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Territorial Rights and Open Borders

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Territorial rights consist of the right to jurisdiction, the right to resources and the right to exclude immigrants and are assumed to be essential to state sovereignty. Scholars who have discussed the justification of these rights have mostly focused on the right to jurisdiction. Few engage with the implications of such justification for the right to exclude immigrants. This paper argues that the justification for territorial rights cannot justify the right of states to exclude immigrants. Allowing immigrants to settle within the territory does not undermine any of the interests territorial rights are meant to protect. In addition, the interests of current inhabitants do not provide sufficient reasons to grant the state the right to exclude immigrants from the territory that everyone has equal right to in an original situation. State sovereignty is therefore seen as compatible with open borders.

Keywords: territorial rights; open borders; immigration

Introduction

It is a common presumption that state sovereignty requires states to possess and effectively exercise territorial rights. It is also standard to include in these territorial rights a right to exclude foreigners to enter as well as to settle within the territory. Thus in extension, state sovereignty is assumed to rely on the continuation of states' unilateral control over who is allowed to enter and settle within its territory. In this paper, I take issue with this assumption. While I accept that state sovereignty presumes effective territorial rights, I argue that such rights do not by necessity include a right to

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exclude immigrants. Open borders are therefore seen as compatible with a world divided into sovereign, territorial, states.

Before beginning it is important to set the parameters. Firstly, I do not discuss the case for open borders on all possible accounts. Others have argued extensively and in my view convincingly for why the concepts of justice and democracy support open borders (Carens 1987, Abizadeh 2008, for a counter-argument Wellman 2011). Secondly, I do not discuss membership in a state or a political community (i.e. citizenship), but only the right to enter and settle (I discuss the distinction below). Thirdly, the arguments are deemed to be compatible with, rather than challenging, a world divided by sovereign states (coupled with international institutions aimed at ensuring equal basic rights for all). The narrow focus is on territorial rights and the right to exclude immigrants.

The paper consists of two parts. Part One begins with a definition of territorial rights, followed by a discussion of the foundations of territorial rights in order to answer the question: What, if anything, can ground the territorial rights of states? While the aim of this paper is not to establish a theory of territorial rights, this part suggests that the basis of territorial rights lie in the territorial state's ability to protect individuals' interest in autonomy and justice. This narrows the framework to include mainly Kantian theories of territorial rights. Part Two offers the main argument; namely that territorial rights do not include the right to exclude immigrants because open borders would not undermine the state's ability to protect the interests that ground territorial rights, which were discussed in Part One.

The Basis of Territorial Rights

In this section, I discuss the content of territorial rights and how states can rightfully claim them. There are three main theories of territorial rights: nationalist, Lockean and

Kantian. Two previous papers discuss the implications of territorial rights for the right to exclude (Ypi 2013, Lægard 2013). In this paper, the main focus will be on Kantian theories of territorial rights as presented by Lea Ypi and Anna Stilz (Ypi 2012; Stilz 2009, 2011). By drawing out the relationship between such theories' justification of territorial rights and the right to exclude, it also sheds some light on the difficulties theories of territorial rights face more generally when explaining the rightful relationship between individuals and the territory they occupy.

Territorial rights, in short, have three main components which all require separate justifications. I argue, in line with Kantian theories, that territorial rights are justified because they are able to protect certain interests that are fundamental to individuals. These interests are a) having a secure and stable place on earth, b) having the capacity to exercise control, in conjunction with others, over one's material and political environment, c) having one's basic human rights protected and d) living under a minimally just system of law.

The Concept of Territorial Rights

Following John Simmons work on territorial rights, David Miller suggests that territorial rights consist of a bundle of rights, made up of three main yet separate rights: i) *jurisdiction*, the right to enforce law within the territory, ii) *resources*, the right to use and control the resources within the territory, and iii) *border control*, the right to control the movement of goods and people across the borders of the territory (2011, p. 2, also Simmons 2001, p. 305, Stilz 2009, p. 186). Consequently, we speak of territorial rights in the plural tense, as it is not the case that a right to territory necessarily implies all of the rights just listed. These rights require separate justifications. Thus it is not the case that once a state has been found entitled to territorial rights, it is automatically entitled

to territorial rights on all these levels. However, the right to jurisdictional authority is seen, as the key territorial right as the other two rights can only be exercised once the right of territorial jurisdiction has been established (Stilz 2011, pp. 573-4). Thus Cara Nine asserts that immigration control is only part of territorial rights insofar as they are “a condition of [the state’s] claim to jurisdictional authority over territory” (2012, p. 10, see also Lægard 2013, Ypi 2013). This paper will ultimately argue that border control is not such a condition. In addition, as with state sovereignty, territorial rights are not absolute and can be overridden by concerns of justice, human rights and the equal value of all human beings (Lægard 2010, p. 251).

