The Centre for Political Theory and Global Justice was established in 2011 in order to focus and deepen the role of political theory in responding to global issues of human coexistence. Central to the mission of CPGJ has been the promotion of research that deploys and examines dominant philosophical paradigms in the areas of political thought and international political theory. The Centre is particularly interested in issues relating to debates about global justice and how political theory can help inform actual political practice and policy. The Centre welcomes and encourages research from all theoretical traditions and provides a distinctive opportunity for researchers to develop their interests in a supportive and intellectually diverse environment.

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1. 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 these do not by necessity include a right to exclude immigrants. Open borders, in consequence, is therefore seen as compatible with a world divided into sovereign, territorial, states.

Several limits apply to the argument. 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. 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, I do not discuss the existence of a world divided by sovereign states as such; the conclusions of this paper do not rely on a cosmopolitan world view or the creation of a world state. For my arguments are deemed to be compatible with, rather than challenging, the state system as we know it (coupled, thus, 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 is structured as follows. Part one begins with a definition of territorial rights, followed by a discussion of the foundations of territorial rights. What, if anything, can ground the territorial rights of states? Three accounts are discussed: Lockean, nationalist and statist. I conclude by siding with the statist view, albeit with a few caveats. Part two draws out the distinction between the right to control borders and the right to exclude immigrants. Part three offers the bulk of the argument; namely why territorial rights do not include the right to exclude immigrants.

2. Territorial Rights and Legitimate States

In this part, I discuss the content of territorial rights and how states can rightfully claim them. Territorial rights, in short, have three main components, which all require separate justifications. For such justifications, I will adopt Anna Stilz’s view, albeit with some alterations, that legitimate states can acquire territorial rights if they a) regulate property, b) their citizens have a right to occupancy, c) are representative and d) are not usurpers.

2.1. The Concept of Territorial Rights

The modern state is a political community governing over a well-demarcated geographical area - a territory. It is not a necessary feature of a political community that it has a territory, though

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2 A. Stilz (2009), ‘Why do states have territorial rights?’, International Theory 1(2) and A. Stilz (2011), ‘Nations, States and Territory’, Ethics 121 (3).
arguably it is a necessary feature of a modern sovereign state. The reasons for this are laid out below in relation to the foundations of territorial rights. Nevertheless, prior to that discussion, we need a definition of the content of these rights.

Following John Simmons work on territorial rights, David Miller suggests that territorial rights consist of a bundle of rights, made up by 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. 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. Furthermore, as with state sovereignty, the rights are not absolute and can be overridden by concerns of justice, human rights and the equal value of all human beings.

Because it is not necessary for a political community to be a territorial state – communities or states could be entitled to control persons but not territories - territorial rights must stem from and be justified on the basis of some feature of the state. And whatever reason one gives for granting states territorial rights, it must be able to explain all the rights included, as outlined above (jurisdiction, resources and border control), or some rights have to be excluded. In order to argue that these rights should not include the right to exclude immigrants, then, we must first establish why states can have any rights to territory in the first place.

Three additional features of territorial rights need to be pointed out before moving on. Firstly, territorial rights are rights to a particular territory (henceforth the particularity problem). Secondly, and related, given the fact that almost all areas of the earth are covered by states, territorial claims naturally imply potential conflict. Claimants of a territory must believe not simply that they have an interest in the territory, but that their interest is superior to all other potential or current occupiers and therefore can grant them the right to the territory. From these two features follow, thirdly, that territorial rights cannot be justified simply by justifying the existence of the state – the right to territory requires a principle that can explain why equally legitimate states do not have an equal right to the same territory (henceforth the contestation problem).

2.2. States and Territorial Rights

Three accounts of why states have territorial rights have recently been put forward: A Lockean account as argued for by Simmons, a nationalist one as put forward by David Miller and a statist justification proposed by Anna Stilz. I mainly discuss the two latter views, as they represent the...
two most prominent strands of the debate. On the Lockean view, a state's right to territory is derived from its subjects property rights, coupled with their consent to the state. The subjects are assumed to consent to whatever arrangements which can bring about a stable and peaceful society. When individuals consent to the state, they should therefore be assumed to consent to the state's right to jurisdiction over their land: "the state cannot effectively protect its subjects from domestic or alien aggression if it cannot exercise certain kinds of control over (including enforcement of law on) the territory where its subjects mostly reside and work." Thus, unless the subjects of a state consent to their property being included in the territory of the state, the state would not be able to protect land, and the reason for joining the state in the first place is undermined.

The main problem of this view is that it does not explain why states can have territorial rights across generations. Since only the original contractors actually consent to their property being under the control of the state, no other generations can actually fulfil the Lockean criteria of consent, and thus it seems like the territorial rights of the state can no longer be justified (unless actual consent is continuously reaffirmed): "This means that all individuals are not equal in rights: later generations do not have the same rights past generations once had. Given that their subjection to the state cannot reasonably be said to be voluntary, it also puts future generations in the position of being bound by the consent of their ancestors, in violation of Locke's own assertion that a man 'cannot, by any compact whatsoever, bind his children or posterity'."

