model of self-determination-as-exclusion, at the level of citizenship. This is because her distinction between ascriptive and elective criteria for admission to citizenship is unstable. Benhabib accepts that political communities have a right to exercise unilateral control over domestic

¹²² Benhabib (2007), p448.

¹²³ This is a form of immigration control that I discuss critically in more detail in Chapter 7, section 7.2, when looking at the recent introduction of the points-based system in the UK.

¹²⁴ Benhabib (2004a), p111.

economic policy and to decide how their economic priorities relate to their citizenship and immigration policies: “Democratic peoples themselves must form judgments about economic priorities and enlighten themselves about how these priorities bear on matters of social and economic justice in their societies”.¹²⁵ But if economic criteria are legitimate grounds for exclusion, why not age, sex, race, religion or linguistic community? These ascriptive factors cannot be divorced neatly from considerations of economics. If it is for each democratic community to decide upon its economic priorities, and moreover the way in which these priorities stand in relation to other matters of justice, including migration and citizenship policy, then it would seem that they should be entitled to, say, offer citizenship to immigrants with ethnic or racial backgrounds that the members believe to be hardworking in nature. A liberal-democracy could also decide justifiably to bar from citizenship those over a certain age, on the grounds that they have passed the age at which they can make a useful contribution to the economy, or a contribution at least sufficient to offset the drain they are likely to exert at some later point on the health care system and social services. On Benhabib’s account, the citizens of the UK would be entitled to discriminate against female applicants on the grounds that women are entitled by UK law to nineteen weeks pregnancy leave on full pay, which could have a negative impact on their net fiscal contribution. They could also decide justifiably to bar entry to members of religious groups, who must take scheduled breaks from their work in order to pray, on the grounds of the loss of working hours. Indeed, if a state decided that it was in its best economic interests to simply close its borders to all immigrants and to bar all long-term residents from accessing citizenship, there would seem to be little that Benhabib could say in response, given that the closure here is (at least

¹²⁵ *Ibid.*

nominally) not being predicated on the ascriptive characteristics of prospective migrants.

My point is not that these sorts of discriminatory criteria or the reasoning processes behind them are justifiable. Rather, my claim is that Benhabib's approach to self-determination and political membership will have difficulty in explaining what is wrong with them. Her position risks allowing preconceptions which offend liberal-democratic and cosmopolitan values to determine admission to citizenship. Benhabib comes close to recognising this objection when she states that the threat of her position turning into an apology for "democratic selfishness is a risk we must be willing to countenance".¹²⁶ If the point I am trying to make here has force, then it may be difficult to prevent Benhabib's claim that "regulation of immigration for the sake of indigenous labour markets is inevitable and fair"¹²⁷ from sliding into an inadvertent justification for the kind of unilateral club-based model of self-determination-as-exclusion put forward by Walzer, but at the level of citizenship, rather than (as with Walzer) at the level of social membership. It is interesting to note in connection with this point that Walzer himself has questioned the degree to which Benhabib's endorsement of porous borders differs in its political implications from his own commitment to self-determination-as-exclusion:

If "porous" means "not open", then it must be the case that, at some level of political organization, there exists a right "to control and sometimes restrain the flow of immigrants". But that is my position, which she quotes in order to illustrate

¹²⁶ *Ibid.*

¹²⁷ Benhabib (2007), p453.

the “civic republican” position she means to dispute.¹²⁸

In fact, there *is* a key difference between Walzer and Benhabib’s position on closure. In the former case, exclusion takes place at the territorial border, as a means of restricting the access of individuals to social membership, whereas for Benhabib exclusion is permitted *within* the territorial boundaries of liberal-democracies, as social members can find themselves excluded justifiably from citizenship on her account. Over the course of Chapters 2 through 5, I hope to have established that neither form of closure can be justified unproblematically by appealing to the value and practice of self-determination.

5.6 Conclusion

In the introductory chapter I noted that a number of authors claim that the question of admission to political membership in liberal democracies generates a tension between the universal liberal commitment to the rights of individuals *qua* human beings and the particularistic democratic commitment to the rights of individuals *qua* citizens of differentiated political communities. Benhabib argues that whilst this tension is a ‘constitutive’ feature of liberal democracy, it can be mediated over time through democratic iterations leading to jurisgenerative politics. Her cosmopolitan universalism is reflected in her argument that the decisions and policies of states are morally valid only in so far as they are the outcome of deliberation amongst all affected parties. However, she recognises that democratic legitimacy calls for bounded territorial jurisdictions which seem to call for the

¹²⁸ Walzer (2001). See also Urbinati (2005).

distribution of citizenship rights according to the subject-to-the-law principle. In this chapter I hope to have shown that neither of these commitments - to the radically expansive scope of participatory membership through the criterion of inclusion according to affected interests, and to the territorial basis for attributing citizenship according to the subject-to-the-law principle of inclusion - are articulated convincingly within the terms of Benhabib's discourse theory approach to political theory and moral reasoning.

In the following chapter, I look at the relationship between agonistic theory, democratic self-determination and political membership, focusing on the work of Chantal Mouffe and Bonnie Honig. Mouffe shares with Benhabib the idea that liberal-democracy is beset by a fundamental tension between universalism and particularism. However, agonistic theorists are heavily critical of the kind of rationalist, consensual and universalist approach to moral reasoning and democratic deliberation adopted by discourse theorists like Benhabib, as well as the claims to national unity promulgated by liberal nationalists, identity liberals and communitarians. They stress instead the importance of difference, conflict and disagreement within the democratic process. Does their focus on the agonal dimension of citizenship practice contribute to a conception of self-determination and political membership that avoids the shortcomings with the nationalist, deliberative democratic and rationalist models which they set themselves in opposition to? This question is the focus for the following chapter.

Chapter 6

A Democracy of Strangers: Agonism and Political Membership

“(...) every single person needs to be reconciled to a world into which he was born a stranger and in which, to the extent of his distinct uniqueness, he always remains a stranger”¹

6.1 Introduction

In the introductory chapter, I stated that different concepts of collective self-determination result in very different prescriptions concerning both the regulation and porosity of membership boundaries. The previous four chapters have substantiated that claim. The Tamir/Walzer idea that self-determination is primarily a matter of the preservation and status of national identities in the public sphere supports the conclusion that the members of national groups should exercise unilateral control over membership, and that they can justifiably erect firm boundaries that function to exclude those unable or unwilling to endorse the central tenets of their national culture. Miller’s claim that self-determination is primarily concerned with the democratic control of domestic cultural, economic and socio-political conditions leads to a similar claim about the justifiability of exclusive nation-state boundaries under the unilateral control of existing citizens. Young’s contrasting argument that self-determination is achieved via the condition of non-domination leads to the view that the ‘internal’ decisions of states (including but not limited to their decisions over membership boundaries) cannot reside justifiably in the hands of their

¹ Arendt (1994), p304.

citizens alone, but must take account of and involve the democratic participation of affected outsiders. If - as Benhabib argues - acts of self-determination should be constrained by norms of universal respect and egalitarian reciprocity, then a great range of possible membership criteria are morally impermissible, regardless of the social, cultural or democratic preferences of existing citizens.

What if we abandon *all* claims to unity amongst the members of the *demos* - whether that unity be articulated through the idea of a national culture, a shared set of democratic preferences or through the idea of a universal moral perspective that takes into account the voices and interests of all affected parties? What implications for the porosity and control of membership boundaries might follow, and how justifiable are those implications from a normative perspective? In this final chapter I attempt an answer to these questions by focusing on two versions of an agonistic approach to democratic theory. I will discuss the work of Chantal Mouffe and Bonnie Honig in the main, but I will refer at points to William Connolly.

In classical Greek the term 'agon' refers broadly to a public contest, dispute or struggle between adversaries. There are significant differences between each of the contemporary authors associated with the label 'agonist', and they each look to different (though at times overlapping) aspects of historic and modern political thought to motivate their work, drawing from sources as diverse as Aristotle, Schmitt, Gramsci, Wittgenstein, Arendt, Nietzsche, Foucault and Derrida. However, they share in common an emphasis on not only accepting but making greater room for political conflict and disagreement between opposing viewpoints in the democratic process. Agonistic theorists are sceptical of claims to universal reason,

rationality, and consensus, stressing instead the significance of both epistemological and political differences across groups and subject positions. Tied to this view of politics and moral reasoning is a set of claims about the ultimate futility and dangers inherent in attempts to devise political procedures that will neutralise or reconcile those differences into a set of principles acceptable to all ‘reasonable’ or ‘rational’ individuals.

Agonists are also united in opposing what they consider to be the de-politicising impetus in much contemporary liberal and deliberative democratic theory. Honig, for example, is sharply critical of Rawls’ search for an overlapping consensus that would reconcile in the public political sphere the fundamental differences in the various conceptions of the good held by the citizenry. She regards this device as masking a desire to remove genuine disagreement and dissent from the political field, and she claims that it is insufficiently attentive to the exclusions and ‘remainders’ which are, for her, an inevitable and necessary corollary of politics.² Likewise, Chantal Mouffe charges deliberative democrats like Habermas and Benhabib with imposing a false and distorting homogeneity on society through the ideals of consensus and agreement in rational procedures of argumentation and discussion³. One of Mouffe’s core normative claims in favour of agonistic politics is that liberal-democratic societies will be more stable, more democratic and more inclusive towards outsiders to the extent that they make greater room for the expression of conflict between opposing political viewpoints.

² Honig (1993a), Chapter 5.

³ Mouffe (2000a); Mouffe (2000b); Mouffe (2005a); Mouffe (2005b).

Another basic premise that we find shared across agonistic theorists is the idea that identity is constructed on the basis of relational differentiation. In other words, agonists hold that identities - both individual and collective - are partially constructed on the basis of what they exclude. On the face of it, this may seem to imply a rather pessimistic view of the prospects for inclusive democratic politics. Michael Karlberg argues that the agonistic claim that collective identities are inherently conflictive and exclusive, runs counter to the prospects for constructing the kind of genuinely inclusive political ethos or mentality that is in his view required to address political issues of global concern:

(...) a global identity is essential if we are to address the many global challenges that we now face as a species. As long as we continue to understand the world in terms of “us” and “them,” we will be unable to overcome our narrowly perceived self-interests and work together to create a peaceful, just, and sustainable future together.⁴

However, there are many different ways of interpreting the agonistic claim that there is no ‘us’ without a ‘them’, and part of my aim in this chapter is to elucidate a way of reading this claim that serves the inclusive democratic ends argued for in the previous four chapters, without overlooking the dimension of exclusion which I have also argued is justified by the value and practice of self-determination (i.e. the exclusion of outsiders from participatory membership). This may at first sight seem a counter-intuitive approach; utilising the theoretical resources offered by an orientation towards the political that stresses the permanence of exclusion, contestation and conflict to advance a politics of democratic inclusion and solidarity with excluded ‘others’.

⁴ Karlberg (2008), p313.

However, one of my core claims in this chapter is that the idea of divided subjectivity, which is a central component of Mouffe, Honig and Connolly's writings, contributes to a concept of democratic self-determination as political action taken in concert with strangers, which in turn encourages the opening of jurisdictional boundaries that might otherwise function to exclude. Karlberg's objection seems to turn on a narrow, spatial understanding of the 'us/them' distinction that maps onto the existing divisions between nation-states. In contrast, my argument will turn on conceiving of the 'us/them' distinction, and the general agonistic premise that politics is inherently conflictual and that democracy is about managing contestation around identity categories, as referring to the politics *internal* to both democratic societies and individual democratic subjects. That will be the purpose of section 6.5.

In keeping with their rejection of rationalism,⁵ agonists do not attempt to justify the exclusive moments entailed by democratic self-determination, but nor do they envisage a form of democratic politics *without* exclusions. Like Benhabib, they accept the need for and permanence of boundaries separating the members of a *demos* from non-members, whilst insisting on the interrogation of particular forms of exclusion in and through the democratic process. However, as we have seen in the previous chapter, Honig takes issue with what she regards as Benhabib's 'chrono-logical' approach to the trajectory of rights claims, whilst Mouffe is critical of the deliberative democratic emphasis on consensus and rationalism. Although agonistic democrats resist the Walzer/Miller justification of self-determination as a more or less unchecked sovereign prerogative, they are also sceptical of Young's cosmopolitan claim that the current era of globalisation has

⁵ Connolly (1991); Honig (1993a); Mouffe (2000a); Mouffe & Laclau (1985).

rendered the territorially bounded nation-state a political anachronism.⁶ Agonistic democrats avoid grounding citizenship rights exclusively in either universal human rights (as with Benhabib) or strictly delineated nationality or sovereign nation-statehood (as with Tamir, Walzer and Miller). They are critical of attempts to anchor citizenship in abstract personhood, but are also opposed to membership criteria based solely on nationality, ethnicity or a shared conception of the good. Instead, agonistic citizenship is primarily characterised as a form of political *action* and a particular *ethos* of critical engagement with others, with oneself and with political institutions and rules, and as a way of approaching disagreement and democratic deliberation. As David Howarth observes, an agonistic ethos:

(...) speaks to the way in which antagonisms between different groups and coalitions ought to be played out: that there should be an acceptance of the common rules of the game, an acceptance of defeat in the political process and an expectation that conflict and contestation are an ongoing and 'infinite' prospect (...)⁷

What is particularly distinctive about Mouffe's position is her claim that by acknowledging the necessary moments of exclusion in democratic politics and collective identity formation, it is possible to formulate effective strategies for combating the more pernicious, socially destructive and politically violent *forms* of exclusion and oppositional politics: "instead of trying to erase the traces of power and exclusion, democratic politics requires us to bring them to the fore, to make them visible, so that they can enter the terrain of contestation".⁸ This is achieved in part through fostering relationships of agonistic respect between competing political actors with potentially conflicting

⁶ Honig (2001a), pp. 102-103; Mouffe (2005a), pp. 106-107.

⁷ Howarth (2007), p187.

goals and identities. Agonists maintain that recognising the relational, interdependent and fluid character of identity formation opens up new and potentially more hospitable ways of being with others politically than we find in conventional rationalist and/or deliberative models of liberal democracy. For Mouffe, ‘agonistic pluralism’ includes an ethos of critical engagement that enables us to see those with opposing viewpoints or identities as legitimate adversaries to be debated with, rather than as enemies to be destroyed.⁹ In section 6.2, I outline this aspect of Mouffe’s position.

In section 6.3, I argue against Mouffe’s claim that her agonistic democratic community will be more open and inclusive towards excluded individuals by conceiving of those exclusions as political decisions as opposed to moral imperatives. I argue that - in so far as she emphasises the Schmittian rather than the Derridean currents in her thinking - Mouffe’s agonistic democracy is in fact no more inclusive or fluid in its membership boundaries than Tamir’s liberal nationalism; the problematic implications of which I hope to have established in Chapter 2. This criticism of Mouffe takes her exclusion claim at face value, and argues that it does not do the work of promoting democratic inclusion that Mouffe claims for it, at least as far as excluded *individuals* are concerned.

If valid, Mouffe’s claim that collective identities inherently rest on the exclusion of outsiders could pose a serious problem for my objections in Chapters 2 and 3 to arguments for exclusion from the principle and value of democratic self-determination. It would mean that my overall argument that self-determination need not and should not include the

⁸ Mouffe (2000a), pp. 34-35.

⁹ Mouffe (2000b). See also Connolly (1993), p381.

right to exclude outsiders from social membership and citizenship may be mistaken on an *ontological* level. I outline the philosophical basis of Mouffe's exclusion claim in section 6.4. In section 6.5, I go on to criticise the exclusion claim itself, arguing that Mouffe's marriage of Derrida and Schmitt to establish the necessary relationship between collective identity and exclusion is unsuccessful. I then go on to argue that if we re-orientate Mouffe's position more centrally around her Derridean rather than Schmittian allegiances, then her concept of agonistic democratic self-determination should be understood not so much as a process that necessarily entails a clear division between empirically identifiable members and non-members of the demos, but rather as a form of political action taken in concert with strangers. This conception is informed by the agonistic account of divided subjectivity that we encounter in the work of Mouffe and Honig, and which draws centrally on Derrida's critique of Saussurean structuralist linguistics. Embracing this perspective would mean abandoning "the dream of a place called home, a place free of power, conflict and struggle",¹⁰ and adopting instead the more precarious concept of a democratic community as an assemblage of subjects not only foreign to one another but foreign to themselves.

