

ON THE IDEA OF TERRITORIAL RIGHTS

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Territory, it is often complained, is under-theorized. The complaint is in order, although less so today than it was some years ago. Recently, the topic has started to receive attention with writers coming to the question from very different angles defending the idea that states have territorial rights. That is, writers from quite different backgrounds argue that states or groups can have a special right to rule over a particular piece of the earth.

Many find the idea plausible. Surely, it is said, indigenous peoples can have rights to (parts of) the territory from which they were driven away. For such lands may have religious significance or be otherwise intimately connected to cultures already under pressure. Peoples that have been driven away from lands they have historically inhabited feel they have a right to return. And peoples who have been more fortunate and live in peace where their nation has lived for centuries feel they have a special connection to that part of the earth.

Land, in other words, matters to people. They see it as bound up with their individual and collective identities; they see it as something to which they individually and collectively have a special title or claim; they see it as something worth fighting and dying over. In short, they see territory as something to which they have rights.

Moreover, states behave as if they have territorial rights. Their claims of rightful authority – of legitimacy – include not only the idea that they may exercise political power without thereby wronging their subjects, they claim rightful authority over a *particular* area. This area, their territory, is one to which they claim to have a special connection, one that

entitles them, and not some other institution, to govern. And states, just like individuals, are more than willing to fight over their claims to territory.¹

For all these reasons the idea of territorial rights appears very attractive. Yet I believe it should be rejected. In this paper, I try to show why. But before offering my argument to that effect, I will first identify the meaning and justification of the idea of territorial rights. This is necessary as the literature on this topic contains a number of different interpretations and defenses of the idea. Clarifying what precisely is at stake will involve two steps. The first is to get clear what the idea of territorial rights means. I will undertake this task in the first section below. There are two sources of interest in the idea, a Lockean and a nationalist one. And although these present fundamentally different arguments for territorial rights we can identify a common strand in them. Having thus identified the meaning of territorial rights, I will proceed to the second exploratory part: the supposed justification. In section 2, I will show that the Lockean defense should be rejected altogether. In section 3 I discuss the nationalist argument in both its statist and communal form. I will reject the statist argument and suggest that the communal nationalist interpretation is the correct interpretation of the significance and justification of territorial rights. This will enable us to judge the idea of territorial rights on its merits in section 4.

¹ So much so that they get into conflicts over what might look like a ridiculous cause. For example, in the summer of 2002 Morocco and Spain got into a conflict over Isla Perejil. On 11 July a group of Moroccan soldiers, later to be replaced by navy cadets, set up base on the islet. A week later Spain launched an operation using commandos to retrieve Perejil. The Moroccan navy cadets were removed from the island without offering any resistance. Spain maintained a military presence on the island until Morocco, after mediation by the United States, agreed to a return to the previous situation. Isla Perejil has no human population; it is mostly inhabited by goats. Or consider the diplomatic row between Canada and Denmark over Hans Island in 2005. This island in the Arctic is a small, uninhabited, barren rock, the seas around it usually only navigable in August by icebreakers. (It is the melting of the ice and the possibility that the waters around Hans Island will become navigable that caused the conflict.)

1. THE MEANING OF TERRITORIAL RIGHTS

States rule over territories. They and their predecessors have always done this.² What is more, states claim to have a right to rule over their territory. This means that they claim that they have this right uniquely within an area and that their authority applies to all who are present.³ They also claim that they have these rights with respect to a particular area, not just anywhere. In this sense, the idea of territory lies at the heart of our ideas about states and about the way they exercise (rightful) political power.

The idea of territorial rights is meant to give some substance to this. It aims to answer a whole cluster of questions that surround the matter of the territorial nature of political authority. We might ask, for example, *why* a given state should have the right to rule over a particular piece of the earth? (Our theories of legitimacy do not directly explain why this should be so.⁴) Or we might ask whether, as many think, certain peoples or nations can have special entitlements to particular parts of the earth. To such questions, the idea of territorial rights tries to give an answer. It is said that particular states have the right to rule over particular areas *because* they have territorial rights. And it is said that this or that group has a special claim to live and govern here or there *because* it has a territorial right.

Recent attention to the idea of territorial rights has come primarily from two sides. On the one hand, there are followers of the political philosophy of John Locke. They ask:

² See for example Spruyt.

³ There are some qualifications to be made here. Diplomats are exempt to much of the territorial rule of states, there is *ius cogens*, and sometimes jurisdiction is claimed on other principles as well, such as the principle of nationality, objective territory, or sometimes even universal jurisdiction. None of this, however, does anything to diminish the point that states claim extensive rights to govern in a territorial fashion. For a good introduction, see Malcolm Shaw, *International Law*, Fifth Edition, (Cambridge: Cambridge University Press, 2003).

