

Nations, States, and Territory
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It is tempting to view each state as having the right to exercise political authority within a given set of boundaries. But what gives a state the right to these boundaries? Consider the US: its original border encompassed only the Eastern half of the country up to the Mississippi River (excluding Florida). The Midwest was acquired in the Louisiana Purchase from France of 1803, Florida was purchased from Spain in 1821, Texas was annexed in 1845, the Southwest was ceded after the Mexican-American War in 1848, and Alaska was purchased from Russia in 1867. Then Hawaii was added in 1898 after a group of American and European businessmen who had overthrown its government pleaded for annexation. Finally, Puerto Rico, Guam, the Philippines, and Cuba were ceded after the Spanish-American War in 1898. Given this (largely tainted) history, we might ask: does the US actually have a right to all the territory within its current boundaries? What, if anything, differentiates its current relation to the territory of Hawaii, say, from its current relation to territory of the Philippines? (Cuba and the Philippines became independent again in 1902 and 1946, respectively). To ask these questions is to ask what grounds state territorial rights.

Beyond answering our questions about the rights of states with relatively settled boundaries—like the US—an account of territorial rights could also help to resolve the territorial disputes involved in cases of settlement, secession, and decolonization. Many states have attempted to extend their boundaries by subsidizing settler populations, as Israel has done in Palestine or Morocco in the Western Sahara. Is settlement a legitimate way for states to acquire new territory? Or consider secession: we may wonder whether

territory can ever be removed from an existing state. Often, secessionist groups forcibly appropriate territory, as during the secession of Eritrea from Ethiopia in 1993, or of Bangladesh from Pakistan in 1971. If these secessionist groups had no right to the territory they seized, then they may have committed an unlawful taking that would void the legitimacy of their new polity (Buchanan 1991, Brilmayer 1991). Finally, even when some population is freely granted independence, as in cases of consensual decolonization or secession, we still need a theory of territorial rights to determine the rightful boundaries of the new jurisdiction (as in the case of future independence for Quebec or Catalonia). So a theory of territorial rights can aid in two important tasks: explaining the legitimacy of long-settled boundaries and helping us to demarcate new ones.

We should begin our investigation into territorial rights by looking at the claims to territory that existing states actually make. States generally claim a whole bundle of rights over territory, which we can divide into three basic elements.¹ First, they claim the right of territorial jurisdiction, which entitles them to make and enforce law on the land within their borders. If a state legitimately has jurisdiction over a territory, then anyone present on it is rightly subject to its authority and liable to coercion if he breaks its laws. If the state has legitimate territorial rights, then outsiders also ought not to interfere with its exercise of authority, or set up an alternative set of institutions there. Second, a state generally claims resource rights in its territory: states attempt to use, exploit, and control extractable minerals, oil, and other natural resources present on the land, and to profit from their sale. Finally, states claim the right to control borders and to regulate the movement of people and goods across the territory. This includes the right to monitor

¹ The distinctions I make here closely follow Miller 2009.

entry and exit, to impose conditions on movement (e.g. visa restrictions or tariffs), and even to exclude foreign persons and goods entirely.

Of course, the fact that existing states claim these three kinds of rights doesn't mean their claims are valid: we must ask whether these claims can be justified. I propose to begin by investigating the justification of the first, central element in this bundle, the right to territorial jurisdiction. Justifying the second and third elements—the rights of resource and border control—requires a more complex approach. First, these other rights are parasitic on the prior right of territorial jurisdiction, which must be accounted for before these rights can be explained. Second, rights of resource and border control are also limited by a set of *external legitimacy conditions* that constrain how the state should exercise these rights when their exercise affects foreigners. For that reason, this paper considers only territorial jurisdiction, on the theory that we can then extend the view to control of borders and resources in a second step. I therefore will not argue for or against international freedom of movement or resource privileges here.²

Instead, my main aim is to develop an alternative to the currently dominant account of territorial jurisdiction, the nationalist theory. The nationalist theory holds that the state derives its territorial rights from the prior collective right of a *nation* to that territory. A nation is a group defined by objective cultural characteristics that its members believe themselves to share. On this view, a state has a right to exercise authority over a territory if: a) the nation it represents has a right to the land in these areas and b) the state is properly authorized by that nation. One reason why the nationalist theory is attractive is that it seems to provide a good explanation of why a *particular* state

² From now on in the paper, I use the term “territorial rights” solely to describe rights of territorial jurisdiction, not rights to resource and border control.

should have rights over a *particular* territory. On the nationalist view, the French state has rights over the territory of France—and not, say, the territory of Norway—because it represents the French nation, to whom this territory already belongs.

In what follows, I argue that invoking nations is neither necessary nor sufficient to explain territorial rights. I begin in Section 1 by arguing that the nationalist account is more problematic than it initially seems: it has a number of implications that fail to correspond to our intuitions about territory. My arguments may not conclusively refute the nationalist theory, but I believe they point out enough difficulties to make it worth considering an alternative view. In Sections 2-4, I then develop a different account of territorial rights, the *legitimate state theory*. The legitimate state theory holds that a state has rights to a territory if (a) it effectively implements a system of law regulating property in that territory, (b) its subjects have a legitimate claim to occupy the territory, (c) the system of law “rules in the name of the people,” by protecting basic rights and providing for democratic representation, and (d) the state is not a usurper.

I conclude the paper by raising what I think is the most important objection to the legitimate state theory I defend: the *annexation objection*. In addressing this objection, I argue that the legitimate state theory must make room for a residual claim on the part of the state’s people in their territory—a claim I call metajurisdiction, the right to determine the political authority to which that territory is subject. Unlike nationalist theorists, however, I argue that “the people” is not a cultural group, but is simply the collective subject of the state. And I claim that the people’s right of metajurisdiction is a very distinctive kind of right: “the people” can only exercise this right in extraordinary circumstances, where their legitimate state fails or has been usurped. In ordinary

moments, the people exercise metajurisdiction simply by having a legitimate state in place over them. Once it is understood how the legitimate state theory incorporates this account of metajurisdiction, I believe its main competitor—the nationalist theory—loses some plausibility by comparison.

1. The Nationalist Theory of Territory

Nationalist theories hold that territorial jurisdiction is a collective right of national groups, and that a nation bases its right on formative ties between the group and a particular territory. Different nationalist theorists emphasize different formative ties: I will here consider an argument from identity (Gans 2003) and an argument from settlement (Meisels 2005, Miller 2007, 2009).

The identity argument claims that the fact that a territory is central to the identity of a particular nation provides a strong reason for granting that group rights over the territory (Gans 2003, 100). A group's identity tie might have been established because important events in the nation's history occurred on that territory, or because the territory features prominently in the group's myths or traditions. But when the identity tie is strong enough that the group considers a particular territory its "homeland," this fact gives it an interest in physical residence on and governance over that territory (Gans 2003, 109).³

³ Gans limits the territorial rights conferred by the identity argument in several ways. First, he suggests that more than one national group can have an identity tie to the same area, which means they would need to share territorial rights over it (Gans 2003, 114). Second, he claims that the identity argument may not establish the right to establish a separate state on a territory, but only more limited rights of self-government or political autonomy there. Third, he argues that the *scope* of these rights over territory may be limited by the needs of others with regard to resources (Gans 2003, 107).

The argument from settlement is slightly more complex. Settlement, as nationalists understand it, involves not just mere residence on a territory—simply “being present” there—but rather the construction of a permanent physical infrastructure in a way that reshapes the landscape. By creating this infrastructure, settlers add a considerable amount of value to the land. Tamar Meisels and David Miller have claimed on Lockean grounds that settlers have an ownership claim to territories to which they have substantially added value, since they have a prior claim to own their labor, and this labor has been fixed in the infrastructure they have built (Meisels 2005, 75-96; Miller 2007, 218-9).