This highlights the Lockean view's difficulty in accounting for how property and land rights are passed on from one generation to another (henceforth the generational problem), creating a collective right from which the state's right to territory can be derived. To this point, then, there are mainly three issues that any theory of territorial rights needs to address: why states have a right to a particular territory, why a particular state has rights to a territory rather than other claimants to it and how these rights are transferred historically. In the following section I discuss how the two remaining accounts cope with these issues and provide a more viable conceptualisation of territorial rights.

2.2.1. Nationalism

The account that, allegedly, can best explain the generational problem of territorial rights – why one generation's mixture of its labour with land entitles all future generations with the right to the territory – is the nationalist one. David Miller argues that due to the transhistorical character of nations, they are the most appropriate agents in which to attach territorial rights to. Miller proposes three claims to support the idea that nations bestow states with territorial rights:

a) groups that have enhanced the value of the land are "entitled to keep and enjoy the value they have created historically";

b) the territory is essential to the group's way of life: "the territory has been shaped to fit the needs and the cultural values of the group in question";

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9 Simmons, 'On the Territorial Rights', pp. 312-317. See also C. Nine (2008), 'A Lockean Theory of Territory', *Political Studies* 56.
10 Simmons, 'On territorial rights', p. 313.
c) the identity of the people relies on its symbolic relationship with the territory.\textsuperscript{13}

There are several problematic issues with this account, relating to the concept of nation and the particularity problem. In short, the problem with Miller’s argument is that it does not take seriously the special character of territorial rights as entailing a universal claim. As mentioned above, any justification of territorial rights must be able to say why one particular state has a right to that particular territory, and why it has so against competing claimants. It has to be able to justify this not only to the subjects of the state, but to the competing claimants as well.

In order for Miller’s nationalist argument to be valid, he must be able to account for the claim that nations are “transhistorical agents”. In his book \textit{On Nationality}, Miller gives the following definition of a nation: A nation is a community that (1) is constituted by shared belief and mutual commitment, (2) is extended in history, (3) has an active character, (4) is connected to a particular territory, and (5) has a distinct public culture.\textsuperscript{14} For the purposes of part (a) of the territorial argument (groups that have laboured on land should have a right to the enhanced value), it is foremost elements (2) and (3) that are important. Regarding the third element (3), Miller suggests that what sets nations apart from other sorts of communities is that nations take decisions and are therefore active. Churches, for example, are inactive in this sense as they only interpret the message from God, Miller argues. As Miller himself seems to suggest, a nation is not active in a literal sense, but what is important is that when one identifies with a nation, one perceives it as being part of an active community capable of shaping its future collectively.\textsuperscript{15}

Being part of a church involves the subjective experience of not making any decisions, although many (for example those who do not believe in God) would argue that this is precisely subjective.

Given that nations are not actually active agents anymore than any other sort of community, but only perceived as such, it is hard to see how this account solves the generational problem and yields the territorial right that Miller claims it does. As Anna Stilz points out: “'The nation’ does not mix its labour with these objects [houses, churches, and the like] in any sense except metaphorically. So why shouldn't the individuals who actually labored on the objects in question gain private property rights in them? What generates a collective right?”\textsuperscript{16}

Thus with regards to Miller’s claim (a), one might reasonably struggle to see the “nation” as an active historical agent, able to mix its labour with the land and in that way generating a right to that territory. And, as Joseph Carens points out: “In talking about what the community has created [...] we simply assume that we already know the answer to the question of who belongs and who is entitled to join.”\textsuperscript{17}

In defining the concept of nation, Miller positions himself in-between constructivist and primordial accounts, by claiming that while the history of nations is to a large extent made up by myths, he claims that these myths are rarely completely counter-factual.\textsuperscript{18} “National histories

\textsuperscript{13} Miller, ‘Territorial Rights’, p. 8.


\textsuperscript{15} Miller, \textit{On Nationality}, p. 24.

\textsuperscript{16} Stilz, ‘Nations, States, and Territory’, p. 577.


contain elements of myth in so far as they interpret events in a particular way, and also in so far as they amplify the significance of some events and diminish the significance of others.\(^{19}\) It is the political benefits of sharing a national identity that, on Miller's account, can generate the collective right to territory. National identities, he argues, are valuable as they yield social solidarity and thus facilitate social justice and democratic participation.\(^{20}\) Due to this, he argues that "it may not be rational to discard beliefs, even if they are, strictly speaking, false, when they can be shown to contribute significantly to the support of valuable social relations."\(^{21}\) Now, even if the valuable social relations in this case are benign, the history of totalitarianism and dystopian popular culture alike have taught us to be very wary of constructed truths supporting social ends. It might well be the case that mythical and constructed identities do have value for people – but for these to play a political role is a much more dubious claim.

