

Legitimate founding of political community:

The usefulness of global democracy¹

Abstract

Globalization, foreign intervention, and failed states have drawn new attention to theoretical issues of how political communities can be legitimately founded and what it means for a people to be self-governing. In this paper I will challenge an argument in this debate that democracy has no role to play at the moment of founding new political communities. In contrast to this commonly held position, I will argue that political communities can be democratically founded if consented to by people within as well as beyond the boundaries inherent in the foundation, ultimately involving humanity as a whole or all possible contesters of political decision.

Hans Agné
hans.agne@statsvet.su.se

Department of Political Science
Stockholm university
Office

Swedish Institute of
International Affairs

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Globalization, foreign intervention, and failed states have drawn new attention to theoretical issues of how political orders and communities can be legitimately founded, and what it means for a people to be self-governing. Political founding is part of what goes on in international rebuilding of post-conflict societies, as in Darfur or East Timor; in the emergence of new political structures beyond the nation-state, as in the EU or the UN; and in the involvement of third parties in the shaping of new states or constitutions partly by force, as in Kosovo or Iraq. In perhaps less visible ways, there is a politics of founding involved also in transnational developments, such as migration and the rise of stakeholder forums or religious networks. In different ways, these processes all bear the potential of contributing to the making of new political orders and communities.

How then should political foundings proceed in order to be legitimate? The last decades have seen a growing interest in democracy as a source of legitimacy in politics beyond the nation-state (e.g. Held, 1995; Bohman, 2007; Archibugi, 2008; Macdonald, 2008). In relation to the issue of founding, however, political theorists have so far provided very pessimist answers: democracy does not lend itself to support any kind of political founding. There are different variants of the argument but a common assumption is that the notion of democratic founding is paradoxical because of the difficulty or even inability of the people to decide democratically on who they are (e.g. Whelan, 1983: 41; Michelman, 1999: 33-42; Mouffe, 2000: 43-45; Näsström, 2003: 808; Doucet, 2005: 137-55; Benhabib, 2006: 35; Honig, 2007: 2-3; Kalyvas, 2008: 197-98; Bartelson, 2009: 25; cf. Rousseau, 2003: 27). Since democracy means rule by the people, there can be no democracy prior to the delimitation of a people; and since there can be no democracy prior to the delimitation of a people, the delimitation of the people cannot itself be democratically decided, according to this argument. Some conceive of the founding paradox as a productive force in politics (e.g. Näsström, 2007) or a reason to continually negotiate the conflict between included and excluded people (e.g. Benhabib, 2006). Others think that it threatens the possibility of constitutional democracy (e.g. Olsen, 2008, who believes that the paradox can be avoided however) or that it limits the legitimacy even of existing democratic states (e.g. Whelan, 1983).

In any case, I will argue in this article that the notion of democratic founding is not in itself paradoxical, and that the founding of new political orders is not necessarily undemocratic. That which is problematic in founding decisions according to the paradox argument, namely that some people are excluded from the politics of deciding who the people are, is not a

logical predicament inherent in all founding decisions. It is a condition which emerges only where they who will be excluded from the political order once founded are not allowed to influence the boundary drawing in the same ways as are they who will be included. Hence a political order or community founded through procedures which provide equal participation to people who will live within as well as beyond the political order once founded is not created in any perplexing opposition to the concept of democracy from which the paradox of founding emanated in the first place. The paradox of founding may be a serious problem as long as our reasoning is informed by nationalist or republican assumptions that some people should or must be excluded at the moment of founding new political orders or communities. The truth, however, is that we need not exclude anyone. The founding of political orders or communities is democratic if and only if decided in procedures which give equal opportunities of participation to people who will live within as well as beyond the boundaries inherent in the foundation.² In short, the paradox of founding does not exist in global democracy.

This argument is directed against the claim that democratic founding is paradoxical in the sense of a logically mistaken concept. It does not challenge the related views that legitimate institutions must be based on a public spirit, or a common good, which itself presupposes legitimate institutions (e.g. Rousseau, 2003: 27) or that legitimate laws originate from within a constitution whose own legitimacy is either simply presupposed or derived from a non-constitutional source (as disagreed over for instance by Kelsen and Schmitt, see Dyzenhaus 2007: 131-34).³ The problem addressed in this paper, by contrast, is one of inclusion and exclusion. Theorists concerned with the paradox of founding in democratic theory have suggested for instance that ‘the boundaries of democracy cannot themselves be democratically legitimated’ (Näsström, 2003: 808) or that ‘democracies cannot choose the boundaries of their own membership democratically’ (Benhabib, 2006: 35). As noted, some conceive of this argument as limiting the legitimacy of democratic states or constitutions already founded:

² Democracy may also be seen to require, for instance, protection of basic human rights and formation of public opinion in normatively acceptable ways. I bracket those issues here in order to give more attention to the problem which has been at the centre of discussions on the democratic paradox, namely inclusion and exclusion.

³ The paradox of democratic founding is more fundamental than the paradoxes produced by republican and legal theory. The issue of what makes a constitution legitimate has itself often been resolved by reference to the constituent power of the people (e.g. Ackerman, 1991: 6; Schmitt, 2008: 78), i.e. by invoking the resources of democratic theory. Classical republican presumptions, for their part, have lost much relevance as national or international legislation today prevail even before the creation of new political orders (in analogy with the American but not the French revolution, as interpreted by Arendt 1990). Moreover, the social preconditions for legitimate institutions are increasingly viewed as an empirical, not a conceptual, question (Zürn, 2000; List and Koenig-Archibugi, 2010).

