

# Types of theories of territorial rights and the right to exclude immigrants

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## ABSTRACT

The paper considers how different types of theories about the nature and justification of territorial rights of states might treat the right to exclude immigrants. The paper proposes a typology of types of theories of territorial rights depending on whether they take such rights to be justified in an individualist or collectivist way, and whether they conceive rights to territory as necessarily pre-political or as inherently tied to states. These distinctions yield four ideal types of theories of territorial rights based on these distinctions. The paper suggests that these ideal typical differences are important in relation to debates about territorial rights in general since different types of criticisms apply to different types of theories. The paper then discusses the ideal typical theories with specific focus on how they can address the right claimed by states to exclude immigrants and it is argued that they all have difficulties in this respect.

## INTRODUCTION

States are generally characterised, both in ordinary political discourse and in political theory, as having territorial rights. Territorial rights denote the special authority states have over their territory, whether it is further characterised in terms of sovereignty, a legitimate monopoly on the use of violence, administrative regulations of specific matters, or the obligation of individuals on the territory to obey the laws of the state. One territorial right that states are usually assumed to have – or one aspect or implication hereof – is the right to control immigration to the territory and hence to exclude immigrants from the territory.

This paper considers how the right to exclude immigrants can be understood and justified from the point of view of more general theories of territorial rights. I will do this by

developing a typology of types of theories of territorial rights. There are several reasons for this approach. First, the theoretical debates on territorial rights are fairly new within contemporary political theory, so a more systematic overview of the types of theories in play might be of general interest. Secondly, the approach to the right to exclude immigrants from a typological perspective allows me to cover more ground and make some general points that would be obscured by more detailed attention to the specifics of particular theories on offer. It is these general points that are my main focus, although I will also make some more detailed criticisms of specific theories as illustrations of my general points. The paper's main claim is that the types of theories under consideration all have difficulties in addressing and justifying a right to exclude immigrants. The paper further shows that and explains how the difficulties faced by the theories arise for quite different reasons. My aim in making these claims is not to reject the possibility that there might be something like a right to exclude immigrants, or that it can be conceived of as a territorial right. The claim is rather that existing types of theories have difficulties justifying such a right. These difficulties might be symptomatic of something general about the difficulty in addressing the state theoretically, not just show that there is something wrong with the particular theories.

Before starting, I should quickly say something about what territorial rights are, more generally. It is firstly important to keep the distinction between property rights, jurisdictional rights and meta-jurisdictional rights in mind. Property rights are rights of ownership over things. Jurisdictional rights are rights to make, adjudicate and enforce rules for how property rights should be regulated (as well as other kinds of regulations, e.g. rules for persons' conduct generally). And meta-jurisdictional rights are rights to determine and change jurisdictions (Buchanan, 2003: 232-33). Territorial rights are first and foremost jurisdictional rights. A state can have territorial rights over an area without owning anything in the area, and the fact that a state has territorial rights over

the area does not show that the state has the right to change, e.g. expand, the area over which it has territorial rights.

Secondly, in what sense are territorial rights ‘rights’? I want to leave this question as open as possible. Suffice it to say that talk about territorial rights does not presuppose that such rights are fundamental in a moral sense; territorial rights may be derived from other rights that are not territorial, or they may be justified with reference to normative claims that do not invoke the existence of rights, e.g. in indirect consequentialist ways. The point of talk of territorial rights, then, is primarily about the existence of certain kinds of normative claims of a certain strength and generality, which place certain kinds of duties on other agents. Territorial rights are therefore not necessarily absolute or unconstrained, but may allow for some kinds of trade offs or trumping of claims. With these general points in mind, let’s turn to the types of theories of territorial rights.

#### TYPES OF THEORIES OF TERRITORIAL RIGHTS

I will propose a categorisation of positions on territorial rights that is ideal typical in the sense that it employs only two distinctions. Actual theories of territorial rights will therefore often not fit neatly into any single category, because most theories have further elements and often tend towards hybrid positions straddling my distinctions. The ideal types nevertheless capture some important differences between theories that might make a difference for how the theories conceive of and can justify territorial rights.

Another reason for considering theories of territorial rights according to the two distinctions at the basis of the typology proposed here is that each distinction map different principal answers to two of the ‘hard questions’ that any theory of territorial rights must answer. The one question is whether only states can have territorial rights or whether non-state entities may also have such rights. The other question concerns the normative basis for territorial rights. Both

questions are ‘hard’ because most people (at least those not already in the grip of a specific theory) are likely to feel the force of intuitions with regard to these questions that pull in opposite directions. With regard to the first question, many people think that groups that do not already have a state of their own may have a claim to have one, especially if the members of the group are treated unjustly by their present state. This is the kind of intuition underlying liberal arguments for claims to secession. But liberals also think that territorial rights are tied to the protection of individual rights and thus that only entities like states, which can do the job of protecting individual rights, can actually have territorial rights. Liberals therefore have difficulty saying that groups who do not already have a state can have collective rights to its own territory, for the group is not yet the kind of entity that can have territorial rights. On the other hand, liberals are wont to admit territorial rights to groups like nations or peoples who do not have states, for this threatens to divorce territorial legitimacy from rights protection. Because this hard question is one any theory of territorial rights must confront, the typology is relevant to discussions of territorial rights more generally.