⁴ Elsewhere I argue that they are incapable of showing this. See “The Legitimacy and Territoriality of States”. Cf. Copp, “The Idea of a Legitimate State”.

how can it be possible at all that a state should rightfully exercise control over its territory? This question is particularly pressing for the Lockean as, according to her, the state's legitimacy depends on the consent of its individual subjects. That idea is obviously in direct conflict with the way states actually rule. States do not ask for our consent but apply their rules geographically. So if the Lockean is to justify anything like existing states (as Locke himself clearly set out to do) we need an additional answer about how states come to have jurisdiction over territory.⁵

In addition, interest in the idea of territorial rights comes from what we can label liberal nationalist writings. These authors desire to show that the connection between persons, especially special kinds of groups, and land is one that is misconceived in most liberal political thinking. Liberals tend to think of land primarily as property. It circulates, can be exchanged for other land or other goods, it can be used as collateral, and so forth. To the nationalist this misses out on an additional significance of land: that of land as *place*. Territories constitute homelands to peoples, they are intimately bound up with their cultures, appear in their national narrative through poems, literature, historical sites, holy sites, and so forth. It is to land as place that groups, such as nations, can have a special connection. And this connection is one that translates into a territorial right.

The Lockean and the nationalist make for odd bedfellows. Part of the ongoing debate over territory between the governments of states such as the USA or Canada and their indigenous peoples concerns precisely this issue of the land's significance. And historically there have been clashes between the two conceptions of land. For example the

⁵ See A. John Simmons, "On the Territorial Rights of States," *Philosophical Issues*, 11 (2001).

ideas of Locke and Adam Smith were employed against claims to territory by indigenous peoples precisely on the basis of their understanding of lands as property.⁶

Accordingly, the two arguments for the idea of territorial rights take distinct forms. The Lockean attempts to justify the state's territorial rule by reference to the property rights of its subjects, whereas the nationalist attempts to justify something like collective property right for groups by reference to important group-interests. This means that rejecting one approach to the idea of territorial rights will not provide reasons for also rejecting the other approach. It is for this reason that I will discuss these approaches separately below.

There is, however, one important common element in the Lockean and the nationalist argument: the idea that territorial rights confer on a state or group a durable right to exercise political control in an area. It confers on some state or group special title to govern and keep governing over an area. As such, the idea of territorial rights can be used to deliver or counter pressure for changing the jurisdictional control by states.

This idea can be found clearly in various writings on the topic. Consider for example the definition offered by the Lockean philosopher A. John Simmons. He describes territorial rights as a bundle of claims:

- (a) rights to exercise jurisdiction (either full or partial) over those within the territory, and so to control and coerce in substantial ways even non-citizens within it;
- (b) rights to reasonably full control over land and resources within the territory that are not

⁶ Locke's theory, for example, was used to argue that Indians did not use their lands sufficiently productive to ground property rights. See for a very helpful discussion of these issues, Jacob Levy, *The Multiculturalism of Fear*, (Oxford: Oxford University Press, 2000), ch. 7. See also Kolers on Locke & efficiency.

privately owned; (c) rights to tax and regulate uses of that which is privately owned within the state's claimed territory; (d) rights to control or prohibit movement across the borders of the territory; and (e) rights to limit or prohibit "dismemberment" of the state's territories.⁷

Of Simmons' five claims, we need only to focus on the first claim a): the right to exercise jurisdiction over all those within the territory. If a state has the right in a), the other rights Simmons mentions may well follow – assuming that these are all justifiable tasks of government. For if a state has the right to rule over an area we may, at least for the purposes of this paper, assume that it will thereby have as part of its legitimate authority over that area the other elements. Legislating, b), on the exploitation of unowned resources will be, if it is a justifiable state-task, something on which the present state will have authority. The same goes, more evidently, for c) the right to tax and regulate property. And it is widely held that states have d) the right to control migration at their borders.⁸ Finally, we may safely assume that under normal circumstances the state's territorial rights will be lasting rights.

We can therefore treat territorial rights as rights conferring the right to govern over a particular area. One might object to this, arguing that the claims are independent and that rejecting, say, c) does not entail rejecting any other claim. But this would be to miss the central importance of a) the right to territorial jurisdiction. For it might be true that a state could have territorial rights even if its controlling immigration is unjustified. But would

⁷ Simmons, "On the Territorial Rights of States," p. 306.

⁸ A more precise treatment would take too much space, but it is worth mentioning that I think my claims here are false. It is not the case that showing a state can legitimately rule over a territory is tantamount to showing it has the right to exercise all proper functions of government in that area. This has special significance, I claim, for enforcing limits to immigration. See my "The Legitimacy and Territoriality of States" and "Who Has the Right to Control Borders?"

anyone claim the opposite? That is, would we really entertain the option of a state that has the durable right to exploit resources, tax and regulate property and control its borders *without* it also having the right to govern that territory? I take it that the suggestion sounds absurd to anyone looking to defend the idea of territorial rights. The point is this: we do not think that what *makes* a state have the right to do the things in b) through d) is the argument we give in support of its having territorial rights. We think a state has the right to do these things because i) these are the sorts of things legitimate states have the right to do, and ii) this state has the right to rule territorially in a).