Moreover, if it is the case that a nation is constructed as a historical community in the way Miller suggests and that its active character is merely perceived as well, it would surely be possible for it to be reconstructed. In line with such anti-essentialist understanding of nations, Miller suggests that it would be self-defeating for a nation to have just one characteristic as its defining feature, as this is likely to exclude those who are in minority with regards to that specific feature, such as religious minorities.\(^{22}\) Hence in the case of religious pluralism, it would be better for the nation to "de-emphasize" this particular part of national identity and instead find other mutual characteristics around which to base a collective identity.\(^{23}\) This view of national identities suggests that they are indeed very flexible and can be altered in order to fulfil their political, instrumental, purposes.

Hence, with regards to Miller's claim (b) that territorial rights are necessary in order to secure the nation's way of life, it is not clear why absolute unilateral control over a territory is actually necessary in this respect. For those rights seem arbitrary given 1) that the nation's way of life can change in character and 2) all the other possible influences on that way of life, which current nationals cannot control either. In particular, one of such influences is shifts between generations. As most older generations will be aware of, newer generations can change cultural characteristics dramatically and rapidly. At best, the notion of the importance of sustaining a specific 'way of life' is able to justify the territorial right of jurisdiction. That is given that the state is representative of the people living there and who express the preference for this way of life, which can be protected via a specific set of jurisdiction. But it cannot solve the generational problem. For if it is not clear that one generation is that different from, let's say, an immigration cohort, then neither is it very clear why that generation should enjoy the enhanced value of the land yielded by their forefathers, on the basis of securing a 'way of life'.

What is meant to be justified with the nationalist account is why these people in particular have a right to this territory in particular. Miller's account can, at best, justify territorial rights to those who already live in the territory and would thus be able to reap the benefits of the right. It cannot justify it to those –other states, peoples or individuals – who have laid down a competing

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19 Miller, On Nationality, p. 38.
20 Miller, On Nationality, p. 97.
21 Miller, On Nationality, p. 36.
22 Miller, On Nationality, p. 92.
23 Miller, On Nationality, p. 92.

Press: Manchester, for a more primordial one see A. D. Smith (2010), Nationalism, Polity Press: Cambridge.
claim to the territory. And that is what is really at stake. The assumed empirical fact that sharing a national identity will facilitate morally valuable ends for those who belong, such as social justice, can hardly justify why those who might benefit from such arrangement should also have a right to a particular territory, when others (including immigrants) might also claim a right to settle in that territory. As Alan 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.

Lastly, Miller’s claim (c), that the territory is of symbolic value to the nation, does not solve the problem of contestation either. For while it can explain the particularity problem, and perhaps even the generational problem, it cannot decisively say who out of two competing claimants (who both might refer to the symbolic value of land) has the right to territory. As Margaret Moore has pointed out, historical, religious and cultural grounds for territorial rights are problematic, as they are “based on a biased, internal understanding of the particular group’s tradition or history or religion” and “when conflict is between two national communities, each with its own history, it is not helpful to argue in terms internal to one’s own understanding of one’s history or tradition.”

In sum, unless you accept that the nation is an active agent that can gain and pass on land rights in a collective way, it is difficult to see how the nationalist account can generate any territorial rights at all. If you do accept this, however, the account can at best justify territorial rights of jurisdiction, but not the right to control the resources or the right to restrict movement of persons across its borders. This is because the account cannot plausibly distinguish between the changes brought about to the ‘nation’s way of life’ caused by, on the one hand, new generations and, on the other hand, immigration – given that nations are not static. In addition, the nationalist account cannot provide reasons for outsiders to why they should refrain from claiming the territory of a specific nation, as the justifications are particular to a national group and not universal.

2.2.2. The Legitimate State Theory

Against the nationalist account of territorial rights, Anna Stilz proposes the legitimate state theory. As with the Lockean and nationalist theories, hers takes state’s territorial rights to be derivative from features of its individual members – though the state is not reliant on their

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28 Stilz, ‘Nations, States, and Territory’, and ‘Why do states have’. 
consent, only on its ability to represent them. Thus she holds that states “have territorial rights because their jurisdiction serves the interests of their subjects.”29 Specifically, a state is legitimate – serves the interests of its subjects – if it sufficiently protects freedom-as-independence.30 This requires the state to uphold certain basic human rights. “If the system of law grants each member these minimal guarantees [of human rights], then it gives them moral reasons for their compliance since it secures a degree of freedom-as-independence for themselves and their fellow citizens, and each citizen has a natural duty to cooperate in securing such independence.”31 In order to protect these interests of individuals effectively, the state has to have rights over a territory.