I categorize positions on territorial rights according to two distinctions, resulting in four categories. The first distinction concerns the *nature* of territorial rights and one necessary (not sufficient) condition for qualifying as a *bearer* of territorial rights. The question is whether or not territorial rights are a kind of right which only states can be the bearers of? According to what I will call *non-statist* views, territorial rights are in a substantial sense pre-political in that the main normative properties captured by talk of territorial rights can exist independently of states. This does not mean that these theories do not recognize the existence of states or do not consider states normatively important, nor need they deny that states are the main, or perhaps as a contingent fact the only, agents exercising territorial rights. But non-statist theories do claim that non-state entities may also have territorial rights. *Statist* views, on the other hand, hold that territorial rights are in

some intrinsic sense tied to states (or sufficiently state-like entities); territorial rights only arise in the context of states. Statists need not deny that the justification for having territorial rights makes reference to pre-political matters, nor need they claim that states have non-instrumental moral significance or that states automatically have territorial rights. They do claim that territorial rights are a kind of right that only states can have and that territorial rights would not arise in contexts without states.<sup>1</sup>

My second distinction concerns the kind of entities central to the *justification* of territorial rights. According to *non-individualist* views, any sufficient justification of territorial rights necessarily make reference to collectives or at least to entities that are not individual persons. Such views claim that a sufficient justification for territorial rights cannot consist in their complete reduction to rights or interests of individual persons. *Individualist* views, on the other hand, claim that territorial rights, if any such rights exist, can be sufficiently justified with reference to rights or interests of individual persons.

These two distinctions combine to generate four ideal typical categories of theories, which I will sketch below. Before I do that, note first that the typology does not presuppose anything about whether territorial rights do exist or how extensively they obtain; all answers to the questions captured by the two distinctions are compatible with forms of anarchism claiming that no actually existing entities in fact have territorial rights; statist view are for instance compatible with so strict conditions for having territorial rights that no existing state qualifies.<sup>2</sup>

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<sup>1</sup> While statists in this sense claim that states contribute something of independent normative significance to issues of territorial rights, they do not necessarily hold, e.g., that membership of a state generates special obligations, although this view is compatible with statism with respect to territorial rights. For a discussion of a related sense of statism in relation to immigration that is compatible with moral cosmopolitanism, see Lægaard (2009).

<sup>2</sup> Whether the positions noted are also compatible with more principled philosophical forms of anarchism denying not only the *actual* legitimacy of states but the very idea and *possibility* of territorial rights is a more complicated issue. But

The following remarks on the general features and prominent representatives of the different types of theories should furthermore not be taken as comprehensive accounts of theories of territorial rights, which are often more nuanced and complicated than my categorisation suggests. One reason why the distinctions are nevertheless important is that they help to focus and understand criticisms of theories of territorial rights. The statist/non-statist distinction is for instance helpful in sorting out different kinds of objections to individualist types of theories. To take just one example, Avery Kolers criticises individualist theories for understanding territorial rights as derivative and as not requiring any special theoretical apparatus (2009: 32) and for not being able to account for where state boundaries should be drawn (2009: 40). But these criticisms are plausibly understood as directed at non-statist and statist versions of individualism, respectively, and, if that is the case, the two objections are in fact aimed at incompatible types of theories. The typology also offers a way of seeing how superficially similar arguments, e.g. ‘Lockean’ arguments grounding territorial rights in some kind of act of labour or acquisition, may actually be extremely different, as witnessed by the fact that formally ‘Lockean’ theories appear as instances of both individualist non-statist, non-individualist non-statist and non-individualist statist theories. This suggests that the ‘Lockean’ character of such theories may not be the most important trait for the purpose of understanding or assessing them.

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at least some forms of philosophical anarchism might accept, e.g., that if there were to exist any such thing as territorial rights, this would have to be because the bearer of these rights sufficiently respected individual rights, autonomy or freedom, and then simply claim that the relevant standard for respect is so demanding that no entity could in principle fulfil it. Such a view might even accept a statist account of territorial rights, even if no such rights could ever obtain.

