

## **Territorial Rights: Justificatory Strategies**

### I. STATES AND TERRITORIES

States are defined in international law (for instance, in the 1933 Montevideo Convention) as entities with permanent populations and fixed territories under government control. I want to focus our attention here on just part of that definition: on the idea of states as territorial entities (indeed, as necessarily so, from the legal viewpoint). It is certainly true that most of us tend to identify modern states with their territories, first learning to think of other states, for instance, while locating their colored territorial shapes on maps. And every modern state is not only popularly identified with a particular territory; it in fact claims a set of *exclusive rights* of control over a particular territory.<sup>1</sup> Indeed, such rights of territorial control are claimed (and in some cases effectively exercised) by many groups/peoples/nations that are *not* internationally accepted as autonomous political entities. It is commonly assumed, I think, that the territorial rights that modern states exercise are not merely legal rights. They are, at least sometimes, also *moral* rights over territories (or morally justified legal rights). It is on the possible moral justifications of states' territorial rights that I want to concentrate here.

I begin by enumerating the kinds of standard-case rights of control over particular geographical territories that modern states universally claim. These include at least rights to exclusive legal jurisdiction over the territory, rights to exclusive control of movement (of persons and materials) over the boundaries of the territory, and rights to exclusive control over the non-human things and beings contained in (or constitutive of) the territory. More specifically, states saliently claim: the right to coercively regulate the conduct of all within the territory by means of enforcing all legal rules and directives of the state; the right to full control over the land and resources within the territory that are not privately owned; the right to tax and regulate privately owned land and resources within the territory; the right to control or prohibit movement across territorial boundaries; the right to determine the standing of those within the territory (by, e.g., establishing rules governing residency, diplomatic status, or citizenship); and the right to prohibit individual or group territorial secession or alienation of

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<sup>1</sup> These rights of territorial control are often referred to collectively as “territorial sovereignty”, but I will avoid here the vexed language of sovereignty. While sovereignty in fact refers only to supremacy or finality of rule (within a jurisdiction), it is still common to associate the idea of sovereignty with the kind of absolute or unlimited rule described by Bodin and Hobbes. Few serious philosophers today believe that absolute political sovereignty can be justified; but the Hobbesian argument that limited sovereignty is no sovereignty at all – because a limit implies a superior power that imposes the limit – continues, I think, to influence thinking about the concept.

territory to nonmember persons or groups. I will say that a state that claims roughly this set of specific rights is claiming to possess “robust” territorial rights.

These, then, are the kinds of rights that I intend to discuss.<sup>2</sup> I should emphasize that I am concerned primarily with states’ claims over their *particular* territories, rather than with more general moral claims that might be made about group or state control over land and resources. For instance, it has been regularly argued both that certain kinds of groups of persons have by their natures a right to a territory on which to govern themselves – even when there is no particular piece of land to which they obviously have a valid claim – and that it is best in various ways for all or most of the land in the world to be controlled by states or societies, rather than to be simply open for all to use – even when there is no special reason why one state rather than another should control any particular portions of the earth. Groups’ rights of self-determination might indeed imply rights to territory; and the need for societal stewardship, in the face of potential for “commons tragedies”, might indeed show that the needs of all are best addressed by some system of state control over land and natural resources. I set these arguments (and other related ones<sup>3</sup>) to the side. Similarly, I do not address here arguments that states cannot perform their standard or core functions without exclusive control over some territory or other.<sup>4</sup> My concern is rather with the possible justifications for particular states in the world to exercise exclusive control over those particular

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<sup>2</sup> When I first addressed this topic in print (in “On the Territorial Rights of States”, *Philosophical Issues* 11: Social, Political, and Legal Philosophy [2001], 300-326), almost nothing had been written about it by contemporary political philosophers. During the decade (or so) since, a great deal more attention has been paid to the topic. While I would, of course, like to claim the credit for this trend, honesty forces me to acknowledge that the attention of contemporary political philosophers was drawn naturally in this direction by their following the progression of thought in John Rawls’ work. Just as Rawls focused first on questions of domestic justice, asking us to reason as if only one state existed in the world, contemporary political philosophy’s first preoccupation was to follow in his influential footsteps. And once Rawls expanded his view to include more explicitly a position in international political philosophy, we followed that lead as well. Questions about the justifications for states’ territorial claims arise most naturally only after we begin to think more directly about states (including domestically just states) as located in a world of states with similar concerns and ambitions and a world of persons with similarly pressing needs and interests. So the new focus on issues of global justice naturally included a new attention to possible questions about and justifications for the territorial claims made by existing states.

<sup>3</sup> For instance, I do not consider here the possible justifications for states’ collectively claiming control (as they do) over *all* of the useable land (and resources) in the known universe. I should note in passing that I believe there is no convincing justification that can be given for such claims.

<sup>4</sup> E.g., “If we consider the range of functions that modern states perform, it quickly becomes obvious that these functions cannot be carried out effectively unless the state has authority over a determinate territory” (David Miller, *National Responsibility and Global Justice* [Oxford: Oxford University Press, 2007]), 214.

geographical domains they claim as their territories. And that issue cannot be adequately addressed simply by showing that *some* system of state control over land is morally required, that groups' rights of self-determination imply their rights to control *some* land or other, or that states cannot perform their core functions adequately without control over *some* territory.<sup>5</sup>

My topic in this essay, then, is the range of possible moral justifications for states' claims to exclusive control over particular geographical territories. And my aim is to provide a structure for discussion of this topic by identifying the various approaches, their salient strengths and weaknesses, and the argumentative paths forward that present themselves from these analyses. My hope, of course, is that the *best* path forward will become evident from this discussion.

## II. STRATEGIES

In the most general sense, states claim three different kinds of rights, of which territorial rights might at first appear to be but one. States claim not only rights to control specific geographical territories, but also rights with respect to both subject populations and alien persons and groups. Against their subject populations, states claim rights to coercively enforce legal requirements and rights to corresponding obedience from those subjects. And against aliens, states claim rights of non-aggression and non-interference (in their "domestic affairs"). But these three kinds of claimed rights, of course, overlap in various ways. The rights states claim over subjects are largely (though not entirely<sup>6</sup>) rights of *territorial* jurisdiction – that is, rights to make and enforce law for all those who are physically within the claimed territory. And the rights states claim against aliens are largely (though not entirely<sup>7</sup>) rights not to be harmed or interfered with in exercising their *territorial* control. So it seems extremely unlikely that the best justifications for the three kinds of rights claimed by states will turn out to be independent of one another. The obvious question is: how are they related, and which elements (if any) have justificatory priority?

Those writing about territorial rights uniformly proceed, either explicitly or implicitly, as if the primary moral relationship at issue in political philosophy is that of state to subject, with the contours of the other two relationships (i.e., to aliens and to territory) having a derivative status. This seems to me correct. What gives each legitimate state its rights against aliens

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<sup>5</sup> In Chaim Gans' nationalist theory of territorial rights, the distinction I make here is identified as the distinction between "the right to territorial sovereignty" and "the location of territorial sovereignty" (*The Limits of Nationalism* [Cambridge: Cambridge University Press, 2003], 103).

<sup>6</sup> States typically claim rights of legal jurisdiction (in various degrees) over non-citizens (e.g., visitors, resident aliens, foreign diplomats) only when they are physically within the state's territorial domain. Some rights over the state's citizens, however, are claimed even when those citizens are outside state territory.

<sup>7</sup> States also claim a variety of rights against aliens not to be harmed in their non-territorial (e.g., economic) interests and not to have territorial interests (e.g., security) harmed in ways that involve no territorial incursions.

(rights to “external sovereignty”) seems clearly to be its need to limit interference by others in the assigned task of domestic governing, a task taken to be legitimated by the rightful association of the subjects that state comprises or represents. And what gives each legitimate state its rights to territorial control seems clearly to be the fact that the territory in question is either rightfully tied to the state’s subjects in some way or needs to be controlled in order for the state to perform its rightfully assigned tasks. The accounts of states’ territorial rights that will be discussed here all proceed on this understanding of the justificatory priority of the state-subject relationship, as will I.

Philosophical theories of states’ territorial rights seem to me to divide naturally into three (very) broad types, each of which identifies a different sort of collective as being entitled to the status of territorial rightholder. I’ll call these the “pure” types, since, as we’ll see, many actual theories of territorial rights mix elements of more than one type.