I believe that if we reject the special right to territorial rule in a) the support for the other components by the idea of territorial rights will become questionable as well. (If I am wrong about this, one can read my arguments below as applying only to territorial rights as understood here.) Another reason for focusing mainly on the exclusive right to jurisdiction is that this view can also be found in other writings on territorial rights. Cara Nine defines a territorial right as ‘the right to make, adjudicate and enforce law within a certain area.’⁹

According to Chaim Gans it provides a group with:

A right to sovereignty over a given territory [meaning] a power to subject the whole world to the right-holder’s decisions regarding life within this territory and to his or her decisions regarding the use and enjoyment of this territory and the resources that it contains.¹⁰

⁹ See Cara Nine, “A Lockean Theory of Territory”, *Political Studies* 56 (2008): 148-65, p. 149.

¹⁰ Chaim Gans, “Historical Rights: The Evaluation of Nationalist Claims to Sovereignty”, *Political Theory* 29 (2001), pp. 58-79: 61.

Tamar Meisels describes territorial rights as ‘granting political control over a territory to a group’, or a right to ‘cultural domination.’¹¹

The idea of territorial rights thus conveys the thought that specific groups or states can have a *durable* right to rule over a particular area. We can define the idea of territorial rights as follows:

S has a territorial right over area T if S has the durable and exclusive right to formulate and enforce rules for all persons who are within the boundaries of T.

I will now turn to investigating the plausibility of this idea, starting with its Lockean defense.

2. ARE TERRITORIAL RIGHTS BASED IN PROPERTY RIGHTS?

The most detailed account of a Lockean theory of territory has been offered by A. John Simmons. He argues that states can acquire territorial rights when these are based on the individual property rights of their subjects.¹² On the Lockean view the legitimacy of a state, its right to rule, can only be based on the voluntarily incurred political obligations of its subjects (requiring, for example, consent). In other words, for a Lockean the state’s right to rule is a *voluntaristic* matter, it is something to which individuals must willingly and knowingly subject themselves. This voluntaristic principle is the central principle of the Lockean approach.¹³

¹¹ See Tamar Meisels, *Territorial Rights*, (Dordrecht: Springer, 2005).

¹² Simmons, “On the Territorial Rights of States”. Charles Beitz also argues that this was, roughly, Locke’s view. See Beitz, “Tacit Consent and Property Rights”, *Political Theory*, 8 (1980), pp. 487-502.

¹³ Simmons is very clear about his endorsement of this principle throughout his work. See for example his *Justification and Legitimacy*.

For this reason a state's territorial rights must on a Lockean theory be reducible in some way to the consent of its subjects. Only in this way could a theory the territorial rights be consistent with the project of showing that the state's rights over its subjects are derived from their individual rights. Simmons proposes that states may have territorial rights because subjects do not just give it personal consent, but also submit their *property* to the state. In this way, the state's rightful rule becomes attached to this property and can be both territorial and extended over time. Hence a state's rightful territory can be understood as the geographical area consisting of the property of subjects who voluntarily submitted it to the state's authority.¹⁴

As mentioned, the reason the Lockean is interested in demonstrating that this is possible is that it would show how states can have durable territorial rights. That is, typically Lockeans are accused of supporting an implausible theory of legitimacy as they allow for individuals living *within* a state's territory to unilaterally opt out of the state's rule, by not consenting. But if Simmons is right and the state's right to rule is attached to all of the territory as submitted property, the state could correctly insist that it has the right to apply its rule across its territory after all.

The view has some serious attractions. It offers the tools for determining with precision what the geographical boundaries of a state's territory should be. Moreover, it

¹⁴ More precisely, through political consent a subject separates and transfers some incidents of her property right to the community or state – namely those incidents required for effective governing. For example, where she first was under no extra-moral obligations about what to do with the property, the state may now have gained some say in, among other things, what can be built on it or how it may be altered. In this way, Simmons argues, the state can gain a durable right to rule over its territory because after having submitted a piece of property to the state, the owner can no longer transfer a *complete* property right to others. Some of its component incidents have already been transferred away to the state. And so just as a right of passage can remain valid after a plot of land has been sold, so the state's right to rule can remain attached to the land as well. It simply is passed down on us as attached to the property in the state's territory.

bases the territorial rights of states on identifiable *voluntary* acts of individuals. In this way, the theory seems to escape one of the standard objections to Locke's own account of tacit consent (the idea that continued presence in the state's territory is tantamount to consent). This is the objection that the state's right to rule cannot be based in subjects' tacit consent as understanding continued presence to imply consent must assume that the state has the authority to put to individuals the choice between consenting or leaving. Imposing such a choice is itself an exercise of political power. But if the state has the right to rule over its territory based on its voluntary submission, we can see how the state might have such authority.