Meisels and Miller also claim that settlement involves an expressive element that ties it to national identity. Settlement efforts are undertaken by national groups who make decisions about the use of the territory that reflect their culture: “they must, for instance, choose between various modes of architecture...decide whether to build huts or high rises, and what style to build in.” They may “build churches or synagogues or mosques” or erect monuments with historical and cultural significance (Meisels 2005, 87; see also Miller 2009, 14). Since national culture forms an important part of members’ identities, and this culture imprints itself on the settled territory, “those territories are of unarguable significance to the personal identity of the individuals composing that nation” (Meisels 2005, 90). By settling land, a nation imbues it with cultural significance, which is henceforth embodied in its public spaces and physical infrastructure. Since this cultural value cannot be detached from the territory, the nation therefore has a strong interest in jurisdiction over it (Miller 2007, 218).

The appeal to homeland identities or to patterns of cultural settlement may seem to be a strength of nationalist theories, since these considerations provide a standard for demarcating territorial boundaries. Such a standard is lacking in more conventional liberal theories of jurisdiction, which are often thought to rely on a purely functionalist account of state authority. A functionalist account can establish that there are general benefits involved in state control of territory, say by appealing to the fact that states are necessary to enforce justice, define property rights, and provide public goods. But a functionalist view has a more difficult time establishing why France should control the particular territory of France and not the territory of Norway, since the Norwegian and French states are both capable of enforcing justice and providing necessary public goods on these territories. Bringing in homeland identities or patterns of cultural settlement thus provides a supplement to the liberal theory that may allow us to better connect particular states to particular pieces of land. All of this helps to explain the current dominance of the nationalist theory as an account of territorial rights. On closer inspection, however, I believe the nationalist theory is actually less effective than it promises to be. To see why, let us consider four difficulties with this type of view.

First, settlement theorists do not adequately explain how a Lockean labor-mixing account can ground rights of *collective* ownership. Much of the improvement of land that goes on within a national territory—the construction of houses, churches, and the like—is not carried out by the nation, but by individuals or private associations. Meisels and Miller place a strong emphasis on the provision of public goods, but sewer systems, power grids, public transport, and lighting are also built by particular people and groups. “The nation” does not mix its labor with any of these objects in any sense except

metaphorically. So why shouldn't the individuals who actually labored on the objects in question gain property rights in these objects? Such an individualist approach would also square better with the fact that "the nation" does not own the land of modern states.

Instead, private individuals and groups own this land.

Second, settlement theorists do not explain how labor-mixing could confer rights over an *entire territory*, rather than simply property rights in the specific bits of land that have been improved. To see the problem, imagine the Peruvians build houses, churches, a sewer system, and a power grid on the land that is now Peru. On a traditional Lockean account, that would mean the Peruvians now own the homes, churches, sewer system, and power grid and the land on which they rest. But these particular plots of land, even aggregated together, do not add up to the territory of "Peru." Some vacant land within the administrative boundaries of what is now Peru will still be left unlabored, even in a thoroughly settled state, as for example national parks or wilderness areas.

Suppose a group of outsiders raises a claim to this vacant land. How could the Peruvians have the right to regulate their entry, or even to require them to obey Peruvian law if they are allowed to settle there? We normally think that vacant land within the administrative borders of an existing state is not simply *terra nullius*, available for the founding of new sovereign states. But if the only explanation for the acquisition of jurisdictional rights is that the land has been labored, then the state cannot have jurisdiction over undeveloped areas. The settlement view thus seems to tacitly rely on a prior account of administrative boundaries—labor within which grounds a right to the entire territory—rather than explaining the genesis of these boundaries.

A third problem with the settlement view is that it would appear to grant territorial rights to any group that constructs a culturally marked infrastructure, including immigrant groups. Consider for example the Cuban inhabitants of Little Havana in Miami. Have they likewise acquired jurisdictional rights in the territory they have settled? For Cubans have to a substantial degree recreated Cuban institutions there: there are Cuban cultural centers; Spanish-speaking schools; Cuban restaurants; and monuments reflecting Cuban culture and history. But do these facts give the Cubans the right to establish a separate state in South Florida?⁴ Instead, it would seem that the Cubans derived their right to settle Little Havana in the first place only by express grant from the state that *already* had jurisdiction over the territory (the US).

Fourth, while emphasizing formative ties like homeland identity and settlement purports to provide an apparatus for resolving territorial disputes, the implications of these ties for such disputes are often implausible. Consider Poland, for example. As settlement theorists would emphasize, many Polish towns possess a physical infrastructure (architecture, public monuments, churches) reflecting the Germans who once lived there. And as identity theorists would notice, these towns figure heavily in German history and remain the homeland of many German citizens, who were forced out after 1945 (for a good review of this history, see Davies 1981, 492-535 and Lukowski and Zawadski 2001, 217-280). But these ties of identity and settlement—while they provoke a certain amount of nostalgia—are not sufficient to ground the *current* title of

⁴ One might respond that only the *first* people to transform a territory through settlement can possess rights over that territory. But the structure of the settlement account closes off such a response. Both Miller and Meisels claim that regardless of whether a group of settlers unjustly settle land owned by some other group, if they labor the territory in a way that reflects their culture and identity, they eventually acquire a claim to it (Meisels 2005, 94; Miller 2007, 220). On this view, the Cubans could acquire a claim to Little Havana even if some other group (the Americans) had a claim to it before they arrived.

Germany to Western Poland. Why does Germany have no title to this territory? The Polish state has a present-day claim to Western Poland because the people that occupy these areas have a right to be there—they have nowhere else to go—and because Germany has forfeited any claim to sovereignty over this population by the injustices it perpetrated under the Third Reich (including racial discrimination, conscripted slave labor, the prohibition of higher education for Poles, and the deportation and execution of Polish elites).

In sum, while it purports to add a significant element to more functionalist accounts of the state—the ability to demarcate a particular state’s rightful boundaries—the nationalist theory of territory ultimately fails to persuade. Settlement theorists are unable to explain 1) how “the nation” labors a territory in a way that confers collective rights of jurisdiction, not individual property rights; 2) how this labor confers rights to an entire territory without presupposing a prior account of administrative boundaries; and 3) why immigrant enclaves don’t get territorial rights too. Finally, both settlement and identity theories have counterintuitive implications for the demarcation of boundaries in cases where demographic shifts have occurred (Poland).

2. The Legitimate State Theory

Since the nationalist theory has these weaknesses, it pays to examine an alternative: the legitimate state theory. On the legitimate state theory, a state’s claim to territory is rightful if: (a) the state effectively implements a system of law defining and enforcing rights, especially property rights, in a territory; (b) its subjects have a legitimate claim to occupy that territory; (c) that system of law “rules in the name of the people,” by

enacting legislation that represents a minimal public interest and grants the people a democratic voice in defining that interest; and (d) the state is not a usurper. On this view, states have territorial rights because their jurisdiction serves the interests of their subjects. As we will explain in more detail below, individual rights to property can be coordinated with others' rights and rendered interpersonally binding only when there is a state to define and enforce them.

We should highlight one area of agreement and two important contrasts between the legitimate state theory and the nationalist theory we examined above. First, the legitimate state theory *agrees* with the nationalist view that “states can only claim territorial rights...as representatives of the peoples that they govern” (Miller 2007, 217). On the legitimate state theory, the state represents the people when it enacts legislation in the public interest and grants the people a voice in determining this legislation. The state's claims to territory are thus not independent of how well it does at representing its people: as we shall explain further below, a state only has a claim to territory if it meets a basic threshold for being a *legitimate* representative of its people. The state also has no claim to territory that its people have no prior right to occupy.⁵ But, despite the fact that a state gains territorial rights only by representing the people, state rights to territory are *primitive*: only states—not any other actor, such as the nation—can exercise this kind of right.