*Voluntarist theories* maintain that groups of persons that choose to be (and are capable of being) self-determining political societies in fact possess the moral right to be such. And political societies with rights of self-determination may have, in consequence, the right to be self-determining on the particular territory they occupy. On “plebiscitary” versions of voluntarism, the majority (or, perhaps, a super-majority) of the persons living in some territory, acting on behalf of all residents, is the relevant agent for choosing to create a self-determining polity on that territory.<sup>8</sup> On Lockean versions of voluntarism (like the one I have myself defended<sup>9</sup>), freely incorporated groups have the same kind of moral right to self-determination that was enjoyed naturally by their individual members prior to incorporation. But merely possessing the right to be self-determining does not entitle a group to a territory, any more than being a naturally free person entitles a person to a piece of land. Rather, on the Lockean view, the territorial rights of voluntarily incorporated groups must derive primarily from members’ conveyance to their states of certain of the rights they antecedently possessed over privately owned land (rights which, in turn, derived from individual members’ “labor” on that land).

Second, *functionalist theories*<sup>10</sup> derive states’ robust rights to territorial control from the facts that controlling territory is necessary to states’ performances of their morally mandatory functions and that those functions are in fact already being performed by states in particular territories. The moral mandates in question are generally derived from either (broadly) Kantian or consequentialist moral theories. Kantians take the morally mandatory function of states to be that of “doing justice” – that is, making it possible for there to be determinate, enforceable

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<sup>8</sup> E.g., Andrew Altman and Christopher Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009).

<sup>9</sup> “On The Territorial Rights of States”.

<sup>10</sup> This is Anna Stilz’ name for them in “Nations, States, and Territory”, *Ethics* 121:3 (April 2011), 576. See, e.g., Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2004), 370-1; Thomas Christiano, “A Democratic Theory of Territory and Some Puzzles about Global Democracy”, *Journal of Social Philosophy* 37:1 (Spring 2006).

individual rights (“especially property rights”).<sup>11</sup> Or they may (as in Rawls) emphasize instead the need to guarantee that all basic goods in the society are subject to a just distributive structure. Consequentialists take the morally mandatory task of the state to be that of maximizing overall good results.<sup>12</sup> In both cases, reasonably robust territorial rights for states are thought to be required for discharging these functions, while the need for local districting in the performance of these functions is defended both because of general “world-state skepticism” and because of the local nature of the states’ tasks that are at issue.

Finally, *nationalist theories*<sup>13</sup> hold that only groups that have certain characteristics (beyond mere willingness to be a polity or effectiveness in administering justice) possess the right of self-determination. These characteristics are generally taken to include features like a shared history, shared language, shared religion, or shared culture. And on many versions of nationalism, a further characteristic that is required for a right of self-determination is the group’s attachment to a particular geographical territory on which the right to be self-determining may be exercised. The territory in question might be the group’s “national homeland”, or it might in some other way be specially tied to the group through the group’s history, its productive labor, or locations that have acquired national symbolic value.

While these three approaches to justifying states’ territorial rights disagree with one another in reasonably fundamental ways, their more basic disagreement is in fact with a common opponent: the *cosmopolitan*.<sup>14</sup> Cosmopolitan critics of the international state system deny that the “robust” territorial rights conferred upon sovereign states by international law correspond to states’ actual *moral* rights over their territories. States’ boundaries, they claim, ought to be “open” or very “soft” (with respect to immigrants and travelers, say), being legitimately subject to only quite limited control by states themselves. Similarly, cosmopolitans have challenged states’ claims over the natural resources within their territorial boundaries. Resource-rich countries, they argue, are morally required at least to share their good fortune, and possibly to equalize access to or wealth deriving from their resources, with less fortunate states. Cosmopolitans sometimes challenge even the jurisdictional claims of modern states,

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<sup>11</sup> Stiliz, 581-2. Stiliz’s basic position is Kantian (with a dose of Rousseau), with her central defense of legitimate states’ territorial jurisdiction resting on the idea that a legitimate state is one that “effectively implements a system of law regulating property” and in which the “system of law rules ‘in the name of the people’” (574)(see also Stiliz, *Liberal Loyalty* [Princeton: Princeton University Press, 2009]). But her final account of states’ territorial rights, as we will see, is actually a more of a hybrid.

<sup>12</sup> The first apparent defense of a utilitarian theory of territorial rights is in Henry Sidgwick, *The Elements of Politics* (London: MacMillan, 1908), 252.

<sup>13</sup> E.g., Gans, *The Limits of Nationalism*; Tamar Meisels, *Territorial Rights* (Dordrecht: Springer, 2005); Miller, *National Responsibility and Global Justice*.

<sup>14</sup> See, e.g., Thomas Pogge, “Cosmopolitanism and Sovereignty”, *Ethics* 103:1 (October 1992); and “An Egalitarian Law of Peoples”, *Philosophy & Public Affairs* 23:2 (Summer 1994). Left-libertarians are also generally skeptical about the territorial claims made by all actual states; but I will not here discuss their reasons for this skepticism.

though this is far less common. As a rule, natural reservations about the possibility or the desirability of a world-state leave even cosmopolitans in favor of “districted” performance of the mundane jurisdictional tasks of states.

Importantly, this cosmopolitan skepticism about strong territorial rights applies not only to bad states, but to good ones. Justice requires of even (otherwise) perfectly just states that they exercise only quite non-robust rights over the territories within which they have jurisdictional authority. It is also important to notice that each of the three approaches used to *justify* states’ strong territorial rights might *instead* be employed to defend skepticism about states’ claimed robust rights (a skepticism that would be similar to that associated with cosmopolitanism).<sup>15</sup> Voluntarists, functionalists, and nationalists might all defend a set of necessary and sufficient conditions for states to possess the *de jure* robust territorial rights that cosmopolitans think impossible, but then argue that no (or few) *existing* states in fact satisfy these conditions. The result would be a defense of a more *contingent* skepticism about the moral justifiability of states’ territorial claims than that defended by cosmopolitans. As examples, take my own (voluntarist) Lockean skepticism about actual states’ rights or William Godwin’s (functionalist) utilitarian skepticism.<sup>16</sup>

It should be unsurprising – though it has not been much noted – that the three pure types of theories of territorial rights correspond to (what I have claimed are) the three principal kinds of theories of political obligation and authority. They, as it were, naturally fill out the more traditional theories of political obligation – theories that deal primarily with states’ claimed rights over their subjects – by attempting to justify a different category of the rights that states claim. I have divided theories of political obligation and authority into: transactional theories – that locate the source of political obligation and authority in specific “transactions” between persons and societies, such as contracts, consent, or the receipt or acceptance of benefits; natural duty theories – that locate this source in our more general moral duties to do or promote justice, or to advance other impartial goods (such as utility); and associative theories – that identify political obligation and authority with the kinds of duties and rights that are thought to arise within (and to partly constitute) relationships like families or friendships.<sup>17</sup> The three types of accounts of states’ territorial rights constitute natural extensions of these three approaches to political obligation and authority, with voluntarist approaches naturally “extending” transactional theories, functionalist approaches naturally extending natural duty theories, and nationalist approaches naturally extending associative accounts.

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<sup>15</sup> Some skepticism about robust territorial rights, of course, is much more “targeted” than this – for instance, maintaining that states lack the rights they claim in only one particular area (say, in the rights they claim to natural resources), while possessing them in the other salient areas.

<sup>16</sup> *An Enquiry Concerning Political Justice* (1793).

<sup>17</sup> See “Political Obligation and Political Legitimacy”, in R. L. Simon (ed.), *The Blackwell Guide to Social and Political Philosophy* (Blackwell, 2002)..

Many recent theories of states' territorial rights, of course, are not "pure" versions of any of these three types. Altman and Wellman's voluntarism, for instance, rides on a straightforwardly functionalist account of state legitimacy: what makes a polity legitimate is its willingness and ability to perform the essential functions of protecting and respecting human rights. But any group that is able to perform these functions can (within limits) *choose to make* itself the legitimate authority in its territory. Stilz, similarly, embraces Kantian functionalism but recognizes as well that the wrongs involved in plainly illegitimate expulsions and annexations "cannot be explained by purely functionalist considerations".<sup>18</sup> So she adds a number of historical principles that limit or exclude authority for even perfectly functional states, in effect producing a hybrid account of territorial rights. And many recent nationalist theories (such as those of Miller and Meisels) incorporate aspects of the Lockean account of territorial rights, basing nations' rights over particular territories in (among other things) the property-like rights that those groups have in the value that their collective labors has added to the territory.<sup>19</sup> But while few actual attempts to justify states' territorial rights may thus fully exemplify one of the three pure forms identified above, it will still prove very useful, I think, to identify the virtues and limits of those forms. For in doing so we will be locating the argumentative "cores" of those attempts; and we will then be better able to see the directions in which the failures of the pure forms have pushed those attempts – and the directions in which those attempts may need to be further pushed in order to successfully justify strong territorial rights for actual states. It is to the task of discussing the pure forms and their recent approximations that I now turn.

