

The State's Territory or the People's Land?

Difficulties in justifying the right to exclude immigrants¹

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One feature of statehood normally taken for granted is that states have a right to control immigration into their territory. This right is often simply assumed to be an implication of state sovereignty, which in turn is taken to be more or less definitive of statehood. If the issue of the right to control immigration, and hence to exclude immigrants, is given any consideration at all – and this is the exception rather than the rule – it is therefore usually discussed in terms of whether states as we know them are justifiable. This is problematic from a political theory perspective for several reasons. First, the nature of the right to exclude immigrants is thereby not addressed at all, since it is simply taken to be implied by a general definition of statehood. Secondly, the normative issue is thereby presented as a radical choice between states as we know them, including the right to exclude immigrants, or some completely different political organization of the world, which we do not even have a name for, let alone much understanding of. Thirdly, the conceptual complexity of the issue is overlooked, since it is only formulated in terms of the concept of the state.

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The present paper examines these issues by way of a partly reconstructive, partly critical discussion of David Miller's recent argument for a right of states to exclude would-be immigrants (Miller, 2007). Apart from being formulated as part of a prominent theory of global justice, Miller's argument is of interest because it invokes a number of arguably common sense and widespread ideas about the nature of states and immigration. The inquiry into Miller's argument is therefore not only part of a discussion of his specific theory, but a way to examine more broadly shared – but often implicit, relatively unreflectively held and little discussed – assumptions. This paper explicates and reflects on Miller's argument in order to thematise the nature of and relationship between fundamental but often under-theorised concepts in political theory. The aim of the paper is not, e.g., to argue for open borders (cf. Carens, 1987) or against the modern state as usually conceived (e.g. Kukathas, 2005: 219), but to raise some fundamental questions for theories of the state and immigration. The central concern is thus not with issues of policy, e.g. how many and which immigrants particular states should admit under which conditions, but with explicating fundamental conceptual and normative issues in political theory.

The paper reconstructs Miller's argument for why states have a right to control immigration and distinguishes between the different kinds of normative concerns and the different kinds of social entities invoked in these considerations. While Miller's argument probably captures widespread intuitions reasonably well, it is in fact quite complex. This may be problematic at the level of political theory since it allows for slides between different meanings of the right, different subjects of the right, or different normative concerns justifying such a right. What is more, it is not clear how the various considerations invoked by Miller relate to each other, how they function in an argument for a right to exclude immigrants, or whether they establish such a right at all.

Although Miller is a prominent theoretical advocate of a principle of nationality, his argument eschews invocation of a principle of nationality as the basis for the justification of the

right of states to exclude immigrants. It rather relies on considerations of 1) the nature and the benefits of *states*, 2) territorial rights as a consequence of *occupancy*, and 3) *democratic self-determination*. Considerations of nationality only enter at a secondary stage, primarily in relation to the determination of the relative *weight* of the claims of existing citizens versus would-be immigrants (Miller, 2007: 222, 228-229). Miller even explicitly rejects some of the more obvious ways in which considerations of nationality might be thought – and have previously been thought by Miller himself (Miller, 2005: 204) – to play a role in relation to immigration, e.g. in determining selection criteria (Miller, 2007: 229; Miller, 2008: 18, cf. Lægaard, 2009; Blake, 2002).

This paper criticises Miller's argument on primarily conceptual and internal grounds, not on the basis of, e.g., normative claims that immigrants have a human right to immigrate or that the state is bound by strong cosmopolitan duties to treat non-citizens in the same way as citizens. While Miller rejects such claims, he still holds that a justification is nevertheless required for excluding immigrants (Miller, 2007: 213). It is his proposed justification and the difficulties it faces that is discussed in this paper. Along the way, the paper also considers different, although related, accounts of the rights of states, e.g. Cara Nine's collectivist Lockean account, in order to extract more general lessons from the examination of Miller's argument. Although it is argued that Miller's argument is problematic and fails to establish a genuine right to exclude, the main purpose of the discussion is to contribute constructively towards a better understanding of the nature of a right to exclude immigrants relative to other characteristics of statehood, and to clarify the conceptual as well as normative distinctions between the different fundamental political entities invoked, especially state, people (in several senses), and nation. These entities are not only *conceptually* distinct, but also enter into quite different kinds of *normative* relations. By way of preview, the main general theoretical claims of the paper are the following:

- 1) The right to impose political authority *in* a territory and the right to exclude immigrants *from* the territory are *conceptually* distinct.
- 2) From this follows that justifications for political authority and exclusion of immigrants must meet different normative requirements.
- 3) There is a (near) *dilemma* for non-individualist Lockean justifications of territorial rights as part of a justification for a right to exclude immigrants.
- 4) Lockean arguments for collective land claims might be a part of a justification of a right to exclude immigrants, but may equally undermine such a right.
- 5) Lockean arguments at best justify individual acts of exclusion, not general rights to exclude as a general feature of statehood.

MILLER'S ARGUMENT

Miller's case for the right of states to restrict immigration involves different kinds of normative considerations:

1. A 'utilitarian' justification of the *state's* territorial political authority (2007: 216-217).
2. A 'quasi-Lockean' account of territorial rights for *occupants* (2007: 217-219).
3. A democratic right to self-determination of a *political community* (2007: 222-224).

These sub-arguments are plausibly understood as a sequence of counters to different arguments for open borders, e.g.: 1) Why have states at all? 2) Given states, why do they have authority over any particular territory? 3) Given authority over a particular territory, who should decide about immigration? Taken as such, the arguments are building up a case for a right to exclude in the sense that they, if successful, provide reasons for rejecting certain open borders positions. But the sub-

arguments do not make a case in any stronger sense than this. First, their respective conclusions do not clearly function as premises in a new argument the conclusion of which is that there is a right to exclude immigrants. Secondly, the different sub-arguments involve different entities and ascribe different normative properties to these, the relationships between which are not clear. For these reasons, and to make the discussion more general, each sub-argument will be considered in turn in order to explicate the actual concerns involved, to assess Miller's arguments for them, and to discuss what they establish. Possible ways in which they might combine into a unified argument for the right of states to exclude immigrants will be considered along the way.