In section 6.6, I argue that Honig's analysis of the symbolic politics of foreignness - along with insights offered by Mouffe, Abizadeh and Derrida - complements this idea of democracy as political action taken in concert with strangers. Honig advances a form of "democratic cosmopolitanism" that is "rooted not ... in a national ideal but rather in a democratic ideal, one that seeks out friends and partners even (or especially) among strangers and foreigners".¹¹ In this penultimate

¹⁰ Honig (1994), p567.

¹¹ Honig (2001a), p13.

section, I argue that the idea of a ‘democracy of strangers’ offers a way of thinking through the relationship between democracy and political membership that undermines the claim that collective self-determination should encompass the unilateral right of existing citizens to shape membership through practices of exclusion. If ‘foreignness’ names the relationship that exists not only between citizens, but within citizens themselves, the thought that the inclusion of further foreigners may jeopardise the collective right to self-determination of the existing citizens loses much of its purchase.

In the final section of this chapter, I discuss Honig’s reflections on the ‘foreign founder’ and the ‘taking immigrant’ as symbols of democratic activism. This discussion flips the conventional framing of the relationship between democracy and foreigners on its head. It suggests that democratic regimes need not feel that the inclusion of foreigners poses a potential threat to their capacity for self-determination. In fact, they can draw *democratic sustenance* from these markers of the permeability of their territorial and citizenship boundaries; the very markers which liberal nationalists, identity liberals and liberal communitarians regard as indicators that genuine self-determination is at risk of being undermined.

6.2 Liberal-Democracy and Hegemony

Mouffe is one of the most prominent defenders of an agonistic concept of democracy. She explicitly sets herself in opposition to the deliberative democratic account found in authors like Habermas and Benhabib. I canvassed the deliberative democratic/discourse-theory approach to political membership put forward by Benhabib in the

previous chapter and suggested that, along with other difficulties, her position threatens to create internal exclusions through disregarding the voices of marginalised political actors. This means that the internal process of self-determination may not be as equally open to the input of all resident territorial insiders in the way that is called for by the subject-to-the-law principle, which I have defended as a jurisdictional rule. Mouffe is heavily critical of the notion of a universal rational consensus without remainders as it is deployed by deliberative democrats, arguing instead that any agreement reached in a political forum will reflect a particular crystallisation of existing power relations and will necessarily exclude a certain set of claims, identities or subject-positions. For Mouffe, conflict, disagreement and struggle for hegemony between contending identities is to be accepted and even welcomed within democratic politics for giving greater space for the articulation of genuine and legitimate pluralism. This position stems from her views on the ontology of power and objectivity first laid out in *Hegemony and Socialist Strategy*¹² with Ernesto Laclau.

The first stage in Mouffe and Laclau's argument is to follow Derrida and Lacan in proposing a radically constructivist view of objectivity and social reality. On this basis, the meaning of words, actions, beliefs - in sum, the whole field of human activity - is given not by an essential objectivity but through a location within a specific discourse: "there is no meaning that is just essentially given to us; there is no essence of the social, it is always constructed".¹³ Their rejection of fixed meanings leads Mouffe and Laclau to propose that all social objectivity is the product of particular sets of power relations. Power, they argue, is constitutive of the social:

¹² Mouffe & Laclau (1985).

¹³ Carpentier & Cammaerts (2006), p4.

(...) because the social could not exist without the power relations through which it is given shape. What is at any given moment considered as the 'natural' order ... is the result of sedimented hegemonic practices; it is never the manifestation of a deeper objectivity exterior to the practices that bring it into being.¹⁴

Given this view of the constructive and constitutive role of power and the contingency of all social and political arrangements, it follows for Mouffe that any agreement or settlement reached in a political forum should be seen as a temporary stabilisation of the field of possibility. Any given political arrangement reflects the dominance of one set of power relations, and should therefore never be considered an authoritative or final state of affairs beyond further legitimate questioning or revision: "Every hegemonic order is susceptible of being challenged by counter-hegemonic practices, i.e. practices which will attempt to disarticulate the existing order so as to install another form of hegemony".¹⁵ In the following section, I will argue that whilst this claim may be plausible for a great range of political or economic settlements, it is implausible if we are concerned with membership practices and the inclusion of concrete individuals.

Mouffe uses the term 'hegemony' to describe the dominance of one concept of social objectivity over another (or - potentially - all others). This view of the ubiquity of power relations and the ultimately contingent nature of any political settlement explains in part why Mouffe wants to leave more up to the give and take and everyday struggle of democratic politics and is (at least rhetorically) far more reluctant than deliberative democrats or Rawlsians to constrain the

¹⁴ Mouffe (2007), pp. 2-3.

¹⁵ *Ibid*, p3.

collective will of self-governing democratic communities to a universal principle of human rights. Mouffe suggests that politics cannot be governed or justified by universally valid moral considerations of the Kantian, neo-Kantian or Habermasian stripe, since in her view political arrangements are always the product of power and never the product of superior moral reasoning or communicative rationality.

To present political decisions as being the result of a universally valid procedure such as the original position or communicative rationality, is to mask their ultimately political character and to artificially naturalise what is in her view a contingent and temporary state of affairs. Given that power, for Mouffe, rather than rationality or moral superiority, is what ultimately determines their constitution, it follows that political and social institutions should be seen as the site of struggle, contestation and exclusion:

Consensus in a liberal-democratic society is - and will always be - the expression of a hegemony and the crystallization of power relations. The frontier that it establishes between what is and what is not legitimate is a political one, and for that reason it should remain contestable.¹⁶

Seeking to ground politics in a higher form of rationality or a universal dialogic consensus is objectionable to Mouffe because it represents an act of cloaking what is the contingent success of one particular hegemonic project in a veil of objectivity and necessity. The kind of consensus that Habermas and Benhabib seek (or at least endorse as a regulative ideal) is impossible in Mouffe's view because there can be no decision taken, argument made or policy adopted that does not

¹⁶ Mouffe (1999), p46.

create an exclusion. The task of liberal-democratic politics, therefore, is not to achieve a universal consensus without remainders, but to preserve spaces for challenging the necessary forms of exclusion that exist at any time and for re-articulating the hegemonic meaning of identities and rights.

Mouffe believes that by engaging with the terms of Carl Schmitt's critique of liberalism, it is possible to learn useful lessons that can be pressed into the service of a more pluralistic, inclusive and politically stable conception of liberal democracy. For Schmitt, the defining category of the political is the friend/enemy relationship. Mouffe endorses Schmitt's claim that antagonism is the ever-present condition of politics and she also follows him in maintaining that there can be no 'we' without a contrasting and competitive 'them'. By defining the political as characterised by antagonism, Mouffe concludes that any attempt to eradicate antagonism (through, for example, establishing an overlapping consensus or universal agreement through a discursive procedure) amounts to an attempt to eradicate the political itself.

However, Mouffe takes an important departure from Schmitt with her faith in the potential for democratic politics to 'tame' relations of hostility between contending identities. Schmitt believed that that the only way that pluralism could express itself was through antagonism. So he maintained that political communities must have a sufficient degree of homogeneity between citizens in order to function without periodically exploding into violent disorder.¹⁷ Mouffe has a more optimistic view of the matter. In her view, the aim of liberal democratic politics should be to effect a shift in the manner in which we view and respond to political adversaries, by regarding them as legitimate

opponents; i.e. interlocutors who have a right to hold and express viewpoints that one rejects, rather than as enemies who should be eradicated or banished from the public sphere. Mouffe describes this process of domestication as a shift from an *antagonistic* to an *agonistic* relationship. In agonistic modes of confrontation the interlocutors still acknowledge that each other's ends are mutually incompatible and the goal is to 'convert' the other to one's way of thinking through direct confrontation. However, a precondition for agonistic debate is the existence of a "common symbolic space"¹⁸ - which is supplied through a shared endorsement of liberal-democratic values - whereas in antagonistic confrontation there is no common ground at all. The task of agonistic democracy is to offer democratic channels for the public articulation of conflict and disagreement. The hope is that this will in turn facilitate a change in the mode of interaction between contending identities, from a potentially violent antagonistic relationship of friend/enemy to a more benign agonistic relationship of us/them: "the aim of democratic politics is to construct the 'them' in such a way that it is no longer perceived as an enemy to be destroyed, but as an 'adversary'".¹⁹ I will have more to say about Mouffe's relationship to Schmitt, and the alliance she attempts to forge between Schmitt and Derrida in order to substantiate her idea of the political as being characterised by 'us/them' relationships, in section 6.4.

This view on the necessity of exclusion brings us to Mouffe's ideal of inclusion. Mouffe claims that her agonistic model of democracy will be more open to pluralism, more democratic and more inclusive than conventional liberal or deliberative democratic approaches because in her model, exclusions are regarded as explicitly political, which in turn

¹⁷ Schmitt (1985).

¹⁸ Mouffe (2000a), p13.

¹⁹ *Ibid*, pp. 101-102.

means that they are reflected upon, discussed and debated, and so potentially revisable at any point. The relevant contrasting view here would hold that exclusions are mandated by rationality or morality, and so definitive and therefore not legitimate objects for potential re-evaluation. On Mouffe's agonistic account the goals of democratic inclusion and emancipation are served through preserving spaces for contestation over the existing set of political arrangements in place. In a similar vein, Connolly argues that allowing agonistic competition in the public political sphere "prevents injuries and injustices ... from becoming too thoroughly naturalized, rationalized, or grounded in a higher direction in being".²⁰ Mouffe and Connolly believe that liberal democracy will be more open and inclusive if a climate of contest and oppositional politics in the public sphere is preserved because there will always be scope for publicly challenging hitherto unacknowledged forms of subordination, inequality and exclusion. This approach also purports to be more democratic in seeking to empower individuals to actively engage in self-legislation, both at the individual and communal level, rather than bow to inherited traditions or institutions.

In Mouffe's view, the attempt to dissolve or avoid the inherently confrontational nature of the political is not only ontologically misguided, it is also politically dangerous. She argues that the Rawlsian and deliberative democratic search for harmony/unity-in-difference in the sense of an overlapping consensus or universal agreement can only proceed by suppressing genuine differences between political positions, imposing a false homogeneity on the political field which is at odds with the inescapable facts of pluralism and antagonism. This act of suppression, in turn, threatens to channel those differences into the service of pernicious nationalism,

²⁰ Connolly (1991) p93.

religious fundamentalism or far-right extremism.²¹ Mouffe's concern is that if deep-seated differences of political opinion cannot be aired in a democratic forum they will only be able to find expression through these anti-democratic movements. This is why she takes issue with the consensus-oriented politics of the so-called 'third way' in Europe. According to Mouffe, when political parties traditionally divided to left and right, start moving towards the centre in an effort to conduct consensual politics, they deprive citizens of important channels for the democratic expression of political differences, which are in turn more likely to manifest themselves in either apathy or, at the other end of the spectrum, anti-democratic extremism.²² In this way, Mouffe's appeal for greater confrontation and disagreement in democratic politics is motivated by a desire to save liberal-democracy from destroying itself through embracing too *little* pluralism in the public sphere (rather than too much pluralism, which is the concern for political liberals).²³ Socio-political stability *without* the creation of a totalitarian or authoritarian regime, in Mouffe's view, comes from inviting conflict and serious disagreement into the public political sphere, rather than removing it from the table as in the later-Rawlsian model.

However, despite her attack on consensus-orientated deliberation and her endorsement of conflict and contestation in the public sphere, Mouffe concedes that liberal-democratic politics rests on agreement on the political maxim: 'liberty and equality for all'. Democracy, in her view, no matter how radical, cannot allow for the public expression of viewpoints that would put those core values into question. Whilst she endorses a model of deliberation in the public sphere that would invite viewpoints that challenge the existing hegemonic *interpretation* of

²¹ Mouffe (2005a), pp. 19-34; pp. 69-72.

²² *Ibid.*

²³ Rawls (1993).

liberty and equality, she doesn't actually want to invite into her *agon* those who would overturn liberal institutions or those would seek the "radical negation of the established order".²⁴ Notice in the following quotation that it is the *nature* of liberal-democratic institutions that are a constitutive part of Mouffe's agonistic debate, not the desirability of the institutions themselves:

Some demands are excluded, not because they are declared to be 'evil', but because they challenge the institutions constitutive of the democratic political association. To be sure, the very nature of those institutions is also part of the agonistic debate but, for such a debate to take place, the existence of a shared symbolic space is necessary.²⁵

For Mouffe, agonistic competition is carried out amongst citizens who "have a shared adhesion to the ethico-political principles of democracy: liberty and equality".²⁶ Adversarial debate therefore takes place *within* the framework of liberal-democratic institutions; it does not extend to disagreement over the desirability and the hegemony of those institutions themselves. As a theorist of liberal democracy, it is unsurprising that Mouffe refuses to countenance viewpoints that reject liberal democracy outright. She attempts to avoid falling prey to the same criticisms concerning the negation of difference and the suppression of contestation that she levels at Rawlsians and deliberative democrats by claiming, firstly, that hers is a 'conflictual consensus' in the sense that it permits open disagreement over the *interpretation of the meaning* of liberty and equality. Her public sphere requires "consensus on the ethico-political values of liberty and

²⁴ Mouffe (2005a), p82.

²⁵ *Ibid*, pp. 120-121.

²⁶ Mouffe (2000b), p15.

equality for all”²⁷ but welcomes “dissent about their interpretation”.²⁸ Secondly, as we have seen, she emphasises that any agreement reached through an agonistic democratic debate will be recognised as explicitly political (i.e. reflecting a particular and contingent, as opposed to rational or moral, reification of existing power relations) and so permanently open to further questioning, debate and revision: “(...) I claim that the drawing of the frontier between the legitimate and the illegitimate is always a political decision, and that it should therefore always remain open to contestation”.²⁹ Mouffe claims that by facing up to the ineliminable dimension of power and exclusion that grounds every political settlement, policy or decision, and the corresponding absence of rationality or moral certainty, we preserve a space for the potential re-organisation of our political society: “Every order is ... political and based on some form of exclusion. There are always other possibilities that have been repressed *and that can be reactivated*”.³⁰ The idea is that by confronting “the contingent character of the hegemonic politico-economic articulations which determine the specific configuration of a society at a given moment”,³¹ agonistic democracy remains open to this potential ‘reactivation’ of suppressed/excluded possibilities.

In the following section, I evaluate whether or not this claim is convincing when it is applied to individuals who find themselves excluded from social membership and citizenship in liberal-democracies. Could Mouffe’s agonistic approach to the political ground a form of democratic politics that promotes the forms of inclusion argued for in Chapters 2 and 3 of this thesis? I will argue to

²⁷ Mouffe (2005a), p121.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Mouffe (2007), p3.

³¹ *Ibid.*

the contrary that Mouffe's agonistic public sphere is far less open, to the radical re-interpretation of its existing political settlements and in particular to its hegemonic membership practices and modes of inclusion and exclusion, than she suggests.

6.3 What's Radical about Radical Democracy?

As we have seen, Mouffe maintains that by registering and facing up to its necessary moments of exclusion, and by acknowledging them as political acts rather than rational or moral imperatives, liberal-democratic communities will be more open to pluralism and inclusive of difference, because they will preserve a climate of contestation over the forms of exclusion existing at any time. This may be a plausible claim to make for a great range of political, social, cultural or economic policies. If, for example, one refuses to see capitalism as the one true model of economic organisation for fulfilling the good of all people at all times, then it seems natural to at least entertain the possible merits of alternative, 'excluded' models of economic organisation. However, whether or not this kind of openness extends to membership procedures and excluded *individuals*, is a different matter. David Howarth believes that the agonistic idea of recognising the political dynamics of hegemony and exclusion and therefore resisting closure for the sake of inclusion does in fact extend to membership practices and concrete individuals:

(...) even though decisions have to be taken that exclude some from a democratic space, the virtue of agonistic respect requires an openness to those who are excluded; and this ethos is itself predicated on the idea that such boundaries are never fixed but contingent and revisable. Indeed the agonistic ethos requires the conduct of

democratic practices which endeavor to transform and thereby include those that are deemed enemies or who declare themselves outsiders, practices that actively seek to transform enemies into democratic adversaries.³²

In what follows, I aim to show that Howarth's faith in the inclusive potential of Mouffe's agonistic ethos is misplaced. As a preliminary point, notice the tension in the statement just quoted between, on the one hand, the requirement of an "openness to those who are excluded" and, on the other hand, the idea that the excluded must be 'transformed' as a condition of their inclusion. If it is the *excluded* who must be transformed in order to be included, rather than the community and its membership boundaries, in what sense is there *openness* towards the excluded? A community that has to "transform" outsiders before it is prepared to accept them as members is not particularly 'open' at all. Howarth does not seem to recognise the tension between these requirements. I argue below that this tension is present in Mouffe's work, and that it complicates the idea that her democratic community is open to the perpetual re-articulation of its membership procedures.