The first contrast with nationalist theories is that the legitimate state view does not

⁵ As I will explain further below, an occupancy right is a right of individuals to reside on a particular territory, and the right of a people to occupy the territory is simply an aggregated bundle of individual occupancy rights. A territorial right, on the other hand, is the state's right to jurisdictional authority over a particular piece of land. The two rights are connected, however: only if the individuals represented by a particular state have rights of occupancy in a particular territory does their state have a right to jurisdiction over that territory.

require that the state be *authorized* or *consented to* by the people in order to have jurisdiction over territory. Instead, the state is like a guardian who represents the people, but is not directly appointed by them. Consider the analogous case of a child who has a guardian. The child has various rights, including perhaps rights to an estate, but he cannot exercise these rights in his own name. Instead, the guardian acts like a proxy for the child, representing his interests in court proceedings or exercising his rights in everyday decision-making (e.g. he decides how to manage the ward's property). What gives the guardian the right to represent his ward? Not the ward's consent. The guardian's right to represent derives from his ability to *act in his ward's name*. The legitimate state theory applies this model of representation to the state. The people possess basic rights in their territory. But—for reasons to be discussed below—the people cannot exercise these rights directly; instead, these rights must be exercised for them by a proxy (the state). In assuming this role as proxy, then, just like the ward's guardian, the state speaks and makes decisions as though it were the people. But its title to perform these functions derives, not from the people's consent, but from its capacity to act in the people's name.

The second contrast with nationalist views is that on the legitimate state theory, the “people” are made into one collective body by being subject to state institutions and by participating together in shaping these institutions. No cultural nation pre-exists the state and, in an act of self-imposition, confers upon it the authority to govern the national territory. Instead, *the state defines the people*. Consider again the analogous case in which a guardian has more than one ward. Nothing has to connect these wards other than the fact that the same person serves as guardian for all of them. Over time, these wards

will likely come to share some connections through their history with the guardian. But the wards do not need any prior bond among themselves to be represented by the same person.

To unpack the legitimate state view further, we should start by explaining why it is that the people lacks the capacity to exercise their own rights directly. To answer this question, it will be helpful to borrow elements of Kant's account of state authority.⁶ His view is complex, but the main elements can be briefly summarized as follows:

- (1) Each individual has an innate claim to freedom-as-independence, which requires that he not be forced to obey the will of another person. To fulfill this claim, the individual must enjoy a set of guaranteed rights, including: (a) rights of control over his own body and (b) rights to property in external things.
- (2) Each individual has a basic duty to respect the freedom-as-independence of others, including their rights to control over body and property, and he can be coerced to perform this duty.
- (3) Individuals cannot respect others' freedom-as-independence if they interpret and enforce their rights *unilaterally*, i.e. on their private initiative.
- (4) The only way to respect others' freedom-as-independence is to set up a state that can serve as an *omnilateral* arbiter and enforcer of everyone's rights.
- (5) If a state legislates and enforces a system of rights that protects a subject's freedom-as-independence, then it represents that person and rules in his name. A subject also has an obligation to comply with the state if it protects other people's

⁶ I cite Kant's writings by the standard German edition of Kant's works, *Kant's Gesammelte Schriften*, edited by the German Academy of Sciences (Berlin, Walter deGruyter & Co. 1900--). These numbers are widely noted in the margins of English translations. *MM* stands for *Metaphysics of Morals*, *PP* for *Perpetual Peace*, and *TP* for Kant's essay "On the Common Saying: That May be Correct in Theory, But it is of No Use in Practice."

freedom-as-independence, because that is the only way to fulfill his basic duty to them.

I am unable to expound Kant's arguments here. I focus only on propositions (3)-(5), which are particularly useful for our purposes, since they address the question of why the *state* is a necessary intermediary for the interpretation and enforcement of rights, especially rights to property.⁷ Understanding these propositions will help us to see why only states—not individuals or non-state actors, like the nation—can claim jurisdiction over territory.

States are the proper possessors of territorial rights because of two intractable problems involved in any exercise of jurisdiction by non-state actors: the problem of unilateral interpretation and the problem of unilateral defection and lack of assurance. Both of these problems are particularly severe when it comes to jurisdiction over property. This is because an individual's right to a sphere of property is not naturally particularized. Freedom-as-independence requires that I have rights of control over a particular body (my own), but it does not specify which particular objects I should have rights of property in. Property rights are thus partly conventional. In any stateless condition, each actor would have to interpret for himself which particular share of property he has rights over, how he might signal to others that this share belongs to him, and how far his claims over it extend. This conventional aspect of property rights contains the potential for grave conflict when these rights are interpreted and enforced by actors in an uncoordinated way.

⁷ I should say that I believe the state is a necessary intermediary for interpreting and enforcing all our rights, not just our rights to property. I focus on rights to property here for two reasons: first, rights to property are often rights over land, and the state's jurisdiction over a territory is therefore bound up with the need to establish clear definitions of our property; and second, the problems of interpretation and assurance that make state authority necessary in general are particularly clear in the case of property rights.

Unilateral interpretation of rights undermines our independence because interpretations of partly conventional property rights may diverge, and other people's good-faith interpretation is just as authoritative for them as our own interpretation is for us. Therefore when someone else's interpretation of my property rights disagrees with mine, what *I think my rights are* does not place him under any duties. As an equally authoritative interpreter, he has title to enforce his own view of property rights—not my view—which means that he may try to use force on me whenever he judges the claims to property that I make to be unjustified. The less generous his interpretation of my property rights and the more powerful he is at enforcing it, the more threatened my independence becomes.

But since the point of property rights is to coordinate our actions and avoid mutual interference, the goal of a system of property is undermined so long as individuals exercise unilateral jurisdiction in this way. To really secure our innate right to independence, we must construct one *univocal* interpretation of property rights and correlative duties to which everyone is subject. To eliminate private interference, we require a single, unitary exercise of jurisdiction that can provide a public definition of our property rights and place everyone under an obligation to respect it, not a slew of competing private interpretations.

There is also a second problem of unilateral defection involved in any private enforcement system, which creates a lack of assurance about our rights. Kant thinks that this second problem undermines my independence even if my state-of-nature neighbors and I happen to *agree* on the bounds to our property “all the way down,” that is, even if there are no problems of interpretation between us. That is because even when you agree

on the limits of my property rights, I am still dependent on your arbitrary will to sustain this agreement at every moment, and this is itself a form of insecurity that compromises my basic claim to independence. You might respect my rights now, but your will could change at any time, and so you retain the *power* of interference with me and my rights, even if you do not in fact exercise that power. To be fully independent, I should not have to depend on your will as the only source of security for my rightful claims; instead, I must have a mechanism to *assure* me that my rights will be guaranteed, no matter what the condition of your will. The proper mechanism of assurance is the state's framework of public law.

Because of the two problems of unilateral interpretation and unilateral defection, allowing non-state actors to exercise jurisdiction and enforcement over their property is inconsistent with guaranteeing freedom-as-independence. Instead, we require an intermediary that can conclusively place all citizens under a duty to respect *one unitary* view of what everyone's property claims are. The intermediary must also coercively enforce this view, thereby assuring each individual that others will not interfere with his property, which puts him under a conclusive duty to respect theirs. Kant therefore argues that each person has a duty to accept the authority of a state that can serve as an intermediary for the interpretation and enforcement of his rights. Absent a state, a group of individuals simply cannot recognize and respect one another's rights. To do that they must speak with one voice—by articulating public definitions of their rights—and act in a coordinated way—thus assuring everyone that rights will be respected in practice. But this just means that to respect rights, they must be organized as a state. Because a state is required in order to secure everyone's independence, and because we already have a

basic duty to respect others' independence, we do not have to consent to the state in order to be bound by it. Even if the state that rules us has acquired sovereignty simply by seizing power, we still have a duty to obey it (Kant, *MM*, 6:372). If a state exists and enforces a legitimate system of property law, it *necessarily represents me*—whether I agreed to its establishment or not.