POLITICAL AUTHORITY

In order for there to be an issue of *immigration* at all, there have to be states into which people can immigrate. In order for there to be a *political* issue of immigration, states must have the potential to exclude immigrants. Miller accordingly takes states to be entities that claim 'a monopoly of political authority throughout the territory it controls' which more precisely involves 'the right to apply law and other instruments of public policy to everyone and everything within a particular geographical area' (Miller, 2007: 214). This common Weberian idea of states as institutional agencies able to claim and enforce a local monopoly on the legitimate use of force, expressed in the making, adjudication and enforcement of laws within a territorially defined jurisdiction (Copp, 1999: 6-8; Levy, 2008: 495; Nine, 2008a: 156), while not necessarily providing an exhaustive or always pertinent definition (Morris, 1998: 43-46, 199-204), certainly picks out a crucial aspect of statehood. And this aspect of statehood must apparently be justified for states' use of force to exclude immigrants to be legitimate.

Miller's justification of political authority invokes functions 'broadly advantageous to citizens' (Miller, 2007: 214), which can *only* be performed effectively by states having territorial

jurisdiction. According to Miller, even people who have not and would not consent to political authority can justifiably be subjected to it for the sake of the good of others living alongside them who do have a reason to subject themselves to authority (Miller, 2002: 25). As the reference to the ‘good’ makes clear, this argument relies on the *benefits* of political authority, which is presumably why Miller characterises the argument as being ‘utilitarian in character’ (2007: 215).² The benefits in question are potentially many, but Miller focuses on two, namely ‘a legal regime in which laws are applied in a uniform and consistent way to every citizen, allowing each to plan his or her future in relative security’ (Miller, 2002: 25, cf. Miller, 2007: 214) and ‘a range of public goods, goods that benefit a large number of people but that individuals acting alone are unable for various reasons to bring into existence.’ (Miller, 2002: 25-26, cf. Miller, 2007: 214f)

Even if a basic legal system and some forms of public goods can only, or only effectively, be provided by a state with political authority over a determinate territory, this *fact* does not settle whether it is *justifiable* to impose political authority on people in the territory who, perhaps with good reason, do not want the state to provide them with these benefits. In response to this normative question, Miller claims that, such imposition may be justifiable if the benefits serve ‘vital human interests’ (Miller, 2002: 27).

The right to exclude immigrants

Even if one grants that political authority can be justified by reference to benefits which require a territorial monopoly of (what is claimed to be) legitimate violence³ this does not in itself justify a

² This also underscores one way in which Miller’s defence of the state is distinct from social contract views both of the Hobbesian kind based on considerations of *mutual* advantage for all prospective citizens, rather than their aggregate, and of the Lockean kind concerned with natural *rights* rather than the good.

³ For reasons to think such consequentialist justifications inadequate, see Copp, 1999: 32-36.

right to exclude immigrants (or show that political authority thus justified is adequate for the purpose of a further argument designed to do so). This is because the argument is an argument for *imposing authority in* a territory, which is not the same as *restricting access to* that territory (Copp, 1999: 18-26).⁴

This is first of all a conceptual point, which can be made clearer by considering what a right to exclude immigrants more formally involves. The subject of a right to exclude immigrants is a state, and the object of the right, that which the state has a right to, is to prevent people who are not citizens of the state from entering the state's territory, or to expel them, using force if necessary, if they have entered illegitimately.⁵ Political authority as an aspect of statehood can also be understood as a right. The subject of the right is once again the state, and the object is the making, adjudication and enforcement, by force if necessary, of law within a territory. A number of complications become evident when political authority and the right to exclude immigrants are characterised thus. First, it may be problematic to say that the subject of the right is a state, if one also defines a state as an entity which has these rights, both because of the circularity and because there may not be such a right and hence not any states, thus defined. One might therefore replace 'state' with a reference to certain institutions or their agents, or to reformulate the characterisation of the rights as parts of a definition of a specific kind of statehood. Secondly, the characterisation

⁴ For an analogous criticism of national self-determination, see Meisels, 2005: 78.

⁵ So the exclusion in question is *territorial* and as such it is distinct from exclusion from *membership* (in the case of states this is citizenship, access to which is regulated by rules for naturalisation). Exclusion from membership is not considered in this paper. Note, however, that a certain kind of argument for a right to exclude, namely the argument from freedom of association (Wellman, 2008), while problematic in relation to immigration (as argued by Miller, 2007: 209-213), may be more plausible in relation to membership, insofar as citizenship, unlike geographical proximity, is an associational tie. States do not, however, have unconstrained freedom of association and a consequent right to exclude residents from citizenship, since other consideration, i.e. concerns of democratic legitimacy, may weigh heavier.

raises the question whether the rights under consideration are Hohfeldian liberties or claim rights, i.e. if the state is merely permitted to make law etc. or whether people in the territory are also placed under a duty to let the state do so or perhaps even to obey the laws thus made (Morris, 1998: 215f).

These complications are of secondary importance for the present point, however, which concerns the *objects* of the respective rights. Even though the state's territory figures in the formulation of both rights, the objects of the rights are different: The right to exclude is a right to prevent would-be immigrants from *entering*, or to deport immigrants who have entered without permission of the state *from*, the territory. Political authority, on the other hand, is the right to set up a jurisdiction *within* the territory. As the positional specifications indicate, the two rights are in fact complimentary; the one is exterior, the other interior to the territory. For this reason alone, the two rights are conceptually distinct.