Stilz lists four conditions that must be satisfied for a legitimate state to enjoy territorial rights of jurisdiction:

“(a) it effectively implements a system of law regulating property there; (b) its subjects have claims to occupy the territory; (c) its system of law ”rules in the name of the people”, by protecting basic rights and providing for political participation; and (d) the state is not an usurper.”32

Rights of occupancy (b) 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.”33

Obviously, condition (1) and (3) of occupancy rights on this account are not compatible with the thesis put forward in this paper about open borders. That is because the first condition is biased against people who have never resided on the territory and the third excludes all people who voluntarily moves to another state. Thus both conditions exclude many potential immigrants. It is not clear what job condition (1) and (3) is supposed to do, apart from simply justifying the status quo. They assert that a person cannot have occupancy rights as a result of voluntary immigration, but give no independent reasons for why this should be the case. Because I discuss these issues in part four, I will simply leave those two conditions aside now and instead focus on condition (2) in relation to the legitimate state theory, as the core of Stilz argument relies on this condition.

Stilz argues that stable legal residence somewhere is an important background condition for almost all other rights to be realised.34 In particular, 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. Thus occupancy rights seem crucial in securing the conditions for autonomy, and coupled with the equally crucial role of belonging to a state that can effectively uphold a system of law regulating property and basic

30 Stilz, ‘Nations, States, Territory’, p. 587. Freedom-as-independence is a Kantian concept, which Stilz defines as follows: “To be free-as-independent [...] is not to be forced to obey the will of another person; it is to enjoy a sphere of independent self-government within which others cannot interfere.” A. Stilz (2009), Liberal Loyalty: Freedom, Obligation and the State, Princeton University Press: Princeton, p. 37.
rights, this account seems to generate territorial rights without having to explain the generational problem. This is because the right to territory is not seen as a collective right possessed by a particular group of people, but as a right of the state insofar as it protects the interests of whoever happens to reside within its territory and who has a right of occupany.

How, then, does the legitimate state theory cope with the particularity problem? Stilz argues initially that a "state has a claim to a particular territory because it defines and enforces property rights on that territory" and "the state's right over its territory [is tied] to its authorization, in a representative process, by the people who inhabit that territory."\textsuperscript{35} She recognises that this lends itself to favouring the \textit{status quo} and rule by convention. Two problems arise from this; the annexation problem, which she addresses, and the secession objection, which she does not address.

Firstly, the annexation objection consists of the intuition that there is something wrong with one (legitimate) state X unilaterally annexing the territory of another (legitimate) state Y.\textsuperscript{36} But, if state X is equally good at protecting the interests and rights of the citizens of state Y as state Y was, what is actually wrong with the annexation? This goes to the core of what territorial rights are actually about: "No matter how just its Constitution and its policies might be made, the United States could still not justifiably extend its political power to include, say, Pakistan or Antarctica within its jurisdiction."\textsuperscript{37} Stilz asserts that the inhabitants of state X, by virtue of having shared a state, constitute a people, and as such they have a claim to collective autonomy, which would be violated if state Y exercised the territorial right of jurisdiction over them and their land.\textsuperscript{38} Two conditions must be satisfied, according to Stilz, for there to be a people;

\begin{enumerate}
  \item \textit{Political History Condition}: the group has establishes a history of political cooperation together by sharing a state (legitimate or otherwise) in the recent past, and
  \item \textit{Political Capacity Condition}: the group possesses the ability to reconstitute and sustain a legitimate state on their territory today.\textsuperscript{39}
\end{enumerate}

When people have shared a state, she argues, they shape the political institutions by their cooperative behaviour, which enables democratic political authority. The relations created between fellow citizens through their history of political cooperation thus become morally valuable as they support political authority, which, from a Kantian perspective, all have a duty to support when legitimate as it is necessary for the protection of freedom-as-independence.\textsuperscript{40} The problem with this argument is that it is not about territory, but about the rightfulness of a particular political authority. “Least the reasoning be circular, usurpation does not count as usurpation unless an independent reason has been given as to why people are collectively entitled to be in a particular territory and not in another.”\textsuperscript{41} And, as argued in relation to the nationalist account of territorial rights, fellow citizens A and B’s relation with each other cannot in itself justify their collective claim to a particular territory. However, if political authority requires the territorial right of jurisdiction, which I argue that it does, and an independent

\textsuperscript{35} Stilz, ‘Why do states’, p. 205.
\textsuperscript{36} Miller, ‘Territorial Rights’, p. 5.
\textsuperscript{37} Simmons, ‘On territorial rights’, p. 302.
\textsuperscript{38} Stilz, ‘Nations, States, and Territory’, p. 591.
\textsuperscript{39} Stilz, ‘Nations, States, and Territory’, p. 591.
\textsuperscript{40} Stilz, ‘Nations, States, and Territory’, p. 593.
argument can be provided for why certain citizens have occupancy rights to a particular territory, Stilz response to the annexation objection seems valid.