### **Individualist non-statist theories**

The most prominent examples of non-statist individualist theories are classical (libertarian) Lockean theories such as those of Hillel Steiner (1996; 2001) and Simmons (2001). This type of theory is non-statist because it not only justifies territorial rights (to the extent that they can be justified at all) with reference to individual rights, but actually reduces territorial rights without remainder to individual property rights in land. This means that all features of territorial rights of states are present already in pre-political ('natural') property rights of individuals. These rights are not created by, or with the rise of, the state, but are merely transferred to the state by individuals, e.g. by way of some form of social contract or consent. The theory is individualist because only individuals can have the kind of natural rights that are the basis for territorial rights.

The simple and neat Lockean theory has several problems, however, as a theory of territorial rights. On the one hand, there is the problem that it presupposes the existence of pre-politically determined property rights, and assumes that these can be transferred to the state by way of contract or consent, both of which are controversial claims (cf. Brilmayer, 1989; Buchanan, 2003). On the other hand, 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 (Carens, 1987: 252-54; Nine, 2008a, 2008b).

### **Non-individualist non-statist theories**

Nationalist theories are non-statist and non-individualist because they take territorial rights fundamentally to belong to pre-politically defined collectives such as nations defined as ethnic or cultural communities. For instance, David Miller (2007: 217-19) argues that cultural nations can have territorial claims based on occupancy and transformation of a piece of land and that (otherwise

legitimate) states only gain territorial rights over a particular territory as a representatives of the people they govern. So the territorial rights of states necessarily depend on previous and independently existing territorial claims. While Miller formulates this view in terms of cultural nations, his ‘quasi-Lockean’ argument for such territorial claims really turns on the interaction with and valuable transformation of the territory that nations engage in, so groups that are not cultural nations may also have territorial claims on this argument. Miller argues, together with Tamar Meisels (2005: 13-23), that the relevant pre-political claimants are necessarily collectives.

Nationalist positions might also be challenged. It is not clear, for instance, that collectives really are constituted independently of states and transform the territory with no help from the state, in which case ‘the nation’ might be a proxy for or presuppose the state. But if the state participates in the valuable interaction, a ‘quasi-Lockean’ type argument seems to imply that states may have territorial rights independently of pre-political entities (Nine. 2008a). It is furthermore not entirely clear that the ‘quasi-Lockean’ type of argument really requires the subject of territorial rights to be collective in any strong sense; if what matters is valuable transformation of territory, individuals might be the relevant right bearers in many cases, which makes the theory collapse into an individualist Lockean theory, which all its attendant problems.

There might be collectivist non-statist theories that are not nationalist, however. According to Kolers’ theory (2009), eligible subjects of territorial rights are ‘ethnogeographic communities’ sharing a common conception of land, and genuine claims to land require such communities to demonstrate empirical and intentional ‘plenitude’, i.e. that the land in question is full or that they have plans for filling the land, where ‘fullness’ is relative to an ethnography but empirically testable. Even though Kolers denies any significance to pre-political identities, his theory is non-statist collectivist, since ethnocultural communities exist independently of states. While this original theory differs from nationalism in being focused on ecological rather than



cultural values, it may have similar problems, e.g. that ethnocultural communities are either completely indeterminate or not independent from states after all. And it may be questioned whether empirical or intentional plenitude provides strong reasons for assigning jurisdictional rights.

### **Individualist statist theories**

Turning now to statist theories, they claim that states bring something distinctive and irreducible to political issues in general and territorial rights in particular. Territorial rights are a kind of right over both people and things in an area that stand in need of justification since it limits people's liberty both over their own actions and their disposal of things. Liberal statist claim that the state, understood as an institution limiting liberty, is justified insofar as it is in some sense *necessary* to avoid even greater limitations on liberty, or to provide similar important benefits that could not be provided otherwise. This general justification for having states at all is then applied to the specifically territorial aspects of states, i.e. the fact that states claim and exert authority over all individuals within a geographically delimited territory, which statist argue is the only way of successfully performing the functions of states (Wellman, 2005: 14-15).<sup>3</sup>

Statist accounts along the lines sketched are individualist if the liberty the state is protecting, or the benefits it is providing, is liberty of or benefits to individuals and if the state's role

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<sup>3</sup> This classical story of the state as an escape from the state of nature is in a sense shared by David Miller, who argues that states may have the right to impose their political authority when this imposition is necessary to provide benefits, such as a modern legal system, that are so vital to many people that this justifies their imposition on dissenters (2007: 214-16). I have nevertheless categorized Miller as a non-statist with respect to territorial rights because he explicitly distinguishes between the justification of political authority and the justification of a particular state's authority over a particular territory (2007:216) and because the account he offers of the latter is non-statist.

in thus assisting individuals may be sufficient to justify its territorial rights. This is the usual liberal position, which is often formulated in terms of protection of basic human rights. A state is then considered to be justified in exercising political power within a territory if it secures a minimal threshold of human rights for all people within the territory (Buchanan, 2004: 153-55).