‘however impeccable democratic decision-making may be within a given community, the outcomes are in a sense determined by the previous and inescapably undemocratic decision that defined the community in the first place.’ (Whelan, 1983: 41) Because the paradox is unavoidable, others emphasize that we should recognize what it does to our understanding of politics rather than making vain attempts to avoid it: the paradox is the very ‘condition in which we find ourselves when we think and act politically’ (Honig, 2007: 2).

According to these formulations, the paradox arises equally in the founding of new states, with new delimitations of territory or citizenry, and the founding of new constitutions in existing states, without any significant changes in existing territory or citizenry. Before a people can govern itself democratically, there can be no democratic decision that this people – rather than some other – should govern itself. And once people govern themselves democratically, their procedures will operate on an undemocratic policy of exclusion. In short, the founding of democracy – in new states as well as in new constitutions in existing states – is a paradox. Democracy is possible only when we do not consider its founding in the past, and when the moment of founding cannot be forgotten – because a new state is being created here and now – war and irresolvable conflict is a permanent risk, according to the paradox argument.

The paper will be structured in two parts. In the first part I will review some earlier attempts at solving the democratic paradox and conclude that nationalist, contractualist, and “substantialist” theories of self-founding have been unsuccessful in this regard. The second part elaborates my proposal as to why global democracy does not produce a founding paradox.

Earlier attempts at solving the democratic paradox

A normative resource in the concept of the *nation* is that it captures something which can exist before and independently of the state. The question of who should participate in the making of a democratic state will then have an obvious answer: members, and only members, of the nation (Sieyès, 2003: 136-37; Smith, 2008: 139-41; cf. Yack, 2001: 531-32).

Nationalism can therefore be invoked both as a solution to the founding paradox of

democratic theory and as an explanation of why impositions of democracy from the outside of a particular nation are impossible.

However, the nationalist theory of legitimate founding only pushes the question of the democratic paradox one step back in the chain of concepts and historical events. Rather than a paradox in the founding of democratic states we would be faced with an equivalent difficulty in the founding of nations. Is there any democratic legitimacy in the founding of a particular nation? Since the nationalist strategy for circumventing the democratic paradox consist in stipulating that the nation is historically prior to the founding of democracy, it must answer this question in the negative. But if a nation has not been democratically founded, how could it confer such legitimacy on a state? Once again we would be stuck in the difficulty of deriving democratic legitimacy either from an entity whose foundation is undemocratic, or from a democratic state which did not yet exist at the moment whose democratic legitimacy is at stake. On a closer inspection, therefore, nationalism offers no solution to the founding paradox of democratic theory, and for the same reason it cannot be invoked as an explanation of why the founding of states by involvement of foreigners is particularly problematic from a democratic point of view.

One may notice that the problematic premises of nationalism are very much alive in those interpretations of deliberative democracy which presume that individuals alter their preferences in view of their collective identity. While much work on deliberative democracy sets out a conception of legitimacy according to which preferences change on the basis of general principles rather than bounded collective identities, the practical relevance of collective identities is generally admitted. According to Habermas (2001a: 107), for instance, any 'democratic community' must 'distinguish between members and non-members' and form 'a collective identity, in the sense that it interprets and realizes [democratic constitutional] principles in light of its own history and in the context of its own particular form of life'. As long as a collective identity presumes the existence of boundaries between groups of human beings, a democratic theory which suggests that legitimacy derives from the formation and realization of preferences in view of a particular collective identity will be unable to explain the legitimacy of those boundaries (for a contribution to deliberative democratic theory which is clearly not susceptible to this objection, see Cheneval, 2006).

In the vision of *social contract theory*, the founding of legitimate, or even democratically legitimate, states has been seen to consist in a unanimous vote among the contracting parties. The reason for resorting to unanimous voting is that majoritarian democratic procedures appear insufficient. If people are born free, why should the majority decide and force its will on the minority? The only condition under which this can be right, Rousseau (2003: 8) argued, is that every individual has agreed to the use of majority voting 'on one occasion at least'. Because a unanimous vote guarantees that no person is forced by another, according to this argument, it implies a democratic foundation.

However, adherence to unanimous voting does not address the objection that the group of people who was permitted to participate in the unanimous decision could and perhaps should have been composed in some other way – most importantly that someone who was in fact excluded should actually have been included. This would perhaps not trouble the prospective citizens of the state, all of whom must have agreed with the ways in which the people was delimited for the state to be founded in the first place, but it will be a devastating objection against the legitimacy of the state in the views of all others. People on the outside of the state will simply have no reason to accept its coming into being by a process from which they were excluded. This does not pose a serious problem as long as states are isolated from each other, as they might have been for early contractualists. Today, however, there are no isolated states.

A more sophisticated version of the contractualist position adds to the idea of unanimous voting that of a voluntary association (Locke, 2003: 141-42; Nozick, 1974: Ch. 10; Habermas, 1996: 124-26 *et passim*). A democratic founding of states modeled on that principle implies that all individuals are free to initiate other associations (states) than those in which they find themselves in the status quo, and that everyone is allowed to migrate to all other associations (states) which are willing to accept him or her as a member.

From the perspective of democracy as equality in power among people, this is an insufficient criterion, however. Not only does the principle of voluntary association risk leaving many people outside of all associations, but more seriously it will bias the politics of founding towards the associations which exist in status quo. Since voluntary associations are free to decline applications for membership (Nozick 1974), the conditions for changing the composition of existing voluntary associations will be set by the associations which exist already, rather than by everyone subject to the reproduction of their boundaries. That is, the

principle of voluntary association has no means for addressing an objection that decisions regarding what people will be included in a particular state are themselves premised on a controversial policy of exclusion. The normative flaws in the principle of voluntary association become visible in particular when applied to the founding of territorial states, rather than say sport clubs or labor unions, as it will then determine people's access to natural resources and accumulated wealth (Beitz, 1979: 109). But in any case, it is undemocratic to delimit the people through a political process which begins with the exclusion of some people.