Recall that the legitimate state theory asserts that a state has a right to its territory when: a) the state is in control of that territory and legislates laws defining property rights there, b) its people have a prior right to occupy that territory, c) it meets a set of legitimacy conditions showing that it “rules in the name of the people,” and d) the state is not a usurper. Our argument up to now has established only Condition (a). I have claimed that only states can have territorial jurisdiction, because only they can promulgate and enforce a unitary, public, and objective criterion of rights, especially property rights, that binds everyone in a given area. But this argument does not yet show which *particular* states ought have authority over which *particular* territories. This is what Conditions (b) and (c) are meant to do. Condition (d)—that the state must not be a usurper—will be discussed in the paper's final section, through an examination of the problem of annexing territory.

3. Rights of Occupancy

Let us next consider Condition (b). How can we show that the people have a right to occupy their territory? We should note first that a right to occupy a territory is not the same as a right to property there. Instead, it is a right to be in *legal residence* on the territory: to be physically present, and to have one's rights defined and enforced by

whatever state has jurisdiction there. Thus, even non-property owners can have rights of occupancy on a particular territory. This right of occupancy is an important precondition for almost all other rights. If I can be displaced off a territory at any moment, then my property, my other rights—even most of my goals and pursuits—mean little to me. The question of what gives a people the right to occupy their territory is very difficult to solve, not least because appeals to history are insufficient to establish such a right. Even if the very first occupants of a particular territory could be established (through archaeology) and their descendants somehow identified (by genetic evidence), we should not reallocate rights of occupancy on the basis of these historical claims. Any such reallocation would involve massive wrongs—involving the displacement of populations—and would leave many present-day persons with no place to live.

We have already seen, in our discussion of the nationalist theory, that the construction of a culturally marked infrastructure is not sufficient to establish a group's right to occupy the territory (i.e. the Germans have no right to occupy Western Poland). And we have just noted that rights of occupancy are of crucial importance to *individuals*—since they provide the background framework for their goals and pursuits—and not just for national groups.⁸ That might prompt us to think the following: “Why not just base a people's right to occupy territory on the fact that the individuals who make it up currently reside there?” But this approach has problems too. Specifically, it does not rule out the following case:

Forced Removal. Suppose a group of mercenaries gets together, overthrows the state of Chad, and drives out all the inhabitants, who become refugees in neighboring states. This group of mercenaries then

⁸ Recall that at footnote 5 I defined “a people's” occupancy rights as simply an aggregated bundle of individual rights to occupancy.

sets up an absolutely perfect state on the territory. It rules justly and enjoys the unanimous consent of all its inhabitants. We will still want to say that this perfect state does not have a right to the territory, at least not at the moment of its founding. This is because its *people* have no right to the territory at that moment: its members are engaged in the wrongful displacement of another group. In constructing a theory of occupancy rights, we want to avoid legitimizing wrongful acts like this one.

Part of the appeal of using considerations like identity or settlement to establish occupancy rights is that they help us to rule out cases of wrongful displacement, without necessarily resorting to a full-blown theory of historical rights to territory. It takes a while—perhaps a few generations—to identify with the territory, and to transform it in accordance with a particular culture. This means we could say that the mercenaries do not yet have a claim to occupy the territory they have seized, because they aren't identified with it or haven't transformed it. A few generations down the line, though, perhaps the mercenaries' descendants *would* be identified with the territory and *would* have transformed it, so they would gain the right to occupy it. This is in line with our general intuition that the claim to restitution for ancient wrongs weakens with time (Sher 1981, Waldron 1992).

Although supersession of ancient wrongs is important, I believe that settlement and identity do not properly identify the conditions under which supersession occurs. What really counts for supersession is a person's *legitimate expectation* of continuing to occupy a territory (Waldron 1992, 17-18). If Person A has such an expectation, and if he has formed the expectation through no fault of his own, then Person A has a right to occupy the territory or, if he has lost occupancy of it, to have that occupancy restored.

Kant also recognizes a right of occupancy that takes something like this form: he says that “all human beings are originally (i.e. prior to any act of choice that established a right) in a possession of land that is in conformity with right, that is, they have a right to be wherever nature or chance (apart from their will) has placed them” (Kant, *MM*, 6:262). For Kant, each subject has an innate, though indefinite, claim to a fair scheme of property, a claim that must ultimately be given content by reference to the laws of a legitimate state. This innate claim, then, requires him to live in a legitimate state that defines and enforces his legal rights: it is a claim to a *stable legal residence*.⁹ On this Kantian view, the state’s right to its territory is *grounded in* its citizens’ rights to territorial occupancy: by putting into place a legitimate system of law, the state is defining and enforcing its subjects’ claims to a stable legal residence and to a fair scheme of property rights, by providing a conclusive public definition of what these claims entail.

Why are rights of occupancy so important? Occupancy of territory plays an important role in almost all of our pursuits and our plans for the future. If I structure my goals and choices against the background expectation of continuing legal residence in a particular territory, and if I am there through no fault of my own, then respect for my personal autonomy tells in favor of allowing me to remain there, since it would be impossible to move me without major damage to nearly all my life-plans. Because the expectation of territorial occupancy is so fundamental, each person has a right to a stable legal residence. We therefore have reason to restore occupancy to those whose expectations of residence have been wrongly violated in the recent past. But note that a

⁹ A person’s stable legal residence is the state in which he has a permanent right to reside. A mere visitor or tourist is therefore not an occupant, in my sense, of the state he is visiting (since he permanently resides somewhere else). If a person has been on a territory for a sufficiently long period of time, however, such that most of his goals, relationships, and life projects are contained within that territory, he may be owed a stable legal residence there.

certain balancing is called for here. Over time, the expectations of the displaced will change, and new expectations will form.

Reflection on the importance of legitimate expectations, I think, shows us why we should avoid a robust historical rights account of territory, and also why settlement and national identity are not the heart of the matter. What is truly the heart of the matter is individuals' need for a stable legal residence; their need to live under a legitimate state that defines their rights. I might require occupancy of the territory *in this sense* in order to sustain the integrity of my goals and pursuits even if I haven't settled it or identified with that territory in any more robustly cultural way. The morally significant feature of the situation is that I have formed expectations of continued legal residence, I have formed them without wrongdoing (perhaps by being born on the territory), and that others' respect of these expectations is fundamental for my autonomy. So consider a more refined occupation principle:

Rights of Occupation. A person has a right to be on a territory if he expects to occupy the territory in the future, if his expected occupancy of the territory is an assumption that structures his major life-pursuits, and if he formed that expectation through no fault of his own.

How would this principle deal with cases of unjust displacement? In our mercenary case, it would call for the mercenaries to restore the territory to those whom they have expelled, and would place a duty on other states not to recognize the mercenaries' state at the moment of its founding, since it does not have a right to its territory. Other states could justly go to war against the mercenaries to enforce the displaced people's claim to reoccupy the territory. So the refined occupancy principle has the benefit of disallowing any claims to occupancy on the part of wrongdoers.

