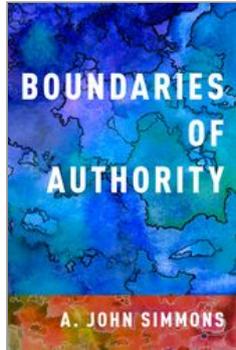


University Press Scholarship Online

Oxford Scholarship Online



Boundaries of Authority

A. John Simmons

Print publication date: 2016

Print ISBN-13: 9780190603489

Published to Oxford Scholarship Online: August 2016

DOI: 10.1093/acprof:oso/9780190603489.001.0001

Borders

A. John Simmons

DOI:10.1093/acprof:oso/9780190603489.003.0010

Abstract and Keywords

Chapter 9 examines another kind of property-like right claimed by modern states: the right to control movement across state borders. The chapter discusses the connections between the idea of national self-determination and states' border rights. Recent arguments for open borders employing both the arbitrariness of nationality and rights of free movement are critiqued. Appeals by functionalists to states' rights to self-determination as a justification for a robust right to exclude aliens are rejected. Similarly, appeals by nationalists to the idea of *cultural* self-determination are found inadequate. The chapter concludes by arguing that Lockean voluntarism in fact yields the desired balance between the rights of legitimate states to exclude and the rights of aliens to consideration.

Keywords: open borders, immigration, self-determination, culture, Carens, Locke, nonideal theory

Boundary Lines and the Right to Exclude

Modern nation-states relate to their claimed territorial borders in many of the same ways in which individual landowners relate to their property lines. Both are in most cases permitted by applicable laws to fence (or wall) their holdings and otherwise govern movement by persons and things across their boundary lines. Both may legally (under international law and domestic property law) insist on acceptance of a wide range of requirements as conditions for being permitted to cross those lines.¹ States may even sometimes be *required* to control border crossings—to prevent the spread of an infectious disease, say—just as landowners are sometimes legally required to fence their lands (to confine livestock, for instance, or to deny outside access to dangerous sites). And both states and landowners are required to fence their lands only in ways that will not be directly harmful to innocent (and, perhaps, not-so-innocent) outsiders.² Federations of states—like gated neighborhoods of landowners—sometimes opt to control only the outer boundaries of their combined holdings. Friendly states or those with unfrequented borders—like neighborly or rural landowners—often choose to be casual about the extent to which they actually exercise such rights of border control. In all these ways, then, control over national borders is one of the claimed rights of states that seem *most* “property-like” in nature.

All of these similarities, however, so far concern only border *control*. While many may challenge the particular internationally accepted placements of particular national borders, few (as we saw in the last chapter) challenge the general right of autonomous states to responsibly *control* their legitimate borders (p.214) for certain kinds of purposes—such as for security from outside threats to the state’s viability or wellbeing. Most of the famous historic border barriers—such as the Great Wall of China, Hadrian’s Wall, the Atlantic Wall, and the Maginot Line—were built to secure territorial holdings from threatened foreign military incursion, as were many of the most prominent contemporary examples (such as the Korean DMZ). Other contemporary barriers are just designed to funnel border crossings to monitored sites, another apparently legitimate purpose. But what of border barriers whose purpose is simply to keep outsiders out, to preserve the comfortable enjoyment of territory by members only (as with

Borders

landowners in affluent, gated communities), or to preserve, unsullied by outside influences, members' preferred lifestyle or culture or racial/ethnic composition? Landowners, of course, are generally taken to have the right to simply *deny entry* to their land to all others, for reasons good, bad, or indifferent (except, perhaps, in various kinds of emergency situations or when states' jurisdictional activities require official entry). If you wish to be an antisocial curmudgeon, hidden away from the world on your own walled land, there are in most nations no legal obstacles to such a choice. Private property owners have quite sweeping rights to exclude others from their land and structures. Are states' (property-like, territorial) rights to control their borders—to determine who passes over the (tangible and/or juridical) national fence-line—similar to private property rights in this respect as well?

Most states, of course, do not choose to exercise any very stringent “right to exclude,”³ preferring to permit entry and (at least) limited stays by aliens for tourism, education, employment, and a host of other reasons. Most also have legally defined pathways for aliens to secure more permanent statuses involving rights of long-term residence or citizenship (through “naturalization”). But legally speaking, the limits on states' rights to simply and unilaterally exclude from their territories all noncitizens and to expel all uninvited entrants, are impressively minimal—with the legal rights of refugees being perhaps the most salient exception.⁴ And refugee law really amounts to little more than the kind of legal (and minimal moral) requirement that sometimes limits landowners' prerogatives: namely, the requirement that they accept (what would otherwise be) trespass under emergency conditions. So again, with respect to a “right to exclude”—in the eye of the law, at least—state territories and individual (p.215) properties in land are treated much the same. Under international law, lawful residents of a state possess rights to *leave* their country, to return to it, and to move freely within it.⁵ But there are no general rights to *enter* states in which one is not a legal resident, nor are there general duties on states not to simply exclude aliens from entering and using state territories.

When we shift our focus from legal rights to *moral* rights, however, many theorists believe that there is a sharp divergence between the “boundary rights” of landowners and those of states. Set aside for a moment some of the obvious

Borders

parallel moral limits on those rights—such as those set by special obligations undertaken by the rightholder and humanitarian duties owed by the rightholder—and focus just on the right to exclude for “bad reasons.” However unloveable (and unvirtuous) the antisocial curmudgeon may be, and however idiosyncratic or unpleasant or bigoted his reasons for doing so may be, most will still affirm his (defeasible) moral right to simply exclude unwanted (in his case, all) visitors from land that he legitimately owns. (This is one of those “rights to do wrong” that we accept in a variety of contexts.) But the parallel right for states is denied by many. States may not, they claim, without moral wrongdoing exercise their unquestioned rights of border *control* in ways that convert rights of control into robust rights to arbitrarily *exclude*.