To begin with, notice with Howarth that what Mouffe's position seems to entail is that the process of fostering agonistic respect for one's enemies is in fact a process of persuading them to argue their case by appealing to a recognisable interpretation of the values of liberty and equality, so that existing citizens are able to view them as sharing a 'common symbolic space'. For agonistic relationships to unfold, the deliberators have to be co-members of a common democratic enterprise. The presence of antagonism can therefore be read as implying an *absence* of shared membership, because antagonists, for

³² Howarth (2007), p188.

Mouffe, reject liberal democracy outright, and those who reject liberal democracy outright “exclude themselves”³³ from membership. However, if Mouffe’s ‘political’ account of exclusion requires a perpetual openness to those currently deemed enemies and so subject to exclusion from the community, and a perpetual openness to new forms of membership and new hegemonic assemblages (because their exclusion is a political decision rather than a rational or moral imperative), this would seem to imply that political outsiders are not to be considered *permanently* excluded. Instead it seems that, for Mouffe, they must (in some unspecified sense) remain on the periphery of the community, until such time as they succeed in presenting their views as an interpretation of liberty and equality that existing citizens are able to accept.³⁴

But I find it difficult to understand how those who are excluded in this way can attain membership whilst still posing a challenge to the hegemonic political settlements concerning membership already in place. Mouffe’s understanding of membership in liberal democracies describes not only “allegiance ... to a set of shared ethico-political principles”³⁵ but a more substantive commitment to a specific, shared way of life. Agonistic citizenship, for Mouffe, describes not only adherence to liberal-democratic principles and institutions but also an *ethos* or a certain *attitude* towards liberal democracy as a ‘form of life’. Citizenship is not, in her view, primarily a legal status, nor a matter of national or ethnic belonging, nor the sharing of a substantive

³³ Mouffe (2005b), p4.

³⁴ This all sounds very similar to Miller’s claim that his form of republicanism is radically (and in his view *sufficiently*) inclusive because it “places no limits on what sort of demand may be put forward in the political forum”. Nevertheless, the success of a claim depends on “how far it can be expressed in terms that are close to, or distant from, the general political ethos of the community”. Miller (2000), p191.

³⁵ Mouffe (2005a), p122.

conception of the good life. Instead, Mouffe argues that liberal democratic citizenship consists partly as a form of identification with liberal democratic principles:

To be a citizen is to recognise the authority of such principles and the rules in which they are embodied, to have them informing our political judgement and our actions. To be associated in terms of the recognition of liberal democratic principles: this is the meaning of citizenship that I want to put forward. It implies seeing citizenship not as a legal status but as a form of identification, a type of political identity: something to be constructed, not empirically given.³⁶

Despite her claim here that citizenship is primarily about identifying with a set of political *principles* specific to liberal-democracy, Mouffe also argues on the basis of her Wittgensteinian rejection of rationalism that individuals cannot be persuaded by appeal to arguments to adopt liberal principles and so be accepted into the community, because principles are always grounded on a more substantive ‘form of life’: “The real issue is not to find arguments to justify the rationality or universality of liberal democracy ... Liberal democratic principles and procedures can only be defended as being constitutive of our form of life ...”.³⁷ As such, we are told that becoming a member of a liberal democracy “is more a sort of *conversion* than a process of rational persuasion”.³⁸ The key, notorious passage in Wittgenstein that Mouffe appeals to in her rejection of rational-universalist, ‘foundationalist’ models of liberal democracy reads thus:

³⁶ Mouffe (2005b), pp. 65-66.

³⁷ Mouffe (2000a), p66.

³⁸ *Ibid*, p102.

Giving grounds, however, justifying the evidence, comes to an end; but the end is not certain propositions striking us immediately as true, i.e. it is not a kind of seeing on our part; it is our acting, which lies at the bottom of the language game.³⁹

According to Mouffe's reading of Wittgenstein, in order for there to be agreement on principles and procedures, there must already be agreement in 'forms of life':

(...) procedures only exist as complex ensembles of practices. Those practices constitute specific forms of individuality and identity that make possible the allegiance to the procedures. It is because they are inscribed in shared forms of life and agreements in judgements that procedures can be accepted and followed (...)⁴⁰

All of this means that possessing an ethos of agonistic respect and having an attachment to (a recognisable interpretation of) liberty and equality are *preconditions* for membership, rather than qualities that one achieves *in and through* participation as a member in the political life of an agonistic democratic community. Paradoxically, it seems that what Mouffe characterises as the work of agonistic democracy - translating relationships of antagonism into agonism, enemies into adversaries - must be complete in a society *before* her agon can get under way. In what sense, then, is Mouffe's agonistic democracy open to *new* and *radical* challenges to the hegemonic interpretations of the meaning of liberty and equality in such a way that would enable those individuals who are currently excluded to attain membership whilst also challenging and re-articulating the dominant meanings and

³⁹ Wittgenstein (1969), p204; quoted in Mouffe (2000a), p70.

⁴⁰ Mouffe (2000a), p68.

settlements attached to membership? Unfortunately, Mouffe nowhere provides concrete examples of the kinds of interpretations of liberty and equality that would be acceptable and welcomed into her radically pluralist public sphere but would be excluded from, say, the public sphere of Rawls, Benhabib or Habermas. Presumably, that is because it will be the responsibility of the existing members to decide. It is possible to present a great range of claims as being *an* interpretation of liberty and equality, unless some limits are placed on the range of acceptable interpretations. Absent an appeal to rational argument, morality or some other extra-communal standard, it follows that those limits must be supplied by the ‘form of life’ of the existing citizens and the dominant interpretations in place at the time. But then it is hard to understand how Mouffe can make good on her claim that her agonistic democracy constitutes a “community without a definite shape ... and in continuous re-enactment”.⁴¹ My core objection is this: how can excluded individuals be brought “to the fore” and made “visible, so that they can enter the terrain of contestation”, thereby perpetuating the “continuous re-enactment” of the community, when the reason for their exclusion is precisely because existing citizens cannot regard them as sharing in the common ethos and way of life that makes participating in the “terrain of contestation”⁴² possible on agonistic, rather than antagonistic, terms? Agonistic competitors, Mouffe tells us, “are adversaries, not enemies. This means that, while in conflict, they see themselves *as belonging to the same political association*, as sharing a common symbolic space within which the conflict takes place”.⁴³ So, to put the point a slightly different way: how can enemies become adversaries through the agonistic democratic process when they are excluded from the political association precisely *because* they are

⁴¹ Mouffe (2000b), p67.

⁴² Mouffe (2000a), pp. 34-35.

⁴³ *Ibid*, p20 (emphasis added).

enemies?⁴⁴ Yet another way of putting the point is this. If - as Mouffe's appropriation of Wittgenstein entails - one has to agree with the dominant liberal-democratic form of life that is in place in a given society as a condition of participating as a member in liberal-democratic procedures, how is it possible to challenge the terms of that form of life in and through liberal-democratic procedures?

Mouffe's claim that her agonistic recognition of the permanence and necessity of exclusion leads to a more inclusive and pluralistic form of democratic community - one that is "more receptive to the multiplicity of voices that a pluralist society encompasses"⁴⁵ - therefore seems unfounded. In fact, it seems that we are faced with a similar position to that which we encountered at the beginning of Chapter 2 of this thesis. Namely, with a state that requires prospective citizens to display a commitment to liberal-democratic values and principles and which excludes those who fail to meet the standards set unilaterally by the existing members. Mouffe's position on membership seems to coincide with Tamir's when the latter states that "Prospective citizens must be able and willing to be members of this particular historical community, its past, its future, its forms of life and institutions".⁴⁶ I hope to have already pointed out a number of problems with Tamir's position, and if my criticisms were valid, they should be equally damaging to Mouffe. At this point, it will be useful to recall the three-part distinction introduced in chapter 2. Whilst Mouffe attempts to defend concept A, it seems that the thicker cultural commitments described by concept C inevitably bleed into the supposedly thin, abstract commitments that

⁴⁴ Richard Rorty would say that Mouffe's 'enemies' are individuals with whom liberals simply cannot have a fruitful conversation because there is insufficient overlap between their respective belief-systems. Rorty (1991), pp. 187-188.

⁴⁵ Mouffe (2000a), p77.

⁴⁶ Tamir (1993), p129.

are supposed to sustain the conceptual space shared by citizens in Mouffe's agonistic public sphere.

The idea that Mouffe's agonistic pluralism implies the kinds of cultural-nationalist policies of preemptive exclusion that we encountered in the work of Tamir and Tebble is probably not one that she would be happy to countenance. But it does seem - at the very least - that we are faced here with the idea that what matters for the inclusion of outsiders is that they identify with or have a strong feeling of emotional attachment towards the dominant values in their host society, and that their formal political inclusion is conditional upon the presence of such sentiments. However, as Carens points out, whilst it may be *desirable* that all citizens have these sorts of affective ties towards the liberal polity, whether or not it should be made a condition of their formal inclusion is a separate matter, and not one that liberal-democrats should be quick to endorse.⁴⁷ The emotional, affective element of identification that is central to Mouffe's account should make it particularly unpalatable as a model for membership procedures from a liberal perspective, as liberals typically regard the affective or emotional states of individuals as lying outside the legitimate scope of political scrutiny.⁴⁸

In this section I have taken Mouffe's exclusion claim at face value, and have argued that it fails to do the work of fostering a democratic polity that is more inclusive towards excluded individuals than - for example - Tamir's liberal nationalist position discussed in Chapter 2. However, the exclusion claim itself has been subjected to vigorous critical

⁴⁷ Carens (2005), p39.

⁴⁸ Miller (2008), pp. 384-385.

scrutiny. In the following section I will discuss in greater detail the philosophical basis of Mouffe's exclusion claim. In section 6.5, I will argue that Mouffe fails to show that acts of concrete exclusion are a necessary implication of democratic rule and the formation of collective identities.

6.4 Mouffe on 'The Political'

Like Benhabib, Mouffe is interested in exploring what she regards as tensions between liberal and democratic approaches to liberty and equality as they pertain to the construction and negotiation of boundaries, not only between insiders and outsiders of political communities but between notions of reasonableness and unreasonableness, between acceptable and unacceptable forms of pluralism, and between rational and irrational forms of political argument, persuasion and conviction. However, whilst Benhabib is committed ultimately to the idea that these tensions can be mediated successfully through attention to the discursive principles of her version of discourse theory and through strategies of democratic iteration leading to jurigenerative politics, for Mouffe the contradiction between their respective logics runs deeper and cannot be reconciled through either theoretical reflection or discursive procedures: "liberal democracy results from the articulation of two logics which are incompatible in the last instance and ... there is no way in which they could be perfectly reconciled".⁴⁹ Even if deliberative democrats concede that full reconciliation between liberty and equality is only a regulative ideal and that consensus in political discussion will never actually be realised, the obstacles they perceive to stand in the way of such a consensus are empirical and political,

whereas for Mouffe the desire for agreement and consensual politics is not only politically unrealistic and dangerous but also conceptually and ontologically mistaken.⁵⁰

Contra Habermas, who argues that there is a “conceptual or internal relation ... between the rule of law and democracy”⁵¹, Mouffe argues that liberalism and democracy belong to two distinct historic schools of thought and political practice and that any relationship between them is a purely contingent political achievement. The ‘democratic paradox’, for Mouffe as for Benhabib, consists in the conflictual relationship between the liberal emphasis on individual rights, liberty and the rule of law, and the democratic emphasis on collective self-determination, popular sovereignty and equality. As I have noted before, political membership is a particularly salient issue on which liberalism and democracy are said to collide. Whilst liberalism claims equal liberty and freedom for all, Mouffe argues that democracy requires a moment of closure in the sense of a boundary between insiders and outsiders.⁵² We have seen in the previous chapter that Benhabib’s defence of democratic closure appeals to the logic of democratic representation and the drawing of jurisdictional boundaries. Mouffe also appeals to “democratic logics” to justify her exclusion claim, which she claims “always entail drawing a frontier between ‘us’ and ‘them’, those who belong to the ‘demos’ and those who are outside it”.⁵³ What this means is that democratic equality and rights cannot be based on a general appeal to humanity, but must be instantiated through the category of ‘we, the people’, in contrast to a ‘them’ that is excluded from the

⁴⁹ Mouffe (2000a), p5.

⁵⁰ *Ibid*, p48.

⁵¹ Habermas (1998), p449; quoted in Mouffe (2005a), p84.

⁵² Mouffe (2000a), p39.

⁵³ *Ibid*, p4.

community.⁵⁴ This is why Mouffe makes the Wittgensteinian claim that the respective ‘grammars’ of equality deployed in liberal and democratic theory are in tension with one another and can never be reconciled perfectly. Democracy needs to be based on a principle of equality between citizens, but it cannot achieve the ideal of liberal equality because without a community there could be no democracy, and - according to Mouffe - without the exclusion (and thus unequal treatment) of a group of outsiders there could be no community. Mouffe’s democratic paradox therefore occurs because the condition of the realisation of a perfectly inclusive liberal-democratic regime is at the same time the condition of its impossibility.⁵⁵ Liberal equality refers to the equality existing between persons *qua* human beings whereas democratic equality refers to the equality between persons *qua* citizens of particular communities, and so the latter concept requires the drawing of a distinction between insiders and outsiders: “What matters is the possibility of tracing a line of demarcation between those who belong to the demos - and therefore have equal rights - and those who, in the political domain, cannot have the same rights because they are not part of the demos”.⁵⁶

However, as I pointed out in Chapter 3 in my discussion of Walzer, even if we grant the point - as I have done in this thesis - that democracy requires the drawing of a jurisdictional boundary, this tells us nothing about the appropriate regime of boundary *control*. A boundary delimiting a jurisdiction and drawing a line between those inside and those outside can exist, but still be open, closed or somewhere in between.⁵⁷ In other words, a jurisdiction can exist without there being any controls preventing people from freely moving

⁵⁴ *Ibid*, p40.

⁵⁵ *Ibid*, p16.

⁵⁶ Mouffe (1999), p41.

across it and acquiring social membership, thereby putting themselves on the road towards citizenship. I have argued in the previous two chapters in favour of the subject-to-the-law principle of democratic inclusion as against the all-affected and all-coerced principles. But the subject-to-the-law principle in itself is agnostic about *who* constitutes the subjects of the law. It gives a normative explanation for *why* the subjects of the law should also be its authors, but it does not offer guidance as to whether the membership boundaries defined by law-making should be closed, open or porous. Absent further conceptual, ontological or normative premises, there is nothing inherent in the logic of either democratic rule or the all-subjected principle that means that democratic jurisdictions cannot be open. Long-term residents would possess rights within that jurisdiction according to the subject-to-the-law principle of demarcation and would lose those rights if and when they freely chose to depart. Mouffe's more fundamental exclusion claim - the idea that the jurisdictional boundary dividing members from non-members must *necessarily* function to keep some individuals outside of its scope - rests on her appropriation of Schmitt's ontological concept of the political as inherently characterised by potential antagonism, or relationships of friend/enemy, and the way in which she combines this with Derrida's account of 'the constitutive outside'.⁵⁸ Whilst Derrida proposed this as a deconstructive tool with which to challenge Saussure's structuralist linguistics, Mouffe argues that it teaches liberal-democrats important lessons about collective identity formation; namely, that "collective identities can only be established on the mode of an us/them".⁵⁹

⁵⁷ Abizadeh (2008), p43; Baubock (2007), p400; Baubock (2009), p10.

⁵⁸ Derrida (1967), Chapter 3, Part 1.

⁵⁹ Mouffe (2000a), p213.