But suppose that the mercenaries' injustice goes unrectified and now we are

dealing with the second or third generation of mercenaries' descendants. On the above principle, these people *would* have a legitimate claim to remain on the territory they currently occupy, since their expectations were formed without fault, and displacing them would undermine their autonomy. But what about the descendants of the victimized population? Do they have a claim to come back? Whether or not they have a claim to reoccupy the territory depends on how their expectations have developed since. Suppose that they are now incorporated as full citizens in some other legitimate state, with an expectation of continuing to reside there. I believe the American and Israeli descendants of Jews expelled from Eastern Europe meet this criterion, as well as the Germans who were forced out of Western Poland in 1945. On my view, their claim to occupy lands that their ancestors once occupied has therefore been superseded. But suppose that the victims' descendants have not been incorporated as full citizens in a legitimate state. They remain a stateless people, reside in an illegitimate state, or form a population of second-class citizens in a democracy ruled by another people. If this is the case, then they have a continued claim to occupy the previous territory. That does not give them the right to expel the descendants of settlers, but rather a right to be readmitted to the territory and granted equal citizenship rights there. This is an enforceable right, and other states could justly pressure the settler state to grant the expelled descendants readmission. In many political conflicts, of course, the current occupants may not be trusted to deal fairly with the victimized population, and therefore we may have to seek second-best solutions. But I believe that in these cases the victims' descendants continue to have a *prima facie* moral claim to occupy the territory, even if this claim cannot always be made good.

The principle behind the refined view of occupancy, then, is the following: each person has a general claim to stable legal residence in any state in whose territory he resides (for the long-term) through no fault of his own, and he ought to be treated by that state as an equal citizen. Where this claim is met, the wrong of displacement is superseded. Where it is not met, the right of return on the part of the displaced population continues in force. It should be emphasized here that a claim of *occupancy* can be superseded without a claim to *compensation* for harm or *reparation* for confiscated property also being superseded. If a victimized group's property was taken, or if they suffered grievous harm as a result of their displacement, then the settler state owes them compensation even if it does not owe them current occupancy. A state that rests on a past act of dispossession ought to make reparation to the dispossessed population (as Germany, for example, did to the Israeli Jews). This obligation to compensate is also potentially enforceable. Other states and international organizations can justly demand that reparations be paid, and sanction the settler state if it refuses to do so.

4. Conditions of State Legitimacy

Let us now consider Condition (c), which stipulates that a state has territorial rights only if it adequately represents the people who occupy that territory. Recall that our main argument for why states should have jurisdiction over territory is that their exercise of such jurisdiction is of benefit to individuals. We require a *stable legal residence*, and that means we need a state to legislate and enforce a set of rules that define rights to body and property. But there are many possible sets of rules the state

could put into place. Some of them will protect freedom-as-independence well, some not-so-well, and some not at all. Since our reason for granting states territorial rights is that state jurisdiction is of benefit to individuals, we will want to grant territorial rights only to states that *actually protect freedom-as-independence to a sufficient degree*. We need some more precise criterion by which to judge whether the laws the state puts into place meet this standard.

Kant offers a useful heuristic for addressing this problem: he argues that a law is not rightful if “an entire people could not possibly agree to it” (Kant, *TP*, 8:297). Indeed, he glosses the basic right to freedom-as-independence as “the warrant to obey no other external laws than those to which I could have given my consent” (Kant, *PP*, 8:350). We can see why this criterion is relevant by returning to our guardian/ward analogy. A good guardian is a guardian that does more-or-less what his ward would have done were his ward able to speak and act for himself: he acts in the ward’s interests. In many cases, though, it may be difficult to know what the ward would have done for himself, especially in cases where the ward can’t tell us, or in cases (like the political one) where he does not speak with one voice. But we can know with a greater degree of confidence what the ward surely would *not* have done, had he any reasonable regard for his interests.

A guardian who steals his ward’s estate, for example, will not be acting in the interests of his ward, on any reasonable definition of those interests. He therefore fails to pass the threshold for being a *legitimate guardian*, and it would not be reasonable for others to take him as representing the ward. A legitimate guardian may still fall far short of being an ideal guardian: there may be better interpretations of his ward’s interests and more effective ways to pursue them. But a legitimate guardian will be engaged in an

activity that we can call “representing his ward’s interests,” at least in some minimal sense.

In the case of the state, we are also looking for a standard of legitimacy, not ideal justice or perfect representation. A state defines and coercively imposes a set of rules that define its subjects’ rights, including their property rights. It claims that these rules are based on the public interest, i.e. that they protect an interest each member can share. But interpretations of the public interest will vary, and which rules best instantiate it will be subject to reasonable disagreement. What we wish to know is whether the activity the state is engaged in is reasonably viewed as acting in the public interest *at all*. (This interest should be understood in a distributive, not an aggregative sense—i.e. securing the public interest requires securing an interest shared by each-and-every member).

So where are we going to set the legitimate state standard? We must demand that a legitimate state give at least *minimal consideration* to each member’s interests, since the public interest is supposed to be an interest each member could share. We can best define this minimal consideration by delineating a set of basic rights as a standard for state legitimacy. Since speaking in its people’s name is a condition on the state’s possession of territorial rights, any state that fails to provide these basic rights to its members fails to possess title to its territory.

The particular list of basic guarantees that states ought to provide each member is properly subject to debate, and ideally would be rendered authoritative by international institutions. There is also reason to believe that these standards may change over time, as our understanding changes (for example, with a better understanding of the interests of hitherto excluded groups) and as institutional capacity grows (a right to basic health care

could not have been provided in the nineteenth century). But I believe any such minimal standard will include most of the core rights set down in the UN Declaration of Human Rights, including rights to life, liberty, and security; rights against slavery, torture and cruel and inhumane punishment, and arbitrary imprisonment; rights to equal protection of the law, a fair trial; to a sphere of property and privacy; freedom of movement, freedom of conscience, and freedom of association; and rights to political participation.

Human rights are designed to ensure that states are like legitimate guardians in two different ways. First, these rights show that the state's laws are not just forcible impositions on the state's subjects, but regulations that these subjects could endorse, on a reasonable conception of her interests. If the laws are to impose putative obligations, they must give a member some moral reason for her compliance. If the law grants each member these minimal guarantees, then it makes moral demands, since such a system of law secures a degree of freedom-as-independence for herself and her fellow-citizens, and each citizen has a basic duty to cooperate in securing such independence. Where the laws make no pretension to being based on common interests, they make no pretension to imposing any obligation.

Second, rights of free association, free speech, and democratic participation put into place additional safeguards for ensuring that the state represents a public interest, since it allows the people collective input into what the state does. This means that the people are not just the passive recipients of government directives; they also have the active capacity to influence the laws made in their name. When the public interest, as they see it, is clearly contravened, they can do something about it: they can contest and object to the laws, and sanction the government that imposes them. This gives us an

additional reason to believe that the state represents the people, since when it does not, there are channels by which they can contest and change the decisions made in their name. If the state grants these democratic rights, its laws and institutions must be responsive to the values of the people and come to reflect these values over time.¹⁰

If a state exists and meets conditions 1-3, then according to the legitimate state theory, other states ought to respect its right to jurisdiction within its territory. Where a legitimate state is unjustly annexed by foreigners or dismembered by rebellious domestic forces, it should be restored. To hold otherwise would give incentives to wrongdoers not to respect territorial rights.

5. The Annexation Objection

With this account of the internal legitimacy conditions of state control over territory now in place, let me conclude by considering what I think is the most important objection to the legitimate state theory.