If, say, Germany were to annex Sweden – is it my relation with other Swedes that make this annexation unjust? To some extent, perhaps, but primarily it seems to be our relation with the Swedish and German states, respectively, that matters. Recall that one of the criteria for territorial rights laid out by the legitimate state theory, is that “its system of law "rules in the name of the people", by protecting basic rights and providing for political participation.” Even if we do not accept a definition of a people as a collective agent, “the people" could refer to each and every individual subject to the state. For the state to be legitimate to every individual, it needs to enable political participation through democratic procedures. This, however, could presumably be done by the German state just as by the Swedish one. The state also needs to be representative, to “rule in the name of the people.” If we take this to mean that the people must somehow recognise the state as their representative, we can see how even if consent as such is not required on the legitimate state theory, opposition to the state cannot be tolerated. Thus, a minimal criterion for representation is that the people subject themselves to the jurisdictional powers of a state and that they need to not prefer any other (existing or hypothetical) state. So it is not my relation with other Swedes that make the German annexation of Sweden wrongful – it is the fact that I and at least a majority of the other Swedes prefer the Swedish state to the German. This minimal notion of representation gives us reason to grant states jurisdictional rights over territory, and gives other states reasons to respect such rights.

In addition, according to Stilz, someone has occupancy rights if “legal residence within that territory is fundamental to the integrity of his structure of personal relationships, goals, and pursuits.” 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. Or, for example, if their land has previously been annexed by another state, it might still be the case that a specific territory is fundamental to their relationships, goals and pursuits, even if they do not reside there at the moment. Arguably, this can also be the case for someone who has never occupied the territory in question. Thus with the notions of, on the one hand, minimal representation and, on the other hand, occupancy rights as requirement for autonomy, the legitimate state theory can account for the particularity problem. Note, however, that the occupancy rights are not absolute and that this only applies to the territorial rights of jurisdiction. I discuss the implications for the territorial right to exclude below.

Secondly, the legitimate state theory fails to address the issue of secession. On Stilz account, those groups qualifying for having territorial rights must be or previously have shared a state. This seems overly statist, excluding the claims of both groups within states seeking independence, as well as those residing in several states aiming to create one of their own (such as the Kurds). However, if one applies the two criteria just outlined – representation and occupancy rights – one can make sense of secession as well. For what secessionists assert is precisely a preference for being subjected to a different state. Thus creating a new state would satisfy the minimal representation condition as outlined above. If the secessionists can claim

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42 Stilz, 'Nations, States, Territory', p. 574
43 Compare this to when Norway and Sweden parted as two separate sovereign states in 1905.
occupancy rights, as outlined above, they might have a right to create a new state with territorial rights of jurisdiction. Of course, conflict might still occur. Arguably, the condition that a territory must be fundamental to someone's relationships, goals and pursuits, is not much more divisive than the symbolic attachment as proposed by nationalists. But, as Stilz remarks, this condition, as opposed to the symbolic one, relies on some "objective facts about [someone's] interests and actual life experience, not on subjective facts about [...] aspirations."\textsuperscript{45} This, in a way, makes the principle more restrictive than the symbolic one, as it might grant a new state territory that is other than the one its citizens had wished for. Given how conflict about territory normally plays out, though, this seems to me to be an advantage of the theory rather than a problem. Sometimes it simply is not possible for a state to have exactly the territory its citizens most desire to have, because another state's citizens want the same territory, and then a neutral (as opposed one to based on symbolism) principle is needed to resolve the conflict.

In sum, the legitimate state theory can account for the generational problem, as it focuses on individuals of each and every generation rather than on groups. It can also, when modified to include the representative political authority as well as the occupancy rights conditions, explain the particularity problem and the issue of contestation. However, all I have argued so far is that the modified legitimate state theory can justify territorial rights of jurisdiction (which is what Stilz restricts her discussion to as well). In the final section, I will argue that it cannot account for the territorial right to exclude immigrants. This, I argue, should lead us to an open border policy rather than to abandon the legitimate state theory of territorial rights. However, before proceeding to lay out the argument, it is necessary to clarify the distinction between the right to control borders from the right to exclude immigrants from settling within the state's territory.

3. A Right to Settle, a Right to Exclude and a Right to Monitor

Two points need to be stressed before moving on to defend the proposition that territorial rights should not include the right of states to exclude immigrants. Firstly, 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. There is nothing odd about a state having different jurisdictional relations to different people within and outside its territory – think only of tourists, international students, business people, citizens who currently reside in a different state, officials of other states and so forth. "[The] class of a state's subjects (those within its jurisdiction) is seldom thought to be identical to the class of people within its claimed territory."\textsuperscript{46} The state is thus able to set the conditions for naturalisation, such as a certain time of residence requirement and citizenship courses and/or citizenship tests. It is a right to settlement that is defended in this paper, and that is thus distinguished from a right to citizenship.

\textsuperscript{45} Stilz, 'Nations, States, and Territory', p. 585, footnote 23.
\textsuperscript{46} Simmons, 'On the territorial rights', p. 305.
Secondly, the state still has the territorial right of monitoring its borders, that is, to oversee who enters and when. “Having open borders is not the same as having no borders.”47 This idea is not particularly controversial either. 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.48 As opposed to most other borders, the Nordic ones operate within a closed system, which means that if you leave one country for another you are automatically registered as a resident in the new country and removed as a resident from the old one. Most other borders are only monitored in this way voluntary – thus you only change your residential registration with a state if you actually tell both states that you have moved (though registers are corrected with varying frequency, as well as censuses).