But there may be a further, more substantial, difference: Although actual immigration policy is usually decided and formulated by states in terms of law, and immigrants who have entered without the permission of the state are routinely referred to as 'illegal immigrants', the right to exclude is in a sense not related to law, at least not in the same way as political authority. This is indicated by the fact that 'illegal immigrants' are normally not considered as criminals and are not prosecuted and convicted by the legal system, but are rather deported on an administrative basis (Carens, 2008: 166). While political authority is related to territory in the sense of *jurisdiction*, the right to exclude is apparently more related to territory in the *geographical* sense (for this distinction, see Buchanan, 2003: 232). Whereas political authority involves treating citizens and legal residents as subjects of the state's system of law, exclusion of would-be immigrants involves preventing them from being so and is motivated by the idea that they are not proper subjects of the state authority. This makes for the first thesis of this paper:

The conceptual distinctness of the right to exclude immigrants from a territory and the right to impose political authority in a territory (the conceptual distinctness thesis):

These two rights have different objects, both extensionally and in the substantive way in which they involve law and authority.

But even though political authority and the right to exclude immigrants are conceptually distinct aspects of statehood, they might be connected so that any state that has political authority in a territory also has a right to exclude immigrants from the territory. Whether or not this is the case (or for that matter, whether any state has any of these rights) is a normative question, however, which can only be answered by way of consideration of the justifications for the rights.

Justifying the right to exclude

There are of course many possible justifications for these aspects of statehood, and this paper cannot satisfactorily examine even a few of them. Instead, the present discussion will make the general claim that there is not only a *conceptual* distinctness between the two rights but a *normative* one as well. The point is simply that, because of their conceptual distinctness, the requirements any satisfactory justification of the rights must meet are different. This difference is basically due to the fact that exclusion of immigrants is an exercise of the state's power over another group of people than the group subjected to more 'domestic' expressions of authority. This means that justifications of political authority and exclusion of immigrants must address different *audiences*. The justification of political authority is usually assumed to be directed *to* those subjected to it, which means that a sufficient justification must provide adequate reasons *for these people* to accept the state's authority over them, e.g. by taking their interests and concerns suitably into account (Morris,

1998: 108f).⁶ On this usual view, no such reasons need be provided to other people to justify the state's political authority; others lack the standing of being owed a justification, e.g. because they are not subjected to the state's political authority.

But if the conceptual distinctness thesis holds, the scope of justification sufficient in relation to political authority is inadequate in relation to the right to exclude immigrants, for several reasons: First, immigrants are not included in the audience to which justifications of political authority are usually directed. This is for example the case in Miller's argument for political authority, which is explicitly concerned with the benefits of authority to present citizens. So the scope of justification usually assumed to be appropriate in relation to political authority is too narrow to function as a justification for a right to exclude. Note that this is solely a claim about the proper *scope* of justification; nothing is here assumed about the required *kind* or substantive *standard* of justification, e.g. whether a sufficient justification involves taking peoples' interests equally into account or whether something less than this will do. Second, excluded immigrants are in a sense not subjected to the political authority of states, since exclusion precisely consists in denying them legal residence within the state's jurisdiction. They are clearly affected by the state's immigration policies, and may even be subjected to the state's use of force, but the state does not claim the same kind of authority over them as it does over people whom it recognizes as legitimately residing within its jurisdiction. So whereas the state claims a right to exclude them, its assumed authority over immigrants does not extend any further than this (at least not in their capacity as excluded immigrants). So not only is the usual scope of justifications for political

⁶ For present purposes I disregard the complication that states usually limit the group of people to whom it justifies itself more narrowly than the group over which it actually exercises its authority (citizens are taken into account but residents are not, even though they are also subjected to its laws and authority). A similar discrepancy may also be relevant in relation to immigration control, as argued by Abizadeh 2008, but no claim made in this paper depends on Abizadeh's specific view about justification or the conclusion he derives from it in relation to immigration control.

authority too narrow for a right to exclude immigrants, the objects of the rights are also different, which makes justifications for political authority even less likely to apply to the right to exclude.

This makes for the second thesis of this paper:

The normative distinctness of the right to exclude immigrants from a territory and the right to impose political authority in a territory (the normative distinctness thesis):

The required scopes of justification of these two rights are different and justifications must take account of the different objects of justification.

For these general reasons, Miller's argument for political authority, even if successful, does not provide a justification for a right to exclude immigrants. Miller might not think this, however. A more charitable reading is that an argument for political authority is needed since it is states that exclude immigrants, so if there cannot be a legitimate state, *ipso facto* there cannot be a right to exclude immigrants. But it is not clear that the argument succeeds even on this more charitable reading, for it still only justifies the state's authority *relative to* its citizens, not relative to immigrants.

This general problem persists if one looks at the specific benefits invoked in Miller's argument. To take just one, the primary benefit of having a state is a modern legal system, which plausibly requires territorial authority. Miller claims that 'a system of territorial authority cannot function without some control over who falls within its scope' (Miller, 2007: 215-216, cf. Walzer, 1983: 38-39). But as long as anyone present on a state's territory are subject to its authority, a right to exclude is not necessary for having a territorially defined legal system. What makes Miller's claim plausible is not something about territorial jurisdiction *as such*, but something about many of the additional functions states might assume; the more demanding the functions, e.g. the provision

of tax funded universal welfare benefits, the more plausible it is that the successful performance hereof requires not only that it is determinate who are subjected to the system but also that it can control who may become so (cf. Lægaard, 2007: 286). This indicates that Miller's argument is not really about territorial jurisdiction as such (*pace* Miller, 2007: 214) but rather about standard nation-states performing the functions of a welfare state.