The theory also has some clear drawbacks. Most obviously, it requires of us to accept that *all* existing territories – regardless of their size, shape, or conduciveness to legitimate political rule – must be illegitimately held by states, nor will any change in the world's jurisdictions alleviate this problem. No existing state obtained its territory by the process the Lockean envisages. The view also makes very real the possibility of a world with territories that look like slices of Swiss cheese: filled with holes. A disconcerting possibility to many.¹⁵

Such implications might make the view unpalatable for anyone looking to vindicate our ordinary understanding of the territorial rule of states. But there is also a reason why any Lockean should reject Simmons' argument. The reason is that it cannot be held consistently with the voluntaristic condition for legitimacy. To see why this is so, let us imagine a place where the state has somehow in fact succeeded in obtaining the right to rule

¹⁵ On this latter issue, see Cara Nine, ###, *Political Studies*. Did Locke himself hold the view Simmons attributes to him? Simmons offers some support, but I do not believe it accurately reflects what Locke had in mind. I hope to show this more convincingly in future work, but for now two reasons will do. First, these objections against this Lockean story are embarrassingly simple – of a kind Locke himself surely would have anticipated. Second, in his sparse comments on the matter, Locke sets out a view that is, I believe, more subtle than the view Simmons attributes to him.

over all pieces of property within the area otherwise known as its territory. Does this state have the durable right to formulate and enforce rules for all persons who are within the boundaries of its territory?

To address this question we need to ask whether the act of submitting property to the authority of the state can be sufficient to overcome the justificatory burden posed by the voluntaristic principle mentioned above. And this is where the problem lies. The conclusion that the state can legitimately govern over everyone within its territory is supposed to be the result of owners submitting their property. But what about those who are non-owners? Are they now subjected by the decisions of owners to submit their property? It is not clear how they could be, for they have not decided, willingly and knowingly, to consent to government. How could the decision of others bind them?

Perhaps here we should understand Simmons to be saying that everyone who enters onto previously submitted property *thereby* agrees to be under the authority of the state. But if that is what he means Simmons will run into another objection – one that he himself in fact endorses. For we can say with Hume that the argument that mere presence on land in the area where one lives cannot constitute a significant instance of consent. Such “consent” is not freely given as the costs of the alternative – emigration – are simply too high. Therefore tying the acceptance of the state’s right to rule to residence in a territory is simply an instance of unjustified coercion by the state, it is an “offer they cannot refuse.” As Simmons stresses, this makes for conditions of duress rendering any given consent void.

Therefore tying the authority of the state to property is in violation with the Lockean principle that political authority must be voluntaristically justified.¹⁶

On the other hand, we might understand Simmons' argument to mean simply that the submission of property establishes the state's right to rule over a piece of land only with respect to its owner. If this is what Simmons means, he could hold on to the voluntaristic principle: for it was the owner who decided to accept the state's rule. However, this simply means giving up on the idea of territorial rights. For the territorial rights of a state are supposed to establish its right to rule over everyone in an area. On this interpretation the idea of a state's territorial rights collapses into the old Lockean thought that a state has the right to rule only over those who have decided to submit to it. Those who never purchase land, those who do but live on the land of others, those who choose to rent their homes all will remain outside the reach of the state's legitimate authority.¹⁷

¹⁶ Simmons offers this objection against the idea of tacit consent. See Simmons, *Moral Principles and Political Obligations*, (Princeton: Princeton University Press, 1979), chapter IV and *On the Edge of Anarchy*, (Princeton: Princeton University Press, 1993), chapter 8.

¹⁷ Things might be even worse for the Lockean, for tying the acceptance of legitimate political authority to the purchase of property may be altogether unavailable on this view. There are numerous very important economical opportunities that go hand in hand with owning property. It is an important means for the social and economical development of individuals in society. It can be a gateway towards starting a business, generating capital as collateral. Hernando de Soto suggests that in many developing countries the most important steps toward economical development may be achieving widespread property ownership, enabling people to generate capital. See Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, (New York: Basic Books, 2003). Property also allows for a measure of freedom and independence of others, see for example Gerald Gaus, 'Property, Rights and Freedom', *Social Philosophy and Policy* 11 (1994), pp. 209–40. As Jacob Levy notes: 'Jefferson and Burke, Smith and Mill, saw the fungibility of land and other goods, the ability of new people to buy new pieces of land and put them to new use, as critical to a free society.' (p. 207) In our time writers from very different backgrounds and political persuasions continue to emphasize the importance of property. James Meade supported a basic income for all citizens on these grounds. John Rawls seems to have been sympathetic to his ideas. See James E. Meade, *Efficiency, Equality, and the Ownership of Property*, (London: George Allen and Unwin, 1964), John Rawls, *Justice as Fairness: A Restatement*, (Cambridge, MA: Harvard University Press, 2001). In all these ways the widespread availability and circulation of property in society are critical for both individual liberty and social progress. This means that the owning of property might be too important an option for people. Tying political consent to purchasing property, that is, might also make for consent under duress.

One way out of this, of course, would be to conclude that the Lockean theory of territory is perfectly acceptable but that the voluntaristic principle needs to be discarded. Perhaps. But even if this would be proposed, the Lockean theory of territory still has the implication that states can only have territorial rights over land that was *actually* submitted, and I will here simply assume that most who are willing to give up on the voluntaristic principle will find this unwelcome. In any case, I know of no one who has defended the Lockean proposal in this sense.

We should thus reject the Lockean theory of territorial rights. The view has serious practical implications that are at odds with the spirit of the idea of territorial rights.¹⁸ Moreover, the view is not consistent with the central Lockean voluntaristic principle. Instead, Lockeans should embrace as an implication of their theory that it does not establish territorial rights in the way defined above.¹⁹ Those desiring a theory of territorial rights should look elsewhere.