A standard objection to individualist statist accounts of territorial rights is that the general functions of states, minimally in terms of protection of human rights, but perhaps also provision of public goods, democratic self-determination etc., do not provide a sufficiently specific answer to the question why any particular state should have authority over any particular geographical area. If the alternative to having a particular state fulfil the functions of states in an area is not the state of nature but to have another state carry out the same functions, the statist position seems unable to give an answer (e.g. Miller, 1995: 163; Kymlicka, 2001). Non-statist theories therefore suggest that pre-political entities and normative claims must be invoked in order to answer this question.

Allen Buchanan's answer to these 'particularity problems' of political legitimacy is that a state is legitimate if it satisfies two conditions, namely 1) it is *effective*, i.e. actually exercises political power within a given territory, and 2) if democratic government is possible, it has been *authorized* to wield political power over people within this territory by democratic processes in which they can participate (Buchanan, 2004: 158). This answer stays within the individualist statist framework, since Buchanan justifies the appeal to democratic authorization with reference to the same kind of respect for the equal moral status of individuals that justifies political power in the first place. The question is whether the answer addresses the objection in a satisfactory manner? The answer may seem unsatisfactory because it does not really say anything about territory; it only refers to people and political power. There are many ways of making a group of people coextensive

with the effective exercise of political power of a given state, not all equally justifiable or significant, and this account apparently does not address cases of thinly populated areas at all.

Statists who consider positions like Buchanan's unsatisfactory as accounts of territorial rights, might try two fuller types of answers to the non-statist objection: Individualists might add a further component which tries to explain a particular state's territorial rights in terms of concerns relating to the individual members of the state. States' territorial rights might for instance depend, not just on liberal legitimacy, effectiveness and democratic decision procedures, but also on its subjects' legitimate claims to occupy the territory (Stilz, 2009a: 6). The challenge then is to characterize the individuals in question and their claims of occupancy in a way that is not pre-political in order to avoid collapse into a kind of individualist non-statism reminiscent of classical Lockean theories. To avoid this, rights of occupancy cannot be natural property rights. Individualist statists must rather locate preconditions for individuals' minimally decent lives that might justify territorial rights of states but are not pre-politically defined, e.g. persons' legitimate expectations of continuing to live within a territory as preconditions for successful life plans (Stilz, 2009a: 10). Such a theory remains statist if it can make sense of territorial rights as only held by states although justified, in part, by reference to individuals' rights of occupancy.

### **Non-individualist statist theories**

The second strategy is to try to explain the state's territorial rights over a particular area with reference to the state as such, independently of its individual members. Such non-individualist statist positions must explain how the state as such, independently from individuals or pre-political collectives, can have territorial rights. Cara Nine proposes that states can attain territorial rights in a manner analogous to how individuals can attain property rights over previously un-owned resources according to traditional Lockean theories, i.e. by way of labour on the object that improves its

value. The state works on the territory by exercising jurisdiction, which improves its value by establishing justice, and this activity grounds a territorial right to continue to exercise jurisdiction over the territory. Nine labels her theory a ‘collectivist Lockean’ account, ‘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). It is more precise to characterize the position as non-individualist, however, since the state, while not a normal individual person, is a unitary organization or structure of authority, not a collective. 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). If territorial rights are due to the activity of the state then the subject of the rights must also, on a Lockean understanding, be the state, not its citizens or government.

It might be objected that institutions like states cannot deserve territorial rights on the basis of their previous jurisdictional activities, or that it is implausible to ascribe territorial rights to the state as such. Nine in fact suggests a different non-individualist statist theory that might answer these objections. According to what she terms ‘the democratic conception (or at least ‘for the people’ conception) of territorial rights’ (Nine, 2008b: 959) the democratic people collectively hold jurisdictional rights and merely delegates 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). But, while collectivist, this theory is no longer strictly speaking Lockean; although the state performs valuable labour in upholding a jurisdiction, the ‘for the people’ conception of territorial rights locates territorial rights in the people rather than in the state. But the people does not obviously labour, according to Nine’s proposal; the people merely gives its consent to the state’s labour.