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 states can quite effectively exercise its territorial right to control the movement of both goods and people, despite the borders being open. And they seem to still be sovereign.49

In short, two distinctions have been made here: One differentiating a right to control borders and consequently exclude immigrants from a right to monitor border. The latter would still be included in a state’s territorial rights in a state of open borders. The other distinguishes a right to citizenship from a right to settlement. Only the latter is argued for in this paper.

Having made these clarifications on what, on this account, territorial rights entail, I now proceed to the final section, which will discuss why territorial rights are compatible with open borders.

4. Territorial Rights and Open Borders

We now need to recall the foundations of state’s territorial rights, as outlined above. On the modified legitimate state theory, a state has territorial rights to, inter alia, jurisdiction if:

“(a) it effectively implements a system of law regulating property there; (b) its subjects have claims to occupy the territory; (c) its system of law “rules in the name of the people”, by protecting basic rights and providing for political participation; and (d) the state is not an usurper.”50 Condition (b) applies if “legal residence within that territory is fundamental to the integrity of his structure of personal relationships, goals, and pursuits.” (c) obtains if the citizens would not prefer to be subjects of another state.

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48 Called the Nordic Passport Union, including Denmark, Sweden, Norway, Iceland and Finland.
49 Of course, there are great problems with illegal substances and weapons being sold across borders – but large parts come from outside the EU anyway. In addition, that is hardly a problem unique to European countries with their internally open border policy.
50 Stilz, ‘Nations, States, Territory’, p. 574.
Central to these foundations of states’ territorial rights is thus citizens’ interests and the protection of the conditions for their autonomy. We can see how the right of a state to exercise jurisdiction over the territory – which also includes the right to prevention and punishment – is necessary if the interests grounding the rights are to be acknowledged. 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.\(^{51}\)

However, territorial rights are universal claims and thus need to be justified to outsiders as well as insiders, as pointed out above. On the legitimate state theory, territorial rights are grounded on the interests of the subjects of the state. Because not all interests ground rights, and because outsiders’ interests need to be taken into equal account (assuming that everyone has an equal claim to earth), we can see how territorial rights cannot include the right to exclude immigrants. It might be useful to point out that when territorial rights are normally discussed, the competing parties over a certain territory are mostly seen as being other states or some form of collective (e.g. a nation or a people). I cannot, however, see any reason for why individuals outside the territory should not be equally considered when a state’s right to that territory is being justified. Three different categories of claimants can be seen as requiring a justification to why they should recognise a state’s right to a particular territory: other states, other groups of people and other individuals. I focus here on the third category, that of individual migrants.

It is presumed on the modified legitimate state theory that anyone who recognises the value of autonomy, and in consequence the value stable legal residence, should be willing to accept others territorial rights, in as far as they in doing so are given assurance that they will enjoy territorial rights as well. A necessary condition for territorial rights to fulfil their function is that others do not constantly try to invade, annex or otherwise disrupt the peaceful existence of the territorial state. If all individuals have an interest in territory, everyone should be able to accept the territorial rights of others. However, it is not clear at all a) how the interests underlying territorial rights would be undermined by open borders or b) why individual migrants should accept a world order in which they are not allowed to enter any other state than the one they were born in. In other words, it does not seem like open borders would threaten the interests of current citizens – at least not to an extent that outweighs their benefits to the interests of immigrants. And, if everyone is free and equal, and no one can unilaterally claim rights to a piece of land, then territorial rights should not include the right to exclude immigrants.

Why is it, then, that it is often assumed that open borders would undermine territorial rights? Some of the reasons were discussed and dismissed above in relation to nationalism, namely those relating to the cultural and symbolic value of land. 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 and therefore cannot solve the particularity or contestation problem. Moreover, because cultures change even without immigration, nationalism fails to make a plausible distinction between cultural changes brought about by immigration cohorts and by new generations.

\(^{51}\) I will leave aside the issue of the right to control resources and the movement of goods.
Other objections might be brought up in relation to the legitimate state theory. Firstly, it might be argued that immigration changes the nature of the territory to such an extent that people’s relationships, goals and pursuits are seriously disrupted. Thus the basis of occupancy rights – that stable residency is necessary for autonomy – would be undermined. Secondly, open borders might cause chaos and instability to the extent that the state can no longer guarantee security and stability – the state is thus made incapable of exercising its territorial rights. Lastly, if a large proportion of people from one state move to another, a situation might come about that looks like annexation by default.

Firstly, the autonomy objection 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. It might be reasonable to suggest that if the composition of residents change, so will the way land is used and laboured. However, this objection fails to address the right issue. For if we are only concerned with settlement, the state can deal with this alleged issue either by not granting citizenship at all, or by creating certain criteria for citizenship that mitigate it. 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. Moreover, akin to the nationalist account, it fails to show how immigrants are different from under aged citizens or unborn citizens. Both the latter categories can and are likely to (probably much more likely than immigrants) to change the composition of the citizenry. But most would agree that it would not be right for the state to try to control who is born. The state can socialise children born within its territory - but through its institutions and integration policies it can do so with immigrants as well. The analogy therefore refers to what powers the state should have in controlling who resides within its territory, not how it subsequently incorporates them into the political and social community.