3. THE NATIONALIST DEFENSE OF TERRITORIAL RIGHTS

The second approach to territorial rights analyzes them not as arising directly from individual property rights but as something importantly similar to a property right or entitlement. This view is held mostly among writers in what I have labeled the nationalist tradition.²⁰ There are two versions of this approach: on the one hand the idea of territorial

¹⁸ See Nine against Steiner.

¹⁹ As for example Hillel Steiner does in “May Lockean Doughnuts Have Holes? The Geometry of Territorial Jurisdiction: A Response to Nine”, *Political Studies* 56 (2008), 949-56.

²⁰ Levy writes: ‘nationalism thinks about that homeland in certain recurrent ways. It elides the distinction between sovereignty and ownership; all of the land belongs to *this* people, from whom it cannot be taken

rights is defended as something that states themselves can possess (the statist nationalist argument), on the other hand it is ascribed to groups such as nations or communities (the communal nationalist argument). I will discuss these in turn.

Recently Cara Nine has proposed an argument for the idea that states as such can come to have territorial rights by means of a semi-Lockean process of appropriation. Instead of focusing on Locke's ideas about consent, Nine suggests we look at his ideas about how property rights in land come about. For Locke also argued that individuals can appropriate land without the consent of others and thereby generate property rights for themselves. Similarly, Nine argues, states can appropriate territories and thereby generate territorial rights for themselves.

States do this by improving their territories, Nine argues. They add value to the land by regulating its use, by erecting monuments, by maintaining the commons, and so forth. In that way, 'states have world-altering abilities that may be the source of rights claims to land.'²¹ Nine draws an analogy between these world-altering abilities of states and the Lockean view on laboring unowned objects. Appropriating acts, she claims, make individuals deserving of the rights that are secured by systems of private property. And analogous acts make states deserving of territorial rights. In this way Nine seeks to vindicate what she understands to be the common-sense understanding of territorial rights (the justifiability of which she seems to take as a given).

away. Nationalism typically conceptualizes land as place, not property. *This* piece of land is part of the patrimony of *this* nation.' (204)

²¹ Nine, "A Lockean Theory of Territory", p. 155

There are, however, two serious problems with this view.²² Nine's argument i) does not establish the requisite link between states' appropriative acts and their purported territorial rights and ii) appeals to a rather mysterious and problematic understandings of the moral status of states.

Consider the first. On the Lockean theory of property rights, as Nine reproduces it, an individual can come to have a property right over land when she makes it the case that others' use of that land would unfairly take away from her some of the benefits of her labor. Since it is the laborer, not others, who is deserving of that benefit, others can be under a duty not to take it. This is what gives the laborer a property right. So the question is: why should a state's positive impact on land create territorial rights instead of property rights? If an individual's property rights are supposedly grounded in the *individual's desert*, why should the *state's desert* not similarly ground a property right for the state?

Nine answers that the state's role or function, that which generates its desert, is to *enable* people to change and improve the land by regulating the use of land. And such an enabling role requires jurisdiction, not ownership.²³ But what does this have to do with anything? In the individual case, a property right is granted because it is required in order to

²² There are others too. For example, Nine's project to vindicate the 'common understanding' of territorial rights is slightly puzzling. The idea of collective appropriation of territory is all but common-sensical. Initial appropriation theories of property rights are controversial and desert-based theories even more so. Moreover, the idea that states can be deserving of territorial rights is surely a revisionary one. It is not clear how much of the common understanding of territorial rights remains when supported by such an argument. Moreover, the argument seems to justify territorial rights in the wrong instances. Nine claims that her argument does not vindicate the claims of colonizing nations, because it only awards territorial rights to states if they have a 'deep relationship' to a territory, which takes time to develop. But *time* has never been the problem with colonization: many colonizing countries occupied pieces of the world for many centuries, ineradicably altering the land there (consider the still very much tangible Spanish influence in Latin America). And indeed, former colonies have in many cases become an important part of the national culture, narrative, collective awareness, "character" of the colonizing state. By Nine's argument, there comes a point where this translates into territorial rights. Something she clearly does not want (p. 160). (Consider this question: if the US does a good job rebuilding Afghanistan, does it obtain territorial rights?)

²³ p. 156

secure the individual's deserved reward: the value of the land. That is what (on this reading) property rights are for. So why should the state's rights to land not equally aim at securing for *them* their deserved rewards? The state's desert-generating improvement of the land should thus also give rights securing its deserved rewards. And that cannot just be limited to its having the continued ability to regulate that area (what kind of reward is that anyway?),²⁴ but should include something that is in the state's interests. Again, ownership rights seem to fit the bill perfectly. For states clearly have serious interests in such rights over their territories. Throughout history states have been keen to treat territory *like* property and such ownership rights would neatly line up with their land-improving activities.²⁵

Now I take it Nine will respond that the above is to misunderstand what states are for. They are, she points out, instruments for the achievement of justice, and this conception determines what rights or entitlements they can have.²⁶ Here we agree. Yet this would mean that it is a mistake to conceive of states as having the kind of primary moral status that would make them appropriate candidates for claims of desert.²⁷ Or, if states as such *can* deserve, then appeal to the interests of their *subjects* in determining the nature of the rights

²⁴ A property right does not only secure for the laborer the continued possibility of working on the land, it offers the chance to gain materially from the work done. (It is only because there *is* material gain involved that the continued control over land is worth anything at all.)