Autonomy and Control over One’s Material and Political Environment

The two Kantian theories of territory put forward by Anna Stilz and Lea Ypi are partly based on a connection made between territorial rights and the value of autonomy (Stilz 2011, Ypi 2012). Stilz holds that the subjects of a state need to have occupancy rights for the state to have territorial rights. Rights of occupancy are defined as follows: “A person has a right to occupy a territory if (1) he resides there now or has previously done so; (2) legal residence within that territory is fundamental to the integrity of his structure of personal relationships, goals, and pursuits; and (3) his connection to that particular territory was formed through no fault of his own (2011, p. 585).” The second criterion is really what explains why Stilz’s theory is one of territory, and not just of political authority, as it stresses the necessity of territory in securing the conditions for autonomy. “Occupancy of territory is connected to autonomy because it plays an important role in almost all of our life plans” (Stilz 2011, p. 583). The value of autonomy would be seriously undermined if people did not have secure occupancy rights somewhere, as almost all life plans and relations with others are formed on the basis of one’s residence. The protection of the conditions of autonomy is what lies at the

heart of Ypi's theory of territorial rights as well. She argues that "[f]ailing to have one's place on Earth secured severely impairs individuals' ability to pursue their own ends. It deprives them of the possibility to form reliable life plans and to access opportunities necessary to promote them" (Ypi 2012, p. 8).

Occupancy rights seem crucial in securing the conditions for autonomy, however Stilz does not specify exactly what occupancy rights entail short of simply residing within the territory. This does not appear sufficient to ensure secure legal residence. In order to explain what this requires – and to see why jurisdictional rights are necessary – we can borrow a notion of having control over one's political and material environment suggested by Cara Nine. In line with Martha Nussbaum, Nine argues that having control over one's political and material environment is an essential capacity for a human, autonomous, life (Nine 2012, p. 33, Nussbaum 2000, p. 80). For occupancy rights to be meaningful in the sense of protecting the conditions for autonomy, it is the capacity to exercise control over the territory one occupies that is central – not merely the right to live there. If one does not have such control, occupancy would not be stable or secure, which is what matters for individuals' ability to form and pursue their life plans. By bringing in a notion of control we simply clarify what is meant by stable occupancy. Stability, on this account, can only prevail if individuals have some form of control over the territory. Borrowing this notion should thus be seen as a clarification of the Kantian theories discussed here; not an endorsement of Nine's otherwise Lockean theory, which is not the focus of this paper.

Before moving on, we need to explain what is meant by having "control" over one's political and material environment. Because territorial rights are held by the state and exercised collectively by its subjects, the relevant sense of control is having some form of democratic rights of participation and representation. Thus Nussbaum specifies

the capacity to control as political participation and Nine defines control as “autonomous participation and self-expression in some minimally (...) effective form” (Nine 2012 p. 34).¹ She adds that the individual must “feel that her views are reasonably reflected in a significant set of political decisions which affect her life” (Nine 2012, p. 34). The latter claim alludes to the importance of “control” not to be seen simply as formal citizenship rights, but as minimally effective democratic rights. This must be so, because residence cannot be said to be secure or stable if one, despite having formal participation rights, have no influence over the developments of the territory.

Basic Rights and the Rule of Law

Stilz’s theory holds that states “have territorial rights because their jurisdiction serves the interests of their subjects” (2011, p. 578). The state is also required to uphold certain basic human rights (Stilz 2009, p. 202, Stilz 2011, p. 589). In order to protect these interests of individuals effectively, the state has to have rights over a territory. If the state did not have monopoly of jurisdiction over a certain territory, its ability to serve the interests of its subjects would be seriously disabled. The effective implementation of a system of law, as a well as the protection of basic rights, are therefore key in understanding why states have territorial rights. Similarly, Ypi argues that “...the creation of a collective political authority that adjudicates claims compatibly with principles of equal freedom...” is necessary for a state to have territorial rights (2012, p. 21). Thus states can only have territorial rights if it protects individuals’ interest in living under a just system of law (Ypi 2012, p. 12). Living under a just system of law and having one’s basic rights protected are seen as a fundamental human interest. It is essential in providing security and stability, as opposed to the arbitrariness and instability typical of states that fail to uphold the rule of law and protect basic rights.

Territorial Rights and Property Rights

To further see the nature of territorial rights, they can be contrasted with property rights, with which they are commonly conflated. Nine points out that the function of the two rights differ: "...the primary function of a property right is to give the right-holder *control over the use and benefits* from a thing, and the primary function of a territorial right is to give the right-holder the power to *establish justice* within a particular region" (2012, pp. 73-4). The state's territory is not owned collectively by its citizens, on the account of territorial rights discussed in this paper. Occupancy rights, which form the basis of territorial rights, stem from individuals' relationship with the territory and this relationship's importance for the capacity to be autonomous. This relationship is not one of ownership – the idea of ownership does not enter the foundation of territorial rights at all on this Kantian account. What grounds occupancy rights is the stability the territory provides in terms of a person's pursuits and relationships. As discussed above, the control necessary to provide such stability is one of democratic participation. The foundation of territorial rights, based on occupancy rights as necessary for autonomy, therefore generates rights of jurisdiction and not property rights, the former being "rights to make, adjudicate, and enforce rules, both for how property rights should be regulated as well as other kinds of regulations, e.g. criminal law or traffic regulations" (Lægaard 2013, p. 4). Citizens must consequently be able to influence the conditions of how their private property is regulated, but not who is allowed to own private property within the territory.