TERRITORIAL RIGHTS

Even if a state may have political authority over a territory, there is the further question why any *particular* state can legitimately claim authority over any *particular* territory. Miller submits that:

States can only claim territorial rights, in my view, as representatives of the peoples that they govern: such rights, in other words, belong fundamentally to the people collectively and are exercised on their behalf by the state they have authorized to do so. (Miller, 2007: 217)

Two different kinds of considerations are involved here: one about *state legitimacy* as derived from 'the people', i.e. a relationship between *government* and *governed* which has to be properly representative for exercises of political authority to be legitimate, and one about *territorial rights* as derived from a different relationship between the *territory* over which the state claims authority and the *people* who live on it. Territorial rights in this latter sense are pre-political, both because they are held by peoples rather than states and because they are supposed to justify state authority over specific territory. Miller's justification for territorial rights also points to pre-political factors:

Consider a nation that over a long period occupies and transforms a piece of territory and continues to hold that territory in the present. This unavoidably has a number of consequences. First, there is a two-way interaction between the territory and the culture of the people who live on it. The culture must

adapt to the territory if the people are to prosper: it matters whether the climate is hot or cold, the land suitable for hunting or agriculture, whether the territory is landlocked or open to the sea, and so forth. But equally the territory will in nearly every case be shaped over time according to the cultural priorities of the people, as fields are marked out and cultivated; irrigation systems are created; villages, towns, and cities are built; and so forth, so that eventually the face of the landscape may be changed beyond recognition. It has become the people's home, in the sense that they have adapted their way of life to the physical constraints of the territory and then transformed it to a greater or lesser extent in pursuit of their common goals. It does not matter here that the transformation may not be coordinated or consciously intended by the participants, so long as it reflects their shared cultural values (Miller, 2007: 217-18)

Because of this 'two-way interaction', Miller claims that 'the nation as a whole has a legitimate claim to the enhanced value that the territory now has ... And because the enhanced value cannot be separated from the territory itself—it is *embodied* in cultivated fields, buildings, roads, waterways, and all the rest—there is no way in which the nation could retain the value it has created but not the territory.' (Miller, 2007: 218, cf. Meisels, 2005: 80-86)

This 'quasi-Lockean basis for territorial rights' is supplemented by further considerations regarding 'the symbolic significance of national territory':

Living on and shaping a piece of land means not only increasing its value in an economic sense, but also (typically) endowing it with meaning by virtue of significant events that have occurred there, monuments that have been built, poems, novels and paintings that capture particular places or types of landscape. Those living in the present may attach more or less value to living in a place that is rich in historical meaning, though my sense is that this has come to matter more as a global consumer culture permeates so many other aspects of life. The case for having rights over the relevant territory is then straightforward: it gives members of the nation continuing access to places that are especially

significant to them, and it allows choices to be made over how these sites are to be protected and managed. (Miller, 2007: 218f)

The difference between the two arguments is mainly that the latter concerns symbolic significance, or subjective value, rather than material, or objective, value.⁷ The arguments nevertheless share the ‘quasi-Lockean’ structure, since both concerns the value of the territory and ground rights to territory in the active relationship between residents and the value of the territory.

Miller’s ‘quasi-Lockean’ argument for territorial rights is in a sense neither an argument about territory nor about rights. The object of the right cannot be territory as usually understood in relation to states, i.e. the territorial jurisdiction within which a state claims authority. This is so because the subject of the right is not a state but the people actually living in the territory, which is not constituted so as to be able to make, adjudicate and enforce law, and because the territorial right is supposed to be logically prior to the specification of any jurisdiction, the physical extent of which it is supposed to determine.⁸ The relevant sense of territory is therefore not

⁷ This means that the second argument only provides reasons to other people who do not share the subjective appreciation of the symbolic value if one also assumes a more general principle, e.g. that people’s welfare provides reasons and that welfare partly depends on experience of subjective value.

⁸ While Miller’s quasi-Lockean arguments do not invoke the state at any point, but only the fact of settlement and the transformation of the land, there might be an implicit reference to the state in the argument from symbolic significance. According to Tamar Meisels (2005: 90-92), identification with land might ground a right to it, but only if the identification takes place on the basis of a legal system which generates legitimate expectations that the land will be of continuous use to the person(s) identifying with it. Meisels accordingly argues that the symbolic significance of land to settlers may grant them a right to it if their expectations have the assurance of a legal system, e.g. as is the case for Israeli settlers in occupied Palestine. This claim is problematic, however, since the legal assurances must arguably in turn be normatively legitimate for the resulting expectations to be legitimate. But for present purposes this problem can be set aside, since the issue at hands does not concern land rights of settlers with the backing of a state, but whether

jurisdictional but geographical (cf. Buchanan, 2003: 232). So contrary to other proposals for Lockean accounts of territory (e.g. Nine, 2008a), Miller's argument in fact seems to be about a kind of property right in land rather than a jurisdictional right. To this has to be added yet another qualification, since Miller himself only takes the argument to establish 'a legitimate claim' (Miller, 2007: 218) rather than a right.⁹

The subject of land claims

Even though Miller formulates his quasi-Lockean argument in terms of the relationship between nation and territory, the subject of the land claim supposedly established by the argument is not necessarily a nation. Miller understands 'a nation' as a culturally defined community, whose members share an identity, a sense of special obligations and an aspiration to political self-determination (Miller, 2007: 124-126). A nation is a 'community' distinct both from 'merely collections of individuals who happen to be juxtaposed in physical space' (2007: 124), i.e. a people

people might have land rights *merely* in virtue of the land's symbolic significance to them, *independently* of there being a state. Alternatively, one might take this complication as indication of one way in which the argument for land rights *presupposes* the argument for political authority. But while this might be the case according to the logic of the former argument, it is problematic in relation to an argument for the right of states to exclude immigrants, since the assumption of a state with the authority to regulate property in a territory would then in effect assume the right to exclude which is precisely what is to be justified.