### III. NATIONALISM

The most obvious strength of nationalist approaches to states' territorial rights is the ease with which they seem able to deal with the particularity of such rights. Because many nations have historical, cultural, and emotional ties to particular geographical territories (such as "homelands"), nationalists have a natural argumentative avenue for explaining why particular territories – and not just some territory or other – ought to be subject to robust control by particular states. The "central case" used to motivate Miller's account, for instance, is that of "a nation that over a long period occupies and transforms a piece of territory and continues to hold that territory in the present". That nation, he claims, has a "quasi-Lockean basis" for a right to "the enhanced value that the territory now has", both in the "economic

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<sup>18</sup> Stilz, 591.

<sup>19</sup> Cara Nine similarly defends an approach that she describes as Lockean, but one which rejects the individualism and voluntarism of the position I above described as the Lockean view. She writes "the state acquires territorial rights in much the same way that individuals acquire property rights ... States change the land ..., via labour ... by creating, adjudicating, and enforcing laws" ("A Lockean Theory of Territory", *Political Studies* 56:1 [March 2008], 155). But this Lockean aspect of the theory rests on an account that is really more functionalist in nature (as in the plebiscitary voluntarist view), since collectives, on Nine's view, gain jurisdictional authority over a geographic area by demonstrating the capacity to use that area to establish a legitimate rule of law (in a way that promotes basic liberal values).

sense” and in terms of “the symbolic significance” the national territory acquires<sup>20</sup>. Gans similarly takes the central roles that certain territories can play “in the formation of national identities” as an important determinant of the proper “location” for peoples to exercise their rights of self-determination.<sup>21</sup>

An equally obvious first difficulty for such approaches, of course, is that even if we are persuaded of Miller’s conclusion in the “central case”, “other cases may lack one or more of [these] features ..., so the strength of the claim to territorial rights may vary”.<sup>22</sup> Nations may not have occupied their territory for very long, they may not have transformed it or enhanced its value in interesting ways, or their identities may not have been “geographically formed”; worse, nations may not even be the current occupants of the territories to which they in fact have these sorts of connections. And many of the states in the world that claim robust rights over particular territories are not single “nations” in any very strong sense, either because they are multi-national societies or because they otherwise lack the cultural cohesion or uniformity required for strong nationhood. These facts immediately suggest that nationalist accounts of territorial rights simply may not apply (or apply uniformly) to quite a variety of actual states, all of which *claim* precisely the same kinds of rights over territory.

Especially troubling are cases in which the state currently occupying (and claiming) the territory is not the one – or the only one – with the appropriate sorts of historical and cultural connections to the land to trigger nationalist-style reasoning about robust territorial rights. And, of course, these cases are *most* troubling when the current occupant took possession of the territory in question by plainly unjust or illegitimate means. Such cases are unhappily a commonplace, so any nationalist account that hopes to apply its arguments (non-skeptically) to the real world is obliged to address them. The standard argumentative move is to simply claim that the rights of innocent peoples (and persons) who are illegitimately annexed, conquered, or expelled “fade out” with the passage of time, while new rights for those who have wrongly seized their territories (or their descendants) “fade in”. While it is, of course, hard to be very precise about this process, it is a process that is assumed by many (including non-nationalist) writers on the subject to reflect the moral facts. Miller, for instance, maintains that while wrongful conquest or expulsion does not “immediately” give the wrongdoer territorial rights over the land illegitimately seized – so that his position does not amount to “a charter for thieves” – the question of who eventually “has the better title will be a matter of judgement”.<sup>23</sup>

Because virtually no modern states can make territorial claims that are not historically stained by such injustices, it may seem that a view like Miller’s is a necessary feature of any adequate theory of territorial rights. We should note two points, however. First, the devil here is surely in the details. Exactly *when and why* rights go away and appear, when and why victims lose their claims to restitution and wrongdoers (or their heirs) acquire claims to ill-gotten gains

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<sup>20</sup> Miller, 217-18.

<sup>21</sup> Gans, 116.

<sup>22</sup> Miller, 219.

<sup>23</sup> Miller, 220, 219.

is a matter of significant theoretical and practical importance and great theoretical difficulty. Second, we only need to accept such a view at all – on which rights and wrongs gradually just disappear – if we think a standard of adequacy for theories of territorial rights is that they not be radically *revisionist* in their implications – that is, that they be able to explain why at least most of the stable states in the world that are generally acknowledged to exercise legitimate territorial jurisdiction turn out in fact to have defensible *moral* claims to such jurisdiction. I consider below whether such anti-revisionism should be accepted as a standard of adequacy for theories of territoriality. Here, however, I want just to flag the problem confronting nationalist accounts – call it “the problem of rights supercession” (that is, of rights fading out and in with the passage of time)<sup>24</sup> – since it is, I think, both a serious problem and a problem that (as we will see) also confronts many non-nationalist accounts of states’ territorial rights.

Surely, though, the most severe hurdle faced by nationalist accounts of territorial rights is simply the absence of cultural/national uniformity within the marked boundaries of the political world, an absence observable within *every* modern state. Nationalists tend to locate the relevant territorial rights in the cultural or national *majorities* within pluralistic political units, leaving the preferences, interests, and goals of those not included in the majority national group disturbingly to one side. Miller acknowledges that one might complain that his position “seems to assume a homogeneous national culture in which all participants share the same goals”. His response is that while all residents of a national territory may not share all of the same goals, they all do have “a common interest in being able to set those goals through democratic debate” – where, of course, “majority decisions” rule – and in belonging “to a community with a shared sense of national identity”.<sup>25</sup> But this response seems only to push the relevant difficulty one step back. Minority groups and individuals may well have the interests described by Miller. But they might well have no interest at all in a shared setting of goals, engaging in democratic debate, and achieving a shared national identity in *the particular* political setting in which they find themselves – a setting in which they will be systematically outvoted on matters of central concern to them by the majority national group. It is, of course, primarily worries about this sort of case that have motivated some of the voluntarist accounts of territorial rights mentioned above. Call this difficulty “the problem of trapped minorities”. It is again, however, as we will see, a difficulty shared as well by a variety of non-nationalist approaches – *including* voluntarist accounts that explicitly attempt to move beyond it.

#### IV. FUNCTIONALISM

The strongest point of nationalist approaches – namely, their ability to explain and justify the particularity of territorial rights – seems to me to be plainly a significant weakness of functionalist approaches. Legitimate states for the functionalist, remember, are simply functional political units: that is, institutionally structured collections of persons, of whatever size or location, that successfully perform their morally mandated functions (such as administering justice, establishing social equality, or adequately promoting social utility). The

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<sup>24</sup> Jeremy Waldron, “Superceding Historic Injustice”, *Ethics* 103 (1992).

<sup>25</sup> Miller, 224.

clearest strength of functionalist theories of territorial rights seems to me to lie in their plausible claims that states must advance important moral goods in order to legitimate their use of coercion, and that territorial control is an essential condition for achieving those moral goals.

Why is particularity a special difficulty for functionalism? It is the institutional structure of the state – and the way that structure operates in the lives of its citizens – that matters from the functionalist viewpoint, not the location or the history of the state. The fact that functional states happen to arise in one place or another need not reflect any special relationship between those states' citizens and the land they occupy. If those states could function effectively elsewhere or function effectively with altered boundaries, simple considerations of their morally mandated functions would present no principled bar to such changes. Without additional, non-functionalist principles in play, it is hard to see why depriving a legitimate state of territory or requiring some of its citizens to move to other parts of the state would constitute any wrong to them. Further, of course, currently functional states can plainly rest on a sordid history of wrongdoing. What matters for the functionalist is that the state in question *here and now* successfully administers justice or successfully promotes social happiness.