Nine's 'for the people' conception of territorial rights does seem more liberal and democratic than a conception vesting the rights in the state independently of the people it governs. But the question is, on the one hand, in what sense such a democratic or popular conception is statist, i.e. whether 'the people' can be identified in a purely political way that does not imply or depend on the pre-political existence of, e.g. a nation? On the other hand, the question is why 'the people' has territorial rights, if this cannot be accounted for by reference to a Lockean labour theory (given that it is the state as an institution and individual persons rather than 'the people' as a political collective that actually performs the value enhancing labour on the territory)? The 'for the people' formulation can still be statist insofar as 'the people' is defined as a collective by reference to the state, e.g. by being subject to and cooperating in shaping state institutions (Stilz, 2009a: 6-7). Why such a politically defined people might have territorial rights is more difficult to explain, however. One suggestion is that peoples brought into existence by states will, if the states are legitimate, 'have freely engaged in shaping their terms of citizenship, and the laws to which they are subject will reflect the history of that interaction ... and will reflect forms of political cooperation that we have reason to respect.' (Stilz 2009b: 209) While plausible, this seems first of all a contingent matter – a state's being legitimate does arguably not automatically secure 'engagement' of the citizenry – and, secondly, it merely states *that* such cooperation should be respected by granting the people territorial rights, it does not explain why. So what is the justification for territorial rights conceived of in a collectivist statist way?

One suggestion is that, even though peoples are dis-analogous to individual persons in many ways, there is sufficient analogy in some relevant respects that the self-determination of peoples should be respected in a way reminiscent of the autonomy of individuals. And respect for a people's self-determination might plausibly involve granting it territorial rights. The relevant feature of states, according to Andrew Altman and Christopher Heath Wellman, is that 'suitably

organized political groups' can exercise what is relevantly similar to the 'rational will' of individuals that grounds demands for respect for individual autonomy. Groups exercise such a rational will 'when they take on the task of establishing and operating institutions that perform the functions requisite for legitimacy.' (Altman & Wellman, 2009: 38) This proposal is a promising example of a non-individualist statist theory that avoids vesting territorial rights in the state as such, because the *group* is the bearer of territorial rights in virtue of its purely political and organisational relation to the *state*. It is furthermore a *liberal* theory because the resulting territorial rights are conditional on the state fulfilling liberal *legitimacy* requirements and insofar as the assignment of irreducibly collective territorial rights is compatible with *value individualism* (Altman & Wellman, 2009: 37-41).

There are challenges facing Altman and Wellman's proposal as well, however. There is first of all a problematic ambiguity or instability in their view having to do with how one should understand the 'taking on the task' formulation. Does this require that the institutions performing the requisite functions *actually* be established, or is it sufficient that a group has the collective *intention* to establish such institutions? If the former is the case, then the view is unable to account for the wrong inflicted on the members of groups who are denied a state of their own. The view then fails to justify Altman and Wellman's ascription of primary, i.e. non-remedial, rights of secession to all groups fulfilling the requirements for self-determination (Altman & Wellman, 2009, chapter 3). If the latter is the case, then there is both the problem that there is no guarantee that the liberal legitimacy requirement is fulfilled and it seems that such a pre-institutional collective intention presupposes a non-statist account of the relevant group. Secondly, there seems to be a mismatch between the liberal legitimacy requirement, which Altman and Wellman (reasonably) cash out in terms of sufficient protection of human rights, and the focus on a collective exercise of will as the crucial basis for self-determination and territorial rights. Simply put, successful

performance of the requisite functions in terms of individual rights protection need not involve a collective exercise of will. So the justification for self-determination involves two different requirements that do not necessarily coincide.

#### DIFFICULTIES IN JUSTIFYING A RIGHT TO EXCLUDE IMMIGRANTS

The question now is how the particular territorial right to exclude immigrants can be addressed by the different types of theories of territorial rights. The different types of theories of territorial rights have different accounts of what the structure of justifications of territorial rights should be. While I have noted several possible objections to each type of theory, I will not here attempt to decide between them; rather, I will try to draw out a couple of general lessons for the project of justifying a right to exclude immigrants as part of, or on the basis of, these types of theories of territorial rights.

One general difficulty concerning the justification of rights of states to exclude immigrants is due to the fact that neither statist theories nor non-statist theories seem to address the issue in the right way. Statist accounts primarily understand territorial rights in terms of the *internal* jurisdictional rights of the state. By this I mean both that the primary *aim* of statist theories is to justify the jurisdictional authority of the state over individuals within a territory and that statist theories (at least of the more plausible liberal kinds) propose to do this by reference to the state's successful protection of the human rights of the *citizens* of the state. Statist theories of this form proceed from this internal perspective and apply the same considerations as justifications for why legitimate states have territorial rights against other states. But such statist justifications for political authority in this sense do not directly address the distinct question about exclusion of immigrants from the territory. This is both because immigration concerns another *question* than that about jurisdictional authority – the question is not about whether a given state's exercise of jurisdiction is legitimate, but about who are to be allowed to be subjected to it – and because the values or goods

invoked to justify territorial rights do not obviously succeed in performing the same justificatory function with regards to exclusion of immigrants as for exercise of jurisdiction and exclusion of competing jurisdictions – while protection of citizens’ human rights does provide a reason for citizens to accept the state’s jurisdiction and for excluding other state’s from taking it over, it is not clear that this provides a reason why non-citizens cannot enter the territory and share in the good in question.