⁹ By 'claim' Miller does not mean a Hohfeldian claim right: 'A claim is something less than a right, but those who refuse it must give the claimant a reason for doing so.' (Miller, 2007: 213) The view that Lockean arguments like Miller's do not establish actual rights is echoed by Cara Nine: 'The rights claim generated by the Lockean principle of desert is weak because it can be defeated by other considerations, most importantly by another agent's prior rights claim to L' (2008a: 159) and 'Lockean theory proposes ... that rights to land can come in degrees' (2008a: 164).

in a purely *demographic* sense, as well as from a ‘political association’ (2007: 38), i.e. the citizens of a state.

On the basis of this understanding of ‘nation’, Miller’s use of the term in his argument for land claims is clearly an expression of his special choice of focus (Miller, 2007: 217), rather than a requirement of the argument. The considerations about ‘a two-way interaction between the territory and the culture of the people who live on it’ grounding the quasi-Lockean argument for land claims do not require the people in question to be a nation in Miller’s strict sense; it seems to apply equally to a people in the broader demographic sense (cf. Nine, 2008a: 160).¹⁰ If occupancy and transformation is what matters (Miller, 2007: 219) the strength of the reasons for land claims is not affected by whether or not the occupants also form a nation.

Some might think that even if the subject of the claim justified by the quasi-Lockean argument is not necessarily a nation, it must be a *collective* of some kind (Meisels, 2005: 13-23). This might be one reason why Miller terms the argument *quasi-Lockean*, namely to draw attention to the collectivist nature of the claim.¹¹ But is this necessarily true? The argument invokes interaction and increased value, but individuals take care of much of the interaction. It is true that

¹⁰ One of Miller’s earlier formulations of the argument as a claim that ‘people who settle a territory have a good claim to continuing control of that territory, a claim that can be set aside only in fairly extreme circumstances’ (Miller, 2003: 265) makes it explicit that the argument is not nationalist, as Miller’s subsequent formulations suggest, but is concerned with the demographic people who live in a territory and their rights as such.

¹¹ Another sense in which Miller’s arguments are *quasi-Lockean* is that they do not address the issue of the initial appropriation of territory at all, but only focus on the normative significance of actual settlement in, use of and identification with a given territory. The passing over of the problem of initial acquisition, which is of fundamental importance to any recognisably Lockean theory, is problematic in relation to the issue of immigration, unless it can be assumed that would-be immigrants do not have a Lockean claim to the territory and are thus not dispossessed of their rightful property if excluded from it (see below).

some of the interaction, and some of the consequent increase in value, is not the labour of individuals but an effect of the state's creation, adjudication and enforcement of law within the territory (Nine, 2008a: 156). But in that case the subject of the resulting land claim is the state rather than the people or nation, so this example does not fit Miller's bill. The subject of land claims may need to be collectives insofar as it is in fact collectives that live on any extended territory, but the sense of 'collective' required here is simply the sum of individuals living within and interacting with the territory. This aggregative conception is actually compatible with individualistic Lockean theories according to which territorial rights are simply derived from individuals' property rights in land (Steiner, 1996). The implication of such theories is that territorial rights have radically different properties than usually thought, specifically that individuals can secede with their land and that states cannot restrict immigration against the will of individual land owners. But it is not clear that Miller's argument for land claims precludes this implication.

Alternative non-individualist Lockean accounts

Even if Miller's quasi-Lockean argument is collectivist, it is not nationalist, but implies that the subject of land claims is the demographic people actually living in a geographical area. Miller's theory is accordingly quite different from other attempts at justifying territorial rights in a Lockean way. Cara Nine's presents her Lockean theory of territory as 'collectivist' 'because it asserts that the state, a collective, can directly acquire rights to land without prior reference to property rights or to individual consent.' (2008a: 154-55) Her aim is to avoid the revisionist implications of radical individualist forms of Lockeanism like Steiner's. Nine's theory is Lockean in a way similar to Miller's in that it invokes a kind of 'labour' as the basis for rights, namely the way in which states are capable of 'changing the land' by creating, adjudicating and enforcing laws, thereby developing and creating value in the land in a morally valuable way (Nine, 2008a: 155-56). The subject of the

resulting right is accordingly the state. While her theory is non-individualist, it problematic to characterise it as collectivist since states are not really collectives. A modern state is rather a unitary organization or structure of authority. Nine seems to conflate the state with its population, its citizenry, or with the people who staff it. But offices and positions in the state, and statuses assigned by the state, are not identical to the individuals who actually occupy them (Morris, 1998: 37, 45; Copp, 1999: 6).

So while both Miller's and Nine's theories are non-individualist Lockean theories, they differ with respect to both the subject and object of the resulting rights.¹² If the justification is based on actual settlement on and interaction with the territory (Miller), then the subject of the resulting land claims is the people and the claim is not jurisdictional but a collective property right. If, on the other hand, the justification is based on the state's actual jurisdictional activity (Nine), then the subject is the state and the right is jurisdictional.