Annexation. In 1945 the Allies occupied Germany in a legitimate use of force. Suppose, though, that instead of restoring the territory to the German people, the US had simply annexed their zone of occupation, turning it into the fifty-first state. After annexation, the US governed legitimately, protecting the Germans' human rights and granting them rights of democratic participation in the now-unified state. Could the

¹⁰ This raises the question of whether there are forms of political participation other than democracy that are sufficient to render a state legitimate. I believe that democracy is both instrumentally valuable (because democratic regimes are, over time, more likely to do better at protecting rights than autocratic regimes) and also intrinsically valuable (because democracy reflects a commitment to the equal moral status of individuals that is also enshrined in principles of basic rights). Nevertheless, I recognize that successful democratic institutions are dependent on a supportive political culture and are often the product of a long process of political evolution. For that reason, I would support extending *provisional territorial rights* to non-democratic regimes that (a) protect basic rights and institute the rule of law, (b) provide meaningful non-democratic forms of political consultation and contestation, and (c) are *reformist regimes*, i.e. they aim reforming the political culture in the long term, in a manner that is supportive of democracy. The minimal standards of political consultation and contestation require more codification than I can give them here, but they would include rights of free speech and political protest, as well as rights for ordinary citizens to contest political decisions and receive some public justification for those decisions.

annexed people of Germany legitimately have attempted to recover their territory?

I think it is a widely shared intuition that for such an annexation to be legitimate, there must at least be a democratic referendum held. Nationalist theories of territory have an advantage in explaining this intuition. Germany is a nation, and that the consent of a nation (in a plebiscite, say) is required for a state to have a right to rule the nation's territory. But our theory denies that there is a pre-political nation independent of the state. It also denies that the consent of the people is necessary for state legitimacy. So can it accommodate this intuition?

Even if states are the only actor that can possess rights of *jurisdiction* over territory, what our above example shows is that another party—the people—may possess a kind of right over territory too. We might call this the power of metajurisdiction over the territory, the power to confer authority on a particular state to rule it. I think the legitimate state theory must concede that the state's right to territory is occasionally conditional on an exercise of metajurisdiction by its people.¹¹ What makes me inclined to think this is our intuition that states cannot unilaterally annex territory, even in cases where that territory is not currently ruled by a legitimate state. Our imagined case is one where the use of military force seems justified: the war against Nazi Germany, I am assuming, was a just war, and the invasion and occupation of German territory did not infringe any rights held by the Nazi state. But it still seems that the US could not have *unilaterally* claimed permanent jurisdiction over German territory, even if its temporary

¹¹ In understanding this occasional conditionality, it may be helpful to appeal to the ward/guardian analogy once again: the guardian's rights in respect of the ward do not *derive* from the ward's consent (but from an act of appointment by a court). Still, there may be moments where the guardian's rights are properly conditional on an expression of the ward's wishes (as when the court is considering which of two relatives to appoint).

occupation of that territory was justified. Why not? The best answer seems to me to be the following: unilateral annexation would infringe the residual right of the German *people* in their territory. This gives the German people a claim against annexing states even when their own state fails or becomes illegitimate. A legitimate state theory must make room for these rights.

How are we to explain these metajurisdiction rights? My argument can be schematically outlined as follows:

(1) When the state disappears, a people persists. Individuals are not simply dissolved into a disconnected multitude when their state becomes illegitimate or is overthrown; instead, they retain important bonds to one another. We do not need to invoke cultural traits to identify “the people,” but can identify it by a common relationship these individuals share: they belonged to a prior state and they retain the political capacity to sustain a legitimate state today.¹²

(2) There is a value of collective autonomy that attaches to a people so understood. This is because the value of state institutions does not simply reduce to the protection they provide for individuals’ fundamental interests and rights. If that were so, there would be no objection to *Annexation*, since *ex hypothesi*, individuals’ private rights and interests can be equally well protected under the annexing state. But state institutions

¹² This raises the difficult question of what to say about cases where the state has disappeared, but individuals do not share the common goal of recreating legitimate institutions over the whole territory. Consider a stylized account of “what might have been” in Iraq: Saddam’s state is overthrown, but instead of one people, one finds three competing claimants to “peoplehood”: the Kurds, the Sunnis, the Shiites, each of whom share the goal of creating their own state. I am unsure how to handle this kind of case, but I am inclined to be skeptical about partitioning the state, for two reasons: first, there is likely to be disagreement within “the Kurds” as to whether or not the Kurds should constitute a separate people or not and second, demarcating the boundaries of the new states may create abuses insofar as these groups are territorially mixed. I am inclined to say that these aspirations should only matter if the groups in question *are unable* to sustain a legitimate state together, perhaps because of entrenched animosities. In this sense, “the people” is defined objectively, not subjectively: it is a group brought into being by having shared a previous institution—an objective fact—not a group that shares a present-day intention—a subjective one.

also bring a *people* into being, and these institutions are collectively valuable *for the people* as a public manifestation of their shared activity. State institutions are the creation and result of the people's autonomous collective cooperation. If their joint project—sustaining their social union through a state—is (or can be) a legitimate one, then it has a claim to be continued.

(3) This value of collective autonomy justifies granting the people metajurisdiction rights, a claim to decide which state should have jurisdiction over the territory the people occupy. If the people demonstrates the political capacity to recreate and sustain a legitimate state, they ought to be allowed to do so, in the absence of interference from outside.¹³

What does it mean to say that a people persists in the absence of a state? Recall that on the legitimate state theory the people are made into one body by being subject to common institutions and by participating together in shaping those institutions. Peoples undertake two important shared activities together. First, peoples sustain the institutions that define and enforce their rights. It is in an important sense their cooperative activity, by obeying the law and paying taxes, that creates these institutions. Laws are not just enforced through directly coercive acts on the part of the authorities; they depend much more pervasively on large-scale patterns of behavior on the part of the people, who orient their actions to these laws. By paying taxes, the people also uphold the institutions that enforce their rights against those who refuse to respect them. So it is “the people’s” shared activity that makes their system of public legislation and coercion—the state—

¹³ This raises the difficult question of what it means for a people to *demonstrate* the political capacity to sustain a legitimate state. Though I can't give adequate attention to this issue here, I think substantial steps toward the establishment of a rights-respecting state (writing a constitution, organizing political parties, holding elections) need to be undertaken before territorial rights are recognized. Should such steps fail to be undertaken, a group lacks the political capacity necessary to peoplehood in my sense of the term.

possible. Additionally, when their state is a democracy, the people not only help to sustain an apparatus of legislation and coercion, they also have a voice in determining the particular scheme of rights protected by the state. Through exercising their political rights—voting, debating political issues, associating in political parties and interest groups, and taking part in social movements—*democratic peoples* produce the laws they live under. The role of the people’s shared activity in sustaining the state and—in a democracy—in producing law helps explain why, over time, political cooperation can constitute a group of citizens into a collective with important ties binding them together (Pettit 2005, 2006). Indeed, following Kant, we might say that the result of these shared activities is to make the people into a “moral person.”¹⁴

Consider an analogous example: like states, universities are also sustained through the shared activity of their members. What binds together the members of a university is their engagement in an ongoing practice of higher learning. As with states, there is no pre-institutional answer to the question of how many universities we should have in the world, or which particular people should be members of which ones: universities are not bound together by pre-institutional bonds. But over time members of a university become more than an aggregate of separate individuals because of what they do together. They shape their institution in accordance with their values and priorities, debating, say, the best curriculum, departmental structure, and professional requirements. New members, in turn, understand themselves as part of an enduring collectivity not

¹⁴ “For a state is not (like the land on which it resides) a belonging (*patrimonium*). It is a society of human beings that no one other than itself can command or dispose of. Like a trunk, it has its own roots, and to annex it to another state as a graft is to do away with its existence as a *moral person* and to make a moral person into a thing, and so to contradict the idea of the original contract, apart from which no right over a people can be thought” (Kant, *PP*, 8:344). Emphasis added.

because they share cultural characteristics, but because they are heir to a continuous practice of debating and influencing the rules of the institution, and upholding these rules through their shared practice. I think there is independent value to institutions that are shaped by their members in this way. Suppose the US government forcibly merged Harvard and Yale without consulting their membership. And suppose that faculty and students were allowed to retain their positions in the new, merged institution. I believe we could say that this forced merger is wrong, because it ignores the collective value the institution has for its membership-as-a-whole, a value that goes beyond the private interests of individuals (in degrees, positions, and the pursuit of higher learning) it satisfies.