Non-statist theories, on the other hand, understand territorial rights in terms of pre-political property rights or land claims, which might conceivably include claim rights against others not to intrude without permission on the right holder’s property or land. But these theories fail to explain how the *state* gets *jurisdictional* rights over the territory, which includes a right to exclude immigrants. So both kinds of theories appear incomplete as justifications for a right to exclude immigrants on the basis of territorial rights of states. Let me elaborate on these general claims.

### **Non-statist theories and jurisdictional rights**

Turning to non-statist theories, I will argue that the problem of justifying *jurisdictional* rights over a geographical area is not specific to Lockean individualist theories but threatens all kinds of non-statist theories of territorial rights. Such rights are what might be called *active* rights in the sense that they protect the ability of the right holder to *do* something (the right holder has a Hohfeldian privilege and/or power) as distinct from passive rights regarding the actions of others (only involving Hohfeldian claims and/or immunities; Wenar, 2005: 233). Jurisdictional rights are active rights since they concern the making, adjudication and enforcement of law, all of which denote activities on the part of the right holder (which may of course also have claims that others do not interfere with these activities or immunities denying others authority over these activities).



A problem for non-statist theories arises if one assumes that in order to have such active rights to do something, an agent must be able to do it, *at least in principle*. If one grants this assumption, then the subjects of territorial rights apparently has to be states, for only states have the capacity to make, adjudicate and enforce law within a geographical jurisdiction. This is compatible with holding that the *justification* for why states have jurisdictional rights involves reference to non-state entities, e.g. the individuals, peoples or nations that states represent. So the claim that only states can be subjects of territorial rights does not necessarily imply that states have moral standing independently from whether they represent a people, function as instruments for a nation, or protect the rights or interests of individuals.

Nor is this claim necessarily a more general rejection of so-called interest theories of rights in favour of a general endorsement of so-called will (or choice) theories of rights. Interest theories, which claim that in order to have a right, a subject must have an interest strong enough to place other agents under a duty, postulate a sufficient condition for being a right holder. The will theory, which claims that a right holder must have the power to control, e.g. waive or enforce, the corresponding duty, only postulates a necessary, but not sufficient, condition for being a right holder. The present claim does not need to deny (nor to claim) that rights are always based on interests, nor does it need to claim that only agents capable of choice can be right holders; it merely suggests that if the right in question is active in that its exercise necessarily involves specific kinds of actions on the part of the right holder, in this case the making, adjudication and enforcement of law, then it appears strange to say that an entity which, because of the *kind* of entity it is, not for purely contingent reasons, cannot do these things, can have a right to do them.<sup>4</sup>

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<sup>4</sup> Another way to formulate the difference is that whereas the will theory stipulates that rights always involve Hohfeldian powers (Wenar, 2005: 239), the present claim need not hold this, since it can be formulated purely in terms of Hohfeldian privileges. The present suggestion concerns cases where there is reason to ascribe to an agent a privilege

In the case of jurisdictional rights to make, adjudicate and enforce law, this means that, even if the reason why a state has such rights has to do with the interests of a nation or of individual citizens, the nation or citizens do not have *this* kind of right *as* nation or *as* citizens, because they are not organised so as to be able to make decisions and act collectively (Lægaard, 2007: 288; Levy, 2008: 486).<sup>5</sup> This is compatible with nations or individuals having a different right, e.g. a right to have a state protect their interest through law, perhaps even in a democratic way. So this claim does not rule out, e.g., that state-less peoples may have a claim to political self-determination, or that groups within a state may have a claim to secede; it only says that such claims should not be understood as jurisdictional rights to make, adjudicate and enforce law. This is also compatible with holding that states which for contingent reasons, e.g. being conquered by hostile states, are not able to enforce law in their territory may still have the right to do so.

If one accepts that in order to be the subject of territorial rights, an agent must be able, at least in principle, to make, adjudicate and enforce law within a territory, non-statist theories face a kind of dilemma: On the one hand, they do assign rights to pre-political entities, but these cannot be territorial jurisdictional rights, since only states can have such rights. On the other hand, they may of course say that states should be held to have territorial rights because they represent pre-

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to  $\phi$ , the corollary of which is that the agent is not under a duty not to  $\phi$ . There does not seem to be any reason to ascribe such privileges to  $\phi$  to agents who cannot, even in principle,  $\phi$ .

