

Including the Unaffected*

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ONE of the most basic questions facing democratic theory is who ought to be included in political participation. Many have argued that all affected by a political decision ought to be included, while others argue for a stronger criterion—that one must be coercively subject to the decision, for example.¹ Most recent discussions of this question have focused on the wrongful exclusion of those who ought to be included. A compelling case has been made that, in areas such as immigration policy, the decisions of polities do not merely affect those outside their borders, but actively coerce them.² It is then concluded that non-citizens have a right to participate in policy formation, at least when the policies in question affect them (under the weaker standard) or subject them to coercion (under the stronger).³

Less attention has been paid to the question of whether political participation can be objectionably over-inclusive. Robert Dahl insists that it can; a claim to inclusion, he writes, “cannot be justified if it is advanced by persons whose interests are not significantly affected by the decisions of that unit.”⁴ As Robert Goodin observes, Dahl here interprets the “all affected interests principle” of political inclusion as an “all *and only* affected interests principle.”⁵

*Previous versions of this article were presented at the Australian National University Philosophy Colloquium, the University of Sydney Philosophy Seminar, the Harvard University Political Theory Research Workshop and meetings of the Association for Political Theory and the Northeastern Political Science Association. In addition to all those who offered their suggestions at these venues, I would like to thank Coral C. Frazer, Eric Beerbohm, Ryan Davis, and Benjamin Hertzberg for their helpful comments, as well as Jennifer Page for her invaluable assistance. Thanks are also due to Robert Goodin and the anonymous reviewers for the *Journal of Political Philosophy*.

¹For the weaker criterion, see David Held, *Democracy and the Global Order* (New York: Cambridge University Press, 1995). For the stronger, see David Miller, “Democracy’s domain,” *Philosophy & Public Affairs*, 37 (2009), 201–28. For a thorough review of the debate, see Sofia Näsström, “The challenge of the all-affected principle,” *Political Studies*, 59 (2011), 116–34.

²See Arash Abizadeh, “Democratic theory and border coercion: no right to unilaterally control your own borders,” *Political Theory*, 36 (2008), 37–65.

³But see David Miller, “Why immigration controls are not coercive: a reply to Arash Abizadeh,” *Political Theory*, 38 (2010), 111–20. Miller never denies that immigration policies affect non-citizens, so his argument is only relevant to those who accept the stronger rather than the weaker standard for a claim to political inclusion.

⁴Robert A. Dahl, *Democracy and its Critics* (New Haven: Yale University Press, 1989), p. 208.

⁵Robert E. Goodin, “Enfranchising all affected interests and its alternatives,” *Philosophy & Public Affairs*, 35 (2007), 40–68, at pp. 56–9.

This article is a moral defense of what Dahl would consider political over-inclusion, of empowering those entirely unaffected by a given political decision to participate in the making of that decision. My argument is not that the unaffected have a right to participate or that they are somehow wronged by political exclusion in a manner analogous to how the affected may be wronged when excluded. What matters, morally, is not what a proper resolution to a specific political conflict will do for the unaffected—by definition, it can do nothing for them. What matters is what the inclusion of the unaffected can do to improve the quality of the decision being made, and hence to benefit those affected by this decision. My focus will be on one particular manner in which the inclusion of the unaffected can improve political decision-making: namely, by increasing impartiality. As I argue in the first section of this article, whereas the affected can only possess what I call “artificial impartiality,” the unaffected possess what I call “natural impartiality.”

Of course, few today would embrace a purely results-oriented, consequentialist theory of proper political decision-making. As democrats, we are concerned not only with the quality of the decisions being made, but also with the identity of those making them. One interpretation of our deontological commitment to democracy implies that political decisions must be made exclusively by those affected by these decisions. Including the unaffected might therefore be morally impermissible because the affected could legitimately complain that they are being denied self-rule. Yet I will argue in the second section of this article that this objection depends on an incomplete understanding of the values of democratic equality and self-determination.

The third section of this article will then be devoted to questions of institutional design. It will outline the many possible ways that the sort of natural impartiality described in the first section can be integrated into political structures that promote high-quality decision-making, and how these institutions can be crafted so as not to run afoul of the democratic objection discussed in the second section.

I. THE CONTRIBUTION OF THE UNAFFECTED

A. EXISTING ARGUMENTS FOR INCLUDING THE UNAFFECTED

Although the subject has not been central to the debate on political participation, a few arguments for including the unaffected in decision-making have been made in the existing literature. Goodin, for example, begins his argument with the premise that voters unaffected by a particular political decision will vote randomly. Since a large number of random voters will end up distributed equally among the options available, the unaffected will have no effect on the outcome. Goodin concludes that adding the “and only” clause to the all-affected principle

is “otiose.”⁶ Since political under-inclusion is a grave wrong, while over-inclusion will have no effect whatsoever on political decisions, it is always best to err on the side of over-inclusion.⁷ Yet, unless strong external incentives are provided, few (if any) would bother participating in a decision-making process solely for the purpose of registering a random selection. Frederick Whelan thus arrives at a similar conclusion to Goodin’s by arguing that the unaffected will simply fail to participate.⁸ Under either argument, political over-inclusion is morally permissible because it is entirely innocuous.

Goodin and Whelan seem to be assuming that those unaffected by a given political decision will necessarily be indifferent to the outcome of that decision—that they will be unable or unwilling to formulate an opinion on the matter in question, and hence either fail to participate in decision-making or participate at random. To be sure, it is possible that unaffected spectators will be indifferent in this way. Yet it is also possible that the unaffected will be able to help contribute their opinions to a decision, and will be able to do so in particularly beneficial ways. If we believe that every polity owes its members the best possible decision-making procedures available, then taking steps to improve these procedures is not merely advisable; it is morally obligatory. Yet the question of whether we can improve our politics by including the unaffected remains of keen interest even if we reject this strong moral claim.