A common objection to invoking the value of collective autonomy in the case of states, however, is that states are not like universities. Membership in a state is not voluntary. We are born into states, and whatever options we may have to leave, these are usually far too onerous to render membership an act of free association, in the way membership of a university is. Indeed, following Kant, we may even argue that membership in a state is a moral imperative rather than a choice, since living under a common system of law is the only way to respect others' freedom-as-independence. And if the coercive authority of the state can be legitimate in the absence of its members' consent, then why can't the coercive authority of some external body over them—like the rule of the US over Germany—be equally legitimate? If the citizens of Alabama do not need to consent to the US government in order to be legitimately ruled by it, then it would seem the citizens of Germany wouldn't have to either. What distinguishes the one from the other (Beitz 1979, 80)?

This objection is powerful, but I think it is misguided. To see why, consider an analogous involuntary relationship: the parent-child relation. From the perspective of the child, this bond is always unchosen: he is merely born into it. But that does not mean that his relationship with the parent is a forcible imposition on him or that we can depose the old parent and replace him with a new one without doing the child any wrong. For over time, the child is likely to have developed a bond with the parent he originally had, and that bond will be of significance. If the parent is a good parent, he takes account of the child's interests and allows the child input into the relationship. A bad parent should be removed; a good parent should not be, even if a slightly better one is waiting in the wings. For there may be a wide range of good parenting styles, and a significant part—perhaps even the most important part—of what is valuable in the parent-child bond is the way it is shaped by the interaction among the particular parties involved.

Our bond with our fellow-citizens—the other members of “the people”—is equally unchosen. But as in the previous case, that does not mean that this relationship is forcibly imposed on us, or that an outsider can amalgamate one people with another without doing them any wrong. Although it is unchosen, the relationship of “peoplehood” will be collectively autonomous if a) it guarantees basic rights, thus securing each citizen's independence; and b) allows citizens a voice in determining the rules under which they must live. Over time, we shape our institutions together with our fellow-citizens in accordance with shared values and principles of justice, even though we did not choose *these* institutions or *these* compatriots. An important part of what is valuable in the bond between compatriots, then, is the way this bond is shaped by their history of interaction. Our state is simply the public manifestation of this shared activity.

For that reason, the forcible merger of two peoples disrespects the collective autonomy of citizens in much the same way that replacing the parent disrespects the autonomy of the child.¹⁵

To make these ideas more concrete, consider how democratic peoples—while all protecting certain core liberal values—often produce schemes of law that differ a great deal in their particularities. But these differences are not dispensable details to be overlooked in a forced merger, because they reflect different patterns of entitlement, shaped by collective choices, that matter to people and around which they have structured their lives. For example, German citizens had provided one another with a highly developed social welfare system by the late nineteenth century, which was expanded in the Weimar years. If the US had annexed Germany in 1945, and imposed its own system of law, it would have done away with these entitlements, forcing Germans to restructure their lives in painful ways.

These remarks—though sketchy—point to the view that “peoples” who have historically shared a state deserve collective autonomy when they possess, and can sustain, a political tradition that is worthy of our respect. While the boundaries of “the people” are historically contingent and unchosen, “peoples” may still exist today—having been brought into being by states—and will reflect forms of political cooperation that we have reason to value. When their state fails or becomes illegitimate, it is the collective institutional subject of this state, “the people,” that retains metajurisdictional

¹⁵ I should emphasize here that I do not mean to suggest any further similarity between the relationship of parent to child and the relation of state to citizen than the fact that both are unchosen relationships. In particular, I do not conceive of the state as having a paternalistic relationship to its citizens, nor do I conceive of it as an agency separate from the body of citizens as a whole. The state is simply the citizenry united together in their common institutions, and its laws must be consistent with what they could reasonably will. But, as in the parent-child case, the state-citizen relation is an involuntary one.

rights over their territory. As long as they possess a distinctive political tradition and can sustain their own legitimate institutions, an outsider cannot annex their territory without doing them wrong. To do so without their consent would be to abolish a valuable relationship around which many have structured their lives.

We should note three implications of accepting such a view of “the people.” First, this view differs from the nationalist one in that it does not hold that to qualify as a people, a group must share objective cultural characteristics. All they need to share is a history of political cooperation.¹⁶ Individuals with very different cultural characteristics—as the citizens of India, South Africa, Switzerland, or Canada—can share such a history. The bond that constitutes a people can therefore be quite thin.

Second, unlike the nationalist view, the legitimate state view does not conceive of metajurisdiction as a primary right that the people can exercise at any time (Buchanan 1997). It cannot exercise this right at any time, because in order to make a collectively binding choice, a people must first organize itself into a state. Peoples are not yet *organized collective agents*. They have no procedures in place by which to aggregate information, deliberate about the reasons that apply to their situation, and make decisions that are binding on their members. For this reason, peoples cannot exercise political authority directly. But an unorganized people may share sufficient solidarity to carry through an important one-off action: they may be able to set up a state, by giving

¹⁶ Is sharing a legitimate state the only way to establish the history of political cooperation needed to constitute a people? I grant that other kinds of political cooperation may sometimes be enough to constitute a group as a people, even if they have not yet had a legitimate state. Democratic liberation movements targeting severely repressive governments, for example, may give a group the political organization and experience necessary to support legitimate political institutions, even though they have not had such a state in the past. But to count as a “people,” a group must (a) demonstrate the *political capacity* for supporting legitimate institutions on a territory; and (b) it may not usurp the prior rights of a legitimate state in that territory.

themselves a constitution or set of decision-procedures. *Once it has constituted itself as a state, though, the people can only act in accordance with the procedures through which it has organized itself.* Its voice can only be conveyed through the procedures it has chosen to give its decisions structure and meaning. In more ordinary times, the people speak through their legitimate state.

Finally, this account of peoplehood will not rule out all territorial annexations, and I am not certain that it should. Consider severe failed state cases, such as present-day Somalia. My interpretation of the “facts on the ground” in Somalia may be contestable: but let us assume for the purposes of the argument that there is now no collective agent in Somalia capable of organizing and sustaining a legitimate state.¹⁷ Then it may not be wrong for another state to annex the territory, if their invasion was just and they can commit to ruling legitimately.¹⁸ The purpose behind a people’s self-determination is the provision of justice for its members: where there is no people capable of sustaining a legitimate institution, this purpose must be fulfilled in some other way.

¹⁷ This interpretation is most contestable in the case of Somaliland, a region in the Northeast of Somalia that has an effective police force, coinage, and government, and held a 2001 referendum on independence from Somalia. This region also has a historical distinctiveness from the rest of Somalia that dates to its experience as a British colony until 1960. Although Somaliland has not been recognized internationally, it may have the political capacity to sustain an independent state. I thank Cara Nine for discussion about the Somalia case.