Moreover, even if someone would come up with a doctrine of voluntary association stipulating (in clear opposition to liberal theory) a right of all individuals to join every existing political association, there would not be a democratically justifiable solution. The practical difficulties of such an adapted doctrine apart, the founding of the political communities wanted by the people would come into being only through migration – and to impose migration as a condition for exerting influence in the politics of founding is surely not supported by any theory of democracy. Hence the ideas of voluntary association and unanimous voting do not overcome the founding paradox in democratic theory; and as a consequence, not observing the principle of voluntary association – as a democratic intervention would surely not do – does not violate a successful democratic theory of political foundation.

What may for lack of a better term be referred to as '*substantialist*' solutions to the founding paradox of democratic theory consist in defending a substantive position on what people should be included in a particular state. In contrast to the nationalist and contractualist strategies, the '*substantialist*' position does not imply that impositions of democracy from the outside are impossible: it makes an argument about the desired result, not about the procedures through which to get there. But as a proposed solution to the democratic paradox, '*substantialism*' is worth considering in its own right. Different variants of the position may suggest that democratically legitimate states include those whose interests are potentially affected by their decisions (Goodin, 2007), those whose identities have been significantly shaped by these states (Smith, 2008), those whose inclusion contributes most to the autonomy of everyone inside and outside the boundaries of the state (Agné, 2006), or those whose inclusion creates or restores conditions for appropriate principles of justice (Beitz, 1979: 112; Buchanan, 2004).

Substantialist arguments are undoubtedly important when deciding on alternative delimitations of a people. However, as solutions to the paradox of founding in democratic theory they are ultimately insufficient. The aim of democratic theory, as imbued in the paradox of foundation, is not to identify what decision should be made, but to identify procedures for dealing with the pluralist predicament of politics that people will often disagree over what should be done, and that they will consequently have to make their decision by means of political procedures. The democratic paradox does not imply any impossibility at furnishing morally grounded views about what people should compose the citizenry of a particular state; it consists in an alleged impossibility of determining which people should make that decision in case of persisting disagreement about who should be included. The distinction is important because not only philosophers, but citizens in general, may diverge across substantive moral positions like those listed above as well as the terms of their empirical application. A solution to the democratic paradox must therefore explain the availability of a democratic procedure for defining the people of a state, not the availability of a decision alternative that is allegedly superior to all others and which is supposed to make political procedures superfluous. That is, a convincing solution to the problem of inclusion can, within a pluralist society, make no recourse to a ‘transparent objectivity of ultimate moral insights.’⁴

To sum up, neither nationalism nor contractualism or substantialism provides any solution to the paradox of founding in democratic theory. However, the very existence of these theories suggests that the paradox is not necessarily inescapable. Moreover, in view of the specific failure of both nationalism and contractualism to account for the interests of people beyond particular states, it is worth examining whether some alternative theory can explain the possibility of democratic founding in global politics. I turn to that question in the next section.

⁴ Habermas (2001b: 774). Habermas also elaborates a contractualist solution of the paradox of foundation: the making of a constitution is seen by him as an inter-generational learning process through which people detach themselves from their primordial beginnings and build their identity on more abstract principles regulating democracy and human rights (ibid. p. 768). The theory of voluntary association, rejected above, is one necessary premise of this theory (p. 776) but more seriously for my purposes, Habermas provides only a retroactive justification of the founding process (for another recent attempt at overcoming the paradox retroactively, see Olsen 2007). By definition, such justifications are limited to states or constitutions founded in the past. Hence for anyone interested in the legitimacy of ongoing and future efforts at founding new states or constitutions, as everyone concerned for instance with the real political problems of democratic foreign intervention or the making of supra-national structures must be, theoretical attention must be directed elsewhere.

A global principle of democratic founding

When the boundaries of a state are about to be decided, the first option is to make the decision at a political level which is agreeable to people within and beyond the boundaries about to be decided. This can be a national level, a regional level, or some other territorial level.

However, if there is permanent division over who should make the decision, we must identify a political procedure whose democratic legitimacy is safe from objections that the procedure operates on an illegitimate policy of exclusion. A reasonably safe way of observing this criterion would be to decide on the founding of territorially delimited states democratically at the global level, i.e. to include humanity as a whole in the politics of founding either a world state or a territorially or functionally delimited state (see Bartelson, 2008 for a similar argument). Inclusion in the global demos are then taken to imply a right, no obligation, to participate in the making of collective decisions, but an obligation to comply with the globally made decisions.

Inclusion of humanity as a whole is theoretically attractive in part because it does not produce a boundary problem equivalent to that of other foundational categories, e.g. particular nations or classes. Even the most related ontological domains beyond mankind – which in addition to animals and plants might perhaps be conceived of as including, for instance, angels, gods, UFOs, and self-operating units of artificial intelligence – do not include entities which can themselves engage in political contestation (noticing their potential existence is important nonetheless; see Wendt and Duvall, 2008). Human beings may have moral obligations to take non-human interests into consideration, but in relation to the paradox of foundation in democratic theory we are not primarily concerned with moral responsibility but with the procedural issue of who are in fact able to participate in politics. And in that respect human beings are unique. Hence the reason for including humanity as a whole in the politics of founding is not that biological humanness is particularly valuable, but that everyone has a right to contest political decisions.