Nine's Lockean arguments for why states have territorial rights are more precisely that this promotes values of liberty, desert and efficiency. Nine's arguments for territorial rights are similar to Miller's argument for political authority in at least two respects: First, both justifications are broadly consequentialist, insofar as they are framed in terms of the valuable effects of granting states territorial rights. Secondly, the object of the justification in Nine's case is a right to territory in the sense of jurisdiction, i.e. the right to make, adjudicate and enforce laws within the territory, which is exactly what Miller talks about under the heading of political authority. These similarities mean that the conceptual distinctness thesis formulated in relation to Miller's argument for political authority might also apply to Nine's arguments for territorial rights. In that case, the claim would be

¹² A further difference is that Miller's theory is purely backward looking, referring only to the past relationship and interactions between the people and the territory, which might be characterised in terms of desert, whereas Nine's theory is partly consequentialist or at least forward looking, since it also refers to the values of liberty and efficiency realised by giving a state certain rights.

that even if Nine's arguments justify territorial political authority in general (an institutional perspective), or even a specific state's political authority in a particular territory (a token right perspective), this is not the same as a right to exclude immigrants.

This raises the further question whether the normative distinctness thesis poses a difficulty for attempts to use Nine's arguments as justifications for a right to exclude immigrants. If the two rights require justifications to different audiences, the question is whether Nine's arguments have the required broad scope to function as justifications for a right to exclude immigrants? Insofar as the relevant consideration motivating territorial rights is that 'the actions of the state that protect and promote important moral values are actions concerning the establishment of justice in a region' (2008a: 156), the justification may be understood as limited in scope to people actually present in this region and able to actually enjoy the benefit of justice (here understood in Lockean terms of liberty, desert and efficiency). In that case, the normative distinctness thesis would imply that the justification is inapplicable as an argument for a right to exclude immigrants. If, on the other hand, one understands justice as a general value providing reasons also to people not within its reach, there is no necessary normative distinctness of scope. Then the question is rather the substantial normative one whether a) a specific Lockean conception of justice is plausible, and b) actually justifies a right to exclude immigrants.

These considerations make for the third thesis of the paper:

A (near) *dilemma* for non-individualist Lockean justifications of territorial rights as part of a justification for a right of states to exclude immigrants: Collective land claims do provide immigrants with a reason (respect for property), but it is not linked to the state. Jurisdictional rights to territory are linked to the state, but insofar as their

justification only addresses the demographic people, it does not provide a reason for immigrants.

If this (near) dilemma holds, there are apparently two ways out for non-individualist Lockean attempts to justify a right to exclude immigrants: Collective land claims have to be supplemented with further considerations connecting them in a relevant way with the enforcement capabilities of a legitimate state having political authority over the territory in question. But before this avenue can be considered, a difficulty due to the well known fact that Lockean property rights presuppose the satisfaction of a suitable ‘enough and as good’ proviso must be addressed (next section). If, on the other hand, the right in question is a jurisdictional right of a state justified by appeal to the general value of justice, the question is rather whether the considerations central to Lockean accounts of justice in fact justify a right to exclude immigrants. This is a substantive normative question that cannot be discussed satisfactorily here. But note that the relevant conception of justice must be Lockean since it is supposed to be part of a Lockean justification of a state’s territorial rights. And it is at least not obvious that such considerations justify restrictions on immigration; they may to the contrary ground a case for open borders (e.g. Carens, 1987: 252-54).

Problems due to a Lockean proviso

Miller’s quasi-Lockean argument at best justifies a right to exclude immigrants if, or to the extent that, a) immigration will undermine or detract from ‘the enhanced value’ of the land which is the primary object of the claim, and b) if a suitable ‘enough and as good’ proviso is satisfied (cf.

Meisels, 2005: 83f).¹³ Since territory is not taken from a reservoir of un-owned land, this proviso in effect subjects property rights to a distributive constraint. Miller seems to think that the imposition of a proviso is tantamount to a claim that territorial rights can only be legitimate if they are derived from ‘an unblemished original title to land’ (2007: 220), which he quite rightly notes would rule out almost all candidates. But a proviso is not only applicable in the (perhaps fictional) case of original acquisition of previously un-owned land; because it concerns the distributive implications of Lockean respect for the equal freedom of all individuals, it also applies to subsequent distributions, e.g. for generations born when there is no un-owned land left to appropriate (Steiner, 1996: 145). But not only does the insistence on a proviso not presuppose the fiction of property rights derived from original appropriation, this constraint also seems necessary for Lockean arguments (quasi- or not) to have plausible implications. Otherwise they might justify rights to exclude immigrants from land even if it is not needed or used by the right holders, and even if there is nowhere else for immigrants to take up residence.

So what counts as ‘enough and as good’? A genuinely Lockean answer is some kind of right of all persons to an equal share of (the value of) natural resources (Steiner, 1996: 145). Such a proviso would provide the needed constraint on the right to exclude while still acknowledging the right of residents to the enhanced, i.e. non-natural, value they have produced. The problem for Miller is that Lockean arguments incorporating provisos like this cut both ways: they may justify land claims but may also limit or even undermine the right to exclude immigrants. This is the case if exclusion of immigrants lays claim to a too great per capita share of the world’s land, or, more generally, natural resources. In that case the proviso either requires that immigrants

¹³ A proviso requirement may not apply to Lockean arguments for territorial rights in the sense of jurisdiction, since jurisdiction is not a scarce good taken from the commons. But precisely because Miller’s ‘quasi-Lockean’ justification concerns collective land claims rather than jurisdictional rights the proviso issue still needs to be addressed.

be admitted or that they be paid a compensation equivalent to their fair share of the value of the resources from which they are being excluded (Blake & Risse, 2007; Risse, 2008). Miller argues that there is no neutral way of making the required assessments of the value of natural resources (2007: 58-62). But this claim, if true, constitutes a problem not only for egalitarian ideas about global redistribution but for Miller's own Lockean argument for territorial rights as well, since such arguments are only plausible if a suitable proviso is satisfied.