Amartya Sen, in his defense of what he calls “open impartiality,” has provided two principal grounds for believing that political decision-making would be improved through the inclusion of others besides those who are obviously affected.⁹ The first is based on the fact that those who do not appear to be affected by a particular political decision may in fact have interests at stake in it. Of course, this is not so much a revision of the all-affected principle as a proper response to our fallibility in its application. Yet Sen also emphasizes that proper political decision-making requires us to overcome our parochialism, “scrutinizing not only the influence of vested interests, but also the captivating hold of entrenched traditions and customs.”¹⁰ This gives us a reason to include those whose cultures are quite different from our own in our political deliberations, even if they are unaffected by the decision at hand. The second of Sen’s arguments implies that we may not, in fact, be utterly indifferent to decisions which do not affect us. There are many ways in which we come to have opinions on questions

⁶Ibid.

⁷Ibid., pp. 64–8.

⁸Frederick G. Whelan, “Democratic theory and the boundary problem,” *Nomos XXV: Liberal Democracy*, eds. J. R. Pennock and J. W. Chapman (New York: New York University Press, 1983), pp. 13–47, at p. 20.

⁹Amartya Sen, *The Idea of Justice* (Cambridge, MA: Harvard University Press, 2009).

¹⁰Ibid., p. 404. For the initial formulation of this argument, see Amartya Sen, “Open and closed impartiality,” *Journal of Philosophy*, 99 (2002), 445–69. In this earlier piece, Sen also discusses other reasons for favoring open impartiality, which go beyond the two main arguments in the 2009 version, but none of which anticipate the argument from natural impartiality that I am making here.

which do not affect us; Sen's observation that we may notice that decisions are being influenced by parochial traditions that we do not share is merely one example.

To be sure, it might be argued that anyone who develops a preference for one outcome or another is no longer unaffected by the matter at hand. Under one definition of "being affected," we are affected not only when our interests are advanced or hindered, but whenever the world comes to more or less correspond to our preferences about how it should be. Yet this conception of what it would mean to be unaffected would not only answer the question of whether the unaffected are necessarily indifferent by definitional fiat, it would also be incompatible with ordinary usage. Whenever a referee or judge settles others' disputes, this previously unaffected individual now develops preferences about the case at hand. Yet it would nonetheless be odd to say, before a call is made, that the referee is him or herself affected by the dispute; the referee is neither a member of, nor rooting for, either of the teams at play. It is therefore best to understand individuals as unaffected by a decision if they have no interests at stake or *pre-existing* preferences on the matter, although they may develop preferences during the resolution process itself.¹¹

My argument for empowering the unaffected (thus defined) because they are capable of natural impartiality can be understood as a friendly amendment to Sen's two existing arguments for open political decision-making. Even when they genuinely have neither interests nor pre-existing preferences at stake, and even when they suffer from the same cultural parochialism as the affected, the unaffected ought to be included decision-making because they are capable of a unique kind of impartiality. Given the fact that he calls his view "open impartiality," it is surprising that Sen never really discusses the unique sort of impartial perspective available to the unaffected. In order to identify this unique form of natural impartiality, we must first understand impartiality more generally and see why it is so often considered a key feature of good political decision-making.

B. NATURAL VERSUS ARTIFICIAL IMPARTIALITY

The demand for impartiality arises in situations where the interests or preferences of individuals are in conflict. A resolution to a conflict is impartial when it does not favor any party over any others because of who they are. Impartiality precludes bias or favoritism, what Hobbes called "acceptance of persons."¹² It

¹¹For further discussion of interests, preferences and related issues, see Alan Montefiore, *Neutrality and Impartiality: The University and Political Commitment* (New York: Cambridge University Press, 1975), pp. 30–3.

¹²Thomas Hobbes, *Leviathan*, ed. Richard Tuck (New York: Cambridge University Press, [1651] 1991), p. 108.

does not matter if the “accepted” person is oneself or someone else. Selfishness is therefore not the proper antonym of impartiality, since utter selflessness is wholly compatible with intense favoritism.

Many philosophers consider impartiality to be somehow constitutive of morality as such, although many others have pointedly rejected this claim.¹³ Yet those on both sides of this debate can agree that impartiality is one feature of good decision-making in a wide variety of contexts, particularly in the political sphere. This is not to say impartiality is the only thing of value with regard to political decision-making; it always has to be weighed against other values. Nor is impartiality valuable in all political contexts; there may be situations in which political actors should favor some people over others. Many believe that elected representatives may permissibly favor their constituents over those who live elsewhere, for example, though they should not favor their friends and family members over other constituents.

To determine the extent to which impartiality is valuable in any given context will require appeal to higher-order values. Brian Barry argues that “second-order impartiality” is to provide the grounds for answering this question.¹⁴ It might be argued that the reason representatives may show favor to their constituents but not to their own families is because only the former sort of partiality can be justified in terms of impartial principles of justice. Such impartial principles might very well allow geographically-based representation but forbid nepotism. Most modern moral and political theories advocate impartial principles of this sort. Yet once we are certain that first-order impartiality is of value in some particular political context, we face the practical question of how it is to be achieved. My interest in this article is on one underappreciated means of doing so through appeal to those unaffected by the decision at hand.

I claim no great originality on this point. Its most famous predecessor is Adam Smith’s concept of impartial spectatorship. Although Smith’s impartial spectator has been increasingly discussed as of late, these discussions have been marked by an emphasis on the imaginary over the actual. Sen, for example, sees “the Smithian impartial spectator” as “a device for critical scrutiny and public discussion.”¹⁵ Like the impossibly ignorant agents in John Rawls’s original

¹³For a recent edited collection that provides a good overview of this vast literature, see Brian Feltham and John Cottingham, eds., *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (New York: Oxford University Press, 2010).