According to Saussure, the meaning of a given sign is determined not by its relationship to an external reality or non-linguistic entity, but by its location within a linguistic system.⁶⁰ The meaning of sign *a*, on this basis, is determined by its difference from all the other signs in the linguistic system. Derrida's critical analysis, however, suggests that this idea of a linguistic system conceptually entails closure in the sense of a boundary between the inside and the outside of the system. However, Derrida argues that closure is not only essential to the account of meaning proposed by structuralism, but it is (paradoxically) what makes meaning impossible. If we are to suppose that there is a firm and determinate boundary between the inside and the outside of a linguistic structure then meaning within that structure becomes wholly self-referential. If the meaning of sign *a* is determined by its difference from signs *b*, *c*, *d* (etc), and if the meaning of signs *b*, *c*, *d* (etc) are dependent for their meaning on their difference from the meaning of sign *a*, then the meaning of sign *a* is ultimately determined by the meaning of sign *a*. The only way to rescue meaning from this vicious circularity is to propose the idea of an 'outside' to the structure which is in fact *partially constitutive* of the meaning of the terms 'inside' the structure. Signs internal to the 'closed' structure must refer to something outside that structure. In this way, the very idea that there is an 'inside' and an 'outside' to the linguistic structure is called into question, since the existence of an 'outside' is what enables the existence of an 'inside' by creating a boundary, and yet the 'outside' has to penetrate the 'inside' to make meaning possible.⁶¹

Mouffe transposes the Derrida/Saussure debate from the field of linguistics to the domain of collective identification, arguing that the idea of the constitutive outside reveals the "antagonism inherent in all

⁶⁰ Saussure (1960).

⁶¹ Abizadeh (2005), p56.

objectivity and the centrality of the us/them distinction in the constitution of collective political identities”.⁶² According to Mouffe’s reading of Derrida, he shows us that identities always depend on a set of differences that they exclude as a condition of their possibility. In other words, identities - no less than linguistic signs - require an excluded exterior: “the creation of an identity implies the establishment of a difference”.⁶³ Mouffe argues that this in turn points to the fact that both individual and collective identities are *relational*: what we are is partially constituted on the basis of what we are not, that which constitutes our ‘exterior’: “every identity is relational and ... the affirmation of a difference is a precondition for the existence of any identity ... In the field of collective identities, we are always dealing with the creation of a ‘we’ which can exist only by the demarcation of a ‘they’”.⁶⁴

Mouffe presents Derrida’s understanding of the constitutive outside as complementing Schmitt’s characterisation of the necessarily antagonistic nature of political life and communal identification: “the notion of the ‘constitutive outside’ forces us to come to terms with the idea that pluralism implies the permanence of conflict and antagonism”.⁶⁵

For Mouffe, the Derridean account of the constitutive outside and the Schmittian account of the antagonistic nature of the political together indicate the conceptual and ontological impossibility of a democracy grounded on universal personhood, or a ‘pure’ form of cosmopolitan democracy that had transcended the need for differentiated political

⁶² Mouffe (2000a), p12.

⁶³ *Ibid*, p15.

⁶⁴ *Ibid*.

communities. As we have seen, Mouffe acknowledges that the “universalistic rhetoric” of liberalism calls for the creation of a democracy of mankind, but claims that the logic inscribed in democracy itself is the condition of the impossibility of ever realizing such a cosmopolitan world order⁶⁶. In her view, democracy itself would perish if the borders between communities were torn down to make way for a global state inhabited by ‘world citizens’ because those citizens would no longer be the bearers and the subjects of rights to self-government that could be actualised within a specific community:

(...) it is through their belonging to the demos that democratic citizens are granted equal rights, not because they participate in an abstract idea of humanity. This is why he (Schmitt) declares that the central concept of democracy is not ‘humanity’ but the concept of the ‘people’ and that there can never be a democracy of mankind.⁶⁷

I think there is a useful parallel to be drawn here between Mouffe’s criticism of cosmopolitan rights and Arendt’s discussion of the “right to have rights”.⁶⁸ Arendt was moved to postulate the idea of a ‘right to have rights’ in the face of the situation of refugees left stateless in the aftermath of the First World War. What Arendt meant to indicate through this phrase was that citizenship in a particular polity is a prerequisite for the meaningful exercise and enforcement of human rights. In other words, without secure membership in a political community our universal human rights are empty signifiers. In a similar vein, Mouffe argues that the ‘rights’ of individuals as members of a global demos would in fact be *moral claims* rather than *political*

⁶⁵ *Ibid*, pp. 32-33.

⁶⁶ *Ibid*, p44.

⁶⁷ *Ibid*, pp. 40-41.

⁶⁸ Arendt (1967), pp. 296-297.

rights since they could not be actualised within any particular political community.⁶⁹ At best, global citizens would be left with the ability to appeal to transnational courts to challenge global political arrangements. For Mouffe, this would not constitute effective democratic self-determination because there would be no scope for contesting the hegemony of the liberal-universalist terms on which global democracy would in her view have to be based:

(...) without a demos to which they belong, those cosmopolitan citizen pilgrims would in fact have lost the possibility of exercising their democratic rights of law-making ... In all probability, such a cosmopolitan democracy, if it were ever to be realized, would be no more than an empty name disguising the actual disappearance of democratic forms of government and indicating the triumph of the liberal form of governmental rationality (...)⁷⁰

Mouffe appears quite similar to Walzer then in her normative evaluation of the prospects for genuinely democratic politics on a global scale. For the sake of protecting the value and practice of self-determination, both theorists support the idea that more should be left up to politics in the sense of preserving spaces for differentiated communities to pursue different sorts of policies and adopt different kinds of political principles. Walzer criticises Benhabib for supporting the imposition of a single universal model for membership policies on all political communities - a charge that amounts to the claim that her distinction between the *principle* of rights and different *schedules* of rights is illusory.⁷¹ Mouffe argues on similar grounds that cosmopolitan theorists fail to take pluralism seriously in their desire to

⁶⁹ Mouffe (2005a), p101

⁷⁰ Mouffe (1999), p42. See also Mouffe (2005a), pp. 106-107.

⁷¹ Walzer (2001).

“impose one single model on the whole world”.⁷² Her key objection to cosmopolitan political rights (i.e. rights that are not anchored in a particular political community) is that they stand in direct opposition to collective rights to self-determination:

(...) they may be used to undermine existing democratic rights of self-government as when civil society institutions challenge national sovereignty in the name of ‘global concern’. By justifying the right for international institutions to undermine sovereignty in order to uphold cosmopolitan law, (the cosmopolitan approach) denies the democratic rights of self-government for the citizens of many countries.⁷³

We can see then that on a global level, both Walzer and Mouffe support self-determination as non-interference and the outcome of popular sovereignty over and above the universal validity of any particular set of political principles. What is crucial to Mouffe’s opposition to global democracy is the normative legitimacy of democratic self-determination and, in turn, the conceptual claim that democratic self-determination necessarily requires the creation of a boundary and acts of exclusion: “if the people are to rule, it is necessary to determine who belongs to the people. Without any criterion to determine who are the bearers of democratic rights, the will of the people could never take shape”.⁷⁴ However - once again - we can accept the point that democratic self-determination calls for a clearly demarcated space - a jurisdiction - in which the will of the people is sovereign, without insisting that that space has to be closed to outsiders seeking social membership and citizenship. In the following section, I argue that Mouffe’s ontological claim that democratic jurisdictional boundaries

⁷² Mouffe (2005a), p115.

⁷³ *Ibid*, p101.

⁷⁴ Mouffe (2000a), p43.

must necessarily function to exclude concrete outsiders from membership is unfounded. However, I conclude this discussion of Mouffe's work by arguing that if we downplay her allegiance to Schmitt and emphasise instead the Derridean aspects of her thought, then the agonistic frontier between 'us' and 'them' shifts from describing an exclusive territorial boundary separating the members of a *demos* from the non-members, to describing boundaries both *between* and *within* the members themselves. We arrive at the idea that an agonistic democratic community is a *democracy of strangers*.

6.5 Us/Them?

The most forceful critique of the 'particularist thesis' advanced by Mouffe - the idea that democratic communities must *necessarily* commit acts of exclusion understood as barring concrete individuals from membership - has been put forward by Arash Abizadeh. Abizadeh's main target in his paper 'Does Collective Identity Presuppose an Other?'⁷⁵ is the idea that collective identification necessarily rests on the exclusion of concrete, actually existing and empirically identifiable outsiders, who are excluded from full membership. Abizadeh wants to rescue the prospects for a genuinely global democratic community, i.e. "a democratically legitimated cosmopolitan political order buttressed by a sense of identification or solidarity with humanity as a whole".⁷⁶ For Mouffe, as we have seen, this goal is conceptually and ontologically impossible since 'personhood' is in her view not a political category and so cannot be used to anchor genuine democratic rights. It is not a political category in Mouffe's view since it is not formulated in opposition to an enemy or

⁷⁵ Abizadeh (2005).

⁷⁶ *Ibid*, p45.

adversary and so cannot capture the dimension of antagonism and the necessary exclusions which accompany the constitution of collective identities. It is this position that Abizadeh aims to undermine. In so doing, the thesis that there is a necessary, ontological relationship between democratic self-determination and exclusion is brought into question.

What Abizadeh takes exception to in the presentation of Mouffe's argument is the claim that "every collective identity simultaneously and necessarily excludes some individuals from its constitution".⁷⁷ According to Abizadeh, there are two ways of reading this premise. The first is to interpret Mouffe as claiming that communities necessarily exclude some concrete individuals from membership: A) *that there is no 'us' without a 'them', where 'they' consist of 'actually existing individuals or groups who are denied membership'*.⁷⁸ Abizadeh points out that this argument is belied by the fact that the subject of exclusionary forces could in fact be an insider or a full member of the community in question:

(...) exclusion need not consist in the *denial of membership* to particular individuals ... The exclusionary violence to which Mouffe refers ... might, for example, take the form of *including* the targeted individuals as members by forcibly excluding ... characteristics that fail to fit the mould.⁷⁹

The second, more expansive way of reading Mouffe's exclusion claim is: B) *communal identities are based on excluding some actually existing individual or groups from membership, whether inside or*

⁷⁷ *Ibid*, p54.

⁷⁸ *Ibid*.

outside the community.⁸⁰ Abizadeh moves on to attack the idea that the formation of collective identity requires excluding *any* actually existing individuals or groups of individuals from membership. He does so via a critical re-appraisal of Mouffe's deployment of the Derridean notion of the 'constitutive outside'. As we have seen, Mouffe presents Derrida and Schmitt as complementing each other in the sense that they mutually support the conclusion that identity is relational and that therefore the constitution of every identity involves an act of exclusion. For Mouffe, Derrida shows us that "difference is the condition of the possibility of constituting unity and totality at the same time that it provides their essential limits".⁸¹ What Abizadeh attempts to show is that Derrida's views cannot be pressed into the service of a simple binary consisting of us/them, where 'they' are excluded from membership by 'us'. In fact, according to Abizadeh's reading of Derrida, a proper understanding of the constitutive outside *confounds* Mouffe's assertion of the particularist thesis.

As mentioned above, Derrida's argument is directed at Saussurean structuralist linguistics. For Saussure, the meaning of a sign is determined by the relationship between a concept and an acoustic image within a closed linguistic structure. Signs therefore derive their meaning not from their relation or correspondence to nonlinguistic entities but from their differential relationship to all the other signs within the linguistic structure. As we have seen, Derrida argues that this idea of a closed linguistic system succumbs to a vicious circularity that renders meaning impossible. He argues that the only way to escape the self-referential character of meaning within a closed linguistic system is to postulate an 'outside' to the system that *penetrates* the

⁷⁹ *Ibid*, p55.

⁸⁰ *Ibid*.

⁸¹ Mouffe (2000a), p33.

inside. For Derrida, this interpenetration actually calls into question the clarity of the distinction between the inside and the outside of a linguistic structure that structuralist linguistics proposes as an account of the meaning of signs. For Abizadeh, this interpenetration is no less fatal to the Schmitt/Mouffe claim that all collective identities rest on the exclusion from membership of actually existing, empirically identifiable outsiders. If the outside (the 'enemy') is partly constitutive of the inside (the 'friends'), then the distinction between the outside and the inside of a collective identity cannot be transposed neatly onto a clear, empirical distinction between those individuals who are friends (and included) and those who are enemies (and excluded). Rather, it follows from Derrida's critique that there are enemies *within* the circle of friends, just as the outside of a linguistic system is constitutive of the meaning of the terms within the system:

(...) if the 'constitutive outside' is *constitutive* of what is inside ... then the (impure) conceptual distinction between friend and enemy ... cannot map onto existing, empirically identifiable bounded groups of individuals ... This is because any act of identifying the 'friend' will inevitably find within its members characteristics that supposedly belong to the category of the 'enemy' ... the enemy is within one's own self.⁸²

Finally, Abizadeh points out that the idea that politics always involves relations of 'us/them' underdetermines the construction of any particular boundary between 'us' and 'them', as well as any particular way of filling in the *content* of 'us' and 'them'. Even if it is conceded that collective identity requires an 'other', and that democracies require the drawing of a boundary, why should that 'other' be thought of as a geographically external human or group of humans, and why should the boundary be conceived of in spatial or physical terms? A

community could quite coherently define its identity and draw its boundaries in opposition to some community that existed in the past, or a set of imaginary values, or a set of non-human properties or characteristics⁸³. The particularist thesis; the claim that ‘they’ must consist of actually existing, empirically identifiable individuals who are excluded from membership, does not therefore follow logically from the premise that collective identities require an ‘other’.

Abizadeh has in my view shown convincingly that Mouffe’s neo-Schmittian ontological exclusion claim cannot be supported on Derridean grounds.⁸⁴ However, for my purposes it is important to note that Mouffe’s relationship to Schmitt is more ambiguous than a simple affirmation of his reductive account of the political as characterised by ‘friend/enemy’ relationships, understood as describing a relationship whereby ‘we’ exclude ‘them’ from membership. In her more Derridean and less Schmittian moments, Mouffe acknowledges that the outside of a political community is partially constitutive of the inside, and that there cannot therefore be any ‘pure’ ‘we’, or a community free from internal differences, that sets itself in contrast to, and so excludes, a concrete, empirically identifiable ‘them’:

In order to avoid any misunderstanding, let me point out that the ‘constitutive outside’ cannot be reduced to a dialectical negation ... what is ‘outside’ is not simply the outside of a concrete content but something which puts into question ‘concreteness’ as such ... the ‘them’ is not the constitutive opposite of a concrete ‘us’, but the symbol of what makes *any* ‘us’ impossible.⁸⁵

⁸² Abizadeh (2005), p57.

⁸³ *Ibid*, p58.

⁸⁴ Honig (2001a, p144, nt. 16) also disagrees with what she calls the ‘metaphysical’ exclusion claim.

Similarly, she observes that:

“(...) every object has within its very being something other than itself ... Since the constitutive outside is always present within the inside, every identity becomes purely contingent. This implies that we should not conceptualize power as an *external* relation taking place between two pre-constituted identities (...)”⁸⁶

Abizadeh does concede that Mouffe makes these claims, but he states that she fails to see how they are incompatible with her endorsement of the Schmittian exclusion claim.⁸⁷ I think it is coherent - although more charitable in light of Abizadeh’s critique - to read them instead as marking Mouffe’s *difference* from Schmitt, or at least her ambiguous relationship to his philosophical legacy; an ambiguity fostered in my view by her simultaneous allegiance to Derrida.

Mouffe does sometimes appear to endorse an uncritically reductive account of the political in terms of the Schmittian distinction between friend and enemy - for example, when she claims that “it is useful to remember with Carl Schmitt that the defining feature of politics is struggle and that ‘There always are concrete human groupings which fight other concrete human groups’”⁸⁸. However, at other points she acknowledges the fact of multiple, fractured identities and the way in which this understanding of divided subjectivity disrupts the Schmittian binary; for example, when she calls for multiplying relations of ‘us/them’ as a means of *defusing* the antagonism that Schmitt believed was a necessary aspect of the political:

⁸⁵ Mouffe (2000a), pp. 12-13. See also p21.

⁸⁶ *Ibid*, p21.

⁸⁷ Abizadeh (2005), p57, nt. 38.

⁸⁸ Mouffe (2005b), p113, quoting Schmitt (1985), p67.

(...) the most likely condition for the emergence of antagonism ... is when there is a very strong separation between 'us' and 'them' ... If on the other hand, the us/them is multiplied, so that for instance you and I constitute an 'us' with respect to 'them', but then a different you and I constitute a different 'us', then it is less likely that there will be antagonism.⁸⁹

The idea that a single subject can occupy multiple positions of identification, so that they can be both friends with another subject in one context and the agonistic opponent of that same subject in a different context, contradicts a bifurcated conception of the political in terms of a simple relationship of us/them. This understanding of political subjectivity turns on the idea that we have encountered above in Abizadeh's reading of Derrida; that "the construction of a political frontier is ... something that can cut across each individual".⁹⁰

In the following section I will argue in connection with my discussion of Honig that this idea of divided subjectivity suggests a way of thinking through the relationship between democratic self-determination and political membership which speaks to a number of the key concerns I have raised in relation to the theories canvassed in the previous four chapters. If the collective identity of the 'self' that is self-determining is composed of subjects who are not only foreign to one another, but also contain traces of foreignness within themselves, then the concern seems to lose purchase, that the introduction of further foreigners into that political association might compromise the practice of self-determination for the existing members.