But why should the term *everyone* refer to all human beings rather than to all members of some other group? Perhaps inclusion of humanity is just another proposal in an endless debate about who should be included in the legitimate political community (Näsström, forthcoming). However, there is a critical difference here. Humanity is not just another group of human

beings. It is all of them together. By defining the founding category as inclusive of the whole world, no one will be excluded. By defining the founding category as one among many discrete groups constituting the world, the rest of the world will be excluded. So while grounding political rule in a community of all human beings can be as politically controversial as proceeding on alternative assumptions, it alone can fulfill a criterion derived from democratic theory, namely to exclude exclusion.⁵ From a democratic viewpoint, the legitimacy of such procedures does not presuppose any prior decision on inclusion and exclusion, since they imply no exclusion in need of justification to begin with. Therefore, the ‘move to define the relevant community for deciding boundary issues as the global community of humanity’ (to cite an anonymous reviewer of this manuscript) is justified at the very moment when this move is taken.

From a more practical perspective, the usefulness of the criterion to include humanity as a whole in the politics of founding presupposes that the boundaries of humanity are themselves not severely contested. Understood as an assumption about what differences politically capable entities can in fact recognize, this is not a controversial view: whether an entity should be classified as a human being is today politically contested only in rare and marginal cases. This is an empirical observation, not an intervention in the controversy over the possibility and appropriateness of defining man. Perhaps most forcefully the ability of political subjects to recognize human beings can be illustrated by their ability to do so even when they think humans act in a ‘non-human’ way. For instance, there appears to be no difficulty to decide which out of the following four disasters that are human beings and can as such be prosecuted for crimes against humanity: Hermann Göring, Cancer, Malaria, and Omar Al Bashir. This point, that the boundaries of humanity are not politically contested, is not denied even by leading critics of the concept of humanity in political theory. For instance, the popular view that politics in the name of humanity implies treating political enemies as non-humans (Schmitt, 2007: 53-58), actually supports the assumption needed here. That is, human

⁵ The distinction between the whole and the parts on the one hand and the relationship between different parts on the other serves also to specify the logical domains in which the democratic paradox does and does not arise. The paradox arises when the founders are grouped under a concept of which there are many instances. It does not arise when the founders are grouped under a concept of which there is a single instance only. The practical relevance of this distinction can of course be challenged on the extreme assumption that the world is limited to a particular, territorially delimited, state (Scholte, 2005: 64-65 believes that this assumption has some historical validity). If there is no world outside one’s own state, there are no human beings other than one’s co-citizens. However, this theoretical possibility does not affect the line of argument pursued here. Assuming that the world is limited to a particular, territorially delimited state, the founding of democracy by the members of this particular state would not produce any paradox in the first place.

beings can be identified empirically even in cases when we fear that they will not be treated as such.

More specifically then, I will defend in the remainder of this section the view that a state is founded in accordance with democratic principles if and only if the foundational decision is made by they who will live within as well as beyond the boundaries once founded and if each individual has the same opportunity to influence such politics of founding. This global principle of democratic founding (GPDF) will be seen to have both constructive and destructive implications. Its destructive contribution consists in an emphasized denial of the legitimacy of territorially delimited states founded by their citizens alone. As shown in an earlier section, a state founded by a particular nation or a voluntary association is indeed not founded on a democratic decision. But as I will argue that GPDF is successful, this conclusion does not point to a necessary limitation in democratic theory but to a violation of democracy in practice which could indeed be rectified.

The main constructive contribution of the principle, on the other hand, is an explanation of why democracy is a potential reality rather than a necessarily unrealizable dream. In short, democracy is possible because the paradox of democracy does not arise under the circumstance identified in GPDF. If humanity as a whole is equally included in the foundational decisions of territorially delimited states, there is no political exclusion on the basis of which these foundational decisions can be contested. The individuals who are excluded from the political procedures of a particular state, and who may on that basis contest and undermine the legitimacy of a foundational decision made by the internal procedures of this state, will, under GPDF, be included in the foundational political process and for that reason capable of voicing their concerns.

Non-voluntary exclusion

The ability of GPDF to explain the possibility of legitimate foundings as an outcome of democratic procedures, without falling into paradoxes, is a theoretical virtue in itself; it provides for a more widely applicable theory of procedural democracy. However, usefulness in democratic theory presupposes not only logical possibility, but also normative justifiability. In this and the following section I will therefore demonstrate the normative attractiveness of

the solutions GPDF provides for what can be referred as the problem of non-voluntary exclusion (this section) and the problem of non-voluntary inclusion (next section).⁶

Non-voluntary exclusion occurs when a state is founded through political procedures which exclude people who want to be included in that procedure. The solution to this problem supplied by GPDF is straightforward: include everyone who wants to be included. In substantive terms, this group may include for instance they who are significantly affected by the decision, also if affected only in the moral sense of believing that they should be included (for more on substantive dimensions, see Agné 2008). In any case, why should we give a right to everyone to influence the founding of territorially limited states everywhere? And why should we provide equal influence to everyone? Shouldn't for instance people in the bordering areas of a prospective state have a greater say than people on the other side of the world?

To answer these questions in some detail, let me separate the reasons for inclusion of three groups of people: (1) they who seek inclusion as citizens in a prospective state; (2) they who do not seek inclusion as citizens but who still make some claim to resources that will be held within the prospective state, for instance through trade or private visit; (3) they who do not seek inclusion as citizens and who do not make any claim whatsoever to resources within the territory of the state once founded.