Particularity and Universality

Two issues face all theories of territorial rights. One is that claims of territory are claims not simply to any territory, but to a particular one. Another issue is that, given that in an original situation everyone is entitled to use any land on earth, territorial rights must be

universally justified. That is, they cannot simply be justified on the basis that they protect the interests of current inhabitants of the territory, but the justification must include reasons for those excluded to respect others' rights to a particular territory.

Some theorists try to resolve the particularity problem by appealing to a collective with a certain attachment to territory. This is for example the method used by nationalists like David Miller (2011). It is also employed by Stilz, who introduces the idea of a historical collective that has established just political institutions on a particular territory (2011). However, introducing a historical collective moves the foundation of territorial rights away from the individual level to the collective and this creates problems of conceptualisation. Territorial rights, as defended here, are founded on individuals' occupancy rights, which stem from them having a relationship with the territory that makes it integral to their life plans and pursuits. These individuals may also belong to a collective that have lived on the territory for generations, but this may also not be the case. They could be children of immigrants, have immigrated themselves as children or they could belong to a national minority, in which case they may not necessarily belong to the collective that has occupied the territory historically.² Moreover, it is not clear why one generation's ability to establish justice – or any other added value – on the territory can grant future generations the right to that territory.³ Because territorial rights on the account presented here are founded on the interests of individuals, their connection to a collective needs to be established for the role of the collective as justifying rights to a particular territory to be valid. This seemingly gives those who do not belong to the collective less of a basis for collective territorial rights. To avoid these difficulties, the particularity problem is better solved by looking at current occupiers' relation with the territory they live on.

Ypi claims that individuals “...have claims to territory because they have ended up where they are “‘by nature or chance’, as a result of historical contingencies upon which they have no control” (2012, p. 17). This is a very similar argument to Stilz’s condition (3) of occupancy rights, that a person’s “connection to that particular territory was formed through no fault of his own” (2011, p. 585). As argued above, stable legal residence seems in this way to be a necessary condition for autonomy. Because most people are simply born within a particular territory, it automatically makes their ability to plan their lives bound to the territory in question. Acknowledging this does not preclude the possibility of open borders. In this paper, I am not arguing that migrants have claims to any territory in the world on the same basis as current residents of that territory. Such conception would render the foundations of territorial rights meaningless. Territorial rights as outlined here are based on individuals’ fundamental interests in stable occupancy and of being subject to a state that effectively can establish just rule of law and protect basic human rights. Now, being denied the capacity to control the political and material environment where one happens to live, through no choice of one’s own, seems directly harmful to someone’s interests as just defined. This is not suggesting that no harm is done to those whose freedom is restricted by not being able to use the territory that in an initial situation was free for all to use. But it is seen as much *more* harmful to someone’s fundamental interests to exclude them from exercising control over the political and material environment in which they reside through no fault of their own, than to exclude someone who do not reside there from exercising such control.⁴ Thus those who occupy a territory through no fault of their own are seen to have at least a *prima facie* claim to rights of jurisdiction on that territory.

Note that such occupancy rights are not absolute and that this *only applies to the territorial right of jurisdiction*. Provided that the *status quo* on this account is highly biased towards, it actually provides further reasons for opening up borders. Since most people acquire territorial rights simply by being born somewhere, they will have gained rights to territory at the expense of everyone else born outside of the territory through an entirely arbitrary process. This restriction of outsiders' freedom extends further than simply denying them to use the land of the territory freely. Territorial rights of jurisdiction entail that states have the right to enforce its system of law, by having monopoly on violence, on anyone within its territory. Most of these will be citizens with corresponding political rights that can legitimise the state's powers. Some, however, will not be citizens but nevertheless bound by the laws by the state. Thus a state's territorial rights also entail that some people's political freedom will be infringed upon.

These infringements of outsiders' freedom need to be justified. Because the justification of territorial rights to a particular territory as presented above is biased towards the *status quo*, and because it still entails the exclusion of everyone who does not currently occupy the territory to use it, the justification lacks universality in its scope. Ypi partly solves this by giving outsiders a right to visit (Ypi 2012, p. 19). She also requires the territorial state to contribute towards the establishment of equal freedom for all globally: "To the extent to which this use of territory necessarily affects outsiders and entails a unilateral infringement of their freedom, the right to exclude is permitted only if coupled with the attempt to establish rightful political relations between states (Ypi 2012, p. 21)." This way the unilateral claim to territorial rights by states can be universally justified.⁵

In sum, Kantian theories hold that the values of autonomy and justice require states to have territorial rights. Humans need secure legal residence somewhere, which

implies having control over their political and material environment, and they need this particularly on the territory on which they live through no fault of their own. This gives them occupancy rights. Humans also need protection of basic rights and to live under a just system regulating property and the rule of law. This requires them to live under a state with effective jurisdictional territorial rights. The particularity problem is avoided by an appeal to the particular importance for individuals in having control over the territory on which they reside through no fault of their own. Finally the issue of universality is addressed through acknowledging the unilateral act of claiming territorial rights and the obligation of states holding such rights to work towards establishing equal freedom for all universally.

Territorial Rights and Open Borders

Following from the discussion above of mainly Kantian theories, a state can be said to have territorial rights to, *inter alia*, jurisdiction if:

- a) it effectively implements a just system of law that regulates property and,
- b) it protects basic rights and,
- c) the state's subjects have occupancy rights and,
- d) the state contributes to establishing equal freedom for all universally.