⁸⁹ Mouffe and Laclau, (2001), p26.

In the final section of this chapter, I go on to argue that Honig's work, on democracy and the symbolic politics of foreignness, opens up a distinctive way of approaching the relationship between democratic self-determination and political membership. It encourages the following 'switching' of the conventional problematic: what if certain key aspects of democracy rest not on the right to *exclude* outsiders from social membership and citizenship, but instead on the symbolism implied in the act of *including* them? This reversal of the conventional way of framing the relationship between self-determination and political membership is motivated by Honig's argument in *Democracy and the Foreigner*⁹¹ that democratic regimes often rely on those energies, qualities or virtues that come from the introduction of foreigners into the political association. Although Honig does not apply her arguments directly to the question of self-determination and democratic membership, my reflections here take inspiration from the way in which she switches the normative/investigative framework within which immigration is traditionally situated. Rather than asking whether or not foreignness poses a *problem* for democracy, Honig asks whether foreignness *solves* certain intractable problems for democracy.

6.6 No place like home; Bonnie Honig, Democracy and Foreignness

Agonism, for Honig, names a certain attentiveness to those elements of society that are left out of or alienated by "ideal or systematic"⁹² approaches to justice. Her agonism calls for "a commitment to a certain

⁹⁰ Mouffe (1996), p25.

⁹¹ Honig (2001a).

⁹² Browning (2008), p438.

fidelity to the *remainders* of politics ... those undone oughts that haunt political life and to those parts of all persons that are ill fitted to dominant norms and forms of subjectivity and kinship”.⁹³ In Honig’s view, both the traditional liberal commitment to a universal politics of rights, as well as the communitarian emphasis on the unity of political community, represent ‘virtue’ theories.⁹⁴ They seek to contain conflict and to subsume potentially disruptive moments in democratic politics within a stable system of rights or according to a unitary concept of communal values and identity respectively. By contrast, agonistic ‘virtu’ theorists - for example Nietzsche and Arendt - celebrate the unexpected and the unconventional in politics, and they aim to harness these disruptive and destabilising energies to bring new political worlds and possibilities into being.⁹⁵

Like Mouffe, Honig is critical of rational and universalist approaches to moral reasoning and political organisation. In her view, they seek a form of closure and unity which can only be preserved through a denial of difference, dissonance and pluralism. Her agonism promotes politics as “a disruptive practice that resists the consolidations and closures of administrative and juridical settlement for the perpetuity of political contest”.⁹⁶ She calls on the subjects of modern liberal societies to resist seeing their state as either the final and authoritative arbiter in matters of justice or as the sole avenue for political allegiance and democratic activity, and to develop and participate instead in multiple channels for the expression of democratic energies below, across and beyond state boundaries.⁹⁷ This is in part because she agrees with the doctrine of divided subjectivity that we have encountered in the previous section.

⁹³ *Ibid*, p436.

⁹⁴ Honig (1993a).

⁹⁵ *Ibid*, Chapter 3, Chapter 4; Honig (1994), pp. 586-589; Honig (2006), p110, p117.

⁹⁶ Honig (1993a), p2.

⁹⁷ Honig (2001a), p103.

She claims that individuals “are constituted by multiple and often incommensurable identities and differences”.⁹⁸ I will discuss further the connection between this account of divided subjectivity and Honig’s emphasis on resisting the state as the sole avenue for democratic activism at the end of this section.

The idea of a shared collective democratic will - for example the tradition of jurisprudential thought that conceives of the state as a “corporate ‘person’ having a sovereign ‘will’ and interests that it may rightly pursue, with territorial sovereignty understood as analogous to private property”⁹⁹ - would seem to be a clear example of an idea of democratic politics that denies the existence of what Honig calls remainders, i.e. those conflicting voices and competing interests within the *demos* itself, or the strangers within the ‘self’ that is democratically self-determining. Following Jacques Ranciere’s concept of democracy as an “abstract assemblage of ordinary people, who have no individual title to govern”,¹⁰⁰ Honig argues that “democracy is always about living with strangers under a law that is therefore alien (because it is the mongrel product of political action - often gone awry - taken with and among strangers)”.¹⁰¹ In contrast to Walzer’s use of familial analogies to help explicate the moral basis of his liberal-communitarian position on membership, Honig encourages us to “rethink democracy in non-kinship terms, as a politics among strangers”.¹⁰² Instead of regarding the fundamental opacity between democratic citizens as being a problem to be overcome, or as an obstacle to collective self-determination,¹⁰³ Honig sees the potential for a re-invigoration of

⁹⁸ Honig (1994), p565.

⁹⁹ Whelan (1988b), p24.

¹⁰⁰ Ranciere, (2000) p19; quoted in Honig (2009).

¹⁰¹ Honig (2001a), p39.

¹⁰² *Ibid*, p72.

¹⁰³ cf. Taylor (2002).

democratic energies, particularly on behalf of the disenfranchised and the stateless: “Even at its very best, or especially so, democracy is about being mobilized into action periodically with and on behalf of people who are surely opaque to us and often unknown to us”.¹⁰⁴

Honig’s understanding of democracy as political action taken in concert with strangers suggests that the ideal of a unified collective democratic will articulated through popular sovereignty is illusory, or at best a regulative fiction that can never be realised. On the agonistic account of divided subjectivity, we are alien to aspects of ourselves, we are alien to aspects of others, and so at least partly alien before the law that we democratically participate in formulating in concert with those others. As John Heilbron points out, one of the key messages of Honig’s work is that “ (...) *no political order, not even democracy, can be fully transparent and honest about itself ... the real foreigner among us is the law itself*”.¹⁰⁵ In other words, the state is never wholly authorised to act in the name of a ‘people’; the marriage between “a people and its law, a state and its institutions”¹⁰⁶ is never a perfectly harmonious relationship. For Honig, this permanent legitimacy gap is something to be welcomed:

Which is the better course for democracies? To see such perhaps necessary moments of alienation in life under law as welcome gaps that remind us of the insufficiencies of juridical efforts to institute justice or legitimacy without remainder? Or to seek, as Kant and Rousseau did, as Habermas often does, to overcome the moment of alienation?¹⁰⁷

¹⁰⁴ Honig (2001a), p39.

¹⁰⁵ Heilbron (2004), p247.

¹⁰⁶ Honig (2001a), p109.

¹⁰⁷ Honig (2001b), p794.

On Honig's account, facing up to the "moments of alienation" under the rule of law in a democratic society opens up channels for democratic experimentation. In particular, recognising that democratic energies never rely on fully or correspond to a shared collective will of the people helps to displace the territorial nation-state's claim to be the sole site of democratic allegiance and activity:

(...) the felt strangeness of the institutions that aim to define the terms of the democratic contest ... might ... stand as markers of the fact that democracy's energies and origins always point beyond the (national) borders and commonalities that have heretofore presented themselves as democracy's necessary conditions.¹⁰⁸

Honig's understanding of democracy as a form of political action taken with, and on behalf of, strangers, issues a distinct understanding of the relationship between self-determination and political membership. If the law is always partly alien to us, then membership controls (as much as and no less than any other policy or decision) do not issue straightforwardly from a shared will of the people articulated through popular sovereignty. If, as the work of Honig (and Mouffe, in her more Derridean and less Schmittian moments) suggests, democratic self-determination is ultimately about political action taken in concert with strangers, then the worry that a community will lack meaningful self-determination if it is deprived of the unilateral right to control membership, becomes considerably less pressing. If a democratic community is composed of strangers, this dissolves the concern that foreigners may pose a threat to the internal social unity, the shared values, identity, or the common will, and therefore to the collective democratic projects, that are often said to both *express themselves* and

¹⁰⁸ Honig (2001a), p40.

be preserved by the unilateral right of existing citizens to shape the sphere of membership. Following Honig and promoting democratic politics “without presupposing a unified demos stabilized by a metaphoric of national kinship”¹⁰⁹ renders control over political membership a far less urgent feature of self-determination, because shared membership in this agonistic *demos* is something that is *always already* riven by internal differences, conflicts and disharmonies; those “incommensurabilities and differences that cut across and through traditional, ethnic, local, or national group identities”.¹¹⁰

In what ways does the idea of a democracy of strangers have normative merit in comparison to the theories of self-determination canvassed in the previous four chapters? I have argued in Chapters 2 and 3 that appeals to social or cultural unity, to substantiate the normative link between control over membership and self-determination, are both problematic in themselves and have unappealing implications for democracy. The idea of a democracy of strangers avoids the objections to the claims of cultural unity that underly Tamir and Tebble’s claim, that political communities have a right grounded in the significance of shared culture to autonomy to exclude those who cannot affirm the dominant shared values of the host community. The idea of the democratic community being composed of individuals who are ultimately strange to one another is the direct antithesis of the Tamir/Walzer view of national groups as “communities of character” united in a collective project of self-determination, the internal unity of which legitimates the kind of discretionary ‘club’ based model of unilateral membership controls. I argued in Chapter 3 that Miller’s democratic argument for membership controls is undermined by the fact of heterogenous preferences for state policy amongst the citizen

¹⁰⁹ *Ibid.*

¹¹⁰ Honig (1994), pp. 565-566.

body. This is an objection that the idea of a democracy of strangers avoids, as it makes no appeal to a shared collective will of the ‘demos’ that could be ‘hollowed out’ by the entrance of outsiders with different preferences. Furthermore, it is opposed to the discourse-theory approach to moral reasoning as the practice of ‘enlarged mentality’ advanced by Benhabib. The idea that we can reason from the standpoint of all relevantly affected others, and so act on the basis of decisions that are universally justifiable, turns on a level of transparency and mutual understanding between subjects which denies their strangeness to one another. I argued against Benhabib that her assumption of the reversibility of perspectives between democratic subjects threatens to create internal exclusions, which in turn compromises the normative logic behind the subject-to-the-law principle of democratic inclusion, which I have argued in favour of as a jurisdictional rule. The contrary assumption of the *irreversibility* of perspectives, on the other hand, is quite clearly sustained by the assumption of the fundamental alterity of other democratic subjects.

A democracy of strangers would be a democratic community mindful of Iris Young’s warning that “politics should not succumb to a longing for comfort and unity”.¹¹¹ Instead, she argues with Honig that “(...) politics must be conceived as a relationship of strangers who do not understand one another in a subjective and immediate sense”.¹¹² Young maintains that contemporary urban spaces offer guidance for re-conceptualising the idea of political community in ways that are attentive of difference but which do not “succumb” to the kind of longing for unity in the demos which is characteristic of nationalist approaches to democracy and group identity. “City life”, she writes, exemplifies “a form of social relations which I define as the being

¹¹¹ Young (2005b), p146.

¹¹² Young (1990), p234.

together of strangers”.¹¹³ Cities display a form of unity in so far as their inhabitants operate with a sense of belonging, but this does not entail the kind of homogeneity or unity said to be characteristic of national identities: “In the city persons and groups interact within spaces and institutions they all experience themselves as belonging to, but without those interactions dissolving into unity or commonness”.¹¹⁴ As I noted in Chapter 2 in connection with my critique of Walzer’s communitarian defense of membership controls, city life illustrates the fact that political belonging, group differences and collective self-determination do not necessarily require closure in the form of social membership or citizenship controls.

As Young suggests, there may well be something reassuring about the ideal of national unity; for example, in Miller’s description of national communities as being “held together not merely by physical necessity, but by a dense web of customs, practices, implicit understandings, and so forth”.¹¹⁵ However, in a discussion of the politics of ‘home’ - which can be counterpoised to the idea of a democracy of strangers - Honig argues that this ideal is often politically dangerous in its threat to pluralism and inclusion:

(...) it animates and exacerbates the inability of constituted subjects - or nations - to accept their own internal divisions, and it engenders zealotry, the will to bring the dream of unitariness of home into being. It leads the subject to project its internal differences onto external Others and then to rage against them for standing in the way of its dream (...)¹¹⁶

¹¹³ *Ibid.*, p237.

¹¹⁴ *Ibid.*

¹¹⁵ Miller (1995), p41.

¹¹⁶ Honig (1994), p585. A similar message runs throughout Connolly

If we understand the ‘subject’ in this quotation to mean ‘democratic community’, and if we understand “(...) rage against them” to mean “(...) exclude them from membership”, then we have an apt summary of the point I am trying to make in this section, as well as the normative and political shift that is effected by substituting for the ideal of home the far more precarious conception of a democracy of strangers. Diana Brydon points out in similar fashion to Honig, that “When ideologies of home get channelled through theorizations of community they often lead toward a governmental emphasis on ‘social cohesion’ that seeks to promote homogeneity, limiting dissent and alternative imaginings”.¹¹⁷

Honig cautions her readers not to assume that the philosophical doctrine of divided subjectivity is sufficient in and of itself to usher in a more pluralistic and inclusive redefinition of political identity and democratic community. Acknowledging the internal differences within ourselves and within our community may have the reverse effect; it may lead democratic subjects to pursue unity and homogeneity with even greater vigour, with a correspondingly graver cost to those who resemble or reflect internal ‘others’:

The mere awareness of our own internal divisions may make us more tolerant of others (who may personify those divisions for us). But it may just as well engender and feed a determination to extinguish or contain that strangeness, to scapegoat it, in order to (re)establish the unity ... we crave¹¹⁸.

(1991).

¹¹⁷ Brydon (2007).

¹¹⁸ Honig (2001a), pp, 57-58. There are, of course, dangers inherent in the agonistic concept of politics, rationality and morality. Perhaps the most pressing objection is that it seems grist to the mill for hard-core political realists. If we abandon all appeals to morality and rationality in politics, do we not thereby give licence to the view that ‘might is

At this point, the contextual nature of Honig's analysis becomes particularly salient, and limits the extent to which her conclusions can be generalised. The argument that open immigration can re-vitalise the democratic process seems unobjectionable in the contemporary American context. But it is far more tenuous when applied to, say, the case of Israel/Palestine, where the potential for violent hostility between the two national groups is an unavoidable fact and where the danger of one group being subject to domination at the hands of the other is very real. In situations like this, where two or more mutually antagonistic groups live in close proximity, and where civil, political and human rights are precarious, the thought that the free entrance of outsiders might re-invigorate the democratic procedure seems naively optimistic.

But my point is not so much about the kinds of psychological or political dispositions that might be engendered by attending to foreignness within the political association, and which may lead established citizens to regard foreignness as either good or bad for the self-determining political community. My argument is rather a conceptual one with normative implications. A democracy of strangers cannot claim justifiably that the right to exclude foreigners from social membership or citizenship is necessary for safeguarding its right to collective self-determination, given that the collective 'self' that is 'self-determining' is composed not only of subjects who are foreign to

right'? Whether or not agonists can come up with a convincing response to this sort of critique is beyond the scope of this thesis. But the utility of the agonistic concept of democracy for thinking through the relationship between self-determination and political membership does not turn upon that concept being ethically or conceptually flawless.

one another, and so foreign before the law that they jointly legitimise in concert with others, but also in an important sense foreign to themselves. The idea of a democracy of strangers therefore provides a riposte to Whelan's claim that if democratic communities are denied the right to exclude then "(...) the democracy that existed would be seriously attenuated; it would not amount to self-determination".¹¹⁹

A final point that arises from the idea of divided subjectivity in relation to the politics of membership is that it highlights the importance of encouraging multiple sites for democratic activism. If we have multiple, internally divided selves, it follows that our autonomy may be best served by participating in multiple forms of community and having multiple forms of political membership.¹²⁰ Honig attempts to loosen the state's monopoly over the legitimacy of modes of inclusion and exclusion and the regulation of sites for democratic activism by reflecting on the potential for political voice and democratic citizenship-activity to be expressed and carried out through informal, non-statist organisations and social movements. The aim of her "democratic cosmopolitanism" is to "widen the resources and energies of an emerging international civil society to contest or support the states actions in matters of transnational and local interest such as environmental, economic, military, cultural and immigration policies".¹²¹ Carol Gould supports this emphasis on multiplying the sites for democratic membership and participation by suggesting that such multiplication can help to alleviate the harm of being excluded from any particular community: "multiple memberships can ... contribute to minimizing the exclusiveness and unfairness that besets many cases of national citizenship, and can permit addressing more

¹¹⁹ Whelan (1988a), pp. 28-29.