²⁵ Territory has been sold, states have collected taxes in excess of what was needed for the financing of their activities and services (akin to the collecting of rent?), and states have treated their own preferences concern the use of land as trumping individual owners' preferences. Moreover International Law concerning territory (drawn up by states) is based on the Roman law provisions governing ownership and possession. See Malcolm Shaw, *International Law*, Fifth Edition, (Cambridge: Cambridge University Press, 2003), p. 412.

²⁶ She writes: 'the central function of a territorial right is to give the right holder the power to establish justice within a particular region.' (p. 149)

²⁷ Additionally the state's establishing and maintaining justice involves *much more* than only the improving of land. So if *this* is the relevant consideration for grounding jurisdictional authority, it is not clear that we should base the location of their authority on its desert.

created by their desert must be irrelevant. When I perform some deserving action, we do say that you should be rewarded either.

The former route is, I believe, the way to go. There is something puzzling about the idea that a state's desert is the basis of (some of) its rights. Can states deserve at all? Can institutions deserve? We do not ordinarily speak of states and other institutions as deserving reward or harm, praise or disapprobation. We think of individuals within institutions as deserving. We might also think of collectives as deserving, but all this is different from focusing on the state as an institution.

The problem here is the idea that states can merit rights and have interests independent of the merit and interests of their citizens. Nine's argument for territorial rights includes a commitment to the idea that states can be primary or ultimate units of moral concern. It is, on her view, a kind of concern *for* states (like we sometimes should show concern for persons) that grounds their territorial rights. This is to bring back to life the (happily long abandoned) doctrine of *raison d'état*, something of which we should steer clear. The moral status and entitlements of states depend on and refer to the interests of their subjects. The interests of states themselves do not call for moral vindication. In other words, we should take very seriously Nine's claim that states are *instruments* for justice. Indeed, it has been precisely the turn *away* from focusing on the interests of states that has made attempts by states to exert ownership-like control, like sale and transfer, over territory being as dubious as they are nowadays.²⁸ And that has been progress.

²⁸ See Andrew Hurrell, "International Law and the Making and Unmaking of Boundaries", in eds. Allen Buchanan & Margaret Moore, *States, Nations, and Borders*, (Cambridge: Cambridge University Press, 2003)

Perhaps Nine will object that I have mischaracterized her view and that she in fact intends the moral status of states to be based in the interests of their individual subjects. The state's rights, she might claim, are nothing more than the rights of the community that collectively organizes itself through that state.²⁹ But if this is the case, her argument is not about the territorial rights of states, but about the territorial rights of communities. On this reading, Nine's proposal loses some of its originality, but will gain a number of respectable friends: the nationalist theorists of territorial rights.

On the nationalist argument for the territorial rights certain groups are said to have territorial rights in virtue of their special connection to a piece of land. These arguments draw attention to two sources of group interests in territory. The first is similar to Nine's views as we are interpreting it now. David Miller, for example, also defends a view that refers to the transforming activities of communities on the land. Miller points towards the fact that communities over time transform their territories in light of its particular way of life, establishing a two-way interaction between culture and land. In this way land comes to inhere a specific value over time, value which only that specific nation or community can access. Moreover this value cannot be substituted (by cash payments, for example) for its importance depends precisely on its effect on the way members of this particular nation or community conduct their lives.³⁰

The second strand in the communal nationalist argument refers not to the changes or improvements that a group has made to land but to the special meaning or significance it can have. Miller talks about parts of the world becoming 'endowed with meaning.' Chaim

²⁹ Nine is actually not entirely clear on what her view is. But note 2 suggests something along these lines.

³⁰ David Miller, *National Responsibility and Global Justice*, (Oxford: Oxford University Press, 2007), ch. 8. See also Meisels.

Gans points out that areas of the world can be “formative” for groups or nations: they can occupy a central role in the group’s historical identity.³¹

In both cases the structure of the argument is the same. Groups, communities, nations are said to have important interests in living in a particular part of the earth. These interests are irreducible to simple individual interests. By that token, these group interests are said to support certain rights for these groups. Since rights, on this view, are meant to protect interests, nations or communities can have territorial rights for these are aimed at securing for them the unique ability to determine the future of the important land.

This communal nationalist argument offers a coherent and plausible defense of the idea of territorial rights³² and it seems to track the right kinds of considerations. It seems correct to suggest that territorial rights are held by states in service of their nations. It also seems correct that territorial rights concern the special valuation or claim of a nation and other such group to a particular part of the earth. Surely something along those lines animates arguments in favor of territorial rights for indigenous peoples. And surely something like this lies in the background of the claims of territorial rights for nations that have lived in one place a long time or wish to return to a place where they have.