This means, of course, that functionalist theories will not only have problems with the particularity of territorial claims, they will also face the same problems of trapped minorities and rights supercession that face nationalist theories. States can perform their morally required functions even with unwilling parties and groups subjected to political authority within their borders; and the functionalist, like the nationalist, still owes us a convincing account of when and why the rights of wronged parties just fade away as they are opposed by the interests of established, adequately functioning states. These difficulties for functionalism add up to what I have elsewhere called the "the boundary problem".<sup>26</sup> Pure functionalism simply cannot guarantee that the boundaries of the groups counted by the theory as rightfully subject to state authority do not enclose people who have plainly been subjected illegitimately to states' coercive power. If a legitimate state (according to functionalist criteria) chose today to expand its territory and subject a portion of some neighboring state to its rule, such plainly illegitimate subjection would appear legitimate by functionalist reasoning – provided only that the state's morally mandated services were extended as well to its new subjects, so that justice was still effectively administered (or happiness effectively promoted) over the state's entire claimed domain.

This is a problem that is not faced (at least as immediately or directly) by the alternatives to functionalist theories of territorial rights. Nationalism, for instance, grounds the state's territorial rights in group "attachments" to particular territories. National groups cannot simply "make themselves" attached to some territory outside their current domain. Similarly, political societies cannot, on the Lockean model, simply claim land beyond that which is lived and labored on by those societies' willing members. Functionalism, however, bases states' territorial rights in the current provision to areas of the services that states are morally required

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<sup>26</sup> "Democratic Authority and the Boundary Problem", *Ratio Juris* (forthcoming).

to provide (and that persons are morally required to arrange to have provided *through* their creation of and support for states). States can thus acquire justified territorial rights, according to the functionalist approach, simply by *making themselves* the provider to a territory of those services. It is because of this problem, as we have seen, that Stiliz is compelled to add principles to her functionalist account that identify and prohibit certain kinds of historical, not functional wrongs. But I will say no more here about these issues for functionalist theories, since they are considered at some length below (in sections VII and VIII).

## V. VOLUNTARISM 1

Plebiscitary voluntarism, as we've seen, approaches territorial rights voluntaristically, but using a strongly functionalist account of state legitimacy. A state's legitimacy (that is, what justifies its use of coercive power) "rests on the ability and willingness of a state to protect the human rights of its constituents (i.e., to protect them from "substantial and recurrent threats' to a decent human life") and to respect the rights of all others".<sup>27</sup> A legitimate state, according to Altman and Wellman, is a "territorially based", "nonconsensual form of association" that enjoys a group "right of self-determination".<sup>28</sup> Any group that is "sufficiently large, wealthy, politically organized, and territorially contiguous so that it can secure for all individuals in the territory the essential benefits of political association", has the right to form its own state on (and exercise robust control over) the territory it occupies.<sup>29</sup>

Why even describe as "voluntarist" an account on which legitimate states are characterized as "nonconsensual associations"? This account makes legitimacy and territorial jurisdiction a matter of the *choice* of the relevant (politically capable) group to exercise the core functions of the state. But the "choice" at issue, of course, is the choice of the group conceived as a territorially organized whole. "States must be sufficiently territorially contiguous in order to perform their requisite functions, and achieving contiguity requires them to nonconsensually coerce all those within their territorial borders." While "individuals and legitimate states both have rights to self-determination", one cannot hold that the individual's right of self-determination takes "precedence over state sovereignty ... without implicitly endorsing anarchism".<sup>30</sup> The structure of this position naturally suggests the question of whether it can plausibly solve "the problem of trapped minorities".

It may seem that the answer is obviously 'yes', since "trapped minorities" can (according to Altman and Wellman's theory) escape their traps by opting for secession, choosing to create legitimate states of their own on their own territory. While this will be no help to "trapped" individuals or to trapped small, dispersed, or disorganized groups<sup>31</sup>, any substantial, non-

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<sup>27</sup> Altman and Wellman, 3-4.

<sup>28</sup> *Ibid.*, 4-5.

<sup>29</sup> *Ibid.*, 46-7.

<sup>30</sup> *Ibid.*, 162, 176.

<sup>31</sup> All are free to exit, of course, but only by abandoning their lands and subjecting themselves to the dominion of whatever other society (if any) is willing to take them in.

impoverished group appears to have a reasonable route out from the trap of permanent minority status. Any group that is “willing and able” to perform as a legitimate state may do so (at least provided existing legitimate states are not disabled by this choice). But consider for a moment what “willing and able” actually means here. “Willing”, of course, refers to the will of the majority of residents. Suppose, however, that you are untroubled by how this simply pushes one level “downward” the problem of trapped minorities (such as Union sympathizers in the Confederate States of America). Focus instead on what it means for a group to be “able” to function as a legitimate state. As Altman and Wellman understand it, this means, first, that the group in question must be territorially concentrated. Second, it means that the group must be “sufficiently large, wealthy, and politically organized” to act as a state.

But notice that groups can be *made or kept* small, poor, politically disorganized, and territorially dispersed by the (wrongful?) coercive actions of *other parties* (such as other states or groups that oppose their political independence). The will to act as a legitimate state amounts to nothing if it is defeated by force at every point. So the “trap” in question will certainly look more dire and unavoidable if others can legitimately simply use coercion to guarantee that it will not be escaped. Indeed, even groups that *are* territorially concentrated, large, rich, and organized can still be *stopped* from acting as legitimate states if *other* states or groups are “willing and able” to forcibly *stop* them from doing so. Does a group fail to count as relevantly “able” – and so fail to have a right to self-determination as an autonomous state – if some other state will simply use military force to prevent any attempt by the group to function as a state?

Altman and Wellman, I assume, want to answer ‘no’ to this question. So suppose that we count as “able” to function as a legitimate state all those groups that could do so if others did not coercively intervene to prevent their doing so? Then, however, we must ask several questions: first, how far back in history is coercive intervention by others going to “count” in determining this? Imagine a group that *could* have satisfied the requirements for being “willing and able” to act as a state, but that was forcibly expelled and dispersed by a militarily superior power – such as the Acadians expelled from Nova Scotia by Great Britain (after its conquest of Canada). Once they were dispersed (or fled) to Louisiana, France, and other parts of Canada, the Acadians were no longer a territorially contiguous or politically organized group. Indeed, they lacked any territory at all, since their original territory was rapidly settled by others. Did the Acadians still possess the right to be a state? If not, then Altman and Wellman’s theory simply privileges the existing territorial concentrations of persons, for no good moral reason and regardless of how those concentrations were achieved.

But if such wrongs must be righted – and if the Acadians still possessed the rights of self-determination at issue, even though “unable” to exercise them – when (if at all) did those wrongs and rights “fade away”? This, of course, is just “the problem of rights supercession” again, and Altman and Wellman must solve it before their position can be satisfactorily defended. The success or failure of a group to acquire the characteristics that give it the right to be a state and to control the territory it occupies (according to plebiscitary voluntarism) in each case has a *history*, and that history may be filled, even quite recently, with palpable

wrongs. Unless the theory can convincingly address that fact, it will continue to appear simply without argument to privilege the status quo.

This same problem (of apparently privileging the status quo) is, I think, in evidence in Altman and Wellman's attempt to counter what they call the "regress argument" (an argument that an opponent of their view might deploy). That argument maintains, against their view, that one can't use the principle of self-determination "to determine political boundaries, unless one first decides what the boundaries are within which voting is to take place. But the determination of the boundaries within which voting is to take place is itself a determination of political boundaries".<sup>32</sup> They consider this problem specifically in connection with the issue of secessionist movements; but I think the problem is one that confronts their view throughout. Unless we antecedently assume that existing occupations of territories by groups are legitimate and uncontroversial, how can we possibly proceed to argue that voting *within* those current "group boundaries" – that is, within the bounded territories simply *claimed* by or occupied by groups – will ground genuine moral rights to self-determination?

Altman and Wellman's response to the argument is that it is "possible to stop the regress in a nonarbitrary way ... 'Let the separatist movement specify the area within which the plebiscite is to be held'". In other words: how can groups desiring political autonomy complain if they are themselves permitted to identify the boundaries of the territory within which a vote on independence will be conducted? Altman and Wellman allow that "of course the precise contours of the territory picked out by the separatists is arbitrary in some respects".<sup>33</sup> But they appear to regard that problem as, relatively speaking, just a minor matter of detail.