¹²⁰ Honig (1994), p566.

¹²¹ Honig (2001a), p103.

squarely the requirements of global justice”.¹²² In a similar fashion, Honig argues that “highly politicized institutions that shift and proliferate the sites of politics are the best way to diminish the violence and the resentment that invariably haunt political arrangements”.¹²³

The kind of democratic activism promoted by Honig and Gould encourages the exercise of democratic agency outside formal state channels. In Chapter 4 I argued against Young that self-determination calls for the exclusion of territorial outsiders from participatory membership. The multiplication of forms of political membership may help to ‘minimise’ the potential harm to individuals of being excluded from participation in those ‘internal’ decisions of other political communities which may affect their interests. For example, following Honig and Gould’s line of thought would encourage the participation of South Pacific islanders in informal, non-statist organisations like Greenpeace, in order to put pressure on the French state not to test nuclear devices in their vicinity in the future. Their exclusion from participatory membership in the formal French decision making structure would not thereby render the islanders wholly devoid of a political voice and democratic agency. In the following section, I discuss the way in which Honig encourages the stateless and disenfranchised to ‘take rights’, with a view to disrupting further the exclusivity of nation-state membership.

¹²² Gould (2006), p51.

¹²³ Honig (1993a), p159.

6.7 The ‘Taking Immigrant’ and the ‘Foreign-Founder’

All of the authors I have discussed so far approach the issue of political membership from a more or less state-centric or institutional perspective. They share the thought that rights to democratic voice, entry to territory or access to citizenship are the responsibility of states or other formal political institutions to grant or withhold. Even theorists of post-national democracy like Benhabib and Young, who attempt to de-couple the privileges of democratic participation from citizenship status distributed according to nationality or territorial location, still ultimately rely on formal political institutions to sanction the inclusion of outsiders in democratic decision-making procedures.

In contrast to these ‘top-down’, institutional approaches to enfranchisement, Honig focuses on strategies by which the disenfranchised can be empowered to speak *for themselves* and to *take* the rights and privileges associated with citizenship, rather than waiting for them to be granted or withheld at the whim of a particular *demos*, state or other institutional body. Honig encourages those who are disenfranchised to not only demand the rights of citizenship but *to act as if they already had them*; in other words, to take rights for themselves, and in so doing, to expose the grounds for distinguishing between insiders and outsiders as contestable: “empowering aliens to act as citizens, even when they lack that juridical status ... attenuates the lines between aliens and citizens”.¹²⁴ The founding of American democracy itself proceeded without any external sovereign authorisation, and Honig argues on the basis of this example that democracy is often at its most vibrant when it is animated by those who seek to join or create a community, and who seize rights for themselves

that had not been previously sanctioned by any formally recognised political authority: “the practice of taking rights and privileges rather than waiting for them to be granted by a sovereign power is, I would argue, a quintessentially democratic practice”.¹²⁵ The practice of taking rights is exemplified in efforts to expand forms of alien suffrage. Such taking is, for example, captured successfully in the practice already prevalent in a number of American cities of including noncitizen residents in local or municipal elections.¹²⁶ Informal political advocacy groups such as the international ‘No Borders’ movement help to empower resident aliens to take rights for themselves by providing immigrants, refugees and asylum seekers with free legal advice and representation and by generating local and national awareness of humanitarian and legal complications in the status and treatment of aliens at the hands of the state. As I noted in the previous chapter, linking membership rights to the fact of territorial residence in the way that is called for by the subject-to-the-law principle of democratic inclusion helps to de-nationalise citizenship status, and in turn lends *democratic* legitimacy to the taking of rights endorsed by Honig.

The idea of taking rights without formal authorisation seems to tail with Arendt’s discussion of statelessness and ‘the right to have rights’, in as much as it is concerned with empowering and enfranchising those who lie outside of the structure of state membership and have no formal legal standing.¹²⁷ The difference between Benhabib and Honig’s reading of ‘the right to have rights’ is revealing in the present context. Benhabib points out that the two uses of the term ‘right’ are non-equivalent:

¹²⁴ Honig (2001a), p164, nt. 82.

¹²⁵ *Ibid*, p99.

¹²⁶ *Ibid*, p102.

The first use of the term “right” is addressed to humanity as such and enjoins us to recognize membership in some human group ... The second use of the term “rights” is built upon this prior claim of membership ... Such rights, which generate reciprocal obligations among consociates ... are usually referred to as “civil and political” rights or as citizens rights.¹²⁸

In this sense, the first use of the term ‘right’ sets the ground for legitimising the claim of individuals to possess ‘rights’ in the second sense of the term, i.e. the rights that already exist within a specific political community: “the right of humanity entitles us to become a member of civil society such that we can then be entitled to juridico-civil rights”.¹²⁹ On Honig’s contrasting interpretation, however, the ‘right to have rights’ does not legitimise the incorporation of migrants into a pre-existing system of juridico-civil rights. Instead, she argues that the legitimising grounds *follow from* the making of a new rights claim - not the other way around, as suggested by Benhabib:

(...) the right to have rights could be seen as an authorizing ground for the claims made by those without proper standing to make them ... But I don’t pursue this point further because in general I think such authorizing grounds tend to follow, post hoc, from the making of new claims rather than grounding them in advance.¹³⁰

The difference between Benhabib and Honig here is that the former regards the migrant as “an object of charity or hospitality”.¹³¹ The ‘right to have rights’, for Benhabib, creates an obligation on the part of

¹²⁷ *Ibid*, p61.

¹²⁸ Benhabib (2004a), pp. 56-57.

¹²⁹ *Ibid*, p59.

¹³⁰ Honig (2001a), p149, nt. 53.

¹³¹ *Ibid*, p61.

established political regimes to bestow rights upon aliens, whereas Honig wants to position “the immigrant as a full agent empowered to make (always contestable) claims or take rights on her own behalf”.¹³² For Honig, ‘the right to have rights’ is backward looking, *describing* instead of *legitimising* the grounds upon which migrants *take* rights for themselves. This exemplifies the point that Benhabib is concerned with incorporating immigrants into an already existing polity, whereas Honig is interested in how migrants might bring new political rights and possibilities into being.

I have drawn attention to and discussed critically the boundary problem in democratic theory at a number of different points in the previous three chapters. Although I have endorsed subjection to the law over affectedness as a principle of democratic inclusion, in Chapters 2 and 3 I have conceded that, ultimately, this way of demarcating a *demos* is still vulnerable to the logical problem of initial authorisation. To return to a previously cited quotation, the problem is that simply stating - with Walzer - that the self-determining body of people who initially constitute the subjects of the law are those people who choose to recognise one another as such is “in fact ridiculous because the people cannot decide until someone decides who are the people”.¹³³ The subject-to-the-law principle of demarcation cannot bring this logical regress to a halt, because it presupposes the existence of a bounded territorial unit, and cannot in itself explain why the laws of that territory - including its membership policies - are legitimate expressions of the democratic will of that particular *demos*.¹³⁴ In Chapter 2, I argued that the boundary problem reveals the fact that the *demos* has no legitimate right grounded on purely democratic considerations to grant or

¹³² *Ibid*, p62.

¹³³ Jennings (1956), p56.

¹³⁴ Karlson (2006), p24.

withhold membership to outsiders, because there is no democratic way of answering the question, ‘what gives *this* group of people, bound by *these* territorial boundaries, the right to shape membership through policies of inclusion and exclusion?’, without entering into a logical regress. What the boundary problem suggests in turn is that whilst the ‘taking’ immigrant acts without prior sovereign authorisation, their act of taking rights is no more and no less illegitimate on democratic grounds than any membership decision or boundary policy enacted by established citizens. The idea of the ‘taking’ immigrant as a symbol of democratic activism is crucial for Honig, because it illustrates that, rather than simply being recuperated for nationalist concepts of democracy, the symbolic politics of foreignness can be pressed into service of democracy *outside* of the nation-state, in terms of civil society, and *beyond* the nation-state, in terms of transnational civil networks¹³⁵.

Alongside her analysis of the ‘taking immigrant’, Honig finds dotted throughout the history of Western political thought and contemporary popular culture the recurring figure of the “foreign-founder”. These are individuals who come from outside the established citizenry to provide an important quality or testimony that is lacking in or inaccessible to the current members: “the figure of the foreigner serves as a device that allows regimes to import from outside ... some specific and much-needed but also potentially dangerous virtue, talent, perspective, practice, gift or quality that they cannot provide for themselves ...”¹³⁶ An important insight of Honig’s reflections on the ‘foreign founder’ myths that she encounters in Biblical tales, popular culture and contemporary American immigration politics is that they confront squarely the necessary lack of authorisation in the founding of

¹³⁵ Honig (1998) p19.

¹³⁶ Honig (2001a), p3.

democratic regimes, whilst suggesting ways in which this permanent legitimacy gap can be used to appropriate democratic energies on behalf of the disenfranchised.

But aren't democracies threatened by the figure of the foreign-founder, given the prevalent belief that democracy requires social or cultural unity in order to function successfully?¹³⁷ Not necessarily. In fact, foreigners who seek to join a political community often bolster the democratic character of the association. By naturalising, foreigners provide evidence of 'consent-worthiness' of the political regime, and so provide an important supplement to the political community. Birthright citizens, whose political autonomy is supposed to be protected in part through their secure membership in a self-determining state, are never offered directly the opportunity to voice their consent to membership within that regime. This is an uncomfortable fact for liberal regimes, which are supposed to derive their legitimacy in part from the consent of the governed.¹³⁸ Only the foreigner who has chosen to become a naturalised citizen is in a position to fill this legitimacy gap:

The liberal consenting immigrant addresses the need of a disaffected citizenry to experience its regime as choice worthy, to see it through the eyes of still enchanted newcomers whose choice to come here also just happens to reenact liberalism's fictive foundation in an act of individual consent. Simultaneously, the immigrant's decision to come here is seen as living proof of the supposed universality of America's liberal democratic principles.¹³⁹

¹³⁷ *Ibid*, p10.

¹³⁸ *Ibid*, p92.

Therefore, not only is the inclusion of foreigners to social membership and citizenship compatible with democratic self-determination, it can in fact be seen to *reinvigorate* democracy, by providing evidence that the regime they seek to join embodies desirable principles of governance: “The American need for periodic testimony to the true universality of its principles and the choiceworthiness of its democracy is met by new immigrant foreigners”.¹⁴⁰ As we have seen, liberal nationalist and liberal communitarian theorists worry that the differences that foreigners bring with them may dissolve the shared internal unity which is in their view crucial for the self-determination of the host community. Honig once again reverses this framing of the relationship between nationalism and foreignness. She argues that the more foreign the prospective citizen, the greater democratic supplement they represent to the nation when they choose to pursue membership within it, precisely because the desirability of that membership presumably spans whatever ethnic, religious, cultural or linguistic differences might be thought to stand between them and native-born citizens: “... the more foreign the new consentor, the more powerful the impact of her consent as testimony to the universal’s universal attractiveness”.¹⁴¹

The idea that democratic regimes often draw sustenance from the inclusion of foreigners *precisely because* of their alterity marks a notable exception to the more conventional way of framing foreignness as a threat to the internal unity of the nation and its capacity for self-determination. Charles Taylor has argued that the impulse towards exclusion in contemporary nation-states follows from a political dynamic internal to the functional logic of democracy; which is that

¹³⁹ Honig (1998). p2.

¹⁴⁰ Honig (2001a), p94.

¹⁴¹ *Ibid.*

democracies typically operate better when there is a strong sense of collective identity amongst the citizenry. Taylor argues that a democratic community has to resemble something more than a mere aggregation of strangers; citizens must be “bonded more powerfully than (by) chance grouping”.¹⁴² In order for citizens to accept that they are free and that the rule of law is legitimate even in cases where they are in an outvoted minority, they have to be able to see themselves as part of a political association that is being ruled by laws which are in some sense expressive and protective of an identity or a set of interests that they share in common with their fellow citizens:

(...) the modern democratic state has generally accepted common purposes, or reference points, the features whereby it can lay claim to being the bulwark of freedom and locus of expression of its citizens. Whether or not these claims are actually founded, the state must be so imagined by its citizens if it is to legitimate.¹⁴³

Nationalism provides a source for this unity in the idea of a shared culture: “What is defended and realised in the national state is not just your freedom as a human being, but this state also guarantees the expression of a common cultural identity”.¹⁴⁴ Democratic exclusion is therefore motivated by the threat of the dilution of this common identity.

As an historic account of the drive towards unity and exclusion in democratic societies, Taylor’s analysis may well be correct. But might it be possible to encourage citizens to regard their liberal-democratic association as legitimate *precisely because* of its lack of membership

¹⁴² Taylor (2002).

¹⁴³ *Ibid.*

controls? Could the “common allegiance to the political community”¹⁴⁵ which Taylor sees as a pre-requisite for the “stability of (the) legitimacy”¹⁴⁶ of states come partly from the recognition amongst their citizens that the exclusion of outsiders from social membership and citizenship is *unjustifiable* on both liberal *and* democratic grounds, so long as those outsiders pose no threat to the structure of their self-determining association? Given the “peculiar significance” of membership controls to national sovereignty in contemporary politics, it may be unlikely that we will see such a change in either popular consciousness or international law in the foreseeable future - if ever. But if this thesis has offered convincing arguments, such a shift will be a step in the normatively correct direction.

6.8 Conclusion

In this final chapter I hope to have illustrated some of the advantages of thinking through the relationship between democratic self-determination and political membership from the perspective of a (suitably qualified) reading of the agonistic positions of Mouffe and Honig. I began by discussing critically Mouffe’s claim that democratic communities will be more open and inclusive to outsiders to the extent that they conceive their policies and settlements (including those concerning their membership boundaries) as political acts rather than rational or moral imperatives. In my response I argued to the contrary that Mouffe’s *agon* implies similarly restrictive membership policies to those endorsed by liberal nationalists like Tamir. I then went on to discuss Mouffe’s claim that collective identities necessarily rest on the

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

exclusion of concrete individuals from membership. I illustrated how she tries to ground this claim by forging an alliance between Schmitt's reflections on the antagonistic nature of 'the political' and Derrida's idea of the 'constitutive outside'. I argued that this marriage is unsuccessful, and that Derrida's position in fact *undermines* the Schmitt/Mouffe exclusion claim. In drawing my discussion of Mouffe to a close, I argued that if we downplay her allegiance to Schmitt and bring to the fore instead the Derridean elements of her thinking, then we effect a shift in both the *nature* and the *location* of the agonistic frontier between 'us' and 'them'; a shift that has important implications for how we should understand the inclusivity of an agonistic democratic community. No longer bound uneasily to the reductive Schmittian account that positions this frontier between the (included) insiders and the (excluded) outsiders of a (national) political community, the Derridean voice in Mouffe locates this frontier not only *within* the boundaries of a democratic collective but *within the very identities of the members of the collective themselves*. 'Foreignness', on this revised account of the agonistic frontier, does not simply describe a relationship that exists between the members and non-members of a *demos*, but amongst and within the members themselves. A democratic community viewed from the perspective of this (suitably qualified) agonistic understanding of individual and collective identity represents therefore a 'democracy of strangers'.

In the second half of this chapter I asked what normative light the idea of a democracy of strangers might shed on the relationship between collective self-determination and political membership, through a discussion of Bonnie Honig's work on the symbolic politics of foreignness. I argued that the sorts of reasons that motivate the exclusion claims that we have encountered in liberal nationalist, identity liberal and liberal communitarian theories of

self-determination (reasons which I hope to have exposed as at least contestable in Chapters 2 and 3) simply do not arise if we view both individual democratic subjects and the collective *demos* from the agonistic perspective of divided subjectivity. In the final section, I argued that Honig's reflections on the 'taking immigrant' and the 'foreign founder' offer a further way of 'switching' the conventional framing of the relationship between democratic self-determination and control over membership. In contrast to the prevalent viewpoint which sees the entrance of outsiders as a potential obstacle to the effective self-determination and political autonomy of the state and its members, the conclusion I advanced here is that the democratic vitality of regimes - and therefore, to an extent, the autonomy of the existing citizens themselves - can draw sustenance from the admission of foreigners to social membership and citizenship.