I believe, then, that we have located here the best explication and justification of the idea of territorial rights. The communal nationalist argument for territorial rights poses the

³¹ Chaim Gans, “Historical Rights: The Evaluation of Nationalist Claims to Sovereignty”, *Political Theory* 29 (2001), pp. 58-79. The argument is also endorsed by Tamar Meisels in *Territorial Rights*.

³² Although there are some questions about the argument’s specificity. Cultures and nations extend *over* territories – they do not stop and start at the border. And the same goes for the territorial adaptation that goes with them. Here it seems as if the rights due to communal transformation of territory would extend beyond what we normally would think are the proper ranges for claims of territorial possession. (Just north of Maastricht, in the south of the Netherlands, travelling east to west for just 25 kilometre will bring you from Belgium, through the Netherlands, into Germany.) On the other hand, particular modes of life and cultivation can also arise within the states – often at the *very* local level. Do these cases give rise to territorial rights as well?

most forceful and clear defense of the idea of territorial rights. So let us now inspect the merits of this idea.

4. THE IDEA OF TERRITORIAL RIGHTS

The idea of territorial rights involves the following two claims. First, certain parts of the world have special importance for certain groups. And second, this importance is to ground for such groups the unique and durable right to rule in that area.

The first claim is, I believe, evidently true. It is the second claim, however, that we should inspect more closely. The question here boils down to whether the indentified group-interests can be the proper grounds on which to organize the exercise of political authority. And when we consider the idea in this light, it becomes clear that it should be rejected. For the idea of territorial rights is in conflict with some of our foundational convictions about what justifies the exercise of political rule. Indeed, territorial rights are in conflict with the central liberal principle for the justification of political power: that such power should be justifiable to all who are subject to it.

There are many different ways of spelling out this liberal principle: that political power is legitimate only if it is exercised in the interests of all who are subject, that political power is legitimate only if it is exercised for the common good, that political power is legitimate only if it shows equal concern and respect to all, that political power is legitimate only if it is exercised in a manner to which all its subjects can consent. We need not get into any detail about this because the point is clear: granting territorial rights to a group on the

grounds of *its* interests means organizing the exercise of political power on the basis of the interests of only a subset of the people who will be governed. And this is unjust.³³

Territorial rights award a privileged moral status with respect to the exercise of political rule in the area to a group that makes up only part of the population living in a territory. Thus the group with territorial rights comes to be in a position to settle a range of crucial political decisions before any other consideration can come into play. This violates the important principle, at the heart of liberal theory, that all who live together in a polity should be treated with equal concern. Since the basis for territorial rights refers to interests that *cannot be shared* by all who will live in the state³⁴ the idea violates the principle that political institutions should take into equal account the interests of all their subjects.

This conflict can be seen to play out in different ways. For example, the idea of territorial rights clearly is at odds with the value of democracy.³⁵ It is also contrary to ideas about collective self-determination. Territorial rights create, as indeed is their purpose, inertia in the location and shape of political boundaries. These rights offer an enduring claim for a group or state to rule over a given area and this means that the location of a state's territory will remain the same over time *even if* there are good reasons (moral or non-moral) for changing our political institutions. By contrast, according to the theory of self-determination certain groups get to organize themselves politically. This means redrawing boundaries from time to time, for example when a certain group forms a minority in a larger state. Territorial rights work *against* that ideal. Insofar as the theory of self-determination is expressive of the

³³ I refer to subjects' interests as shorthand for this core liberal principle. I do not mean this to be more than just that, the requirement that political power does not privilege some over others.

³⁴ This makes the assumption that there will be some diversity in any state. Something that, given basic human characteristics, is always true.

³⁵ Thomas Christiano defends democracy precisely on the grounds that it uniquely takes into account the interests of all subject to political power. See *The Constitution of Equality*.

liberal commitment to justify the political power of states with reference to the interests of their entire population, then, its conflict with the idea of territorial rights is telling.³⁶

The point will be clear now: the problem with territorial rights is that they do not allow for the jurisdictions of states to track the morally relevant considerations, namely the interests of all their subjects relevant for the just exercise of political power. According to Car Nine territorial rights are justified because they concern ‘the actions of the state that protect and promote important moral values are actions concerning the establishment of justice in a region.’³⁷ But this is precisely *not* what territorial rights are about. Territorial rights give groups the ability to *counter* calls for jurisdictional change, even jurisdictional change that might serve justice. That is the point of territorial rights. In this way territorial rights are quite similar to individual property rights. Property rights are meant to protect individuals by trumping the ever-changing way in which a utility calculus might suggest we ought to allocate goods. And similarly territorial rights are appealed to in order to justify a *lasting* exclusive right to rule for groups.

But states are different from persons and territory is different from property, and that makes territorial rights unjust. We think people can have property rights, among other rights, because people are of ultimate moral concern. States, by contrast, are instruments for bringing about justice; they are not themselves entities of such moral concern. It is for this reason that the only rights that states have are rights that serve the interests of their subjects.