This seems to me, however, a far deeper and more serious problem than this response acknowledges. Both the boundaries of the original states and the boundaries picked out by those forming new states may be morally arbitrary (or deeply illegitimate) in very important ways. For instance, "the separatists" discussed by Altman and Wellman might easily include in their "specified" territory not just the land occupied by their supporters, but also land occupied by others (who will be easily outvoted by those supporters), possibly because that land contains valuable resources or other desirable geographical features – just as the territory from which they desire to separate may itself have been formed by "trapping" unwilling minorities in various ways. Provided only that this "specification" does not incapacitate their original state (or take an unjust share of the state's resources, say), there appears to be no bar to such majority choices by secessionists. This result, of course, is unsurprising in any theory that transforms so smoothly majority will into majority right. Wherever mere majority will is allowed to dominate the determination of state territorial boundaries, the manner of composition of the body of which that majority *is* the majority should be our primary moral concern. Just as my (populous) neighborhood may not legitimately incorporate the adjoining (less populous, less affluent, less organized) neighborhood without its consent and then control

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<sup>32</sup> *Ibid.*, 49.

<sup>33</sup> *Ibid.*

it by majority rule, political bodies may not legitimately subject to their authority all the unwilling people that they are able to surround and outvote.

While Altman and Wellman do condemn the annexation of less populous by more populous states,<sup>34</sup> they do so only where the less populous groups are already organized as states. Those people and groups who are “unable” to function as states (for whatever reason?) are simply left as grist for the statist mill.<sup>35</sup> Altman and Wellman seem primarily concerned to affirm that unwilling individuals, sprinkled here and there throughout an otherwise willing and territorially contiguous group, may be legitimately subjected to political authority without their consents. But the wrongs their position permits – both in terms of trapped minorities of significant sizes and rights superceded in an instant in the interest of the present possessor of territory – seem vastly more significant than those they seem principally concerned to deny. If a group’s “inability” to function as a state is understood independently of the history and source of that inability, plebiscitary voluntarism will face the same kind of “boundary problem” faced by pure functionalism; and if it is not so understood, plebiscitary voluntarism will be pushed in the direction of a more fully voluntarist theory, a theory that is capable of greater sensitivity to historical wrongs against peoples and persons.

## VI. VOLUNTARISM 2

The Lockean voluntarism that I favor – with respect to both its account of states’ territorial rights and its account of political authority generally – derives its appeal from two strong intuitions: that the only clear candidates for legitimate subjection to any particular political authority are those persons who are *willingly* subject to it; and that the only clear cases of legitimate state claims to territorial rights (over particular geographical spaces) are claims to the territory lived on and labored on by that state’s willing subjects. The Lockean view thus condemns both the political subjection of the unwilling and states’ wielding territorial control over areas not central to their willing subjects’ lives. Lockean voluntarism takes states’ legitimate claims to territorial control to derive primarily from the willing submission of privately owned land to state jurisdiction by the willing subjects of those states. While agreements between legitimate states (and the collective labors of states’ subjects) may add to or subtract from states’ legitimate territory, the heart and origin of that territory is its patchwork composition from the individual holdings of the state’s members. Since I have described elsewhere<sup>36</sup> some of the details of, required revisions to, and responses to obvious objections to this view, I will not do so again here.

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<sup>34</sup> *Ibid.*, 52.

<sup>35</sup> Wellman does elsewhere insist that “willing and able” political groups “who occupy a territory enjoy jurisdictional rights over this land” only “other things being equal”. But the only example he gives of a case where other things are *not* equal is again that of the forcible annexation of one state by another (C. H. Wellman and P. Cole, *Debating the Ethics of Immigration* [Oxford: Oxford University Press, 2011], 102-3.

<sup>36</sup> “On the Territorial Rights of States”.

The principal virtues of Lockean voluntarism, beyond its enjoying this obvious intuitive support, are plainly these: first, it explains the particularity of states' territorial claims in a natural and straightforward way, by identifying each state's territories with the spaces in which its willing members live and labor. Second, the Lockean theory has simple and persuasive answers to the problem of trapped minorities and to concerns about at least short-term<sup>37</sup> rights supercession. The Lockean view is committed to the position that states may do no more to restrict freedom of the unwilling located within their boundaries than private persons would be entitled to do to one another in a state of nature. According to Lockean voluntarism, groups are only entitled to politically incorporate in the first place if in doing so they "injure not the freedom of the rest" (where "the rest" refers to all of those persons not included as members of the particular political society in question).<sup>38</sup> Trapped minorities may not be nonconsensually subjected to political authority – though they may, of course, be watched and defended against – because they enjoy the same rights to live and choose freely that permitted each polity's members to choose to create or join a state. Just as such minorities may not undermine the harmless political arrangements of those around them, those whose arrangements they are may not interfere with the harmless activities of the unwilling. The complaint that states cannot run smoothly without uniformly subjecting all within the states' claimed boundaries to the same political authority is both normally factually false and always morally beside the point.

Similarly, Lockean voluntarism simply rejects the idea of short-term supercession of rights. It thus cannot be embarrassed by theoretical insensitivity to the plights of the expelled, the annexed, and the wrongly subjected – even when those unfortunates are mere individuals or when, as groups, they have never been able or been permitted to organize politically. Nor is the Lockean view vulnerable to charges of over-eagerness to simply affirm the legitimacy of the territorial status quo. The rights of those maimed in the machinery of politics do not simply fade away for the convenience of the powerful or the numerous. Those whose rights have been violated in creating or reshaping states retain the right to restoration of the *status quo ante*. Short-term rights supercession is, according to the Lockean voluntarist position, simply wishful thinking, typically done by those who most stand to benefit from it.

Consider now those powerful intuitions that I have said support the Lockean view: that the only clear candidates for legitimate subjection to any particular political authority are those persons who are *willingly* subject to it; and that the only clear cases of legitimate state claims to territorial rights are claims to the territory lived on and labored on by that state's willing subjects. I call these intuitions "powerful" because I suspect that even most theorists who *reject* the Lockean position share these intuitions at least in part, perhaps conceding that these are at least the "clearest" – though of course not the only – cases of rightful political subjection

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<sup>37</sup> All theories of territorial rights, including the Lockean one, must still solve difficult problems – the answers to which, in my view, have not yet been convincingly settled – concerning the supercession of longer-term injustices, where rightholders and wrongdoers have died without the rectification of those injustices.

<sup>38</sup> Locke, *Second Treatise*, section 95.

and legitimate territorial rights. Rival voluntarist theories, of course, reveal their attraction to the core Lockean claims in their emphases on the significance of political choice. And (as we have seen) most nationalist views display it in their emphasis on the transformative living/laboring that nations claiming territorial rights have done on some particular geographical territory, while some functionalists (like Stilz) feel compelled to add historical, non-functionalist principles to their accounts. Even John Rawls – the contemporary “father” of functionalism – displayed this initial attraction to basic Lockean principles in the reluctance of his retreat from actual voluntarism to hypothetical voluntarism.<sup>39</sup>

Why, then, is this initially attractive Lockean view so summarily dismissed by the majority of theorists writing about states’ territorial rights? I take the most persistent and fundamental objections to Lockean voluntarism to be two. First, of course, many object that it is not possible to make sense of private property rights outside of a state whose laws establish them; so we naturally can make no sense either of grounding a state’s territorial rights in the subjection (by willing members) of private property to that state’s jurisdiction. This objection can have a stronger or weaker form, depending on whether it denies all extra-legal property rights or only extra-legal property in land.<sup>40</sup> Notice, however, that the required skepticism about property must extend further than mere skepticism about Lockean “natural” property rights. It must extend as well to all conventionalist theories of property (like Hume’s), according to which extra-legal moral rights in land and chattels are possible given the establishment of appropriate interpersonal conventions to define and regulate them. If extra-legal property in land is possible – be it naturally or conventionally grounded – then such land can be subjected to a state’s jurisdiction, as the Lockean model requires for justified territorial rights. Further, the property rights at issue need not be absolutely clear in their precise boundaries, provided that their “core” is clearly grounded. Even Locke allowed that an important part of each state’s job is to “settle” the controversial “edges” of natural property claims, just as states collectively settle by treaty the precise boundaries of their territories.<sup>41</sup> So this objection must claim quite a lot about the impossibility of private property in land outside the state, requiring somewhat more philosophical nerve than at first might seem to be the case.