Chapter 7: Conclusion

7.1: Summarising the Thesis

This thesis has explored the question of whether and to what extent the right to collective self-determination justifies or entails a right on the part of liberal-democracies to control admission to membership. As I noted in the introductory chapter, it is often said that the question of the admission of outsiders to membership brings into relief a tension between two of the core commitments of liberal-democracies. On the one hand, the liberal commitment to universal freedom and equality seems to generate a strong presumption in favour of open borders and the inclusion of resident aliens as citizens. Joseph Carens and Philip Cole, amongst others, have put forward robust arguments to this conclusion.¹ Liberals have commonly advanced arguments against the exclusion of outsiders from bounded nation-states, from the value of freedom of movement and from the value of social justice and equality of opportunity. On the other hand, the democratic commitment to self-determination seems to generate a strong presumption in favour of allowing states to control admission to membership and to exclude outsiders from participating in their ‘internal’ decisions and deliberations. Theorists who stress the normative significance of shared national identity like Yael Tamir, Michael Walzer and David Miller, amongst others, have put forward strong arguments to this conclusion. Arguments in support of self-determination rights for distinct political communities commonly appeal to the value of individual and collective autonomy. However, this picture is complicated by the fact that a number of democratic theorists - such as

¹ Carens (1992); Carens (1995); Cole (2000). See also Dummett (2002) & Kymlicka (2001a).

Iris Young and Arash Abizadeh - have argued for *limiting* the ability of self-determining political communities to exclude outsiders from their 'internal' decisions on *democratic* grounds; often by appealing to a principle of democratic inclusion according to affected interests or subjection to coercion. These tensions are the background motivation for my project. Does the question of admission to and exclusion from membership entail that liberal-democracy is in some sense a paradoxical marriage of contradictory political values and principles? I will return to this question in the final section of this chapter, when I discuss the broader theoretical implications of my argument.

In the introductory chapter I identified three forms of democratic exclusion: exclusion from social membership (i.e. exclusion from entering and settling in the territory as a permanent resident), from citizenship (i.e. full and formal membership in the polity) and from participatory membership (a right to have a democratic voice in the 'internal' decisions of other political communities). I then identified six different accounts of the value and practice of self-determination that would provide the framework for the ensuing argument: *liberal nationalist, identity liberal, liberal communitarian, multicultural/republican, cosmopolitan/discourse theory* and *agonistic*. Chapters 2 and 3 have discussed principally arguments from self-determination for controlling admission to social membership and citizenship, whilst Chapters 4 and 5 have discussed principally arguments from self-determination for extending participatory membership to affected outsiders. Chapter 6 has discussed the possible merits of thinking through the relationship between self-determination and political membership from the perspective of agonistic democratic theory.

I began Chapter 2 by addressing the cultural account of self-determination put forward by the liberal nationalist Yael Tamir. For Tamir, the value of national identity to individual autonomy grounds a right on the part of self-determining national communities to exclude those outsiders deemed unable or unwilling to endorse and participate in the central tenets of that identity, which is said to include shared values, beliefs and practices. In my critical discussion I identified a number of tensions and inconsistencies in Tamir's argument, which in turn cast doubt on her defence of exclusion from the value of national self-determination. For example, whilst national identities are characterised by Tamir as being 'pluralistic' and capable of accommodating normative diversity, her argument for excluding outsiders on the grounds of their cultural identity and/or value commitments would seem to be predicated on the idea that national identities are homogenous and that the host community is united in its values and beliefs. This objection, with others, suggests that the tension that Tamir identifies between freedom of movement and national self-determination is exaggerated within the terms of her own theory.

I then looked briefly at the discussion of immigration and national identity put forward by Will Kymlicka. He argues that restricting admission to social membership may be justified as a means of protecting the interest that the current members have in the preservation of their 'societal culture', which encompasses a shared language and common participation in shared political institutions, but not shared values or beliefs in any thick sense. In response, I argued that Kymlicka's concern with protecting societal culture can be met by internal measures designed to encourage the socio-political integration and naturalisation of immigrants.

In the final section of Chapter 2, I focused on the identity liberal position on democracy and exclusion. Identity liberals argue that high levels of immigration combined with multicultural policies that are permissive towards non-liberal or anti-democratic values and cultural practices can result in the corruption of the democratic system from within. On the identity liberal view, the potential threat that immigration and multiculturalism pose to democracy grounds a right on the part of host communities to impose culturally assimilationist admissions policies and to exercise powers of deportation. I argued against this position firstly on the grounds of consistency. A political community nominally committed to universal equality should be prepared to apply the same social membership and citizenship practices to both resident aliens and prospective migrants that are applied to birthright citizens. I then put forward a series of arguments designed to show that the identity liberal position on membership contributes to a politically unappealing concept of identity and of democratic discourse, critique and participation.

In Chapter 3, I discussed critically the arguments for membership control from the value of self-determination put forward by Walzer and Miller. Walzer defends exclusionary powers for nation-states at their territorial borders but argues for a right to inclusion to citizenship for all settled residents. His argument here turns partly on the subject-to-the-law principle of democratic inclusion. This position on citizenship contrasts favourably with the account of the discretionary powers of political communities over admission to citizenship put forward by liberal nationalists and identity liberals. The reasons for my endorsement of Walzer's position on citizenship were developed more thoroughly in Chapter 4, when discussing Young's position on participatory membership. On the subject of admission to social membership, Walzer puts forward communitarian and democratic

arguments for excluding outsiders. In my critique I offered objections to both. The communitarian argument for closure from the value of diversity can be objected to on the grounds that regional political diversity is preserved without restrictions on movement or on membership within institutional arrangements like the federal states in the US. The democratic argument for membership control from the value of self-determination succumbs to a logical paradox, which is that it seems impossible to use democratic criteria to demarcate the political unit that has subsequent powers of exclusion.

In the second half of Chapter 3 I looked at David Miller's account of territorial rights, collective national responsibility and democratic self-determination. Miller argues that a proper understanding of the relationship between these three features of national political life sustains a right on the part of liberal-democracies to exclude outsiders from social membership. In my response, I tried to show that Miller's account of national responsibility and self-determination fails to overcome considerations from equality that weigh in favour of open borders. I then outlined the possible response that considerations of equality are more relevant to arguments for the international redistribution of wealth and resources than for opening up access to membership in wealthier countries, and that liberal-democracies can therefore 'purchase' the right to exclude. I put forward four arguments against this view, suggesting that considerations of social justice in favour of open borders cannot be assuaged straightforwardly by redistributive efforts.

In keeping with the line of argument developed in Chapters 2 and 3, Iris Young argues that the jurisdictional boundaries around self-determining political communities should be open to allow the

free movement and re-settlement of peoples. However, she also argues that those jurisdictional boundaries should be set by and (re)negotiated according to the all-affected principle of inclusion, which is an important feature of her idea of self-determination as non-domination. The primary focus of the first half of Chapter 4 was on Young's argument for re-conceptualising self-determination in terms of non-domination rather than non-interference, and for extending rights to participatory membership to affected outsiders. I argued against this position, partly on the grounds that it seems logically impossible to demarcate those who are affected by a decision or policy in terms that are consistent with the all-affected principle itself. I also argued that the self-determination of political communities could be undermined if they do not have a right to exclude affected or dominated outsiders, because affectedness or domination as jurisdictional rules threaten to undermine the existence of stable, territorially bounded democratic jurisdictions.

In the second half of Chapter 4 I continued my discussion of the merits of the subject-to-the-law principle of demarcation. I began by arguing against extending the concept of subjection to encompass subjection to coercion. I then put forward a way of combining the subject-to-the-law principle with the all-affected and all-coerced principles in a way that is designed to reap the benefits of the clarity and determinacy of the former without foregoing the normative insights afforded by the latter two. Finally, I pointed out that - *contra* Young - advocating self-determination as non-interference and the subject-to-the-law principle of demarcation does not entail abandoning all forms of inter-communal negotiation around issues that transcend the borders of political communities. All it entails is that interaction and negotiation will occur *after* a decision has been made.

In Chapter 5 I discussed critically the cosmopolitan/discourse theory approach to political membership put forward by Seyla Benhabib. Benhabib argues that there is an ineliminable tension at the heart of liberal-democracies between democratic self-determination and cosmopolitan human rights, but that this can be mediated over time through 'democratic iterations' and 'jurisgenerative politics'. Like Young, Benhabib supports the extension of participatory membership to affected outsiders. I continued my critique of this position by arguing that affectedness as a jurisdictional rule is problematic for deliberative democrats like Benhabib because of their commitment to deliberation to discover normatively valid principles and policies. If - as I argued in Chapter 4 - affectedness as a jurisdictional rule requires judging the merits of an issue prior to deciding the appropriate constituency, it would seem to follow that the jurisdictional decision lacks the kind of normative validity that discourse theory demands, because the jurisdictional decision cannot logically be the outcome of deliberation amongst all affected parties. I then outlined and rejected two possible responses to this boundary problem that can be brought out of Benhabib's work. In the final section I criticised Benhabib's position on naturalisation, partly by arguing that her defence of the right of political communities to employ economic criteria in their naturalisation procedures is difficult to reconcile with her commitment to universal respect and egalitarian reciprocity.

Chapter 6 focused on the agonistic approaches to democratic self-determination and political membership put forward by Chantal Mouffe and Bonnie Honig. Mouffe argues that democracy always involves relationships of 'us/them' and that collective identities rest upon exclusion. However, at the same time, Mouffe believes that liberal-democracies will be more open to the re-interpretation of their

existing political settlements if they face up to the political nature of the necessary moments of exclusion entailed by democratic rule and collective identity. In my critical response I argued that neither the 'inclusion' nor the 'exclusion' claim stands to reason. Mouffe's agonistic public sphere seems to require the assimilation of outsiders into the dominant liberal 'form of life' as a condition of membership, and so it seems to imply similar acts of exclusion as Tamir's liberal nationalism. As for the latter argument, the idea that collective identity rests on exclusion does not ground the further claim that exclusion must necessarily consist in the denial of membership to concrete, actually existing individuals. A more accurate description of agonistic self-determination is that of a 'democracy of strangers'.

In the second half of Chapter 6 I developed further the idea of a democracy of strangers through an interpretation of Bonnie Honig's recent work on the symbolic politics of foreignness. This reading of her work led to the suggestion that democratic communities are often revitalised by the entrance of foreigners. For example, by consenting to their host regime through naturalising they provide evidence of the 'choice-worthiness' of the community they seek to join. Rather than representing a challenge to or problem for liberal-democracy, in Honig's view immigration and foreignness often *solve* certain key problems for liberal-democracies. This analysis complements my critique of arguments from self-determination for the exclusion of outsiders from social membership and citizenship, by pointing to ways in which the inclusion of foreigners can be a tool for re-invigorating democratic regimes.

My conclusion has *not* been that there are no circumstances under which there may exist a collective right to exclude outsiders from social membership or from citizenship. It is important to re-iterate the point that, when it comes to the justifiability of exclusive membership

practices, numbers *do* count. I have acknowledged that arguments for membership control have greater purchase in cases where political communities are at risk of being subject to cultural or political domination at the hands of outsiders. Nonetheless, whether or not a particular community is at risk of being overwhelmed in this way is essentially an empirical matter, and so the threat of submergence cannot ground a *general* right on the part of states to control membership. So my claim is instead the more limited one that the theorists I have discussed have difficulty in justifying a general right to control membership on the basis of the value of self-determination. It is unclear that the functions that self-determination is designed to perform (for example the protection of cultural and political diversity) and the values it is designed to further (for example the individual and collective autonomy of existing citizens) would be compromised if control over social membership and citizenship were removed from the self-determining powers of liberal-democracies.

However, if the arguments of Chapters 4 and 5 have force, they suggest that the right of states to non-interference - and so the exclusion of outsiders from participatory membership - *can* be supported by the value and practice of self-determination. I have argued that Young's attempt to construct a model of self-determination, without involving exclusive jurisdictional boundaries, is problematic. Alongside a number of other difficulties, the principle of democratic inclusion according to affected interests - which is a key component of Young's concept of self-determination as non-domination - risks undermining the existence of stable, territorially bounded political communities. If the question: "who has a legitimate claim to membership because their interests are affected?" has to precede any given decision on the part of states about how to act, then the risk is that states could be prevented from making any decisions at all. Negotiations around affected

interests could be protracted indefinitely. This problem is compounded by the logical indeterminacy involved in using the projected *outcome* of a political decision (i.e. the range of individuals who will be affected or coerced by a decision) to determine the group of individuals that get to make the decision. Self-determination does therefore seem to call for the distribution of democratic membership according to neutral and procedural criteria, and the corresponding exclusion of non-resident, non-citizens. This form of exclusion is required to preserve the stability of the jurisdictional boundary within which laws are binding upon those who authorise them.

I have argued that a similar logical conundrum undermines Benhabib's attempt to use the all-affected principle as a jurisdictional rule (a critical discussion that applies to the reading of her work that interprets her as being committed to the co-occurrence of the moral and the democratic community). Neither the teleological nor the hypothetical-deliberation responses to this problem, which I canvassed in turn, are satisfactory. The former argument is vulnerable to the agonistic critique that holds that purportedly inclusive membership procedures seem to inevitably embody alternative forms of exclusivity. The latter argument is vulnerable to the objection that imaginative deliberative procedures often work to reinforce the perspective of the powerful and privileged, whilst marginalising those whose voice and experiences are under-represented.

If valid, the upshot of my argument is that liberal-democrats should support the right to self-determination as non-interference for distinct political communities, but *not* the self-determination of their social membership and citizenship policies. This would involve prising apart self-determination from the ideal of sovereignty over border controls,

but would still entail the exclusion of outsiders from the internal decision-making procedures of distinct democratic communities.

A possible objection to my overall conclusion is that it is insufficiently attentive of the ethnic, historic and cultural differences between nation-states. As Walzer points out, “All the world is not America”.² Is it really the case that the self-determination of, say, the Danes, the French or the British would not be compromised if they lacked control over social membership and citizenship? These are nations that are said to be based upon a distinctive shared historic and cultural background, and the protection of that cultural background may, in turn, be said to legitimate membership controls in order to preserve their collective right to self-determination. In response, I should note that my overall argument is compatible with recognising the justifiability of naturalisation procedures that are designed to ensure integration into *this* particular nation (whichever it may be), with its particular public and political culture, history, customs and language. Learning about the history of one’s host country, its language and its political procedures and institutions seem to be reasonable requirements for accessing citizenship in countries where there is said to be a strong collective identity based on these sorts of cultural factors. But for specifically *liberal* democracies, these measures are only justifiable in so far as they are also applied to natives, otherwise the universalist and egalitarian principles upon which their mode of governance is based turn out to be chimerical.³ As I point out in the following section, the UK policy of mandatory citizenship education for native-born citizens as well as immigrants is to be commended for at least moving in a direction which is congruent with this normative logic.

² Walzer (2001).

³ See Chapter 2, section 2.6 & Chapter 5, section 5.5 of this thesis.

7.2: Policy Implications

This thesis has dealt primarily with arguments and theories at a certain level of abstraction from real-world politics. What difference might these arguments make to actual practice? I want to focus now on the policy implications of my theoretical analysis by discussing two recent documents outlining UK policy on citizenship and immigration: the 2002 White Paper ‘Secure Borders, Safe Haven’⁴ (which I also referred to briefly in the introduction to Chapter 2), and the 2006 Home Office document ‘A Points-Based System: Making Migration Work For Britain’⁵. I will also refer at points to other UK policy developments as well as statements made by senior UK politicians.

The White Paper ‘Secure Borders ...’ was designed to mark a clear break in the restrictive immigration policies of previous UK governments, promising “a new modern approach to immigration which recognised its contribution to British economic and social life”.⁶ Introduced as part of New Labour’s focus on social inclusion and inter-communal cohesion in the aftermath of racial tensions and civil disturbances in Bradford, Oldham and Burnley in the spring and early summer of 2001, the paper stresses the need to encourage the integration of immigrants through ‘education for citizenship’ and ‘citizenship ceremonies’, with an emphasis on the need for immigrants to adhere to what are said to be core British values.⁷ Despite the new focus in the paper on promoting the inclusion to citizenship of settled migrants and the promotion of economic migration, according to Rosemary Sales the document is congruent with Labour policy on

⁴ Home Office (2002).

⁵ Home Office (2006).