³⁶ This is the idea that certain groups have a moral claim to organize themselves in a separate state. See for a nice discussion Margaret Moore, *The Ethics of Nationalism*, (Oxford: Oxford University Press, 2001), p. 165ff. A good critical discussion is David Copp, “Democracy and Communal Self-Determination”, in eds. R. McKim & J. MacMahan, *The Morality of Nationalism*, (Oxford: Oxford University Press, 1997). I appeal here to the idea of self-determination to show the conflict between a central liberal principle (of which self-determination is often said to be an expression) and the idea of territorial rights. I do not wish to endorse the idea of self-determination. In fact, I believe it to be incoherent, but that does not matter here.

³⁷ Nine, p. 156.

Moreover, the rights of states must be based in an equal concern for all their subjects, lest our states fall foul of the central liberal test for the legitimacy of political power. Together these considerations render territorial rights unjust.

This discussion has an important implication, I think. For it shows that there is serious pressure from within liberal political philosophy toward tailoring the shapes of our political institutions as closely as we can to the (dynamic and ongoing) interests of the people subjected to them. The justification of political rule should be based on reasons or interests that (at least *potentially*) refer to all who will be subject to a political authority. This means that the geographical exercise of political rule should be shaped in such a way as to allow that exercise to remain in service of these underlying justifying reasons or interests.

The upshot is that we should attempt, as best as we can, to make the jurisdictions of our political institutions serve their underlying and justifying reasons or interests. Given that the implications or practical requirements of these reasons and interests will change over time, the jurisdictions of our political institutions should consequently also be allowed to change over time in order for them to remain justified. This suggests that the justification of the jurisdictional aspect of political institutions should be based on what may be termed *forward-looking* considerations. That is, we should organize our political institutions with an eye on what will enable them to properly perform their functions today and prepare them for tomorrow. Territorial rights, being essentially *backward-looking* considerations for organizing the jurisdictional aspect of political rule, are incompatible with this. When thinking about what shapes our states and territories should take, we should look not at who can make a better claim of entitlement to a piece of the earth. We should look at how we can organize our world in a way that allows political institutions to function properly.

We can say then that the proper relation between a legitimate state and its territory is, quite simply, that between a legitimate political institution and the area where it is justified in actually exercising political rule. The boundaries or edges of a state's territory are like the administrative boundaries of its influence.³⁸ It is for this reason that states should not be allowed to decide to cede or sell their territory without appeal to the interests of their subjects, as if it was property.³⁹

Note that this is not meant at all to dismiss the communal nationalist's arguments about the special importance of particular areas for certain groups. As said at the beginning of this section, those are quite clearly correct. But it is not true that the only way of protecting such interests is to award to the group territorial rights. Protecting things that are of value is something that anyone can do, including a state organized on grounds other than the group's special interest.⁴⁰ Thus the communal nationalist argument for territorial rights can be read as pointing out an additional task for our political institutions to carry out. That is, they point to things of value, namely the significance of land as place and as a home, that have been underappreciated before.

Note, however, that this task for government should be added to the longer list of tasks that we already have available, including the maintenance of public order, the provision of certain services, tasks of regulation, and so forth. (The fact that the special significance of

³⁸ Thus, out of context, we can here agree with Hans Kelsen's remark that: 'the territory of a State is in reality nothing but the territorial sphere of validity of the legal order called State.' See Hans Kelsen, *General Theory of Law and State*, transl. A. Wedberg (Cambridge, Mass: Harvard University Press, 1949), p. 208.

³⁹ Fortunately, pressure has increased on states against reorganizing their boundaries without reference to the desires of their subjects, as can be seen for example in the case of Gibraltar. Here is another consideration in favor of radically breaking the analogy between territory and property. The rights of states to tax should be conditional upon their services and activities. It is supposed to be a financing *for* certain functions. If territory was like property states might be said to have the right to tax regardless of what they do, they could charge *rent*.

⁴⁰ It would make sense, for obvious reasons, to involve members of the group in carrying out this task.

land has been neglected in the past does not give it special place among these tasks, although it may call for certain remedial measures.) The protection of such especially significant pieces of territory is one of the things that good political institutions ought to deliver. It might also be true that the task of protecting such territorial values may also, or instead, call for protection by political institutions other than the state. Sometimes such things are better protected by institutions that are *not* states, such as UNESCO. No doubt such provisions will seem less than perfect to the communal nationalist, but they will be the only way in which these interests can be protected that is consistent with respecting others.⁴¹

⁴¹ What about the additional *value* of the land? Does the group or nation primarily responsible for this have a special claim to *that*? Should they, for example, receive payments for the sale of oil that non-nationals do not receive? I believe not. An exceedingly large part of the value of such improvements is protected and secured by people's *individual* (property) rights. For this value is accessed by the availability of a well functioning infrastructure, an orderly public space, the provision of collectively provided goods, and so forth. This value thus benefits those who live and participate in society. If we want communities to benefit from improvements to areas, there is no need for a right to territorial possession. Individual property rights guarantee that they will benefit from living in a well-developed part of the world. Immigrants normally do not seek to partake in a community's territorial rights; they come to make a living. (There are those, of course, who would argue that communities or nations do not have special rights to the value of their territory. See for example Steiner, "Territorial Justice". I leave those arguments to a side. I also leave to a side the symbolic significance of granting, say, cash payments to only a sub-group of residents in an area.)