In the first case it, the reason for inclusion in the founding process – as distinct from the state itself – would appear to be very strong. If someone wants to join a prospective citizenry, and is willing to take on whatever responsibilities that requires, the other prospective citizens cannot simply reject his or her claim to inclusion. Such a rejection would presuppose, contrary to the situation at hand, that the composition of the citizenry had already been decided. Since it is a presupposition of my analysis in this paper that political disagreement is about the very boundaries of the group, everyone how wants to be included must to be treated equally for the resolution of the disagreement to gain democratic legitimacy. This argument for inclusion applies most evidently to people in the bordering areas of prospective states, whose inclusion in the state is a realistic possibility. With some extension, however, it applies also to people elsewhere in the world. A cosmopolitan in Africa who fights for a world state

⁶ I thank the editors and two reviewers of *International Theory* for suggesting this distinction and several of its implications.

may contest the division of European states into smaller ones because it moves his or her world in the wrong direction. A nationalist in Asia may for inverted reasons contest regional integration in the Americas. While people with like inclinations can be wrong about what decisions favor their long term interests, and unlikely ever to achieve their aims, those are no reasons for reducing their political influence in comparison with people whose preferences might be empirically better grounded and are likely to realize.

In the second case, where people do not seek inclusion as citizens in the prospective state but still make claims to resources held in the territory, different arguments for inclusion are available. One argument here is that territory is part of what all inhabitants of the world own together. This assumption of joint-world ownership (JWO) does important work in several kinds of justice theory not generally related to international relations (see Vallentyne and Steiner 2000 for a survey). The central proposition of JWO is that authors like Locke and Nozick were wrong when they assumed that property emerges when persons mix their self-owned bodies with yet unappropriated nature through labor. Instead, appropriation of nature or, more precisely, external resources is a matter of negotiation between persons who own the world jointly to begin with. In any case, applied to the politics of founding JWO would suggest that because one group of people has agreed to let another decide within its own state on issues of say transportation and public welfare the first group need not unconditionally have surrendered all power over resource exploitation within the territory of the latter. Instead, the support of the first group for the founding of the latter's state can have been justifiably conditioned on, for instance, the possibility to trade and engage in cultural exchange with people in the proposed state. With this possibility in mind, the founding of new states as well as the contesting of existing ones is a right shared by all human beings together.

However, for the purpose of supporting GPDF the argument based on JWO may appear too strong. With just a minor slide, it presupposes what needs to be proved, namely that humanity as a whole has a right to decide on the distribution of territory among delimited groups of people. A more satisfactory way of defending GPDF should take as its starting assumption, not the right of all human beings to decide on territory together, but that democratic principles should inform the politics of founding. The latter criterion, on the other hand, is fulfilled by the following argument.

Normatively speaking, the politics of founding takes place in a state of nature, i.e. in the absence of state authority or in areas where a prior founding of an existing state is contested. In such a state of nature any territory can be claimed by any group of people without any group, or any territorial claim, being treated as primary to any other group or claim. To settle in a democratic way conflictual claims to territory among groups, or conflictual claims to inclusion of people in different groups, one must then count all people equally and be ready to extend the group of people until the paradox of foundation no longer arises, i.e. when all possible contesters of the foundational decision have been included. Hence the ultimate political inclusion of humanity as a whole in the politics of foundation is a consequence, not a premise, of democratic reasoning under the state-of-nature conditions presupposed by the politics of founding. To emphasize, this defense of GPDF builds on weaker premises than does the argument derived from JWO. More than a theory of collective ownership it resembles a Kantian argument that prior to the establishment of a political order there are no property rights at all consistent with equal autonomy of persons. According to Kant this follows because ‘in order for a right to impose an obligation on others, it must be a publicly imposed right, rather than a privately imposed right based on one person’s idea of what justice requires.’ (Stilz, 2009: 200)⁷ Likewise, prior to the founding of states and international order, or when a prior founding of states and international order is contested, no claim to territory, or to group belongings, is primary to any other claim; and under such conditions democracy implies that all persons be counted equally and be included in the first place.

The arguments considered so far are sufficient to justify inclusion of everyone who wants to be included in the politics of founding. However, equally important reasons for GPDF do not require that people beyond the prospective state themselves seek inclusion. Their inclusion can be motivated solely by the solving of problems within the state to be founded. These are the reasons for inclusion in the third case (3) distinguished above. To sum up some of the earlier reasoning, and to add this final layer in the argument, a more detailed yet stylized picture of political constellations is useful.

⁷ I base this reading of Kant on Stilz’ rigorous attempt at defending state territorial rights. My disagreement with her on the question of state territorial rights stems from different fields of application of our respective arguments. Stilz is concerned with cases where there is more or less consensus as to what people belong to what political order and territory (Stilz, 2009: 208-209). My argument addresses cases where exactly that question is disagreed over.

Say that each letter in the below table is the name of a state, and that each line represents a territorial boundary.

A	B	C	D	E
F	G	H	I	J
K	L	M	N	O
P	Q	R	S	T
U	V	X	Y	Z

Assume further that the people of U and V want to constitute a new state, U/V. The legitimacy of this proposed act of founding might be contested for instance by X, for fear of being bordered by a state which is doubling its size (perhaps one might think here of the reunification of Germany in 1990). X (perhaps France can serve as an illustration) might demand either to be included in U/V, thus proposing to establish U/V/X (here one might perhaps think of the European Monetary Union allegedly requested by France in order to gain control over the currency of the new Germany), or that U and V remain as separate states (notice that in both cases X makes a claim to be part of the constituent power, i.e. the creative power, of future U, V, U/V, and U/V/X). This move of X will activate the paradox of founding in democratic theory and eliminate the legitimacy of U/V in the eyes of X. That is, democratic principles provide no guidance as to whether X should be included in the founding of U/V/X (contrary to the interest of U and V) or whether X should be excluded from the founding of U/V (contrary to the interest of X). Before agreement has been reached on who should be included in what politics, there is no democratic reason for rejecting X's claim to inclusion in the politics of founding U/V. That is the essence of the democratic paradox. What U and V can do, however, is to suggest that still other countries, P, Q, R (think here for instance of the other central members of the European Community in 1990) should be included in the politics of founding U/V.