<sup>5</sup> This criticism does not necessarily apply to peoples as understood by non-individualist statist theories, according to which ‘the people’ is defined and individuated with reference to a state, e.g. as the group of individuals permanently residing on a territory and thus subjected to the coercive powers of the state claiming territorial rights over this territory. Statist conceptions of the people already make reference to a certain kind of organization, so peoples thus understood can at least make collective decisions, cf. Altman and Wellman, 2009: 38. When it comes to carrying out these decisions, e.g. through the adjudication and enforcement of laws, state institutions seem to be necessary. But this is precisely the point made by non-individualist statist theories, namely that the people is the source of territorial rights, whereas the state is necessary for the exercise of such rights.

political entities with rights. But because the territorial rights of the state and the rights of the pre-political entities represented by the state are different kinds of rights, the existence of the latter does not immediately explain or justify the former; territorial rights of states cannot be derived from or reduced to rights of pre-political entities that are not jurisdictional rights over territory (Buchanan, 2003; Nine, 2008a). Proponents of non-statist theories might respond that the reason why states have territorial rights is that the interests of the people they represent are sufficiently important to hold others under a duty in relation to the state that represents them (e.g. Miller, 2007). This is plausible, but then the *rights* of the pre-political entities no longer play any role in the argument; now, the argument rather appeals directly to the *interests* of those represented, not to their rights. So such a response would in fact acknowledge that territorial rights only arise when there is a state to represent the interests of people, which would be tantamount to a kind of statist theory.

### **Statist theories and immigration**

Statist theories have problems too, but of a different kind that is more specific to the problem of justifying a right to exclude immigrants. The problem for (especially liberal) statist theories is a version of the standard criticism of liberalism for not having very much to say about the drawing of boundaries between (otherwise sufficiently liberal) states. Something similar to the ‘particularity problem’ regarding geographical boundaries also arises for demographic exclusion of immigrants. Justifications of the territorial rights of states in terms of the legitimacy of the state address the internal right to exercise jurisdiction within a territory. Liberals argue (plausibly) that this right is justified if the state exercising it is sufficiently legitimate, e.g. measured in terms of respect for human rights and democratic decision making. But even if one accepts this view, a right to exclude immigrants from a territory is something else than a right to exercise jurisdiction within a territory, and a sufficient justification for the latter is therefore not necessarily sufficient to justify the former.

So the liberal legitimate state theory of territorial rights is simply silent on the right to exclude immigrants.

One might think that this is primarily a problem for individualistic forms of statism and that collectivist statism grounding territorial rights in collective (non-nationalist) self-determination might avoid it. Such theories might reply to the criticism that the right to exclude immigrants follows automatically from acknowledgement of the right to self-determination of the state or the people of the state. One version of this argument is advanced by Altman and Wellman, who state that ‘countries like Canada enjoy a right to self-determination that includes the right of Canadians, as a political community, to associate with others as they see fit.’ (2009: 161) Since freedom of association includes a right not to associate, this is the basis for a justification of a right to exclude immigrants, which simply is the exercise of the right not to associate with regards to immigrants. Altman and Wellman further formulate this right as a corollary of the right to self-determination by saying that ‘an important part of group self-determination is having control over what the “self” is.’ (2009: 163) Note that this defence of a right to exclude immigrants is based on a collectivist statist theory as discussed earlier, since the fundamental right to self-determination is held by a group, which is in turn defined with reference to the state.

There are several possible objections to this attempt at linking self-determination with a right to exclude immigrants. First, the right to self-determination is an irreducible *collective* right held by the people as a political community, both over individual citizens and *vis-à-vis* other states. So the bearer is a group and the claim rights and immunities involved are held against other states or collectives. This is supported by Altman and Wellman’s use of examples to make plausible their claim, which all concern the right of peoples against forcible inclusion in international cooperation or annexation by other states. But acknowledging that rights to self-determination exist and involve a right of freedom of association at this collective level does not imply anything about the

individual level at which immigration takes place. Immigrants are individuals, not a collective, and the fact that a political community has the right not to be annexed by another political community does not say much, if anything, about whether it has a right to exclude individual immigrants from its territory.

Altman and Wellman might reply to this objection by invoking their claim that self-determination includes the right to determine what the “self” in question is. But is this a convincing claim? The claim is supposed to express a general fact about what self-determination means, but seems quite radical and illiberal if taken as such. The ‘self’ in question is the ‘people’ of a state. But immigration is not the primary or most important source of reproduction of the people; the people is mainly reproduced by existing members giving birth to children who usually become members of the people automatically. If the existing people has a right to control what the people is going to be in the future, this not only means that it can exclude would-be immigrants, but also that it can direct the reproduction of the people through birth. This can be done in two ways, a) quantitatively, by limiting the *number* of children existing members can have or by requiring that existing members have a specific number of children, and b) qualitatively, by selecting *which* children existing members can or should have. But both kinds of policies are extremely invasive and illiberal. The least problematic example is a policy like China’s one-child rule, which is already considered by many to be problematic. But if political communities really have a general right to control what their future ‘self’ is, then this also gives them a right to engage in policies like those adopted by the Third Reich, including coercive abortions of unwanted children, sterilisations of unwanted parents, state regulated breeding programmes etc. Such policies are radically unacceptable and illiberal, and this is not only because they involve infringements of individual rights, but also because it is hard to see that they are based on a legitimate right to control who are born into the people in the first place.