Condition c) applies if “legal residence within that territory is fundamental to the integrity of [the subjects’] structure of personal relationships, goals, and pursuits” and if they live on the territory through no fault of their own (Stilz 2011, p. 585). It entails, I have argued, having the capacity to, together with others, control one’s political and material environment. Central to these foundations of states’ territorial rights is thus the state’s ability to implement the rule of law and the protection of the conditions for its subjects’ autonomy. A state’s territorial right of jurisdiction seem to follow from this. It

would be hard for a state to fulfil its role of regulating property and protecting rights if it was not the only jurisdictional authority within a territory. Moreover, it seems reasonable to grant states the right to monitor movement of people across its borders, as effective rule requires knowledge about how many and who resides within its territory.⁶

However, territorial rights are universal claims and thus need to be justified to outsiders as well as insiders, as pointed out above. Territorial rights are grounded in the interests of the subjects of the state. But not all interests ground rights and outsiders' interests and freedom need to be given consideration as well. The unilateral claims of states to territory need universal justification because the earth is free for all to use in a state of nature and a state's unilateral claim to territory infringe on outsiders freedom to use the territory. If this rendering is plausible, we must ask if immigration will undermine the state's capacity to effectively exercise territorial rights of jurisdiction and protect the interests these rights are meant to protect. In the following sections, I argue that this is not the case. Immigration does not undermine current citizens' ability to control their political and material environment. Neither does it prevent the state from effectively implementing the rule of law and protecting basic rights. Therefore, states cannot claim the right to exclude foreigners to settle within their territory as essential to their effective exercise of territorial rights.

As a means of exploring my argument, I will discuss these two claims in more detail. The first claim relates to individuals' capacity to control their political and material environment. The second is concerned with the state's capacity to exercise the territorial right of jurisdiction, which also requires it to ensure security and stability. The discussion below is centred on a number of potential objections to why open borders are compatible with these two capacities, which form the basis of territorial rights of states. When discussing these objections one needs to bear in mind that a right to exclude

entails infringements of potential immigrants' freedom on two levels. Firstly, it denies them access to territory that in an initial situation was free for all to use. Secondly, it is an infringement on a general right to freedom of movement. However, for the purpose of this paper, the latter right does not play a part in arguing for open borders, as it is only the former that relates to territorial rights. The starting point for justifying territorial rights is that territory initially is free for all to use. Any justification for the three kinds of territorial rights – jurisdiction, resources and exclusion – needs to provide reasons for why states can exclude others for exercising jurisdiction on the territory, from using its resources or from settling there. The discussion below puts forwards the case that the justification of territorial rights presented in Part One cannot provide reasons for the exclusion of others to settle within the territory.

Autonomy and the Capacity to Control One's Material and Political Environment

In order to have control over one's political and material environment, I argued above that citizens need effective democratic participation rights. I argue that having open borders does not undermine the capacity for control in this sense. One potential objection against this claim is that immigration changes the nature of the political and material environment to such an extent as to undermine current citizens' capacity to exercise control over it. It might also be argued that rapid changes to the territory undermine the stability necessary to provide a base for relationships and life plans. Thus the territory's role in providing for autonomy is undermined.

Such worries are similar to those brought up by nationalist theorists who claim that immigration changes the cultural and symbolic value of land (Miller 2011, p. 8). However, because claims based on the cultural and symbolic value of a specific territory rely on the internal logic of a specific group, they cannot be universalised

(Moore 1998, p. 137). But the objection might still be valid in terms of the theory of territorial rights outlined above. For if it is true that the changes brought about by immigration have a detrimental impact on current occupiers' ability to control their territory, we would have reason to include immigration control in the territorial rights of states. This objection thus holds that immigration would change the territory to such an extent that people would no longer be able to rely on it providing a fundamental basis for their relationships, goals or pursuits.⁷ It might be reasonable to suggest that if the composition of residents change, so will the way land is used and laboured. Moreover, this change would have been brought about by a factor outside of citizens' control - unrestricted immigration. Therefore, this objection also holds that immigration changes the nature of the political and material environment to such an extent as to undermine current citizens' capacity to exercise control over it.

Change and Control

Firstly, change is not problematic so long as citizens are somewhat in control of that change. This is why we specify that stable occupancy entail a notion of control; change as such is not does not undermine stability. The question is not whether immigration may change the territory, but whether such changes undermine citizens' capacity for control necessary to make occupancy stable. The nature of the territory will inevitably change over time due to many different factors, some beyond the control of citizens. Citizens need to be able to exercise control over how change is managed, but territory is not necessarily rendered unstable because they cannot control all these factors as such. In some cases, allowing citizens full control will come with very high costs (often in terms of infringements of certain freedoms). These costs must therefore be weighed against how the loss of control impairs the stability of territory. Ultimately,

I maintain that because citizens can control the *impact* of immigration, they have sufficient control to secure stable occupancy under an open border regime.