⁶ Sales (2005), p459.

immigration since the 1960s in so far as it stresses the need for the control and secure management of migration into the country.⁸

William Walters agrees that “the White Paper continues a relatively well-established convention that sees immigration as a threat to domestic order that calls for careful management”.⁹ In Walter’s analysis, the rhetoric of securitisation put forward in the document reflects the idea of ‘domopolitics’:

Domopolitics implies a reconfiguring of the relations between citizenship, state and territory. At its heart is a fateful conjunction of home, land and security. It rationalizes a series of security measures in the name of a particular conception of home ... the home as hearth, a refuge or sanctuary in a heartless world; the home as *our* place, where we belong naturally, and where, by definition, others do not ... We may invite guests into our home, but they come at our invitation; they don’t stay indefinitely ... Home as a place to be secured because its contents (our property) are valuable and envied by others. Home as a safe, reassuring place, a place of intimacy, togetherness and even unity, trust and familiarity.¹⁰

From this passage, it is clear that domopolitics is the direct antithesis of a democracy of strangers. In Walter’s view, ‘Secure Borders ...’ reinforces the idea that ‘our’ nation is ‘our’ home which must be protected from outsiders. Should ‘we’ wish to invite outsiders in, ‘we’ may do so, but - as we saw in the discussion of Benhabib on Kant - such acts of hospitality are entirely at the discretion of the existing members, and there is no expectation that guests will “stay indefinitely”. In Chapters 2 and 3, I argued that Tamir, Tebble,

⁷ *Ibid*, p455.

⁸ *Ibid*, p449.

⁹ Walters (2004), p239.

¹⁰ *Ibid*, p241

Kymlicka, Walzer and Miller all fail to provide a defensible normative account of self-determination that might sustain the validity of this kind of domopolitics. The ideal of kinship underlying this concept of home fails to do justice to the internal heterogeneity of liberal-democracies. We have seen that whilst Tamir acknowledges the internal diversity within national identities, she wants to protect one particular interpretation of national identity from being corroded through the entrance of outsiders. But if - as she herself states - national identities can accommodate “extreme normative disagreement”¹¹ amongst the existing members without threatening their autonomy, there seems to be little basis within her theory of national self-determination for the defence of immigration restrictions which are designed to prevent the entrance of further diversity. Kymlicka, for his part, has shown through his analysis of immigration politics in Canada and the United States that harmonious socio-political integration can be achieved through *internal* measures designed to encourage naturalisation, language training and political participation. This analysis undermines the rhetoric of securitisation at the border which is promulgated by the idea of domopolitics behind ‘Secure Borders ...’.

Walzer’s communitarian account of political community suffers from a similarly indefensible idealisation of home life. It suggests that “we belong naturally” in ‘our’ own political community. In so doing, it overlooks the point that the identity of the ‘we’ is fractured, internally divided and heterogenous. As we have seen, agonistic democrats argue that home is never simply “a place of intimacy, togetherness ... unity, trust and familiarity”. Honig’s analysis of the symbolic politics of foreignness suggests, in contrast to the rhetoric of ‘Secure Borders ...’,

¹¹ Tamir (1993), p90.

that immigrants should not be seen as a threat to the democratic vitality of the nations they seek to join. Her account of the role of ‘foreign-founders’ and ‘consenting immigrants’ suggests that the very *alterity* of newcomers is often the key to the way in which they reinvigorate democratic regimes, by providing evidence of their choice-worthiness.

Miller’s discussion of collective national responsibility, democratic self-determination and political membership is grist to the mill for proponents of domopolitics. It is designed to show that ‘our’ home is ‘our’ collective property, and that ‘we’ should both shoulder the burdens and enjoy the benefits of our self-determined decisions to the exclusion of outsiders. I argued against this position, in part by disputing the closeness of the ‘fit’ between the actions of states and the collective will of nations. Miller’s position is also supportive of the more explicitly economic approach to membership controls outlined initially in ‘Secure Borders ...’ and developed more thoroughly in the recent UK policy document ‘A Points-Based System ...’. In contrast to the language of shared British values which is prevalent in ‘Secure Borders ...’, this document places greater emphasis on the importance of the skills and resources that migrants possess and the possible contribution they could make to the domestic economy. As we saw in the introductory chapter, the core message of the document is that citizens will be able to exercise unilateral control over immigration according to their self-defined economic needs and goals:

(...) this new points-based system will allow employers and those in educational institutions to take ownership of migration to this country. They, rather than just the Home Office alone, will be able to vet who comes into the UK

according to the skills and talents of individuals they feel they need to enhance their sector.¹²

It seems that Miller's discussion of self-determination is designed explicitly to support this kind of approach to immigration. The idea of a points-based system of migration control with highly skilled labourers set on the quickest path to social membership and citizenship also fits neatly with Benhabib's defence of economic criteria for citizenship. However, I have argued that neither theorist has shown convincingly that liberal-democracies should regard economic criteria for admission to membership as a normatively unproblematic manifestation of their right to self-determination. In Miller's case, his argument that self-determination would be 'hollowed out' if the host community were unable to set restrictive border controls because free movement could make the community's self-defined goals harder to fulfill (which includes the way in which migration might "change ... the mix of skills available in the workforce")¹³ is undermined by the evidence of heterogeneous preferences for state policy in both the existing body of citizens as well as migrants. As for Benhabib, I have argued that her defence of economic criteria in the selection of new immigrants is difficult to reconcile with her commitment to universal respect and egalitarian reciprocity. I also noted that Walzer's discussion of the exclusion from citizenship of Turkish guest workers in Germany illustrates the potentially illiberal and undemocratic implications of the kind of 'open-borders-but-exclusive-citizenship' policy that Benhabib's position seems to permit. The points-based approach introduced in 'Secure Borders' makes access to residency status, social rights and citizenship much harder for those migrants in low skilled jobs.¹⁴ The *Highly Skilled Migrant Programme* outlined in

¹² Home Office (2006), Foreword.

¹³ Miller (2007), p222.

¹⁴ Sales (2005), pp. 454-455.

the document offers residency status in Britain to “those at the top of their chosen profession”,¹⁵ whilst those without the skills required are offered short-term stay, are denied the right to bring in dependents and their access to social rights is restricted. From the Walzerian perspective on citizenship which I have argued in defence of, the clear distinction drawn in ‘Secure Borders ...’ between skilled and unskilled migrants and the differential rights accorded on that basis is problematic, because it contradicts the subject-to-the-law principle of demarcation. More broadly, the whole notion of ‘earned citizenship’ for migrants - emphasised by Gordon Brown in a 2008 speech to members of the third sector and local government representatives in North London,¹⁶ and also reflected in David Blunkett’s introduction to ‘Secure Borders ...’ where he welcomes only “those who have a contribution to make to our country (i.e. skilled migrants)”¹⁷ - seems hard to reconcile with the automatic acquisition of citizenship for some individuals at birth in a society nominally committed to universal equality.¹⁸

However, as I noted above my argument *is* compatible with a formal period of residency as a requirement of naturalisation, as well as forms of citizenship education and language training, but only in so far as these measures are also applied to those born within the territory or born to citizen parents. From this perspective, the introduction in 2002 of mandatory citizenship education in UK schools is to be commended for its even-handedness. The implied message is that simply being a native-born citizen is insufficient in itself to guarantee the possession

¹⁵ Home Office (2002), p43.

¹⁶ Brown (2008).

¹⁷ Home Office, (2002).

¹⁸ Sales (2005, p459) also questions the compatibility of the system of immigration control outlined in ‘Secure Borders’ with the liberal “universalist commitment to the moral equality of humanity”, quoting

and exercise of the virtues of citizenship, so that *both* foreigners and natives are required to undertake some kind of training in preparation for the exercise of their democratic voice. This seems a particularly valid message that should guide UK policy thinking with regard to questions of social cohesion and political stability, given that the majority of the individuals of Muslim faith who were involved in the civil unrest in the north of England in 2001 were not immigrants, but in fact British born-citizens.¹⁹ Citizenship education for native born citizens helps to dispel the idea - promulgated by identity liberalism - that migrants alone pose a threat to the competent and responsible native citizen body. In a similarly even-handed manner, 'Secure Borders' stresses that the goal of encouraging social and political inclusion needs to be applied to native citizens as well as immigrants. In particular, it expresses concerns about "white working-class communities whose alienation from the political process, along with their physical living conditions and standards of living, leave them socially excluded".²⁰ The recognition that native citizens as well as immigrants can suffer from social and political alienation provides a corrective to Walter's characterisation of 'Secure Borders ...' as an instance of domopolitics exclusively. It also provides a corrective to the concerns that identity liberals place exclusively on the potentially disruptive consequences of the social and political alienation of immigrant communities. In their application of broadly similar procedures, values and standards to natives and newly arrived migrants alike, these two aspects of UK policy and governmental rhetoric seem to me impeccably liberal in principle.

Cole (2000), p2. See also Wilcox (2004), p580-581.

¹⁹ FAIR (2002), p2.

²⁰ Home Office, (2002), p10.

As we have seen, both Young and Benhabib dispute the claim that subjection to the law should be the criterion of inclusion in liberal democracies. They argue instead that participatory membership should be extended to affected or dominated outsiders. Institutionally, this would lead to the creation of either supra-national or global democratic fora, or else a federated system of interlinking and overlapping jurisdictions with access to regional or global governing bodies. If my arguments in Chapters 4 and 5 have force, they suggest that arguments from self-determination provide robust grounds for resisting these moves towards transnational or global democracy on the grounds of affectedness of coercion. Instead, more effort should be made to strengthen existing forms of transnational or international legislation dealing with political issues of transnational or global scope. Naturally, my argument would hold that the individuals who would be bound by these laws should have a say in their formulation. So the subject-to-the-law principle would strongly support the democratisation of transnational law-making institutions like the European Union. In Chapter 4, I pointed out that my argument for self-determination as non-interference (and the corresponding right of liberal democracies to exclude outsiders from participatory membership) is compatible with recognising the need for interaction and negotiation between political communities on issues that may impact jointly on their respective interests. But I have suggested that for this to be a *logically coherent* and *politically feasible* enterprise which is compatible with democratic self-determination, rights to participatory membership must first be awarded according to the subject-to-the-law principle. However, I have recognised that a further condition for the normative feasibility of my argument is that comparatively wealthy states take credible efforts to fight global distributive inequality. Otherwise the outcome of negotiation, log-rolling, etc, is liable to serve only the interests of the more powerful and prosperous liberal democracies.

7.3: Theoretical Implications

What broader theoretical implications might be gleaned from the argument of this thesis? What kind of light do the theories, arguments and counter-arguments discussed here shed on the idea that liberalism and democracy collide fatally on the subject of membership controls? Abizadeh observes that:

The tendency in the received literature is to frame debates in the ethics of borders in terms of a conflict between the individual “liberal” right to freedom of movement and the collective “democratic” right to self-determination - and then to weigh the liberal and democratic reasons for and against open borders.²¹

If - as I have argued - democratic self-determination should not and need not encompass the right to exclude outsiders from social membership and citizenship, then the liberal presumption in favour of freedom of international movement defended by authors like Carens and Cole need not be thought of as running up sharply against the democratic commitment to the preservation of the territorial and jurisdictional boundaries of political communities. According to my argument, those boundaries are still required to protect the right of liberal democracies to non-interference, but this thesis suggests that self-determination is compatible with those boundaries being open to allow the free passage and (re)settlement of individuals. In contrast to what has become a prevalent line of thinking with regard to the politics of membership in liberal-democracies, I argue that the value of free movement championed by liberalism is compatible with the value of self-determination championed by democrats. Democrats can join

²¹ Abizadeh (2008), p54.

liberals in campaigning for greater porosity in borders without sacrificing what is arguably their most cherished ideal. What Benhabib and Mouffe identify as the ‘constitutive tension’ at the heart of liberal-democracies, between liberty and equality, may not be as intractable as they suggest, at least as far as the topic of membership is concerned. Whelan has argued that whilst liberalism calls for “the reduction if not the abolition of the sovereign power of states ... especially those connected with borders and the citizen-alien distinction”, democracy “practically requires the division of humanity into distinct, civically bounded groups that function as more or less independent political units”.²² According to the argument of this thesis, Whelan is incorrect in so far as we understand his claim to be that democracy calls for differentiated jurisdictions that function to exclude outsiders from the territory and from citizenship, and that this commitment sets democracy in opposition to liberalism. But if we understand his claim to be *simply* that democracy calls for differentiated jurisdictions, then this is not incompatible with my argument that those jurisdictions are required for the self-determination of distinct political communities, but that they can nevertheless be open to allow the free movement and re-settlement of individuals without compromising self-determination.

As we saw in Chapter 4, Abizadeh has argued that as far as political membership is concerned, both liberal and democratic considerations point to the need for border controls to be jointly negotiated between territorial insiders and outsiders: “(...) a state’s regime of border control could only acquire legitimacy if there were cosmopolitan democratic institutions in which borders received actual justifications addressed to both citizens and foreigners”.²³ An implication of my

²² Whelan (1988a), p16-17, p28.

²³ Abizadeh (2008), p48.

argument in this thesis is that if such democratic cosmopolitan institutions were organised in this way, appeals to self-determination in order to justify a regime of border controls should be rejected. But I have also argued against the all-coerced principle of demarcation which Abizadeh appeals to in order to substantiate his argument for shared decision-making authority over borders in the first place. In my view, the construction of cosmopolitan democratic institutions cannot be supported on the grounds of coercion; but part of the potential sting is removed from this conclusion because self-determination does *not* in my view support exclusive border controls in the first place.

My conclusion regarding the compatibility of democracy and liberalism on the subject of social membership and citizenship may at first sight seem radical. It may seem to have implications about the desirability of greater porosity in borders which are utopian given the “peculiar significance” of membership controls in the current status of contemporary international law and nation-state sovereignty. However, it is worth bearing in mind that the current bureaucratic approach of liberal-democracies towards the restriction, control and/or management of immigration is a relatively new phenomenon, and that extensive freedom of movement for individuals has existed in the past²⁴. Bernard Porter observes that “For the best part of the 19th century the British government deliberately denied itself any control over immigration, and appeared indeed for the most part to take no interest in it”.²⁵ In the US, federal regulation of immigration dates from the 1880s²⁶ and the practice of keeping federal records of immigrants dates from the 1820s.²⁷ As Walters points out:

²⁴ Cole (2000), p30.

²⁵ Porter (1979), p4; quoted in Walters (2004), p250. See also Seglow (2006a), p3.

²⁶ Castles and Miller (1993), p45; quoted in Walters (2004), p250.

²⁷ Bernard (1998), p55.

It is tempting to assume that ... border controls are a natural and eternal feature of political life. Indeed, the case for 'upgrading' border control is frequently made in terms of 'protecting' and 'preserving' the 'sovereignty' of the state, as though sovereignty were inconceivable without border control. Yet ... it seems that administrative barriers to migration between nations in nineteenth century Europe were quite minimal.²⁸

As I noted in the introduction, liberal political theory has largely been silent on the question of membership controls. A rare counter-example can be found in Henry Sidgwick's *The Elements of Politics*, written in 1897, where he argues that:

A State must obviously have the right to admit aliens on its own terms, imposing any conditions on entrance or tolls on transit, and subjecting them to any legal restrictions or disabilities that it may deem expedient. It ought not, indeed, once having admitted them, to apply to them suddenly, and without warning, a harsh differential treatment, but as it may legitimately exclude them altogether, it must have a right to treat them in any way it thinks fit, after due warning given and due time allowed for withdrawal.²⁹

However, in the last thirty years or so theorists of both liberal and democratic persuasion have become increasingly concerned about the justification of practices of membership control from the perspective of a philosophy of universal freedom and equality, in a way that contrasts strikingly with Sidgwick's relatively straightforward analysis. Liberal

²⁸ Walters (2004), p250.

²⁹ Sidgwick (1897), p248.

nationalists, identity liberals, democrats and communitarians have responded to these concerns by appealing primarily to the value of self-determination. If my arguments in this thesis have force, their responses should be rejected; suggesting in turn that liberalism and democracy coincide on the subject of social membership and citizenship controls. However, this thesis maintains that democratic self-determination *does* require a stable and determinate jurisdictional container, which today is supplied, and in all likelihood will continue to be supplied, by a nation-state. But it need not necessarily be so. Other forms of democratic organisation and participation are feasible and desirable, given that the self-determined decisions of democratic associations can and often do have consequences that can impact negatively on the rights and interests of individuals who are disenfranchised, either because they are situated outside the jurisdiction of the state making the decisions in question or because they lack citizenship status. But whether democratic deliberation and decision-making is carried out nationally, sub-nationally, transnationally or globally, according to the argument of this thesis those who should be accorded participatory membership in those deliberations and decisions should be defined according to those who will be bound by the laws issued by the governing body in question.

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