So the claim that self-determination involves a right to control the composition of the people is normatively implausible in general.

A further reason for questioning such a claim is that it might sit uneasily with the statist character of Altman and Wellmans theory, which is one of its chief assets and attractions. A collectivist statist theory assigns rights to self-determination and territory to a group identified by reference to the state rather, e.g., than by reference to its pre-political characteristics such as a shared national culture or language. But if the people is given the right to control its own composition, this seems to open the door for what is effectively non-statist definitions of who qualify for membership.

These criticisms of Altman and Wellman's claim do not show that legitimate states do not have a right to exclude immigrants, but they do suggest that it is more difficult than assumed by Altman and Wellman to derive such a right directly from a right to self-determination. So even though there might be a number of plausible reasons why one might want to grant states or peoples a right to exclude immigrants, and even if one accepts Altman and Wellman's claim that there is an irreducible collective deontological right to self-determination, the right to exclude immigrants is not entailed by, and can therefore not borrow the strict deontological status from, the right of self-determination. Any plausible case for a right to exclude immigrants is therefore most likely more consequentialist and therefore pluralist, conditional and contingent (*pace* Altman and Wellman, 2009: 165). My claim is further that the reason for this difficulty has to do with the collectivist statist character of their theory, towards which I am otherwise sympathetic.

More generally, collectivist statist theories grounding territorial rights in democratic self-determination either make the democratic people the real subject of territorial rights, which are merely exercised on the people's behalf by the state, or justify territorial rights held by states with reference to the interests of the people as a collective. In both cases, 'the people' is defined by

reference to the state, e.g. so that all individuals permanently subjected to the political authority of the state are (or should be, to secure democratic inclusiveness) members of the people. This makes sense for the purpose of justifying political authority which, in standard cases, precisely is authority over members of the people thus defined, which is why the people should have a say in the justification and exercise of authority.

But democratic self-determination views also face a problem in relation to the justification of a right to exclude immigrants, this time analogous to the boundary problem of democratic theory: The theory aims to justify political authority over those actually subjected to it, but immigration precisely involves the question about who should be subjected to authority. Attempts to justify a right to exclude immigrants in the same way as political authority more generally ignore this difference. If the right to exclude is justified with reference to the self-determination of the democratic people, this assumes that exclusion of immigrants from the territory is permitted because they are not members of the people. But if the people in turn is simply defined as those subjected to the political authority of the state, then the exclusion of immigrants from the people presupposes that the exclusion of them from the territory, making them ineligible for membership of the people, is justified, which was precisely what was in question. So even if democratic self-determination is a good justification for the territorial rights associated with internal political authority, it either does not address, or seems to beg the question of, the justification of a right to exclude immigrants.

## CONCLUSION

In this paper I have offered a general typology of types of theories of territorial rights. This typology is general, in the sense that it covers theories of territorial rights no matter what specific political issues they are invoked to address. In this paper I have first noted some general difficulties

faced by the different kinds of theories. The discussion of these general difficulties suggests that statist theories, and perhaps especially non-individualist statist theories, are both more acceptable from a normative liberal point of view and are better able to actually explain and justify the types of rights discussed under the heading of territorial rights (which is of course perfectly compatible with a rejection of many concrete claims to territorial rights, since actual states may not be legitimate according to the conditions laid down by the theories). I have focussed on how statist theories can deal with a particular issue involving territorial rights, namely the right claimed by most states to exclude immigrants from their territory.

Finally I should note that, while the types of theories of territorial rights face difficulties in justifying a right to exclude if taken in isolation, a theory might overcome the noted difficulties by combining different considerations and drawing on the strengths of each.<sup>6</sup> While intuitively attractive, such pluralistic approaches face a threefold challenge: First, they have to secure the *compatibility* of the different normative concerns; secondly, the different concerns have to pull in the *same* direction in terms of individuation of legitimate states and delimitation of territory; thirdly, while such approaches may try to combine the strengths of different positions, they also risk to *aggregate* the problems facing the positions individually (Abizadeh, 2007). Whether particular theories actually fall prey to these difficulties, or whether they can avoid them, can only be determined through much more detailed investigation of particular theories. This investigation, however, is the task for another paper.

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<sup>6</sup> Miller's theory (2007) seems to be an example of such a pluralistic approach, since it combines an apparently individualist statist account of the basic justification of states with a collectivist non-statist account of territorial rights.



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