This last move can be normatively justified in different ways, for instance as a means towards neutral arbitration of existing conflicts (e.g. Honig, 2001; Archibugi, 2008). This provides for a different kind of political community, where some constituents will judge territorial conflicts which they have no direct claims in themselves while others will benefit from legitimate political decisions on conflicts which they cannot themselves resolve in democratic ways. However, the legitimacy of the new political order, this time inclusive also of P, Q, and

R, is not less vulnerable to the paradox of democracy than are the earlier constellations; it can be activated for instance by X thinking that an even more inclusive community will provide for a more neutral judgment of the conflict at hand. (The inclusion of P, Q, and R can of course be questioned also by any other state, like A or B. However, this requires that A or B wants to be included at least in the procedure of founding the new state, and in that case there are other arguments, explained above, which speak more directly to their inclusion.) This process of contestation can go on for long but not forever. When the whole alphabet has been included there can be no further charges of illegitimate exclusion. Hence in order to overcome the paradox of founding in relation to a single state (U/V) structures which allows for the inclusion of the whole world will indeed be necessary.⁸

Non-voluntary inclusion

The problem of non-voluntary inclusion arises when some people are part of a state, or a global political order, from which they want to be excluded. The solution to this problem implied by GPDF is that everyone has a right to the same opportunities of participation as everyone else but that no group has rights to unilateral self-exclusion. Is this implication of GPDF normatively sound? Why shouldn't at least groups of people who are unanimous and peaceful have a unilateral right to exclude themselves from a world political community?

Secessionists, by definition, seek exclusion from an existing political order. However, this does not mean that secessionists seek exclusion also from the *constituent power* of the political order in question. Constituent power is the capacity of determining the particular form of the definitional characteristics of a political order, such as its territory, decision procedures, and citizenry. For instance, the qualification of some Québécois as secessionists imply that they have some very firm positions on who should be part of the Canadian citizenry (not the Québécois!), about who should be allowed to influence this particular decision on secession from Canada (only the Québécois!), and about the territory of Canada (some of the presently Canadian territory should be controlled by the Québécois!). As these claims all refer to definitional characteristics of the Canadian state (i.e. the very identity of the Canadian state is affected by its particular citizenry, constitutional procedures, territory, etc.) we can safely conclude that people who are non-voluntarily included the state of Canada may

⁸ The practical implication of this conclusion is not that everyone must actually participate in the settling of boundary conflicts between all others. Voluntary abstention from political participation does not in itself violate democratic principles but may even facilitate their realization. As noted, human beings should have equal opportunities, not obligations, to participate in the politics of founding new political orders.

still be *voluntarily* included in the constituent power of Canada. Notice that this holds even if we deny Canada the privilege in theory of existing already. Prior to the founding of Canada, the qualification of the Québécois as ‘secessionists’ (whatever that means prior to the founding of Canada) implies preferences on their part equivalent to those held under the contrary and factual condition (namely: Canada should not be founded in ways that include the Québécois in its citizenry; Canada should not be founded in ways that deprive the Québécois of their wanted territory; etc).

The distinction between political order and constituent power serves to delimit and diminish the problem of non-voluntary inclusion: in many cases secessionists seek exclusion only from their political order, not from its constituent power, and GPDF is concerned only with legitimacy in the latter. However, the distinction does not solve the problem of non-voluntary inclusion altogether. Secession might be wanted also in a stronger and more radical sense. That is the case when secessionists demand not only a political order, but also constituent power, of their own. Since the founding of political order, or the exercise of constituent power, will always consume territory and population otherwise available for other political orders, this more radical secessionist claim can be described more completely as (i) a claim to self-exclusion from an existing political and (ii) a claim to exclusion of others, ultimately against their own will, from political influence over the allocation of some particular territory and population. Such forceful exclusion of others from constituent power does not strengthen the normative attractiveness of the more radical secessionist position, but it may still be adopted. Why, then, is the implication of GPDF (that people can be forcefully included in a democratic politics of founding at the global level) a normatively preferable alternative?

Since the aim here is for a procedural theory of democratic founding, the answer should not be based on standard substantive arguments that unilateral rights to secede exist only in response to gross violation of basic human rights (e.g. Buchanan, 2004). Instead, the method should once again be to derive implications from the concept of democracy as applied to the conditions of political founding. The basic argument then is that, in a politics of founding, none of the competing positions on what political communities exists or should exist must be privileged by the political procedure itself; otherwise the procedure would not observe the democratic criterion of neutrality between alternatives (for further discussion on this point, see page 30 below). The reason why even radical secessionists must, if committed to democracy, be ready to accept this conclusion is that their perception of themselves as

constituting a separate political community should be given equal status, neither higher nor lower, as the contrary perception of their opponents that they are all part of the same political community.

At first sight the denial of unilateral rights to self-exclude might seem unreasonable to liberals, who believe that persons can and should be able to choose their identities and social belongings without negotiation with others. At closer inspection, however, this liberal intuition gives little or no support for the case of radical secessionists. Political communities are *not* analogous to individual human beings. The identity of an individual has a biological basis (genes) and origin (birth) which political communities don't (see Wendt, 1999: 221-224 for further critique of anthropomorphizing political communities). The identity and boundary of prospective political communities is much more a matter of contestation and negotiation with others than is the identity and boundary of an individual human being. A claim to existence of a particular political community may for this reason be contested not only by people who is recognized as members of the political community by this claim, but also by people who this claim excludes as members of the community. It is for the democratic resolution of such political conflicts that individuals of either conviction should be counted equally; and for that to be possible all groups, regardless of size, must be included to begin with.