¹⁸ Conditions for annexation in severe failed state cases raise a number of issues that I cannot fully consider here. First, the fact that a state or unorganized group *lacks* territorial rights does not automatically show that it can justly invaded and subjected to military occupation. The absence of territorial rights simply shows that *if* the state or unorganized group is justly subject to military occupation, then there is no further obstacle to more permanent rule over its territory. But the conditions for just invasion and occupation—which are dependent on a broader theory of just war—may be quite stringent: it may be that the only just wars are wars of self-defense and *in extremis* humanitarian intervention. In that case, territory could only be annexed subsequent to a just war, on the above criteria, against a group that was not already a “people” with metajurisdiction over its territory. Second, permitting annexation, even in these sharply delimited cases, raises problems of unilateralism: even if annexation is not always unjust, there may be reasons to prohibit states’ unilaterally judging when annexation is permissible (because they may judge in a biased or self-interested way). But it is not clear to me that at least an *internationally authorized* annexation would be wrong. Something like an improved version of the international mandate system that was briefly tried in the Interwar period under the League of Nations might be the best way to handle these situations.

Of course, it is likely that the Somalis will object that they already are “a people.” They share bonds of culture and history, and these bonds make them into more than an occasional group of individuals with no relation to one another.¹⁹ I concede that sharing these cultural bonds may have important normative consequences: it would be wrong to force the Somalis to stop speaking their language, for example, or to give up their customs and traditions, when these are not harmful to others. Forcing national groups to assimilate to an alien culture is oppressive and wrong. Yet national groups can be governed by those who do not share their culture—i.e. in a multinational state—without being oppressed and forced to assimilate. And the mere presence of cultural bonds does nothing to show that the Somalis possess the *political capacity* required to support legitimate institutions. For these reasons, I think cultural distinctiveness is neither necessary nor sufficient to establish rights to territory. It is not sufficient, because groups can be culturally distinct without having the capacity to support legitimate institutions. It is not necessary, because even groups that do not share cultural distinctiveness may possess political capacity (established through a shared history of political cooperation in a multinational state, for example) and therefore form a people: India, Canada, or Belgium are such cases. These groups, while culturally heterogeneous, form “peoples” because of their distinctive political tradition, organizational knowledge, and ability to cooperate politically so as to sustain just institutions over time.

One might ask, though: what would happen to the metajurisdiction rights of the Somalis if their territory is annexed from outside? If the account I have offered is

¹⁹ It is worth noting that the boundaries of the Somali culture do not overlap with the boundaries of the state of Somalia that existed until 1991: ethnic Somalis reside in parts of Ethiopia, Kenya, and Djibouti, as well as in Somalia. Non-Somali minority groups also make up about 6% of the population on the territory of Somalia.

correct, at present the Somalis *have no metajurisdiction rights* over their territory, because they do not yet form a people in the political sense. If the Somalis' territory were to be annexed and ruled from outside, then there are two options for how the story might play out. First, the annexing state might rule the territory as a separate dependency until such time as it became capable of independence. In that case, once the Somali population became capable of constituting itself as an independent and legitimate state, it would gain rights of metajurisdiction over its territory. A second option is that the Somali population might be incorporated, as equal citizens, into the wider annexing state and granted the same legal rights and voting prerogatives enjoyed by that state's other citizens. In that case, the Somali population would become part of a wider "people": its metajurisdiction right would be contained in the right of that wider people, and be exercised through the larger state.²⁰

I realize these thoughts would need to be considerably elaborated to provide a full defense against the annexation objection. But if the self-determination of peoples is a value that we ought to respect, then I believe the argument for such respect must be

²⁰ This second possibility is perhaps unlikely to occur, since external rulers seldom treat the populations of newly acquired territory equally. But granting equal citizenship has—often over a long period of time—served to legitimize other territorial acquisitions. Consider the case of Hawaii. If you believe, as I do, that the United States currently has territorial rights over Hawaii, one must ask oneself where those territorial rights come from. They do not come from historical title: Hawaii was unjustly annexed in 1898 after a group of American sugar plantation owners had overthrown its government. Puerto Rico, Guam, the Philippines, and Cuba were ceded after the Spanish-American War in 1898, in similarly unjust circumstances. Nor do these rights come from mere prescription or the passage of time: the US granted the Philippines independence in 1946, having held it for 50 years. I assume that it was right to grant the Philippines independence, given the kinds of domination and oppression the US had wrought there. Perhaps it should have granted Hawaii independence then too, since Hawaii was not an official state and its citizens therefore did not yet enjoy equal rights. One of the main considerations in delaying Hawaiian statehood was racial prejudice against its population, a mix of descendants of native Hawaiians and descendants of Japanese and Chinese laborers. But I do not believe that the US is morally required to grant Hawaii independence *now*, despite the tainted acquisition and the history of oppression. Why not? Because, after many hurdles, Hawaiians are now treated as equal citizens. If this fact can legitimize Hawaiian incorporation today, one must assume that it could legitimize other incorporations from the get-go, as long as the initial annexation of the territory was legitimate.

rooted in considerations like these. To conclude, I believe that if it can meet the annexation objection, the legitimate state theory can provide a more plausible account of territorial rights than do nationalist views. It is more plausible, first, because it is able to explain why legitimate states ought to enjoy territorial rights without reference to patterns of homeland identity or culturally marked settlement. Since legitimate states are essential to securing the rights of their members, both its subjects and outsiders have a reason to respect their authority. Second, the legitimate state theory can better explain why states ought to have authority over territory inhabited by diverse cultural populations, since the state derives its legitimacy from its ability to secure justice, and to provide a stable legal residence to its members, not its mission to preserve a particular cultural tradition.

Although there is certainly more work to be done, I hope to have shown that the legitimate state theory provides a promising avenue to pursue.

Bibliography:

- Beitz, Charles. *Political Theory and International Relations*, (Princeton: Princeton University Press, 1979).
- Brilmayer, Lea, "Secession and self-determination: A territorial interpretation," 16 *Yale Journal of International Law*, 1991, pp. 177-202.
- Buchanan, Allen. *Secession* (Boulder, CO: Westview Press, 1991).
- , "The Making and Unmaking of Boundaries: What Liberalism Has to Say," in Allen Buchanan/Margaret Moore ed, *States, Nations, and Borders*, (Cambridge, Cambridge University Press, 2003), pp. 231-261.
- , "Theories of Secession," *Philosophy and Public Affairs*, vol. 26, no. 1, 1997, pp. 31-61.
- Davies, Norman, *God's Playground: A History of Poland, vol. II*, (Oxford: Clarendon Press, 1981).
- Gans, Chaim. *The Limits of Nationalism*. (Cambridge: Cambridge University Press, 2003).
- Kant, Immanuel. *Kant's Gesammelte Schriften*, edited by the German Academy of Sciences (Berlin, Walter deGruyter & Co. 1900--).
- Lukowski, Jerzy and Zawadzki, Hubert. *A Concise History of Poland*. (Cambridge: Cambridge University Press 2001).
- Meisels, Tamar. *Territorial Rights* (Dordrecht: Springer, 2005).
- Miller, David. *National Responsibility and Global Justice*. (Oxford: Oxford University Press, 2007).
- , "Territorial Rights: Concept and Justification," paper presented at the Workshop on Theories of Territory: London, February 21-22, 2009.
- Pettit, Philip, "Rawls's Political Ontology," *Politics, Philosophy, and Economics*, vol. 4, 2005.
- , "Rawls's Peoples," in Rex Martin and David Reidy, eds, *Rawls's Law of Peoples: A realistic utopia*, Blackwell, Oxford, 2006, 38-56.
- Sher, George. "Ancient Wrongs and Modern Rights," *Philosophy and Public Affairs*, 10(1), 1981.
- Waldron, Jeremy, "Superseding Historic Injustice," *Ethics*, vol. 103, October 1992.
- Wellman, Christopher, *A Theory of Secession*, (Cambridge: Cambridge University Press, 2005).