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<sup>39</sup> “No society can, of course, be a scheme of cooperation which men enter voluntarily in a literal sense; each person finds himself placed at birth ... in some particular society ... Yet a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme ... [in which] its members are autonomous and the obligations they recognize self-imposed” (*A Theory of Justice* [Cambridge, MA: Harvard University Press, 1971], 13).

<sup>40</sup> On the stronger view, of course, one is committed to affirming that no moral wrong is done to a person (who is outside a state’s jurisdiction) even by taking what that person has crafted or cultivated and harvested.

<sup>41</sup> “And then, by consent, they came in time to set out the bounds of their distinct territories and agree on limits between them and their neighbors, and by laws within themselves settled the properties of those of the same society” (*Second Treatise*, section 38). For the international version of this “settling” process, see *Second Treatise*, section 45.

Second, I think, many theorists reject Lockean voluntarism because they are deeply reluctant to embrace the dramatic revisionism required by a commitment to that position. Real-world states are not voluntary political associations of the sort that Lockeans recognize as legitimate. The territories claimed by actual states are not (to say the least) restricted to the land and resources that are central to the lives of their willing subjects. So Lockean voluntarism calls for radically different moral assessments (than our casual or commonplace ones) of the claims made by and about modern states. This view has obviously proven unpalatable. Miller, for instance, rejects such positions as “impossibly demanding ..., putting virtually all borders into question”.<sup>42</sup> And Stiliz does not even mention the Lockean position in her discussion of the alternatives (to her own functionalism), clearly regarding it as a philosophical non-starter. I myself find such wariness about revisionism puzzling. While we do, of course, want our philosophical theories to have real-world applications, lest they be idly utopian, the defense of unrealized philosophical ideals is far from obviously useless. Indeed, the kind of revisionism being urged here (by Lockean voluntarism) is really no more substantial than would be defending a theory of social or distributive justice that implies that all existing states are unjust, or defending an account of the ideal international order that condemns existing arrangements as unjust or illegitimate.<sup>43</sup> But, at least since Rawls began shaping the political philosophy of his generation, both of these positions have become perfectly familiar. And it is perhaps worth adding that forty years ago philosophers similarly summarily rejected philosophical skepticism concerning states’ authority over their claimed subjects. In the intervening years, however, such skepticism about political authority and obligation has acquired a reasonably substantial following.

A third, though I think less fundamental, objection that is surprisingly (in my view) resilient involves claiming that the Lockean account confuses the idea of property with the quite different idea of jurisdiction, in consequence of which the Lockean account of states’ territorial rights must be equally confused. To identify the two would, of course, be confused. But property ownership clearly has a jurisdictional aspect, just as territorial jurisdiction has a property-like aspect (making it not at all confused to suppose that one might derive from the other). Landowners have rights to make certain kinds of rules to govern their lands, thus unilaterally restricting the liberty of those who choose to enter on their land. Landowners who choose to submit their land to a state’s jurisdiction give the state’s rules priority on their lands. They also agree to allow the state to regulate their land in other ways (which they were originally entitled to do themselves), including controlling those boundaries of it that will constitute parts of the state’s territorial boundaries. The result is a kind of sharing between state and subject of the various incidents that comprise full rights in land, and a concentration

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<sup>42</sup> Miller, 220.

<sup>43</sup> Lockean voluntarism does, of course, adhere to an ideal (of voluntary political association) that is dismissed by many as hopelessly unrealistic. There are obviously substantial issues here about just how ideal an ideal theory may defensibly be. But there is certainly much that can realistically be done to make familiar polities *more* voluntary, in pursuit of this ideal. And we should try not to forget just how hard it will be to ever even approximately realize in the real world the most popular ideals of social justice and international right.

of some of those incidents (received from all subjects) in the hands of the state. This latter concentration, I think, is an accurate representation of our normal conception of states' rights over their territories, not any kind of confusion of territory with property.<sup>44</sup>

## VII. HYBRIDS

In my view, then, the standard reasons for hasty rejection of the Lockean voluntarist position – on both territorial rights and political authority – are less compelling than they might initially seem. Can nationalist, functionalist, or plebiscitary voluntarist theories effectively avoid these perceived “costs” of embracing Lockean voluntarism by dealing in other ways with the problems the Lockean view allows us to avoid, such as the problems of particularity, of trapped minorities, and of awkward commitments regarding the supercession of rights? Perhaps those theories could simply be converted into more pluralistic, hybrid accounts by adding a set of new principles designed to correct their core theories' inability to effectively address these problems. I will here briefly examine just one – the most recent – effort to “hybridize” an alternative theory of territorial rights: namely, Anna Stilz' defense of her Kantian theory of robust territorial rights. The problems with Stilz' account are, I think, representative of those facing hybrid accounts generally.

According to Stilz, a state enjoys “a prima facie claim to territorial jurisdiction” over a particular geographical territory if, first, “the state is in fact legitimate” (i.e., it protects “freedom-as-independence to a sufficient degree”) and, second, the state's “legal system defines property rights over [that] particular area of land”.<sup>45</sup> The “extent” of states' jurisdictions and the particular “locations” of their territorial rights thus at first appear to be determined simply by the practical “reach” of legitimate states' institutions for administering justice. Legitimate states are morally entitled to govern whatever particular territories they actually effectively govern.

It is not, in fact, particularly uncommon to suppose in this way that part of what we mean when we call a state “legitimate” is just that it rightfully rules where it actually rules. This is precisely the kind of account that we might expect a Kantian theory to offer us (and that we see in other Kantian accounts of territorial rights<sup>46</sup>). After all, what appears to matter centrally in the Kantian project in political philosophy is that individual freedom be secured by the subjection of all to effective justice-administering institutions, not that individuals be subject to this or that particular political/legal administrative structure. So the problem of identifying the particular territories over which states have *de jure* territorial rights is allowed to be settled according to the location of the *de facto* territorial control exercised by legitimate polities.

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<sup>44</sup> This, of course, still leaves many questions unanswered, including ones concerning the status of non-landowners and of common areas within the state's boundaries. While I believe the Lockean position has good answers available to it, I will not address these here.

<sup>45</sup> Stilz, 587, 590.

<sup>46</sup> E.g., Jeremy Waldron, “Special Ties and Natural Duties”, *Philosophy & Public Affairs* 22:1 (Winter 1993); Thomas Christiano, “A Democratic Theory of Territory”.

Stilz, however, correctly recognizes that “if this were all that mattered ... there would be no objection to annexation”, since the annexing state might be able to administer justice as well as (or better than) the existing domestic institutions of the annexed state.<sup>47</sup> Even structurally legitimate states can wrong persons or groups by “over-reaching”, by extending their institutional control in wrongful ways.<sup>48</sup> Thus, Stilz allows that a legitimate state’s prima facie territorial rights can be “defeated” if the particular territory in question (that is, some particular portion of the territory which the state effectively governs) has been acquired by wrongfully displacing other groups from that territory or by wrongfully annexing other groups along with their territories.<sup>49</sup>

The wrongs involved in the two “defeater” cases are, according to Stilz, different but related sorts of wrongs. The wrongs involved in cases of wrongful displacement are violations of *individuals’* “rights of occupancy”. Individuals have not only the right to be *somewhere*, but the right to be in that particular territory in which legal residence “is fundamental to the integrity of [their] structure of personal relationships, goals, and pursuits”. Each individual has a right that others respect “the centrality of territorial occupancy for an individual’s personal autonomy -- his ability to form and pursue a conception of the good”.<sup>50</sup> By contrast, the wrongs involved in cases of wrongful annexation are violations of *collective* rights of the peoples in the annexed territories – specifically, their rights to an analogous but collective autonomy. Even when peoples’ states disappear, the peoples may persist, along with their right to the particular legitimate political institutions “they have created together through their political history”. And even when annexation does not involve destroying an existing government, it may still violate a “residual claim” for a people “to reconstitute legitimate political institutions on their territory when their prior state fails, becomes illegitimate, or is usurped”.<sup>51</sup>

Both of these accounts (of wrongs that states may do in attempting to extend their territorial jurisdictional) seem to me troubling. We can begin with wrongs of displacement. Because Stilz analyzes the wrong involved here as a violation of individuals’ rights of occupancy – and because she defends those rights as based in each individual’s “need for a stable legal residence” – Stilz’s account requires “a certain balancing” between the competing occupancy rights of displaced persons and those of persons who subsequently (and “without fault”) build their lives on the wrongly seized lands.<sup>52</sup> But the actual balancing that Stilz proposes strongly favors the rights of the latter group over those of the former (as we might expect in a Kantian

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<sup>47</sup> Stilz, 595.