This makes for the fourth thesis of the paper:

The both-ways thesis: While Lockean arguments for collective land claims might be a part of a justification of a right to exclude immigrants, the necessary proviso may equally justify a right to immigrate or make a right to exclusion conditional on compensation being paid to would-be immigrants.

This thesis explains why Miller cannot speak of territorial rights, but must limit himself to talk about 'claims'.

Problems of deriving a right of states from collective land claims

If a plausible version of a relevant proviso is fulfilled, then Miller's quasi-Lockean argument may justify collective land claims. But this raises a new problem, for collective land claims are not equivalent to a *right* of the *state* to exclude would-be immigrants from the land, for two reasons: First, a claim is not a right, but may be outweighed by other considerations. Second, and more importantly, the subject of the claim to land is the people living on the land, not the state. And the people cannot, *qua* a collection of residents, exercise such a right because they are not organised so as to be able to make decisions and act collectively (Lægaard, 2007: 288; Levy, 2008: 486). So the

state is needed as the enforcer of the claims of the people, which might be why the argument for political authority is relevant even though it does not provide a justification of a right to exclude. But in order for the state to be able to exclude immigrants on behalf of the people, it is not enough that it can legitimately impose authority on people in the territory. So even granted that states may be legitimate and that people may have a claim to the land, Miller still needs to explain how the state have a right to exclude immigrants from the territory.

This is apparently where the other relationship noted above, that between governments and governed, comes into the picture. Miller suggests that the state can only exclude immigrants if it can offer a justification reflecting its role as representative of the people with a claim to the land, and:

An adequate explanation will be one that links immigration policy to the general goals of the society in question. These goals will reflect existing national values and will ideally be set through a continuing process of democratic debate. Immigration on any significant scale will invariably have an impact on these goals, sometimes positive, sometimes negative. (Miller 2007: 222)

‘The general goals of the society in question’ and ‘existing national values’ are analytically distinct insofar as the ‘society’ refers to the actual people living within the state (Copp 1999: 37), i.e. the demographic people relevant to Miller’s quasi-Lockean arguments, whereas the nation, on Miller’s understanding, is a culturally defined community. If the invocation of the state as representative of the people is to connect with the quasi-Lockean arguments for collective land claims, the people must be understood in the broad demographic sense relevant to the arguments. This, however, raises the questions how democratic debate on shared goals can provide a justification for exclusion?

DEMOCRATIC SELF-DETERMINATION

Miller's answer to the question about what matters for the purpose of providing a justification of restrictive immigration policies is expressed in terms of the value of self-determination:

My claim here is not that the interests of current citizens will always outweigh the interests of those who would wish to immigrate, supposing we could find a neutral metric by which these interests could be compared. I am appealing instead to the value of self-determination, to the importance to a political community of being able to determine its future shape (Miller 2007: 223)

So the argument for why a legitimate state might be justified in excluding immigrants from the territory over which its population has land claims appeals to the self-determination of 'the political community' (cf. Risse 2006: 694f). The entity invoked here is a new one. The political community is a collective of people and as such distinct from the state, but it is not necessarily identical to the demographic people or a nation (Morris, 1998: 229-230). This is for instance the case if the political community is understood as constituted by the subset of residents who are *citizens* of the state.

What normative role does the appeal to democratic self-determination of a political community play? Self-determination might function as a justification for a right to exclude: Then the value of self-determination must be such that it in itself provides a justification to immigrants for why they can be excluded. Whether self-determination can function in this capacity in turn depends on how it is understood. If it is understood, as Miller's formulations suggests (Miller 2007: 224), as a mere interest that individual members of a political community have in being able to set the goals their political community should pursue through the state, then the normative distinctness thesis kicks in again: Since the justification only appeals to the interests of existing citizens, it is insufficient as a justification for a right to exclude immigrants.

So either the appeal to self-determination must have a different function, or self-determination must be understood in a different way than as an individual interest. One alternative function might be to provide a decision procedure for actual acts of exclusion: The argument from democratic self-determination is then understood as a response to one type of argument for open borders, e.g. arguments about global democratic governance, which would take the decision about immigration out of the hands of the state (e.g. Abizadeh, 2008). In that case, the democratic argument claims that decisions about membership of the state should lie with current citizens because of the value of self-determination. Understood thus, the democratic argument is not about giving the justification for exclusion to immigrants, but about who should make particular decisions. This means that the right to exclude must already have been established beforehand so that the only question left is how to decide in practice how to exercise it. The question, then, is whether the right has been established beforehand? As noted, the argument for political authority does not address the issue at all, and Miller's quasi-Lockean argument for collective land claims is (at best) incomplete, since it still needs to justify a right of the state.

A third way of understanding the appeal to democratic self-determination might therefore be as an element in a Lockean account of territorial rights: If the right to exclude can be derived (taking the proviso and other complications into account) from property rights to the land, then the function (and duty) of a Lockean state is to protect and enforce this right. On this understanding, there is little mystery about how the state gets the right to exclude immigrants from its territory, for this right is simply a corollary of citizens' property rights. The problem is rather a practical one of deciding when to exclude. If, as on Miller's account, land claims are held by a collective, the state can only exclude immigrants from its territory if this is in accordance with the will of the collective, and democratic self-determination may be a way of determining when this is

the case. In that case, democratic decision procedures either have an epistemic function revealing what the will of the collective property owner is, or they constitute the common will.