Thus one has to ask why the division of individuals into different states by birth is a more justifiable procedure, than people moving voluntarily between states. It is probably the most practical one, and it is important to make sure that no one is born stateless. But if we imagine people being born capable of having a preference for membership in a particular state, that would seem an equally or more justifiable way of dividing people into states. "The real challenge for advocates of closure [...] is to explain why it is morally acceptable to assign people from birth to different states with no rights to move to a new of their choice, when the differences between states are so great and the consequences for one’s life chances so significant." Hence, if we regard immigration as an equally justifiable way of dividing people into states as birth, then the fact that both ways (immigration and birth) will lead to continuous changes in the composition of the residents or citizenry of a state is no reason to control or restrict either.

In addition, the objection fails to recognise all other factors that change the nature of territory, which are also beyond the control of current inhabitants. Some of these, such as climate change, the global economy, technological innovations and developments in science, they can partly control or control the effects of. But the impact of immigration can also partly be controlled, for example via citizenship policies, but also through various labour market and welfare policies. Thus open borders do not imply that current citizens cannot decide how to make the fact of

52 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, 'Territorial Rights', p. 14.
immigration more or less advantageous. In a similar vein, 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. Against this we can recall Carens's point from above (p.4), that suggesting that current citizens should have the right to control who enters their territory assumes that we already know who has the right to be there. But all the legitimate state theory demands is that the territory should provide the stability necessary for individual’s relationships, goals and pursuits. And if it cannot be shown that immigration undermines such stability any more than generational shifts do, the fact that citizens choose to have children while immigration is beyond their control is not morally relevant. In addition, 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.54

Another factor that changes the nature of the territory is internal migration. As, for example, industrialisation and urbanisation has shown, internal migration can impact the 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 as 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, again, 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. And 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.55

Yet, many might have the intuition that having a right to a territory does include 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. My ability to care for my house and make it part of my relationships, goals and pursuits requires that I can decide who moves in and who does not. The same cannot, however, be claimed on the aggregated level of occupancy rights, which constitute territorial rights. The analogy does not

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54 In addition, 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 to – 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 it hands to impact who enters its territory and the right to exclude someone altogether is really just one extreme form of such tools.

55 As Amartya Sen has argued, starvation is distinct from the availability of food and the causes of famines are often economic rather than based on “natural” shortages of food supply. A. Sen (1981), ‘Ingredients of Famine Analysis: Availability and Entitlements’, the Quarterly Journal of Economics 96 (3).
work simply because the purpose and nature of a state is not the same as for someone’s private property. The purpose of the state is to protect individual’s private property and basic rights. The state’s territory is not owned collectively by its citizens (recall that it would otherwise be difficult to resolve the generational problem, p. 8), in the analogous way to how an individual owns his or her house. What is required for citizens to control the territory in which they live are effective democratic representational and participatory rights – not the right to exclude immigrants. Citizens must 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.

It sometimes seems as if those worried about the effects of immigration assume that states would be “flooded” by immigrants would they open their borders. Now evidence seems to contradict such a scenario. Currently only about three per cent of the world’s population live in a country different to the one they were born in. And there is no flooding taking place in any European country, despite their open borders. Furthermore, when, what are perceived as, large numbers of immigrants arrive within a short time frame, it is almost exclusively due to some natural or human disaster, war, oppression, genocide or simply large inequalities in living standards across the world. Thus the worry about “flooding” is in fact a worry about how best to keep out the poor, the oppressed, the starving or the persecuted. The vast majority of immigration policies in Western democracies are aimed at excluding these people. Now, I do not argue in this paper that the reasons someone has to migrate matters for their right to enter the territory of another state. However, most think that it does. Most people believe that the plights of refugees, for example, are such that they give them the right to asylum. The harder argument, as I read the debate, is to argue for open borders of those who are wealthy and in no obvious need of a new state, because even those who favour state’s rights to control their borders often hold that state’s also have an obligation to accept refugees (and to varying degrees the poor). Thus the point I am making here is that, if one thinks that even under a scheme of unilaterally controlled borders, states’ have an obligation to accept the poor and persecuted, one has very little reason to worry about being “flooded” by immigrants.