<sup>48</sup> See my “Disobedience and Its Objects”, *Boston University Law Review* 90:4 (August 2010) and “Democratic Authority and the Boundary Problem”.

<sup>49</sup> Stilz, 590.

<sup>50</sup> *Ibid.*, 585, 583. It thus remains unclear from Stilz’s discussion how, if at all, we are to explain the (apparent) wrong involved in coercively relocating faultless people whose goals, projects, and so on are *not* specially connected to the place in which they legally reside.

<sup>51</sup> *Ibid.*, 591, 595, 591.

<sup>52</sup> *Ibid.*, 584.

theory). Indeed, the argument is not so much one in which “balancing” is central, but rather one in which prescription or supercession of the rights of displaced persons takes center stage. “Wrongs of displacement” are superceded where the new residents of seized territories meet Stilz’s conditions for having occupancy rights and where the displaced persons are not left stateless (or as second-class citizens in some other state). If displaced persons fail to secure equal citizenship elsewhere, they retain a “right of return” to the land from which they were wrongly displaced, but no “right to expel” the current residents.<sup>53</sup>

Stilz defends her position on rights-supercession primarily by citing Jeremy Waldron’s account of the matter. But Waldron’s account (like all such accounts) is most forceful with respect to *long-term* supercession, where the issue is one of *ancient* wrongs, where the cast of characters is now completely changed, where facts about the wrongs are obscure, and where judgments about “what would have happened” in the absence of the wrong are very tenuous. In cases of that sort, it is, indeed, very hard to determine the structure of present-day rights by appealing to facts about historical wrongings of the original rightholders. Stilz, however, is offering us instead an account of occupancy rights according to which they can be acquired very rapidly indeed (in “the second or third generation”<sup>54</sup>) by the innocent beneficiaries of wrongful territorial seizures.

As far as I can tell, the *property* principle that would be the analogue of Stilz’s occupancy principle would work as follows. If you at gunpoint force me and my family from our family home and then succeed in raising your children and grandchildren in it (while my displaced family manages acceptably in the new place to which we’ve fled), your family acquires an uncontested right to my home. Indeed, even if my family *doesn’t* manage acceptably in our new location, we retain at most a right to come back and share the house with your family (with the two families presumably dividing up the required household chores). This does not to me have the look of a reasonable “balancing” of competing legitimate claims to the home. It has, rather, the look of a disturbingly quick derivation of right from might. Perhaps it might seem that the property case I’ve imagined must be analyzed very differently from the territorial cases described by Stilz, possibly because of the great numbers of persons affected in typical wrongful displacement cases. But this would be mistaken. Stilz’s right of occupancy is an *individual* right; so greater numbers simply multiply the individual wrongs at issue. In the end, then, while Stilz assures us that her account of territorial rights is not “a mere legitimation of

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<sup>53</sup> *Ibid.*, 586.

<sup>54</sup> *Ibid.*, 585. It is not obvious to me why even the “fault” of the original aggressive displacers should not also be capable of being “superceded” on an account like Stilz’s. Her acceptance of the supercession of the victims’ rights seems to grow almost entirely out of her concern that once the new occupants are “settled” in the territory, it will be “impossible to move [them] without damage to nearly all [their] life plans” (584); this is “what really counts for supercession” (583). But if wrongful aggressors manage to re-focus their life plans quickly enough, shouldn’t they also acquire rights of occupancy (that supercede those of displaced parties) in this way? Stilz’ acceptance of any enduring role at all for issues of historical “fault” thus looks ill-motivated by her basic theory and more like a simple *ad hoc* addition to it.

the status quo”,<sup>55</sup> it must be allowed that a very strong conservative bias colors at least her treatment of the “defeater” claims involved in cases of wrongful displacement.

Consider now Stilz’s account of wrongs of annexation. Because wrongful annexation is a matter of violating a *people’s* right, according to Stilz, it follows that there is nothing obviously wrong with states annexing as much territory as they please, provided that the territory in question is occupied only by politically unorganized groups or individuals (or by subjects of some illegitimate state). While Stilz says that annexation must still be “justified” even in such cases,<sup>56</sup> it is very unclear how a legitimate state could *fail* to be justified in such annexations – given the basic Kantian (coercively enforceable) duty on each person to submit herself to legitimate institutions for the administration of justice. But this appears to mean that any legitimate, modern nation-state possesses a more-or-less permanent right to annex any territory that is occupied only by persons who are not citizens in a legitimate state – even by, say, that land’s harmless original occupants – and this despite the fact that such persons may constitute no threat at all to anyone in any legitimate state, at most “threatening” only those who freely choose to share their lifestyle there. Indeed, given that the importance to persons of “legal residence” is not at issue in such cases (since they do not enjoy legal residence at all), existing legitimate states would appear to be entitled not merely to annex territory but also to expel the territory’s inhabitants.

Perhaps this will seem to some the correct conclusion. To me it seems clear that such acts by states often constitute wrongs to the persons who are thus unnecessarily subjected to an unchosen political authority or unnecessarily expelled from their homes. Indeed, I believe a good case can be made that such acts by states constitute wrongs of the same sort as the wrongs that Stilz claims are done in the cases of wrongful displacement that she condemns. Here, by way of illustration, is a set of possible cases. First, consider an individual, living in isolation from other persons (such as an idealized version of Thoreau), who develops a conception of the good that is both firmly opposed to membership in any political organization and revolves crucially around his relationship to the particular land on which he resides. Consider, next, a loose group of individuals (such as American frontier settlers, living on widely-separated bits of land) who mostly just mind their own business, but who also together develop the same kind of ruggedly independent, anti-political, territory-specific conception of the good. Finally, imagine a socially well-integrated group – but one that lacks the formal, rule-centered structure necessary for legitimate government and law (being, e.g., both anti-democratic and “impressionistic” with respect to property and basic rights) – that also has an anti-political and territory-specific conception of the good (such as the Seminole “nation”, prior to its expulsion from Florida). Now suppose, first, that these individuals and groups are forcibly subjected to (structurally just) institutions of government and law, making a good life for them impossible. Then imagine, second, that they are instead forcibly expelled from the land to which their conceptions of a good life are firmly tied (and sent to live in the wastes of Oklahoma, say), again making a good life for them impossible.

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<sup>55</sup> *Ibid.*, 599-600n42.

<sup>56</sup> *Ibid.*, 598n39.

In either case it seems clear to me that wrongs are done by those who do the subjecting or displacing. But Stilz's overall account, including her accounts of the defeater cases, appears to commit her to denying that these are wrongs. Whether or not an individual has a right of occupancy depends on whether or not "legal residence within that territory is fundamental to the integrity of his structure of personal relationships, goals, and pursuits."<sup>57</sup> But it seems reasonable to ask why personal autonomy is only a concern in the cases of those who enjoy a "stable legal residence" in some legitimate state? While life plans may (typically, at least) be formed more confidently and securely when they are formed and pursued within a stable legal order (that coercively enforces basic rights), it is not at all clear why personal autonomy could not be just as much at issue – and just as important, both morally and personally – where the place one occupies is not within the domain of some legitimate political/legal institutional structure.<sup>58</sup>

Stilz's response, I suppose, must be that where people live outside of legitimate states, they live in a condition of injustice with respect to those around them. If legitimate states subject or expel such persons, their doing so is defensible as an act required by justice. Indeed, it might be claimed, further, that is impossible even to understand the idea of "personal autonomy" (or ascribe to it any moral significance) in a context in which peoples' "provisional" rights have not been made "conclusive" by state mechanisms of definition and enforcement. But if that is the answer, surely it misses at least part of what makes the wrongful displacement of innocents wrong. While sometimes doing so robs the expelled of a "stable legal residence" that is central to their lives, the deeper wrong is surely that it simply wrecks their lives by robbing them of a firmly entrenched way of life. Lives structured around territorially grounded conceptions of the good do not have value – or have sufficient value to ground rights of occupancy – only where those lives are lived within a stable legal order. In its unrelenting focus on our right to have and our duty to achieve "stable legal residence" in some legitimate polity, the Kantian view threatens to ignore another kind of value that a territorially-grounded conception of the good may have – namely, its ability simply to structure and give meaning to human life. And in doing so, the Kantian view is blinded to many of the kinds of wrongs that otherwise-legitimate polities do and to the relevance of past wrongs of these sorts to any adequate account of contemporary justice or of legitimate territorial rights.