To see this, we can compare immigration to other factors that can change the nature of the territory but which citizens cannot control. One such factor is generational shifts. As older generations will be aware of, younger generations can change cultural characteristics dramatically and rapidly. For example, in less than three decades (thus less than one generational shift) those not affiliating with any religion have increased from 34 per cent of the population in the UK, in 1983, to 50 per cent in 2010 (Lucy 2012, p. 173). Amongst 18-24 year olds, 65 per cent did not identify with a religion in 2010 (Lucy 2012, p. 182). Another large change, seemingly very important for the question of territory, is that of attitudes towards Scottish independence. While in 1997 14 per cent of English respondents agreed that Scotland should leave the UK, in 2011 this number had nearly doubled to 26 per cent (Curtice and Ormston 2012, p. 116). While these attitudes are only snapshots of cultural changes, they point to the ability of a culture to change rapidly between generations.⁸

Thus the objection fails to show how immigrants are different from under aged or unborn citizens. It is simply an empirical fact that cultures change due to a variety of causes and this is not normally taken to imply that citizens' capacity to control their territory is undermined. The question relevant in this case is whether or not the change brought about by immigration differs in that it has such damaging effect on the capacity to control. This does not seem to be the case. It is commonly believed that the state should not control who is born, thus similarly to immigration it cannot control who will end up residing within its territory. The state can socialise children born within its territory, but through its welfare and educational institutions, as well as integration and naturalisation policies, it can do so with immigrants too. It might be argued that citizens

can choose whether to have children or not, and they should therefore be able to choose whether or not to have immigration. However, it is not the state as such that chooses to have children or not, but individual citizens. Just as we might think it would be wrong for citizens to decide whether their fellow-citizens should have children or not – despite the impact this will have on their common territory – we might think it is wrong for citizens to control who can enter the territory from outside.⁹

Many (external) factors that citizens cannot directly control can change the nature of the territory, such as climate change, the global economy, technological innovations and scientific developments. Current citizens can exercise control over the effects of these factors, though they cannot choose to not be affected by them.

Immigration is similar because current citizens can control the impact of immigration through policies affecting naturalisation, the labour market and the welfare state, to mention a few. Countries have chosen many different ways of responding to the fact of immigration and the cultural, political and economic integration of immigrants vary substantially between countries of immigration. Thus open borders do not imply that current citizens cannot decide how to make the fact of immigration more or less advantageous.

Lastly, another factor that changes the nature of the territory is internal migration. As the example of modern industrialisation and urbanisation has shown, internal migration can impact a territory rather dramatically. Yet most believe that it would be unjust for the state to restrict people's freedom of movement inside its territory. Therefore, if the state can exercise its territorial rights effectively in spite of internal migration, it would seem that it could do so given international migration as well. This is so even if one considers the fact that while internal migration simply changes the distribution of people over a territory, external migration adds or extracts

people. For the morally relevant consideration is not the number of people who enters a territory or who are born there, but the impact this has on the territory's role in facilitating autonomy through providing a stable basis for life plans. It is far from clear that adding people via immigration would have a larger impact than both internal migration and the birth of new generations. Even a fact of scarcity of resources does not change this, as it is more often than not the efficiency with which resources are being used that determines the standard of living they permit, rather than the size of the population (Sen 1981; 1999).

In short, infringing on peoples' freedom by excluding them from territory that was originally free for all can be compared to infringements on integrity, in the case of reproduction, and freedom of movement, in the case of internal migration. Arguably, it would be more serious to infringe on some of these freedoms than others, but the consequences for the ability to control the territory also differ, with immigration in some respects having less of an impact than reproduction and internal movement. In terms of the impact on territory and the ability for citizens to control it, immigration does not seem to differ in a way substantial enough to render the harm done to individuals through exclusion acceptable.

Citizenship and Settlement

To further see how immigration does not undermine the capacity to control territory, one can distinguish between, on the one hand, a right to settle and, on the other hand, a right to membership in the political community, i.e. citizenship. The argument for open borders this paper seeks to defend only involves the right of foreigners to settle within a territory of their choice. It does not include a right to membership in that political community, i.e. citizenship. It simply leaves that issue aside. Having different jurisdictional relations to different people within and outside state territory is common

practice – think only of tourists, international students, business people, citizens who currently reside in a different state, officials of other states and so forth (Simmons 2001, p. 305). It is a right to settlement that is defended in this paper, and that is thus distinguished from a right to citizenship. The state is able to set the conditions for naturalisation, such as a certain time of residence requirement and citizenship courses and/or citizenship tests, or it may not grant citizenship at all. Those who are merely legal residents might still change the nature of the territory to some extent, but not nearly as much as if they enjoyed citizenship rights as well.

The distinction between citizenship and settlement does face an important challenge. As a matter of democratic right, someone who is subject to a state and perhaps has been so for a long time arguably has a strong claim to full democratic rights, given the profound impact that state has on that person's life. If this is the case, immigration becomes inseparable from citizenship, as the state would have a duty to grant immigrants citizenship status.

In responding to this, we need to first distinguish between different kinds of immigrants. Refugees and stateless people have a much stronger claim to citizenship than for example economic migrants. Refugees and stateless people have a claim to citizenship on similar grounds to why current citizens have claims of territorial rights. The stability provided for by being able to control one's political and material environment is vital for autonomous individuals to form and live according to life plans. Refugees and stateless people do not have this kind of stability provided for them by *any* state, thus their claims towards the state they are currently subject to are very strong and in most cases the state in which they reside would probably have a duty to grant them citizenship.