Secondly, against the objection that open borders would lead to chaos and instability and thus disable the state from exercising effective territorial rights, we might simply add to the argument just made that, first, such scenario is highly unlikely and, second, the same problem would apply to internal migration. It is difficult to imagine a situation of mass migrations causing chaos that has not already sprung from an already chaotic situation, brought about by a factor independent of migration (e.g. war, climate change etc). It is such an unlikely scenario that it is simply difficult to take the objection seriously. One might just as well imagine a similar situation within a state. Of course, if everyone started to move around at the same time it would

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57 The introduction to Carens’ pioneering article from 1987 still captures the core of the issue: “Borders have guards and the guards have guns. This is an obvious fact of political life but one that is easily hidden from view -at least from the view of those of us who are citizens of affluent Western democracies. To Haitians in small, leaky boats confronted by armed Coast Guard cutters, to Salvadorans dying from heat and lack of air after being smuggled into the Arizona desert, to Guatemalans crawling through rat-infested sewer pipes from Mexico to California - to these people the borders, guards and guns are all too apparent. What justifies the use of force against such people?” (Carens, ‘Aliens and Citizens’, p. 251.)
58 Some policies also exclude people from other Western democracies, but those restrictions are normally fewer and directed toward permanent settlement, whereas the exclusion of the poor often includes even the right to enter.
create chaos. And maybe in that case the state would be justified in restricting internal movement. Likewise, perhaps states would be justified in excluding immigrants in a situation where the likely and foreseen consequences would be war or other situations of severe insecurity and instability. But that is such an extreme example that it should not be taken to undermine the argument for the compatibility of open borders and effective territorial rights, just as it should not undermine the principle of free internal movement.

Lastly, another hypothetical scenario that might be used to object to open borders is one of 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. Against this, one might say, firstly, that it is very unlikely. Secondly, again, this problem can be countered by naturalisation policies. Thirdly, it is not obvious that such situation would necessarily be unjust. In the case, for example, of the original European settlement in America, it seems as if it was the treatment of the indigenous peoples that was unjust, rather than the act of settlement as such. 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 (albeit in an analogous form), the fact that their settlement, over time, would have altered the territory dramatically would not have been unjust as long as the indigenous peoples’ autonomy and rights had been recognised and respected.60

In sum, open borders are often presumed to undermine territorial rights, and in turn sovereignty, because of the impact immigration supposedly has on territory, stability and the effective exercise of citizenship by current citizens. I have argued that these presumptions are biased when compared to other factors such as internal migration, that they are often based on overtly exaggerated hypothetical scenarios of “flooding” and that they fail to differentiate between the right to, on the one hand, monitor immigration and implement naturalisation policies and, on the other hand, the right to unilaterally close one’s borders.

6. Conclusion

In this paper, I have argued that states’ territorial rights are compatible with open borders. First, I discussed on what grounds we can say that states’ have rights to territory at all. The account of states’ territorial rights that seems, to this date, most successful in explaining the three main issues – the generational problem, the particularity problem and the contestation problem – is Anna Stilz’s legitimate state theory, albeit with a few modifications. On her view, states have territorial rights because it serves the interest its subjects have in a stable legal residence and belonging to a state that can exercise effective jurisdiction, and thus protect property and basic rights.

60 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.
Second, I pointed out that denying the state the right to exclude immigrants does not imply that it should not have a right to a) monitor migration across its borders and b) decide over the terms of political membership, i.e. naturalisation legislation.

With these clarifications in mind, I moved on to the third part, in which open borders as compatible with territorial rights were defended. Three main objections seemed to be left: one holding that immigration would change the territory to such an extent that it could no longer provide current citizens with a stable residence, another arguing that open borders would jeopardise security and stability, and a last warning of a situation in which member of one state annex another country by default simply by moving its citizens there.

However, it seems arbitrary to single out immigration as a factor of change that a state has the right to fully control, given all other factors that it could control, but is thought unjustified in doing so – such as the birth of future citizens and internal migration. Given the extent to which the state nevertheless can manage the impact of immigration through naturalisation laws and integration policies, a right to exclude seems almost extreme, and it appears very difficult to justify using universal values to the people who are being excluded. Moreover, the fear of “flooding” appears to be largely exaggerated as well as hypocritical. For many people accept that migration caused by wars, severe poverty, oppression or the like give good reasons for states to open their borders – yet this is precisely the kind of migration that the so called “flooding” refers to. It is not a coincidence that all countries from which a visa is required in order to enter the EU are countries that people can reasonably be expected to want to move from. It is not a coincidence that during the time when the world witnessed the popular uprising of the Arab Spring, which brought with it hopes of freedom and democracy, but also unrest, civil war and refugees – European leaders called for the open border zone to be amended. And it was not a coincidence that Sweden and Switzerland, independently of each other, called for special passports for German Jews in the autumn of 1938, leading to the Nazi government introducing passports with a red “J” stamped in them. That way, the “neutral” states knew who to keep out of their territory.

Lastly, 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 our environment and civilisation, no one has the right to be immune of any change. Otherwise our theory would be biased towards the status quo.

In conclusion, there does not seem to be any interests of current citizens of the kind territorial rights are supposed to protect, that would be seriously or especially undermined by open borders. In consequence, the current order of dividing individuals into states by birth, bestowing them with vastly different opportunities, does not seem like a necessary arrangement to uphold the sovereignty of territorial states. There is no contradiction in having sovereign states, with territorial rights – and open borders.
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