¹⁴Brian Barry, *Justice as Impartiality* (New York: Oxford University Press, 1995). Thomas Nagel in “Moral conflict and political legitimacy,” *Philosophy & Public Affairs*, 16 (1987), 215–40, at p. 216, and *Equality and Partiality* (Oxford: Oxford University Press, 1991), at p. 155, discusses “higher-order impartiality” in a somewhat different context (see fn. 21 of the present article). Nagel defends something more akin to Barry’s view through appeal to a second-order “Kantian development of the impersonal standpoint” (*Equality and Partiality*, at pp. 15–16; see also *The View from Nowhere* [New York: Oxford University Press, 1986], pp. 202–3).

¹⁵*The Idea of Justice*, p. 135. To his credit, Sen does sometimes mention the importance for Smith of “real spectators”; see “Open and closed impartiality,” at pp. 451–2.

position¹⁶—or, in an even closer analogy, like Roderick Firth’s ideal observer¹⁷—this impartial spectator is not a real person, but the protagonist of a thought experiment. By appealing to this imagined figure, Smith is thought to be constructing an artificial perspective that any of us can and should adopt at will, rather than describing a social category to which all of us at least occasionally belong.

A growing body of heterodox commentators argues against this standard reading of Smith. They note that, in most instances where Smith speaks of fair or impartial spectators, he is describing ordinary people observing situations in which they have no objective interests or pre-existing subjective preferences at stake.¹⁸ Under this view, whenever we find ourselves evaluating competing claims in a conflict in which neither our interests nor our pre-existing preferences are involved, we are in the position of an impartial spectator. In this reading, it is only in Part III of *The Theory of Moral Sentiments* that Smith sets out to explain why, when we are not in the position of an impartial spectator we still feel that our moral judgments ought to remain impartial. It is only then that we must artificially attempt to examine our conduct or that of those close to us “as we imagine any impartial spectator would examine it.”¹⁹ Yet such cases, according to some commentators, are the exception and not the rule.²⁰ In most of our judgments of most other people, Smith believes that our natural perspective as spectators gives us a sufficient degree of impartiality.

Regardless of whether this is true most of the time, it is certainly true at least some of the time. Individuals unaffected by a given decision experience the demand for impartiality differently than do those affected. For the unaffected, the demand for impartiality is not demanding at all. Without any interests or pre-existing preferences at stake, one simply has no reason to favor one of the affected parties over any other. These are cases of what I call “natural impartiality.” They can be contrasted with cases of “artificial impartiality,” in which an individual has at least some interest or preference which leads her to

¹⁶John Rawls, *A Theory of Justice*, rev. edn. (Cambridge, MA: Harvard University Press, [1971] 1999).

¹⁷Roderick Firth, “Ethical absolutism and the ideal observer,” *Philosophy and Phenomenological Research*, 12 (1952), 317–45.

¹⁸This point was first made in T.D. Campbell, *Adam Smith’s Science of Morals* (London: Allen & Unwin, 1971), pp. 134–45, and T.D. Campbell, “Scientific explanation and ethical justification in the *Moral Sentiments*,” *Essays on Adam Smith*, ed. Andrew S. Skinner and Thomas Wilson (Oxford: Clarendon Press, 1975), pp. 68–83, at pp. 70–1. For some of the many passages where Smith refers to actual fair, impartial or indifferent spectators in this sense, see *The Theory of Moral Sentiments*, ed. A. L. Macfie and D. D. Raphael (Indianapolis, IN: Liberty Fund, [1759/1790] 1984), at I.i.5.8 (p. 26), I.ii.4.1 (p. 39), II.i.2.2 (p. 69), II.ii.1.3 (p. 78), II.ii.2 (pp. 82–5), and II.3.42 (p. 154). N.B. This list is from Fonna Forman-Barzilai, *Adam Smith and the Circles of Sympathy: Cosmopolitanism and Moral Theory* (New York: Cambridge University Press, 2010).

¹⁹*The Theory of Moral Sentiments*, III.i.2 (p. 110).

²⁰See Marie A. Martin, “Utility and morality: Adam Smith’s critique of Hume,” *Hume Studies*, 16 (1990), 107–20, at p. 118, and Michael L. Frazer, *The Enlightenment of Sympathy: Justice and the Moral Sentiments in the Eighteenth Century and Today* (New York: Oxford University Press, 2010), pp. 95–6.

favor one affected party, but also has a reason for not doing so. That is, she has a reason to view a dispute *as if* she had natural impartiality. Artificial impartiality is artificial in that it involves adopting a perspective on a situation which is not naturally one's own.²¹

C. MECHANISMS OF IMPARTIALITY: RAWLSIAN, MADISONIAN AND SMITHIAN

Natural impartiality is a resource which most recent theorists have either overlooked or consciously chosen to forego. Under the assumption that only those affected can or should participate in political deliberation, theorists have typically appealed to two strategies for achieving impartiality. First, affected parties may be forced to rely on their own artificial impartiality—that is, their own limited ability to screen out their pre-existing preferences and interests. Those who doubt that political actors are sufficiently willing or able to do this instead attempt to design institutions that somehow produce impartial results from a system in which no single actor achieves impartiality on her own.

Philippe Van Parijs contrasts a “Rawlsian” with a “Machiavellian” approach to such questions.²² While Rawlsians are concerned with inculcating citizens and their shared public culture with a sense of justice, Machiavellians attempt to design formal political institutions in such a way that the right outcomes will emerge even though all individuals are concerned only with their private interests. In our context, it makes more sense to refer to this latter school as Madisonian rather than Machiavellian. The American Federalists, after all, were the most influential designers of governmental institutions constructed in light of Hume's “political maxim” that “every man must be supposed a knave.”²³

Although Madisonians may be concerned with the question of institutional design in a narrow, formal sense, I think it is best to understand Rawlsians as institutional designers as well, since publicly shared moral sentiments and civic cultures can be understood as informal institutions. The question is whether such informal institutions could ever, by themselves, bring about impartial resolutions to political conflicts. The demands that Rawlsians place on individual citizens are considerable. Although a very high level of artificial impartiality may seem like too much to ask of individuals, Rawls replies that there is no available

²¹Even artificial impartiality, however, must be natural in some sense. See *The View from Nowhere*, especially pp. 221–3, where Nagel points out that we are creatures who are naturally capable of adopting an impartial, objective perspective, which is undoubtedly true. One alternative to my preferred dichotomy is Montefiore's related distinction between “indifference” (which is “natural” in my sense) and “detachment” (which is “artificial”), although these terms of art do not coincide with the ordinary usage of these words; see *Neutrality and Impartiality*, pp. 4–6.