But how far does this protect the interest of people who – in opposition to deciding majorities – still conceive of themselves as constituting a political community with an identity of their own? Basically GPDF gives to everyone the right to live under democratic rule but no right to live on a territory cleansed from unwanted people. The model of democracy which it presupposes is not one of identification between rulers and ruled (Schmitt, 2008: 264) but one of tolerating cultural diversity and protecting individual rights. It presumes, in my view correctly, that democratic rights (such as freedom of speech and political assembly, equality in political and legal procedures) are not violated by people having to share territory with others they hate.

The way in which this model of global democracy balances the relation between the majority and minorities is not in all respects different from how the same problem is treated in domestic politics. However, the partial absence of a global demos sufficient for legitimate settling of political, social, and cultural conflicts (Zürn, 2000; List and Koenig-Archibugi,

2010) will give a global majority much stronger incentives to let dissenting minorities follow political directions of their own than majorities within national systems generally have. For instance, there is no apparent prohibition in GPDF to allow the founding of a state where some orthodox Muslims can practice their preferred kind of theocratic rule, given that such rule is actually what the people in question want and that their equal opportunities to contest the founding of the state remain even in the future (proving these assumptions will pose some challenge for theocrats though). Perhaps the oppression implied by the theocracy is not greater or more painful than that of living as a permanent and fundamentally opposed minority under a liberal democratic constitution. Diverging preferences across these and other constitutional alternatives will surely reduce the likelihood of a world state (contra Wendt 2003) and might ultimately explain why humanity can allow the segregation of itself even into such powerful political orders as today's territorial states. Moreover, GPDF implies no obligation to intervene in authoritarian states even if they are contested by their own populations. Just like democracy in domestic politics can be balanced against other values, like national security or public welfare, GPDF involves no requirement to push for democratization at all costs.

Conclusion

I have suggested that in global democracy there is no paradox of democratic founding. The counter-position, that the founding paradox is genuine and therefore inescapable regardless of political context, derives from the perhaps realist but conceptually and normatively misleading position that we must necessarily exclude some people at the founding moment of democratic states and constitutions. The truth is that we need not, in ideal theory, exclude anyone. This observation contradicts not only the view of democracy as being based on a paradox, but also nationalist and contractualist theories of legitimate foundations of states and constitutions. These theories fail precisely because their concepts of legitimate foundations arbitrarily exclude particular groups of people. In opposition to all of these positions, I have developed an alternative principle of democratic founding which puts no limitations on human inclusion whatsoever. The core of this principle is that a state is founded in accordance with democracy if the foundational decision is made by people who will live within as well as beyond the boundaries once founded (ultimately involving humanity as a whole) and if each individual has the same opportunity to influence such politics of foundation.

Literature

- Archibugi, D. (2008), *The Global Commonwealth of Citizens*, Princeton and Oxford: Princeton University Press.
- Arendt, H. (1990), *On revolution*, London: Penguin.
- Ackerman, B. (1998), *We the People I. Foundations*, Cambridge, MA: Harvard University Press.
- Agné, H. (2006), 'A Dogma of Democratic Theory and Globalization: Why Politics Need not Include Everyone it Affects', *European Journal of International Relations* 12 (3): 433-458.
- Agné, H. (2007), 'The Myth of International Delegation: Limits to and Suggestions for Democratic Theory in the Context of the European Union', *Government and Opposition* 42 (1): 18-45.
- Agné, H. (2008) "We the People and the Others: The Co-founding of Democratic States" in *ConWEB: Webpapers on Constitutionalism & Governance beyond the State* 2008 (4): 1-28.
- Abizadeh, A. (2008), 'Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders', *Political Theory*, 36 (1): 37-65.
- Bartelson, J. (2009), 'Globalizing the democratic community', *Ethics & Global Politics* 1(4): 159-73.
- Bartelson, J. (2009), *Visions of World Community*, Cambridge: Cambridge University Press.
- Barzun, J. (1986), 'Is democratic theory for export?', Sixth Morgenthau Memorial Lecture on Ethics & Foreign Policy, Carnegie Council, Available at http://www.cceia.org/media/268_barzun.pdf. Accessed 2009-03-27.
- Bohman, J. (2007), *Democracy Across Borders: From Dêmos to Dêmoi*, Cambridge, MA: The MIT Press.
- Benhabib, S. (2006), *Another Cosmopolitanism*, Oxford and New York: Oxford University Press.
- Beetham, D. (2009), 'The Contradiction of democratization by force: the case of Iraq', *Democratization* 16 (3): 443-454.
- Bush, G..W. (2004), Address at the Army War College May 24, 2004, as transcribed by *The New York Times* the same day. Available at <http://www.nytimes.com/2004/05/24/politics/25PTEX-FULL.html?pagewanted=all>. Accessed 2010-02-10.