In this case it might be said that the right to exclude is only *exercised* by the state, but is fundamentally *held* by ‘the political community’ or ‘the people’, and that democratic decision procedures merely function to *authorise* the state to enforce the right of the people. This certainly fits with Miller’s idea of collective land claims as somehow pre-politically determined. But Nine also ends up in a somewhat similar position. Whereas Nine initially wrote about territorial rights as a rights held by states, her considered view, labelled ‘the democratic conception (or at least ‘for the people’ conception) of territorial rights’ (2008b: 959), seems to be that the democratic people collectively hold jurisdictional rights and merely delegate these to the state: ‘the articulation and assignment of the rights would have to go through something like a democratic process, with the ultimate authority for the decision resting on the fact that it is voluntarily assented to by the people.’ (Nine, 2008b: 962) On this view one might say that the democratic people are the source or author of territorial rights, whereas the state is the executor or enforcer of them (Buchanan, 2003: 234-35).

There is still a difference between Miller’s and Nine’s theories, however, since the right of the people according to Miller is a collective land claim, whereas Nine insists that territorial rights are jurisdictional rights, not property rights. But the ‘for the people’ formulation raises the question how Lockean Nine’s theory is: If the people are the source of the territorial right, can it really be based on the state’s ‘labour’ in terms of enforcing law etc.? This problem may explain Nine’s initial conflation of the state with its citizenry (the characterisation of the state as a collective): The ‘labour’ she talks about (2008a: 156) is only partly attributable to the state (i.e. the enforcement of law etc.); some of it is really done by citizens living under the state’s laws (development of land and resources etc.). But since the two kinds of ‘labour’ are carried out by different agents, a Lockean argument for territorial rights on this basis points in two different

directions. This needs not lead to incoherence, however, for whereas the state's labour in making, adjudicating and enforcing laws, if morally valuable, might reasonably justify jurisdictional rights, then the people's value creating labour within the state's laws rather grounds claims for property. So Nine's 'for the people' formulation of territorial rights needs to distinguish between the people in its ordinary activities (farming, building roads etc.) and in its democratic capacity as the authoriser of the state's activities. But this seems to imply that her theory cannot really be Lockean, for while the state does carry out valuable labour in upholding a jurisdiction, the 'for the people' conception of territorial rights locates such rights in the democratic people rather than in the state as an institution. But the people do not obviously labour; the people only consent. So Nine seems to waver between a Lockean, but purely statist, theory and a democratic, but non-Lockean, theory of territorial rights.

CONCLUSION

Miller's theory might avoid the problem confronting Nine's theory by only assigning land claims to the people and by understanding jurisdictional rights as the right of a legitimate state to enforce and protect such claims. The right to exclude immigrants then becomes a kind of epiphenomenon: there is no right to exclude as such independently of collective land claims and justifiable decisions by the land claimants to have immigrants excluded from their land. So if a justified land claim a) satisfies a relevant proviso, b) outweighs the possible claims of would-be immigrants in entering, and c) the claimant does not want to allow immigrants entrance, then the state is not only permitted but is obliged to enforce the land claim against the immigrant, which it can do provided d) the state is legitimate, i.e. has justified political authority. That the state has a right to exclude in such cases merely means that it is permitted to exclude immigrants from the land and that there is a justification for this act of exclusion which can be recognised by immigrants as providing them with

legitimising reasons. But there are only tokens of this right; the right to exclude is not a general prerogative of statehood, and whether a state has the right (in the noted sense) to exclude immigrants depends features about specific situations, including the comparable claims of would-be immigrants and proviso satisfaction. This makes for the final thesis of the paper:

The token, not type, thesis: Lockean arguments at best justify individual *acts* of exclusion, not a right to exclude as a general feature of statehood.

Does this thesis also hold for other kinds of Lockean theories? It is clear that it holds for individualist theories like Steiner's. But what about other anti-individualist Lockean theories like Nine's? Even if the people have ultimate jurisdictional authority (as noted not a particularly Lockean view) it still does not follow that the people have the meta-jurisdictional right unilaterally to change jurisdictional boundaries (Buchanan, 2003: 235), and the same point seems to apply to unilateral authority over immigration into the jurisdiction. If territorial rights are instead based on the state's jurisdictional activity, then the answer depends, as noted, on what substantial Lockean accounts of justice with the broad scope demanded by the normative distinctness thesis imply for immigration. As already noted, this is a question that cannot be discussed satisfactorily here. But note that considerations of liberty and efficiency central to Lockean justice would seem to qualify a right to exclude in two different ways, which might both give some plausibility to the token, not type, thesis: Rights to exclude immigrants might be justified in the same way as territorial rights, namely as the best way to protect and promote personal liberty (Nine, 2008a: 157). But precisely because this is a consequentialist justification, the value of liberty might at least sometimes speak in favour of relatively open borders, and hence against a right to exclude immigrants. Similarly, the

value of efficiency might speak against exclusion, e.g. in cases where territory is not used efficiently.

In closing, it should be noted that the picture is in fact even more complicated for Miller's theory, because of the collectivist nature of land claims and the resulting difficulty of determining when the will condition (c) is satisfied. If one grants Miller's collectivism regarding land claims, then the state can only exclude immigrants when it has been properly authorised to do so. But if the object of authorisation is individual acts of exclusion rather than a general right to exclude, Miller's theory would seem to require democratic decisions about each and every act of exclusion carried out by the state in enforcement of land claims. This is both the case because there is no general right to authorise and because the people may not be of the same mind with regards to all immigrants.

But one might of course reject Miller's collectivism. As noted earlier, it is not obvious that the quasi-Lockean argument really supports Miller's assumption that subjects of land claims must be collectives – at least not collectives in any stronger sense than aggregations of individuals actually occupying the pieces of land in question. But if no further reason can be given for why land claims must be collective in a stronger sense, Miller's theory may collapse into an individualist Lockean theory like Steiner's. In that case land claimants may be individuals. This means that all land owners get to decide unilaterally whether or not to exclude immigrants from their part of the state's territory. This is clearly an implication Miller wants to avoid, but the quasi-Lockean argument is not incompatible with such an individualist theory.

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