²²Philippe Van Parijs, “The disenfranchisement of the elderly, and other attempts to secure intergenerational justice,” *Philosophy & Public Affairs*, 27 (1998), 292–333.

²³David Hume, “Of the independency of parliament,” *Essays Moral, Political and Literary*, ed. Eugene F. Miller (Indianapolis, IN: Liberty Fund, [1740/1777] 1985), p. 42. Note that the terms “Rawlsian,” “Madisonian,” and “Smithian” here are meant only as labels, and are not intended to offer non-controversial interpretations of the ideas of their namesake authors.

alternative. “There seems,” he writes, “to be no way of allowing them to take a narrow or group-interested standpoint and then regulating the process so that it leads to a just outcome.”²⁴

But if Rawlsians insist that “there is, unhappily, no procedural alchemy whereby a majority bent on injustice can be made to pursue justice instead,”²⁵ there is a long tradition of Madisonians who counter that, with the proper design of formal institutions, the base metals of individual favoritism and self-interest can indeed be turned into the gold of impartial political decisions.²⁶ Most of the formal institutions of modern liberal-democracies have been justified as contributing in some way to the achievement of this goal. Foremost among these is the separation of powers and a system of checks and balances under which ambition is “made to counteract ambition.”²⁷ Elections with universal suffrage have been defended as a means by which self-interested, reelection-seeking officials can be made answerable to at least a majority of their constituents, while judicial review has become a means of insuring that the interests of minorities are not wholly excluded from consideration.²⁸ Recently, Jon Elster and Adrian Vermeule emphasized how what Vermeule calls “veil rules” can encourage impartiality by depriving individuals of the information they need to advance their self-interest.²⁹ Constitutional clauses requiring that laws be prospective and general can be understood as veil rules in Vermeule’s sense, as can rules delaying the date a law takes effect.³⁰

Ideally, the question of how much potential there is for achieving impartiality through these various means could be answered empirically. Unfortunately, if the mechanisms being considered have not been tried—or at least have not been tried often, or not in the precise settings or configurations under consideration—their costs and benefits can only be addressed speculatively. Sometimes the problem with such theorizing is that it can turn unrealistically utopian, spinning out suggestions for institutions that never could or would be attempted in practice. At other times, however, the opposite problem is the case—the analogies to existing institutions are so obvious and the relevant ideas so deeply embedded in existing practice that they go unnoticed.

I believe that the latter is the case with what might be termed “Smithian” mechanisms of impartiality—those which rely on the natural perspective of the

²⁴A *Theory of Justice*, p. 317.

²⁵Brian Barry, *Justice as Impartiality*, p. 101.

²⁶E.g., Jon Elster, “Mimicking impartiality,” *Justice and Democracy: Essays for Brian Barry*, eds. Keith Dowding, Robert E. Goodin and Carole Pateman (New York: Cambridge University Press, 2004), pp. 112–26, at p. 125.

²⁷James Madison, “The Federalist No. 51,” *Independent Journal* (Wednesday, February 6, 1788), online at <<http://www.constitution.org>>.

²⁸See, for instance, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).

²⁹See “Mimicking impartiality,” and Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (New York: Oxford University Press, 2007).

³⁰*Mechanisms of Democracy: Institutional Design Writ Small*, pp. 25–72.

unaffected. Institutions making use of natural impartiality are already highly familiar from the judicial system, where it has long been accepted that no one should be a judge in his or her own case. Judges and jurors are expected to have no interests or pre-existing preferences at stake in the conflicts which their decisions resolve, and to recuse themselves (or be recused) from decision-making if there is even an appearance of possible bias. A similar use of natural impartiality is made by the myriad forms of arbitration used in settings from private business to international diplomacy.

Smithian mechanisms for achieving impartiality are especially appealing because they combine some of the advantages of both Rawlsian and Madisonian approaches. As with Rawlsians, Smithians depend on the impartiality of individuals, on the actual understandings and motivations of those participating in politics. There is little or no attempt at procedural “alchemy,” at some Madisonian magic by which favoritism is filtered away despite the best efforts of political actors to hold on to it. Like Madisonians, however, Smithians do not attempt to improve individuals morally. Smithians simply take spectators as they are, imagining laws as they might be—laws which might empower those who naturally observe a conflict from the appropriate perspective to help settle the conflict impartially.

It is therefore striking that—despite their utter ubiquity in the guise of judges, jurors and arbitrators—impartial spectators are almost never empowered to be legislators or executives. Given that affected parties are excluded from decision-making in the judiciary, why are unaffected parties excluded from decision-making in other branches of government?

II. THE DEMOCRATIC OBJECTION

A. THE CONSENT OF THE AFFECTED

Even if they accept that the natural impartiality of the unaffected might be successfully harnessed to improve political decision-making, there are those who would argue that these considerations are beside the point. What matters, under this view, is neither the impartiality nor the quality of decision-making overall, but the identity of the agents making decisions. These agents must be chosen, not based on the consequences of their selection, but on the basis of a non-instrumental commitment to democracy. Democracy is not one feature of good political decision-making among many. It is an absolute, deontological requirement that any political procedure must meet in order to be morally permissible.