- Cheneval, F. (2006), 'The People in Deliberative Democracy', S. Besson, J.L. Martí, and V. Seiler (eds), *Deliberative Democracy and its Discontents*, Hampshire/Burlington: Ashgate, pp. 159-179.
- Beitz, C.R. (1979), *Political Theory and International Relations*, Princeton: Princeton University Press.
- Beitz, C.R. (2001), 'Human Rights as a Common Concern', *American Political Science Review* 95 (2): 269–282.
- Buchanan, A. (2004), *Justice, Legitimacy, and Self-determination: Moral foundations for International Law*, Oxford: Oxford University Press.
- Doucet, M.G. (2005), 'The Democratic Paradox and Cosmopolitan Democracy', *Millennium*, 34 (1): 137-55.
- Doyle, M.W. (2001), 'The New Interventionism', in T.W. Pogge (ed), *Global Justice*, Malden/Oxford/Victoria: Blackwell Publishing.
- Dryzek, J. (2006), 'Transnational Democracy in an Insecure World', *International Political Science Review* 27 (2): 101-119.
- Dyzenhaus, D. (2007), 'The Politics of the Question of Constituent Power' in M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism*, Oxford: Oxford University Press, pp. 129-46.
- Etzioni, A. (2007), *Security First. For a Muscular, Moral Foreign Policy*, New Haven: Yale University Press.
- Goodin, R.E. (2007), 'Enfranchising All Affected Interests, And its Alternatives', *Philosophy and Public Affairs*, 35 (1): 40-68.
- Habermas, J. (1996), *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, Cambridge, MA: The MIT Press. Transl. by William Rehg.
- Habermas, J. (2001a), *The postnational constellation: political essays*, Cambridge: Polity. Transl. by Max Pensky.
- Habermas, J. (2001b), 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles', *Political Theory* 29 (6): 766-781.
- Habermas, J. (2003), 'Interpreting the Fall of a Monument', *Constellations* 10 (3): 364-370.
- Held, D. (1995), *Democracy and the Global Order*, Cambridge: Polity Press.
- Honig, B. (2001), *Democracy and the Foreigner*, Princeton and Oxford: Princeton University Press.
- Honig, B. (2007), 'Between Decision and Deliberation: Political Paradox in Democratic Theory', *American Political Science Review*, 101 (1): 1-17.

- Kalyvas, A. (2008), *Democracy and the Politics of the Extraordinary*, Cambridge: Cambridge University Press.
- Lang, A. (2006), 'Democracy cannot be imposed by force', Carnegie Council. Available at http://www.cceia.org/resources/ethics_online/5405.html. Accessed 2009-03-27.
- Locke, J. ([1690] 2003), *Two Treatises of Government*, New Haven and London: Yale University Press.
- May, K.O. ([1952]1982), 'A Set of Independent, Necessary, and Sufficient Conditions for Simple Majority Decision', in B. Barry and R. Hardin (eds), *Rational Man and Irrational Society?*, Beverly Hills, CA: Sage Publications.
- Macdonald, T. (2008), *Global stakeholder democracy: power and representation beyond liberal states*, Oxford: Oxford University Press.
- Macdonald, K. and Macdonald, T. (2010), 'Democracy in a Pluralist Global Order: Corporate Power and Stakeholder Representation', *Ethics and International Affairs* 24 (1): 19-43.
- McGrew, A. (2002), 'Transnational Democracy', in A. Carter and G.. Stokes (eds), *Democratic Theory Today*, Cambridge: Polity, pp. 269-294.
- Michelman, F.I. (1999) *Brennan & Democracy*, Ewing: Princeton University Press.
- Mill, J.S. ([1859] 1973), 'A few words on non-intervention', in G. Himmelfarb (ed), *Essays on Politics and Culture*, Gloucester: Peter Smith, pp. 195-246.
- Mouffe, C. (2000), *The Democratic Paradox*, London and New York: Verso.
- Nozick, R. (1974), *Anarchy, State, and Utopia*, Oxford: Blackwell.
- Näsström, S. (2003), 'What Globalization Overshadows', *Political Theory* 31 (6): 808-834.
- Näsström, S. (2007), 'The Legitimacy of the People', *Political Theory*, 35 (5): 624-658.
- Näsström, S. (forthcoming), "The Challenge of the All-Affected Principle", *Political Studies*.
- Obama, B. (2009) Speech in Cairo, June 4, 2009, transcribed by *The Guardian* the same day, available at <http://www.guardian.co.uk/world/2009/jun/04/barack-obama-keynote-speech-egypt>, accessed 2009-10-01.
- Olson, K. (2007), 'Paradoxes of constitutional democracy', *American Journal of Political Science* 51 (2): 330-343.
- Patomäki, H. and Teivainen, T. (2004), *A Possible World: Democratic Transformation of Global Institutions*, London and New York: Zed Books.
- Rousseau, J.J. ([1765] 2003), *On the Social Contract*, Mineola and New York: Dover Publications.
- Schmitt, C. (2007), *The Concept of the Political*, Chicago and London: University of Chicago Press. Transl. by George Schwab.

- Schmitt, C. (2008), *Constitutional Theory*, Durham and London: Duke University Press.
 Transl. by Jeffrey Seizer.
- Scholte, J.A. (2005), *Globalisation: A critical introduction*, Houndmills: Palgrave Macmillan.
- Sieyès, E.-J. ([ca 1788-] 2003), *Political writings*, Indianapolis: Hackett. Transl. by Michael Sonenscher.
- Smith, R. (2008), 'The principle of constituted identities and the obligation to include', *Ethics & Global Politics* 1(3): 139-153.
- Stilz, A. (2009), 'Why do states have territorial rights?', *International Theory* 1 (02): 185-213.
- Walzer, M. (2008), 'On Promoting Democracy', *Ethics & International Affairs* 22 (4): 351-55.
- Weiler, J. (1999), *The Constitution of Europe*, Cambridge: Cambridge University Press.
- Wendt, A. (1999), *Social Theory of International Politics*, Cambridge: Cambridge University Press.
- Wendt, A. (2003), 'Why a World State is Inevitable', *European Journal of International Relations* 9 (4): 491-542.
- Wendt, A. and Duvall, R. (2008), 'Sovereignty and the UFO', *Political Theory* 36 (4): 607-633.
- Whelan, F.G. (1983), 'Prologue: Democratic Theory and the Boundary Problem', R.J. Pennock and J.W. Chapman (eds), *Liberal Democracy*, New York: New York University Press.
- Yack, B. (2001), 'Popular Sovereignty and Nationalism', *Political Theory* 29 (4): 517-536.
- Zürn, M. (2000), 'Democratic Governance Beyond the Nation-State', *European Journal of International Relations* 6 (2): 183-221.