Thus, when discussing the distinction between citizenship and settlement, we mainly have in mind an immigrant who voluntarily has moved from one just state to another. Immigrants of this kind seemingly have weaker claims to citizenship, since they have access to some basic forms of political stability and capacities provided for by a state in the world. The decision to move, if voluntary, might entail that the immigrant have to forgo some political rights. Because the assumption is that they will have moved to a (at least minimally) just state, they will still have their basic rights protected, which includes some civil rights such as the right of association and freedom of speech. Therefore they will not be deprived of fundamental freedoms. They might however be deprived of some political rights, but it is not obvious that this would be unjust.

The principle of open borders does not presume that the decision to migrate ought to be cost-free. Having one's political rights potentially limited is one cost a person will have to take into account before making the decision to migrate. So long as they have the option of moving back to the state in which they do have full political rights, such cost does not appear to be fundamentally harmful to an extent which obliges the host state to grant the immigrant full political rights. The concept of territorial rights defended here recognises the importance of having control over the territory on which one resides through no fault of one's own. It also recognises the infringement of freedoms closed borders mean for outsiders who in an original situation were free to use the territory. Accepting that there are some costs attached to migrating is a way of reconciling these two values. This is a way very similar to Lea Ypi's way of reconciling these two somewhat conflicting values. She argues that foreigners have a right to visit, but not to settle (2012, p. 19). However, she does not distinguish between settlement and citizenship. With this distinction in mind we can extend the right to visit to the right to settle and still reconcile the value of current citizens' capacity to exercise political

control over their territory with the value of freedom of movement in a world originally free for all to use.

In addition, a rigorous naturalisation process should in most cases suffice to render the reasons for denying citizenship invalid. We want to allow the state to exclude immigrants from political membership in order for current citizens to be able to effectively exercise control over their political and material environment. A large influx of immigrants might change the composition of the demos rapidly and thereby change the assumptions about the community that citizens base their political judgments on. This might undermine their effective control over territory. Therefore, immigrants can be denied citizenship. But if the state imposes rigorous naturalisations policies aiming to integrate the immigrants in the political community, as well as setting a time frame for when the immigrant can apply for citizenship, this worry would seem to be substantially mediated.

Unless the state, in theory, has a right to deny someone citizenship, any tests or requirements would be illegitimate. If residents have an absolute right to citizenship, the state could only require a certain time of residency for naturalisation, but any further requirements (e.g. participation in a citizenship course or being law-abiding) would have to be prohibited. Conceptually, therefore, we need to keep the distinction in order to address a worry about how open borders would affect the foundations for territorial rights, to which we respond by granting the state extensive powers to set the conditions for naturalisation. For my argument to be valid, however, I do not need to commit to the normative view that the state has an absolute right to deny someone who has a strong democratic claim to citizenship the ability to apply for citizenship. But unless such applications should always be automatically granted, there needs to exist a possibility

that a resident of a state is not able to gain citizenship (for a similar discussion of the distinction see Pevnick 2009, pp. 155-163).¹⁰

Property Rights and Territorial Rights

Despite the distinction made above, some might share the intuition that ensuring a capacity to control one's political and material environment inherently generates the right to decide who can and cannot live there, just as having a right to one's house includes the right to prevent others from settling in one's back garden. It is hard to see how one could effectively exercise the right to one's private property unless one could also hinder others from using it. The same cannot, however, be said about territorial rights. To see why the analogy does not work, we refer back to the difference between property rights and territorial rights clarified above. Recall that the functions of the rights differ. The function of the territorial right is to ensure the bases for autonomy and justice. This requires democratic participation rights and an effective state that can implement a just system of law, but not the right to exclude others from settling within the territory.

In sum, the objection discussed above consists of the worry that immigrants will change the nature of the territory so that it can no longer provide a stable residency for its current occupiers, as well as the worry that current occupiers' capacity to control their political and material environment would be weakened. I have pointed to three distinctions that counter this worry. Firstly, there is a difference between mere change and a lack of control. Even if immigration might bring about the former, this does not imply the latter. To help see this, I compared immigration with factors such as generational shifts and internal migration. Secondly, the distinction between a right to settle and a right to citizenship retains much of the political control that immigration is supposed to undermine, by giving the state the power to legislate on naturalisation.

Lastly, when distinguishing the functions of territorial rights from those of property rights, it is less clear that a right to exclude follows from the territorial right of jurisdiction.

The State's Capacity to Exercise Territorial Rights

A second objection holds that open borders would lead to chaos and instability and thus disable the state from exercising effective territorial rights. This objection mostly relies on empirical assumptions of the number of people likely to immigrate as well as the consequences of such numbers. Thus this objection to open borders does not undermine a general right to freedom of movement on a normative or conceptual ground, but it presents an empirical case for when such general right might not hold. Furthermore, it claims that this empirical case is intrinsically linked to open borders as such. Though it is not possible here to fully consider the empirical assumptions about immigration, I will examine the claim conceptually to see how, even if the empirical assumptions to a large extent hold, the objection has less force than initially thought.