Although the unaffected may legitimately interpret the laws which the affected have already voluntarily imposed upon themselves—hence the prevalence of Smithian institutions in the judiciary—they may not impose laws on the affected without their consent. Any inclusion of the unaffected in the legislative or

executive matters would serve to bring their legitimacy into question, since it might lead us to question whether policies would have been framed as they were without this “outside interference.” The more power the unaffected possess, the greater the loss of democratic legitimacy. For Dahl, empowering an impartial, unaffected arbitrator to make binding political decisions is thus to abandon democracy for a form of Platonic guardianship.³¹

I have no desire to defend such authoritarianism. Those who emphasize the importance of including the unaffected need not reject the traditional democratic conception of political legitimacy as deriving from the consent of the governed—that is, the consent of the affected. Even if my arguments are correct, they still do not justify the forcible inclusion of the unaffected in political processes where the affected have not welcomed them. Rather than seeking to become a philosopher-king, I am offering my arguments in an attempt at democratic persuasion. Just as the consent of the electorate legitimates the political power of their representatives, so too could the consent of the affected legitimate the political participation of the unaffected. My goal is to convince those affected to freely offer their consent in this regard, demonstrating that they have no reasonable grounds for withholding it.

B. THE ALREADY-EXISTING INCLUSION OF THE UNAFFECTED

One of the easiest ways to convince others of a moral or political claim is to observe that they have already endorsed it implicitly in practice. Such is certainly the case when it comes to the inclusion of the unaffected. In any existing democratic system, voters and their elected representatives must regularly decide on matters which, for a wide variety of idiosyncratic reasons, will never have any effect on them. The larger and more heterogeneous a polity is, the more likely it is that a significant percentage of the political decision-making will be about matters in which neither my interests are at stake nor about which I have any pre-existing preferences.

Since Madison, the fact that extending the boundaries of a state lessens the power of particular interests has been seen as a benefit rather than a drawback—indeed, as a “Madisonian” mechanism for increasing impartiality of the sort described earlier. In Madison’s classic formulation, the benefit of a large polity is that the sheer variety of interest groups decreases the probability that any single one will dominate.³² Yet whenever a state is enlarged to as to reduce the power of any single interest group, it will come to include not only competing interest groups, but also many individuals without interests (or pre-existing preferences) at stake on a given matter at all.

³¹*Democracy and its Critics*, p. 151.

³²James Madison, “The Federalist No. 10,” *Daily Advertiser* (Thursday, November 22, 1787), online at <<http://www.constitution.org>>.

The standard response to this fact has been a turn to federalism, an ideal in which decisions with only local effects are to be made only by those affected by them. Yet this ideal bears very little relationship to how actually-existing federalism works in practice. It is impossible to gerrymander boundaries around each unit in a federal system so as to include all those affected by a given decision and to exclude all those unaffected. Even in the smallest and most homogenous locality, many citizens will regularly be asked to contribute to decisions which will in no way affect them due to idiosyncrasies of their personal situations. Parking codes are set in part even by those who never drive, restaurant regulations even by those who never eat out, and so on.

What is more, power is never divided among the levels of a federal system so as to entirely exclude the unaffected. The division of responsibilities among levels of government may be made for a wide variety of instrumental reasons—or for no reason at all. Regardless of whether the best decision-maker has been chosen in any given instance, it is inevitable that decisions which only affect certain cities are made by county or provincial officials from other cities, and decisions which only affect certain states or provinces are made by national officials from other provinces. If cosmopolitans were ever to get their way, and the world as a whole were to be governed by federal structures, this pattern would merely extend one more level: decisions which only affect certain nations would be made by officials from outside these nations. In certain geographic regions (such as Europe) and certain policy areas (such as international trade) something resembling this situation is already in place.

Even if democratic federalists were to concede that it is impossible to entirely exclude the unaffected from decision-making, they might still maintain that we should try to approach this ideal as closely as is practicable. If we do our best to keep the inclusion of the unaffected to a minimum, then hopefully their participation will not outweigh the participation of the affected, and the collective will of those whose consent is required for a law's legitimacy will ultimately prevail. Yet from the point of view of any given affected individual, it is quite likely that his interests or preferences will not prevail on a given matter. Not only is there a good chance that he will end up in the losing minority, but in any reasonably sized modern polity his contribution to the political process is almost certainly not going to determine which side ends up the winner.³³ Although this famously poses significant problems concerning the instrumental rationality of democratic political participation in large polities, it need not pose a challenge to a polity's democratic legitimacy. As long as defeated minorities freely acquiesce to the decisions of victorious majorities, all involved may be said to consent to the decision so rendered. The same pattern holds regardless of whether the decision is made, at least in part, by those unaffected by the matter

³³Such, at least, is the conventional wisdom. For a dissenting view, however, see Richard Tuck, *Free Riding* (Cambridge, MA: Harvard University Press, 2008).

at hand. The morally relevant question is whether there is any additional objection which those defeated in a decision-making process including the unaffected can make that is not also available to those who are defeated in a majoritarian process including only the affected.

C. THE VALUE OF EQUAL SUBJECTION

At the beginning of the article, we saw that many individuals will be affected by laws which may plausibly be seen as not coercively binding them; if the status of potential immigrants in this regard is too controversial, just think of those harmed by another country's pollutants.³⁴ We have now also seen that many will be left unaffected by laws which nonetheless bind them. Yet while the set of those bound by, or subject to, a law and the set of those affected by it are not coextensive, there is considerable overlap between them. Perhaps the affected cannot reasonably object to including the unaffected as long as the unaffected in question are nonetheless subject to the decision at hand. If they are not so bound, they ought still be excluded.

This thought gains a certain plausibility when we consider that those currently unaffected by a law to which they are nonetheless subject cannot be certain that they will not come to be affected by it. As Goodin observes, "in a world of flux, we actually do not know, with any confidence, what our positions will be in the not-so-distant future."³⁵ If it is merely due to idiosyncratic features of my personal situation that a given law does not affect me, as long as I remain subject to this law, I may come to be affected by it once my situation changes.

Yet it is important not to overestimate the level of uncertainty to which we are susceptible. In a society without a significant degree of socio-economic mobility, for example, the rich can be reasonably certain that they are likely to remain rich over the entire course of their lives. As Anatole France famously observed in *The Red Lily*, they can therefore be quite sure that they will never be affected by laws prohibiting them from sleeping under bridges.³⁶ What France bitterly calls "the majestic equality of the law" can only mean that we are all equally subject to the laws of the politics which govern us, not that we are equally affected by them, or even equally likely to be affected by them at some future point.