Stilz' treatment of the two defeater claims, however, seems to me not only problematic in its own right. It also appears to infect the account she gives of how states' territorial rights can be "particularized" – that is, shown to be rights to specific geographical territories, rather than merely rights to some territory or other. That theoretical virtue was viewed by Stilz (and

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<sup>57</sup> *Ibid.*, 585.

<sup>58</sup> In more recent (unpublished) work on rights of occupancy, Stilz seems to accept that considerations of personal autonomy may ground a natural, pre-institutional use right that makes expulsion or relocation wrongful even in cases of persons or groups who do not enjoy legal residence in a legitimate state. But possession of this right is still made conditional on the willingness to submit to or to construct a common authority for enforcing rights.

by me above) as an apparent advantage that nationalist theories had over (essentially) Kantian functionalist theories like her own (and an advantage that we have seen Lockean voluntarism shares). Stilz tries to deny that this apparent advantage is an actual one by adding to her view an account of individuals' rights of occupancy. In an argumentative move quite similar to that made by Lockean voluntarists and by nationalists who employ Lockean arguments, Stilz maintains that a legitimate state's territorial jurisdiction is particularized by its members' rights to occupy the particular land that is tied to their ongoing relationships and pursuits (and so is essential to their autonomy). So because "the right of a people to occupy a territory is an aggregated bundle of individual occupancy rights",<sup>59</sup> and because jurisdictional rights over a territory rest on and presuppose the people's right to occupy that territory, jurisdictional rights will attach to the particular land rightfully occupied by the state's citizens. But because Stilz's account of occupancy rights – which is what is doing the particularizing work in her theory – suffers from the problems described above, it cannot, I think, make meaningful headway on the particularity problem. Lockeans and nationalists thus seem to me to retain this theoretical advantage over the Kantian functionalist, in virtue of appealing to more plausible particularizing principles.

Even were this not a problem, however, Stilz's approach to the defeater claims would still sit very uncomfortably with the Kantian foundations of her position. As we have seen, the core of Stilz's position is a Kantian functionalism: states' legitimate authority over us and our duties to uphold our states derive from the state's performing its mandatory function of making justice possible. How we happen find ourselves subject to some legitimate state's justice-administering institutions seems simply beside the point. "If a state exists and enforces a legitimate system of property law, it necessarily represents me", Stilz says; "we have a duty to support and comply with legitimate institutions where they exist" (and, we might add [to complete the Rawlsian thought] where "they apply to us").<sup>60</sup>

Nowhere in this basic line of argument is there any obvious motivation for concern about *how* we came to be subject to a just state (or for the "fault" that might be ascribed to those who do the subjecting), and Stilz dismisses as "misguided" voluntarist worries that we (typically) have no choice in our inclusions in our various political collectives.<sup>61</sup> Yet Stilz also acknowledges that her view "differs from [Buchanan's] purely functionalist theory in significant respects",<sup>62</sup> and these differences plainly lie primarily in her treatments of the two defeater claims. There she attempts to take seriously some of the non-functionalist, historical considerations that are crucial to any adequate understanding of states' claims to legitimate authority. And there, perhaps surprisingly, it turns out that even "an absolutely perfect state," one that performs its mandatory justice-related functions as well as a state could, nonetheless lacks territorial rights if it has acquired its control over territory in the wrong way.<sup>63</sup>

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<sup>59</sup> *Ibid.*, 579n.

<sup>60</sup> *Ibid.*, 581, 582.

<sup>61</sup> *Ibid.*, 597.

<sup>62</sup> *Ibid.*, 600-01.

<sup>63</sup> *Ibid.*, 583.

This historical side of Stilz' theory of territorial rights does not appear to "fit" the theory's functionalist side. As we have seen, sometimes historical considerations about territorial control appear not to matter at all ("appeals to history are insufficient to establish [a right to occupy a territory]"<sup>64</sup>); but in Stilz's accounts of displacement and annexation, certain kinds of historical facts about the subjection of persons and territories plainly do matter. In these latter two cases Stilz seems to me to show a quite reasonable concern about how legitimate states acquired the territories over which they claim territorial jurisdiction, not a concern simply that justice for all – in the sense of each possessing determinate, enforceable rights to equal freedom – be done. But our questions should be: why does this concern show itself *only* in these two cases, and how can an essentially Kantian theory justify claims that such historical issues should affect at all the political rights and duties we find in "perfectly just" states?

#### VIII. CONCLUSION: ALTERNATIVES?

My worry about Stilz' position, then, is that its historical side simply cannot be motivated by its core functionalism, but operates simply as an *ad hoc* addendum to it (designed to try to avoid the counterintuitive implications of that position). If I am right in this, then Stilz's own theory is an "unstable hybrid," like the plebiscitary voluntarism she rejects for this reason.<sup>65</sup> My suspicion is that the same will prove true of all other efforts to avoid the counterintuitive implications (outlined above) of the other, non-functionalist alternatives to Lockean voluntarism. Pluralist theories are not, of course, indefensible simply in virtue of their pluralism. But defensible pluralism requires a unifying overall motivation, not simply a convenient conjunction of elements deriving from views that are essentially in tension with one another. I do not believe that Stilz has yet shown us how her theory of the territorial rights of states can satisfy this requirement. Nor is it obvious how other theories of territorial rights – all of whose conceptions of legitimacy seem essentially insensitive to the kinds of Lockean historical concerns that I've emphasized – will be able to offer any more "stable" unifying motivations.

Do other alternatives remain? Here I will merely mention two possible strategies that might appear to circumvent the problems I've identified. The first employs an approach of "indirection". Instead of trying to directly justify particular distributions of territories to states (by appealing to some nationalist, functionalist, voluntarist, or hybrid theory), we might try to justify these distributions *indirectly* – by justifying the international legal order that has made or confirmed (much of) the extant distribution (through its acceptance and its defense of [many] existing territorial boundaries). The problems with such an approach, however, should be obvious. If the international order is not itself well justified, it cannot convey through its history any legitimacy to its recognition of territorial claims by states. And the international order has been and continues to be indefensibly structured around the interests of powerful states, while

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<sup>64</sup> *Ibid.*, 582.

<sup>65</sup> *Ibid.*, 600.

its lack of enforcement mechanisms undermines its capacity to uphold any judgments of illegitimacy it makes (judgments that are typically forgotten after a suitable period of mourning). The international order has permitted states, individually or collectively, to lay claim to all of the useable universe, including that which is unknown and unused (such as outer space and the inner earth). A “legal order” with such a history lacks, in my view, sufficient legitimacy to convey legitimacy to the territorial claims by states that it upholds.

Second, it might seem that the problems faced by existing theories of territorial rights could be neutralized if those theories were understood not as *ideal* theories, but as *nonideal* theories of states’ territorial rights. A nonideal theory could acknowledge, for instance, that the subjection of trapped minorities or the non-rectification of past wrongs constitute genuine injustices, while still arguing that accepting (at least much of) the existing distribution of particular territories to particular states is the best course of action under our current morally nonideal conditions. Now, exactly how we should understand the nature of nonideal theory in moral and political philosophy is, of course, far from settled. But my own view is that we should understand nonideal theory as a transitional theory of justice (or rightness). The rules or principles of nonideal theory, so understood, would be rules designed to direct us on the best (i.e., the most efficient, feasible, but still morally permissible) route to achieving full compliance with the right.<sup>66</sup> And if we understand nonideal theory in that way, I do not think it can be plausibly maintained that simply continuing on our present course is at all likely to bring about full compliance with ideal prescriptions governing states’ territorial claims. I have just referred above to my beliefs about the deficiencies of the international legal order in the territorial claims that it upholds. This order has always plainly been, I think, far more clearly oriented toward achieving a stable compromise between the interests of the great powers than it has been toward achieving full compliance with any ideal conception of the right. If so, nonideal theory is unlikely to dictate anything like simple compliance with that order – and with its dictates with respect to states’ territorial rights – as the best transitional route to perfect justice.<sup>67</sup>

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<sup>66</sup> I defend this view of the relationship of nonideal to ideal theory in “Ideal and Nonideal Theory”, *Philosophy & Public Affairs* 38:1 (Winter 2010), 5-36.

<sup>67</sup> For their helpful comments on earlier drafts of this paper, I would like to thank Jason Craig, Sahar Akhtar, and an audience at the University of Arizona.