First, however, it is important to note that even in a situation of open borders states have the right to monitor borders and keep track of who currently resides within its territory. "Having open borders is not the same as having no borders" (Carens 2010, p. 12). This idea is not particularly controversial. The Nordic countries have had such open border policy in place since 1954, but it is probably one of the most thoroughly monitored areas in the world in terms of the states keeping close track of who resides in which state (the system is called the Nordic Passport Union). Another example is the free movement within the European Union and the Schengen Agreement, which gives any European citizen the right to move to another country and to travel without a passport (the UK is not a part of Schengen). Though less rigorously monitored than the

Nordic borders, the EU member states nonetheless exercise border controls within the area of free movement.

The problem with assessing empirical claims of “mass immigration” or “flooding”, which are the terms often used to describe current immigration levels or the ones that would result from having open borders, is that these terms are ill-defined. Numbers alone cannot tell us how many are “too many”. Currently about three per cent of the world’s population live in a country different to the one they were born in (UNDP 2009). This could be described both as an age of mass migration or as one in which movement of people across borders is limited. Whether or not open borders would cause instability or insecurity depends less on numbers and more on which consequences of immigration one considers. One such consequence could be cultural changes, but as argued above, the perception of the scope of such changes diminishes when compared to other factors, such as generational shifts and internal migration. Political instability is another potential outcome of immigration, but as argued above, when we distinguish a right to settle from a right to citizenship, this risk seems to fade as well. A third stability related consequence could be economic. Now most economic research conducted in the last two decades establish that immigration has no or very little impact on wages and employment (e.g. Reed and Latorre 2009, Manacorda *et al.* 2011, Dustmann *et al.* 2008). Nevertheless, a right to exclude immigrants does not follow from a state’s territorial right of jurisdiction simply because immigration might have some negative consequences. The objection needs to show that immigration impacts the economy to an extent in which stability is challenged.

If large numbers of immigrants really caused stability and security problems and this consequently undermined the freedom to use territory that in an original situation was free for all to use, the same applies to internal migration. In other words, states

would have a right to exclude if immigration had such detrimental consequences so as to override the freedoms that the right to exclude infringe upon. Similarly, if internal migration had such consequences, the state would be justified in restricting internal freedom of movement. This does not undermine the general, but not unconditional, principles of open borders and free internal movement. For example, China controls both internal migration and the birth of future citizens. If one has no problem with these policies, restricting inwards migration appears justifiable as well. However, if one believes the Chinese state to be unjustified in restricting internal migration and child birth on the basis that it infringes on people's fundamental freedoms, then consequently external migration should also be viewed as such infringement on freedoms.

In short, the principle of open borders argued for in this paper is not unconditional. However, examining the impact immigration is likely to have on cultural, political and economic stability, states' effective territorial right of jurisdiction does not appear to be intrinsically or immediately dependent on them also have a right to exclude foreigners to settle within their territory.

Annexation

The last objection to the compatibility of open borders and states' territorial rights that I will consider concerns a situation that can be described as annexation by default. By this, I mean a situation in which a very large number of people from one state move to another state, making the natives a minority within their territory.¹¹ This could undermine natives' capacity to control their political and material environment and it could change the nature of the territory in such a way as to seriously disrupt natives' life plans. It could also disable the state in effectively implementing a system of law and protect basic rights as a consequence of the majority of its population not being its

subjects.

This objection can firstly be met by reminding ourselves of the settlement/citizenship distinction. The state can counter many of these difficulties via its naturalisation policies. Natives would in fact retain all political control over the territory, or as much as they wish to retain depending on the naturalisation policies the state chooses to implement. Moreover, even if inhabitants of a state are citizens of a different state, they are still subject to the laws of the state they live in. This is one of the defining features of sovereign, territorial states. They are the sole political authority, with monopoly of violence, within the territory and their authority stretches over whoever currently resides within the territory, regardless of whether these inhabitants have corresponding political rights or not. Part of the difficulty in justifying territorial rights lies in explaining why outsiders should respect the territorial rights of a state, and this applies especially when they inhabit that state. For this reason it is vital that the justification of territorial rights is universal in scope. And part of making the justification universal is giving everyone the right to inhabit any part of the earth, though they are not entitled to exercise control over any territory of their liking. Thus the “risk” of annexation by default is in a sense inherent in the universality condition of a justification of territorial rights. On the other hand, the risk is heavily mitigated by the settlement/citizenship distinction, which ensures that the bases for territorial rights are not undermined.

However, it is worth noting that it is not obvious that the hypothetical scenario of annexation by default would necessarily be unjust. In the case of, for example, the original European settlement in America it might appear that it was the act of settlement itself that was unjust. But there are reasons to question this assumption. Imagine if the settlement was peaceful, non-exploitative and if the Europeans had not imposed their

own system of law on the natives. Then they might still have been able to settle, albeit in a fundamentally different meaning of the word than how it is used to describe the actual series of events. Thus while the indigenous peoples certainly had a right not to be forcefully incorporated into another state's jurisdiction (e.g. the Crown), they did not necessarily have a right to exclude the Europeans from their territory altogether. Had the Europeans respected the territorial rights of jurisdiction the indigenous peoples must be said to have possessed (as a very minimum, they had occupancy rights), the fact that their settlement, over time, would have altered the territory dramatically would perhaps not have been unjust as long as the indigenous peoples' autonomy and rights had been recognised and respected.¹² Note that such counter-factual series of events would have been radically different to how the indigenous peoples were actually treated. The argument pursued here should not be taken as a partial justification of colonialism. It is nothing of the kind. It is hard even to imagine a situation where Europeans had respected the jurisdictional traditions of indigenous peoples or at least their interests in exercising control over their political and material environment because it is so far from what actually happened.