Despite France's cynicism on the matter, however, there is real moral value to our equal subjection to the law. If nothing else, equal subjection is valuable as a

³⁴For the challenges that environmental problems pose to conventional democratic understandings of the representation of all affected, see Andrew Dobson, "Representative democracy and the environment," *Democracy and the Environment: Problems and Prospects*, ed. William M. Lafferty and James Meadowcroft (Lyme, NH: Edward Elgar, 1996), pp. 124–39.

³⁵Goodin, *Motivating Political Morality* (Cambridge MA: Blackwell Publishers, 1992), p. 45.

³⁶«La majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain.» Anatole France, *Le Lys Rouge* (Paris: Calmann-Lévy, 1894), p. 118.

kind of equal political standing, however unequal citizens may be in all other respects. Platonic guardianship is objectionable, at least in part, because it removes any equal standing whatsoever among classes in the Kallipolis.

Unlike citizens in an Aristotelian polity, Platonic guardians only rule, and are never ruled in turn. Other classes in the Kallipolis only are ruled, and never rule. The same pattern would hold if unaffected spectators were to resolve the conflicts of others and yet themselves only be subject to their own decisions. Such a system would essentially be a form of colonialism: members of certain privileged polities would deny self-government to others, and yet continue to enjoy self-government at home. It would be entirely reasonable to reject this sort of inequality as morally unacceptable.

In order to alleviate this inequality, we must strive as best we can to insure that all are equally ruler and equally ruled, equally legislator and equally subject to laws. Typically, this has been done by insisting that all individuals within a given polity have an equal right to political participation, and then are equally subject to the very same laws that they can be said to have created together. Another form of equality, however, might involve all citizens in a given polity equally participating in the creation of laws to which others are subject, while also being equally subject to laws created by others.

Imagine, for example, two polities engaging in a kind of franchise swap; the electorate of one agrees to make policies for the other, while the other will make policies for them. No one could reasonably claim that this scenario is objectionable because it produces inequality; all are as much both ruler and ruled after the franchise swap as they were before. To be sure, one might object to this swap, not on grounds of equality, but on grounds of political self-determination. Yet while it is true that neither state would remain sovereign and self-governing under this arrangement, the quasi-union of the two would be. If we accept that polities should be free to join together on terms of their own choosing—provided that these terms are not objectionably inegalitarian or otherwise unjust—then I can see no principled objection to the electorates of two polities freely agreeing to this unusual relationship in the hope of increasing the impartiality of their decision-making.

Of course, there may still be many practical objections to a franchise swap. Indeed, such an agreement is probably a comparatively poor way to harness the potential of natural impartiality. Most obviously, a complete franchise swap utterly excludes the input of affected parties, input which is both instrumentally valuable for improving decision-making and expressively valuable as a sign of continued consent to the political process. Unfortunately, including the affected alongside the unaffected will probably mean that the decisions rendered will not be as impartial as they might otherwise have been. As has already been made clear, however, impartiality is not the only feature we seek in political decision-making. Simply because a decision has been made impartially does not mean it has been made well in other respects. Impartiality is therefore to be

optimized, rather than maximized, as it is weighed against other values in the process of institutional design.³⁷

III. INSTITUTIONAL DESIGN

A. SELECTING SPECTATORS, BLENDING MECHANISMS

Many have noted that Madisonian and Rawlsian approaches for achieving impartiality are not mutually exclusive. Nagel, for example, calls for a “moral division of labor” in which formal institutions do all they can to help produce impartial results, but an individual’s sense of justice must do the rest.³⁸ The pattern continues when Smithian mechanisms are added to the discussion. While a well-designed institution may rely primarily on mechanisms of one type, mechanisms of the other two types may prove necessary to support or supplement it in various ways.

This becomes especially clear when we focus on how Smithian institutions of impartiality are to be set in motion initially. Sometimes the unaffected are recruited through pre-existing Smithian institutions, as with organizations like the American Arbitration Association (AAA) or the International Chamber of Commerce (ICC), which runs the International Court of Arbitration (ICA). Such institutions did not emerge *ex nihilo*, however. At some point, those affected by political conflicts were probably the ones to establish them. It seems unlikely that Smithian institutions could ever be fully Smithian all the way down.

While the empowerment of the unaffected through the participation of the affected is a powerful expression of the latter group’s consent to the process, it also raises considerable difficulties. When affected parties are tasked with the selection of what is alleged to be an unaffected arbitrator, it is in the interest of each affected party to select a secretly affected person—one whose interests or preferences were heretofore unnoticed, but which align with the parties’ own. In order to commit themselves to the selection of a naturally impartial arbitrator, the affected must already have a considerable commitment to impartiality. They might therefore have to make considerable use of the imaginary perspectives which allow for artificial impartiality.

If it is worried that a Rawlsian sense of justice is insufficient for the task, Madisonian elements may also aid in the selection of impartial spectators. Participants beginning with roughly equal bargaining power might simply be able to select a naturally impartial spectator through self-interested negotiation. And if direct bargaining proves unsuccessful, the characteristically Madisonian mechanism of elected representation could also be employed. Under the procedures of party-appointed arbitration familiar from private

³⁷See Vermeule, *Mechanisms of Democracy*, pp. 73–176.

³⁸*Equality and Partiality*, pp. 53–62.

dispute-resolution, each participant in a conflict appoints one member to a council of arbitrators. AAA rules explicitly exclude party-appointed arbitrators from presumptions of neutrality, and do not subject them to exclusion for bias or prior relationship with a party.³⁹ The party-appointed members of the council then pick a neutral arbitrator to chair and cast the deciding vote. In cases of international arbitration, ICC rules require that the neutral chair must ordinarily be chosen from a country other than those of the parties to the conflict.⁴⁰ Even if all of the other members of the council of arbitrators are partial, it is reasonable to believe that they will settle on a relatively naturally impartial spectator for this decisive role.