In short, the fear of current citizens effectively becoming a minority in their state is strongly mitigated by their ability to control the process of naturalisation; the conditions for political membership and thus the political influence of newcomers. But, as with other factors that contribute to changing the nature of territory, no one has the right to be immune of any change. Otherwise our theory would be biased towards the *status quo*.

Conclusion

In this paper, I have argued that territorial rights of states are based on their ability to

protect individuals' interests in autonomy and justice. Having control over one's political and material environment, as well as living under the rule of law and having one's basic rights protected are fundamental to a human life. These interests are best protected by a state with the territorial rights of jurisdiction.

Open borders are often presumed to undermine territorial rights, and in turn sovereignty, because of the impact immigration supposedly has on the nature of territory, on stability and on the effective exercise of political control by current citizens. I have argued that these presumptions fail to make several distinctions that would clarify the compatibility of territorial rights and open borders. These are the differences between, first, change and a lack of control, second, settlement and citizenship, and third, property rights and territorial rights. Together these amount to the difference of, on the one hand, a state having a right to monitor immigration and implement naturalisation policies and, on the other hand, the right of a state to unilaterally close its borders.

The interests territorial rights are meant to protect can therefore not serve as a ground for including the right to exclude immigrants in the territorial rights of states. Since such rights necessarily imply an infringement of outsiders' freedom to use the territory that in an initial situation was free for all to use, their justification needs to be universal in scope. Such universality can only be reached if outsiders are allowed to settle. Because settlement does not undermine the bases for granting states territorial rights, there are no reasons for outsiders to respect the inclusion of border control in states' rights over territory. Open borders can therefore be seen as compatible with the territorial rights of states.

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Notes

1. Nine does not, however, want to introduce a demand that states are democratic more than in a minimal sense.
2. Furthermore, Stiliz's conception of "a people" seems overly statist, as it only includes people who have previously shared a state. Thus national minority groups aspiring to have their own state are seemingly disqualified as a people in the relevant sense (Stiliz 2011, p. 591).
3. Moreover, they cannot solve the issue of universality. As Allen Buchanan has pointed out discussing similar views to the nationalist one – the ones based on the right to association - rights of association establish how people relate to one another in a group. But those internal relations cannot also establish a relation to a territory, when the territory is or might be claimed by others as well, that generates a right of that association to that particular territory. In addition, one can argue along the lines of Samuel Scheffler's discussion of associative duties, that the fact that A and B has agreed to associate in a mutually beneficial scheme of cooperation does not justify to C why A and B have an obligation to pay extra concern to each other's interests, and less to C's. And it certainly cannot justify to C why A and B now have the right to the territory on which they all have laid claims (Wellman 2008, Buchanan 2003, p. 255, Scheffler 2003, pp. 55-6).
4. That is as a general principle. There might be cases for example of refugees or stateless people where this does not hold.
5. At least, following Ypi's argument, conditionally and provisionally (2012, p. 4).
6. I will leave aside the issue of the right to control resources and the movement of goods.
7. From the nationalist perspective, for example, David Miller argues that "it matters *who* the people are that are present on territory – whether their use of land will be such to add further material or cultural value, maintain or subtract from it" (Miller 2011, p. 14).
8. These changes in attitudes can to a large extent be attributed to the fall of affiliation with the Church of England, which halved between 1983-2010 (Lucy 2012, p. 180).

9. It might be suggested that the immigration/reproduction analogy does not work, because the state does actually control reproduction to some extent by implementing policies discouraging or encouraging citizens to have children, such as various forms of parental leave. It can even control who has children by constructing policies that benefit certain types of women and families (working or stay at home, for example). However, it can do this, and does so, with immigration too – even given open borders. Both domestically and internationally cities and countries tailor policies to attract certain kinds of individuals, for example by providing excellent opportunities for study or research, a good environment for entrepreneurship, housing, family friendly environments, and so forth. For immigration, as well as reproduction, the state has many tools at its hands to impact who enters its territory and the right to exclude someone altogether is really just one extreme form of such tools. For a similar discussion, relating to the right to self-determination and the composition of the citizenry, see Lægard (2013, p. 21).
10. This distinction would benefit from further discussion. As Pevnick suggests: “The insistence on egalitarian status amounts to a promise to keep membership and residence claimed bundled. However, this bundling predictably begets a situation in which millions – particularly illegal immigrants and asylum-seekers – live without *any* recognition from, and indeed under the threat of, ruling institutions” (2009, p. 160). For a discussion skeptical of making the distinction, see Miller (2008).
11. Garrett Brown has suggested that this risk of conquering is what motivated Kant in drawing a distinction between a right to visit and a right to residency in formulating principles of hospitality (2010, pp. 313-14 and 324).
12. This point is complicated by the fact that it was precisely the indigenous people’s lack of property jurisdiction that, to the British, justified incorporating them under the jurisdiction of the Crown, as their territory was deemed as *terra nullius*.

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