B. PROMOTING QUALITY DECISION-MAKING

Although the unaffected may decide impartially, there is a reasonable suspicion that their decisions will tend to be poorly made in a number of other ways. For example, we might worry that the unaffected will make less informed decisions than the affected. Unlike the unaffected, the affected are embedded in what Downs calls “the free information stream.”⁴¹ Since the decision in question is about their pre-existing preferences and interests, acquiring information about these matters is unavoidable for them. The same is not true of those unaffected by a decision, whose very distance from the affected parties to a conflict will largely keep them away from the free stream of information about it.

As a result, institutions will have to be designed to provide the unaffected with information. Courtroom trials can be understood as institutions of this sort, designed to give judges and jurors as much information as they require to make an informed, yet still impartial decision. Were Smithian mechanisms to be expanded beyond the judicial sphere, additional care would have to be taken to insure that the impartial spectators in question would be as informed as necessary. This would undoubtedly incur significant costs.

Unfortunately, even if public funds are used to provide the unaffected with all the information they require, there is no guarantee that this will actually lead to better-informed decisions. As Downs observes, no information is entirely costless for those who receive it.⁴² Merely paying attention to information takes time and effort; thinking about or assimilating it takes more still. As university lecturers know full well, those without any motivation to do otherwise can successfully avoid internalizing any information presented to them. If the information is

³⁹See AAA, *Commercial Arbitration Rules and Mediation Procedures* (2010), available online at <<http://www.adr.org/sp.asp?id=22440>>, and Steven C. Bennett, *Arbitration: Essential Concepts* (New York: ALM Publishing, 2002), pp. 49, 182.

⁴⁰Bennett, *Arbitration: Essential Concepts*, p. 139.

⁴¹Anthony Downs, *An Economic Theory of Democracy* (New York: Harper and Brothers, 1957), pp. 221–5.

⁴²*Ibid.*, p. 222.

presented in a particularly compelling manner, inherent interest or entertainment value may be sufficient to discourage daydreaming and obliviousness. Yet not only does this work better for some forms of information than for others, but it also requires considerable skills on the part of those presenting the information. It would be preferable if the unaffected were committed to learning the information required simply for the sake of making a better decision. In this way, questions of information transition naturally into questions of motivation.

Since those unaffected have nothing at stake in a given conflict, they will likely have little motivation to resolve it at all, let alone to resolve it well. One simple mechanism to help address this problem is to remove an institution's agenda-setting from its own control. Judicial institutions therefore typically deny judges and juries control over which and how many conflicts they will have to resolve.⁴³ Simply denying agenda control to the unaffected, however, will not be sufficient to motivate them to do as much as they can to make a particular decision adequately. Although they have no choice but to render a decision on some matter, a fully informed, carefully deliberated decision will, in itself, do nothing to advance their interests or pre-existing preferences. There will therefore be a temptation to come to a resolution as quickly and costlessly as possible.

A related worry is that, since the unaffected have so little motivation to make a good decision, it can be quite easy to corrupt or coerce them into making a bad decision. Although all institutions of decision-making will devote some resources to preventing the corruption of officials, these costs will likely prove especially high in Smithian institutions. Our judiciary is filled with mechanisms—from rules of evidence to the physical arrangements of a courtroom—designed to protect judges and juries from bribes or threats. Similar, costly mechanisms would be required in all extra-judicial Smithian institutions. No such system, however, could be foolproof. As with all political actors, the final protection against corruption must be the integrity of the impartial spectators themselves.

As a result, those turning to Smithian institutions must take steps to insure that the unaffected have sufficient motivation to make their decisions well. Like pure Rawlsians, Smithians could simply rely on individuals' sense of justice to insure that they will do their duties diligently. There is no reason, however, why external incentives cannot be added. These incentives could be material (one wonders how differently Americans might treat jury duty if jurors were more handsomely compensated) but they could also be honorific.⁴⁴ The traditional Madisonian

⁴³A notable exception here is the U.S. Supreme Court, which has had the power to control most of its own agenda since 1925. It is not surprising that fewer than 5 percent of the cases for which Supreme Court review is sought are granted certiorari. Peter J. Mesitte, "The writ of certiorari: deciding which cases to review," *eJournal USA*, 10 (2005), 18–21.

⁴⁴For an account of the power of honorific incentives, see Geoffrey Brennan and Philip Pettit, *The Economy of Esteem: An Essay on Civil and Political Society* (New York: Oxford University Press, 2006).

mechanism of re-election may be of some use here; unaffected officials, like affected citizen-representatives, might be motivated by the possibility of remaining in a prestigious, powerful and perhaps even well-remunerated office. There is some empirical evidence that private arbitrators are indeed motivated to develop a reputation for impartiality so as to ensure their continued employment.⁴⁵

Developing a reputation for being impartial and actually being so are, of course, two different things. If a genuinely impartial decision were to give a false appearance of favoritism, then an arbitrator concerned only with reputation would choose the appearance of impartiality over the reality.⁴⁶ Fortunately, appearances here most often correspond with realities, but when they do not, we may have no choice but to rely on the integrity of the unaffected themselves. Once again, an inescapable Rawlsian element is present even in a primarily Smithian and secondarily Madisonian institution.

C. LEGITIMATING THE POWER OF THE UNAFFECTED

Once naturally impartial spectators have been selected, and placed within institutions that help promote decisions which are not only impartial but also well-made in other respects, they can be granted a wide range of powers in legislative or other extra-judicial political processes. At a minimum, the unaffected may simply contribute to political deliberation. As one voice among many, such an impartial spectator has no special power, but may provide arguments which those enmeshed in a conflict would never be able to formulate on their own. New formal institutions might not be necessary in order to allow such naturally impartial voices to be heard. An end to the informal norm that no one should have any say in political decisions that do not affect them could very well be sufficient.⁴⁷ Should additional input from impartial spectators be needed, formal institutions might provide external incentives for them to contribute to deliberation. Smithian institutions of this sort may be particularly valuable when affected parties are blinded by their

⁴⁵See, for example, Orley Ashenfelter, "Arbitrator behavior," *American Economic Review*, 77 (1987), 342–6.

⁴⁶See Alon Klement and Zvika Neeman, "Private selection and arbitrator impartiality" (2011), available at <<http://ssrn.com/abstract=1800026>>.

⁴⁷Alexis de Tocqueville complained that "America is the land of freedom where, in order not to offend anybody, the foreigner may speak freely neither about individuals nor about the state, neither about the ruled nor about the rulers, neither about public undertakings or private ones—indeed, about nothing that one comes across" (*Democracy in America*, tr. George Lawrence, ed. J. P. Mayer [New York: Perennial Classics, (1845/1840) 1969], 1:2:6 [p. 237]). The fact that Tocqueville himself is now cited so frequently in America, by politicians and scholars alike, is evidence that exceptions can be made to the general rule that foreign contributions to American political discourse are not welcome. This, in turn, suggests that it is not unreasonable to hope that the informal rule might be abandoned entirely.

interests from seeing a resolution which, once found, would prove immediately acceptable to all.

Impartial spectators may also be given a wide range of formalized powers in political processes. Impartial spectators may not merely be participants in political discourse, but may also participate alongside the affected parties in decision-making procedures such as elections. Their participation might be used to break a deadlock between two evenly-matched camps among the affected—such as in the case of an election that would otherwise be too close to call. It is also possible to give spectators a special adjudicatory office in formal decision-making. For example, impartial spectators might be commissioned to formulate legislation or public policy, which would then be subject to an up-or-down vote by the affected—a political analogue to non-binding arbitration in the private sphere. There are also political analogues to binding arbitration, under which the decision of the impartial spectator takes effect automatically, without further approval. Such binding arbitrators might nonetheless be held accountable if their decisions could then be subject to later review—whether by the general public, by affected citizen-officials or by other unaffected arbitrators. Finally, in certain extreme situations, there might be a need to use a non-accountable form of binding arbitration, in which the possibility of later review is precluded. For example, non-accountable binding arbitration might be needed if it is reasonably feared that reconsidering the settlement of a given political conflict would result in civil unrest.

Whatever degree of power is granted to unaffected spectators, the conclusions of section two suggest two features which must be included in all Smithian institutions. First, any power granted to the unaffected must be given to them through the consent of the affected. This consent is required to avoid the moral objections concerning democratic legitimacy discussed earlier, and will also help promote compliance with the impartial decisions rendered. If an unaffected arbitrator is not empowered through the direct participation of the affected, then some other institutional mechanism may be necessary to give the affected adequate opportunity to express their consent (or lack thereof) to the procedures being adopted.

Second, Smithian institutions must meet a requirement of egalitarian reciprocity. All those who make decisions that affect others must be equally affected by decisions which others make for them. The hypothetical franchise swap discussed earlier would be an instance of what might be called “direct reciprocity.” Even if they were not to go so far as to trade entire electorates, polities could also engage in directly reciprocal relations through an equal exchange of a limited number of decision-makers. Phillippe Schmitter has proposed institutions along roughly these lines for purposes of what he calls “reciprocal representation.” When the policies of one polity regularly affect the citizens of another—as is the case, for example, when there is significant movement of people or goods between them—representatives from each polity

could be elected to sit in the legislature of the other.⁴⁸ While Schmitter proposes reciprocal representation as a means of better including all those affected, similar institutions might also be used to include those unaffected. Politics seeking to increase the impartiality of their political decisions might seek directly reciprocal exchanges of legislators with distant polities unaffected by the policies being debated, perhaps in addition to the exchanges that Schmitter recommends with nearby, affected polities.

Once more polities agree to participate in such exchanges, however, the level of egalitarianism that democratic legitimacy demands could also be established through what might be termed “indirect reciprocity.” One-to-one trades of decision-makers could give way to complex networks.⁴⁹ If such institutions were to span the globe, no state would be a self-governing democracy, considered in isolation. Yet the world as a whole would remain self-governing and democratic, a cosmopolitan union of political equals in which all who rule are also equally ruled in turn.

It seems fitting to conclude by noting that arguments for worldwide cosmopolitan governance are nothing new. These arguments, however, are typically premised on the idea that the most important problems facing the world today are global, and can only be addressed effectively on a worldwide level. My position is quite different, depending as it does on the observation that some conflicts will always remain local. Truly global conflicts are ineligible for resolution by the unaffected. If literally everyone on earth is affected by a particular political decision, there is no one on the planet who can serve as an impartial spectator. There is no doubt that, in an era of global trade and global warming, there are more and more of these sorts of issues facing humanity as a whole. No matter how globalized our political life may become, however, municipal, regional, national and non-globalized international conflicts will always remain. Natural impartiality can be a powerful resource for helping us find morally acceptable resolutions to these non-globalized conflicts, a resource which misplaced concerns with democratic legitimacy have led us to forego far too often in both political theory and political practice.

⁴⁸Philippe C. Schmitter, “Exploring the problematic triumph of liberal democracy and concluding with a modest proposal for improving its international impact,” *Democracy’s Victory and Crisis: Nobel Symposium No. 93*, ed. Axel Hadenius (New York: Cambridge University Press, 1997), pp. 297–307. See especially pp. 303–7. A similar proposal is considered, but ultimately rejected, by Dobson in “Representative democracy and the environment,” pp. 128–31.

⁴⁹For an argument that the world is to a large extent already being, and ought increasingly to be, run by a complex web of transgovernmental networks, see Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004). Rather than highlighting how these networks could harness the natural impartiality of the unaffected, however, Slaughter interprets “a principle of maximum inclusion” in terms of including “all relevant and affected parties in processes of transgovernmental deliberation” (p. 29).