Very few contemporary states have borders that are simply *closed* to outsiders (countries like Chad and North Korea perhaps currently come closest to this extreme). But between the extremes of closed borders and “open borders” (which are approximated, for instance, within the European Union), there is a wide and legally legitimate variety in the degrees of “hardness” or “softness” of the national borders in the world—that is, a wide variety in the kinds of border crossings (and the kinds and lengths of stays within the borders) that are permitted for those aliens who are taken to pose no criminal or security threats. This is just to say, of course, that the “right to exclude” is understood as a complex, *discretionary* right for states that can be exercised in any number of ways.

For our purposes here, states’ claimed discretionary rights to exclude aliens are best understood as having three general components⁶ (only the first two of which are closely analogous to the legal property rights of landowners): states claim the right to decide when aliens may *enter* their territories (the right to control border crossings), the right to decide when aliens may *remain* within their territories (the right to determine privileges of residence), and the right to decide when aliens may become *members* of the political community (the right to determine citizenship). States could, in principle, claim and exercise only one (p.216) or two, rather than all, of these rights. But existing states in fact claim and exercise all three, differences in state policies turning on how they choose to use the legal discretion these rights give them.

Borders

Because most states find that many state-monitored border crossings by aliens serve (or, at least, do no serious harm to) their national (e.g., economic or educational) interests, they choose to use their discretion in ways that result in reasonably broad legal permission for aliens to enter their territories. It is thus states' various choices regarding the *other* components of their claimed rights to exclude—those that issue in the ways they make available to aliens legal rights of residence and naturalization—that tend to be their more controversial choices, both politically and philosophically. So I next begin to assess such state choices by (very) briefly exploring a few of the central themes in contemporary debates (within political philosophy/theory) about the problem of *immigration*.⁷ As we have seen, states' *legal* rights to determine their own immigration policies are virtually absolute, this being just one implication of international law's recognition of the autonomy of sovereignty entities. But our principal focus here, as always, will be rather on the *moral* question: what moral justifications, if any, can be given for states' claims to possess, if not absolute, at least robust rights to decide for themselves how they will secure their borders and under what conditions (if any) they will allow aliens to cross them and live within them?

Immigration and Self-Determination

The multiplicity of independent states in the world, of course, is what creates the problem of justifying the right to exclude aliens. In a single, global (or universal) state, there would instead be only the (still considerable) problem of explaining the moral legitimacy of nonvoluntarily subjecting individuals and groups to that one state's political authority. Indeed, even in a world of multiple states with viable land left free for appropriation by individuals or groups (including those groups aspiring to establish new territorial polities), justifying exclusion would be far easier than it is in our actual world. For in the actual world—the world in which states, individually or collectively, claim all livable spaces in the universe—the potential for deep helplessness and lack of autonomy (for individuals and groups) is omnipresent: if all states choose to close their doors to aliens, all persons are simply stuck in the countries where the natural lottery first (p.217) places them, however impoverishing, dysfunctional, inhospitable, or alienating those countries might be for them.⁸

Borders

The importance of autonomy or self-government thus factors centrally among the moral considerations that might appear to require of states that they adopt “soft” immigration policies. But the importance of autonomy or self-government *also* drives the opposed case, the case for state rights of unilateral discretion in matters of immigration. For we worry not only about the autonomy of persons trapped in unhappy circumstances (e.g., North Africans wanting to move to Western Europe), but also about the autonomy of established territorial groups (nations, states) and their abilities to control their own fates (e.g., the French and Italians, wanting to preserve their distinctive lifestyles and cultures). The strongest arguments for a robust right to exclude have mostly appealed to some version of the same principle appealed to in international law to justify virtually absolute rights for states to exclude aliens: namely, the principle of *self-determination* (or independence) for legitimate states.⁹ As Michael Walzer puts it, “admission and exclusion are at the core of communal independence.”¹⁰ For Walzer, a group’s right of self-determination includes the right to unilaterally close borders, in order that “communities of character,” with their own particular ways of life, can be created or preserved.¹¹

More recent theoretical appeals to rights of self-determination (in support of robust rights to exclude) have developed more fully some of Walzer’s claims (often, however, without the communitarian trappings of his position). It is necessary, of course, to *analyze* the idea of a national right to self-determination¹²—rather than just to point to it or even to justify it—because the connection (p.218) between a right of self-determination and a right to exclude is far from transparent. Nations may be entitled to be self-determining (just as persons have a right to freedom from interference by others), and so they may (both) be entitled to pursue policies that others regard as unwise or even bad. But a national right to self-determination (like a personal right to freedom) does not include any right to *wrong* others in the process of determining the self. Nations may not, under the banner of self-determination, choose, say, to annex or expel innocent neighbors; for in doing so, they would delegitimize themselves, thus forfeiting a legitimate state’s right to be self-determining. Even, then, if we accept that nations’ legal rights to self-determination are also moral rights, these rights imply discretionary moral rights to exclude aliens only if such

Borders

exclusion does not wrong the excluded (or others). In short, we need an explanation of *why* discretionary self-determination in immigration policy does no wrong.

Recent attempts to link self-determination to exclusionary rights, though, concentrate less on showing that self-determination does no wrong to those excluded (unlike the Lockean approach that I defend below) and more on showing that self-determination advances important interests for the state doing the excluding. The most discussed of these arguments have invoked national rights to freedom of association and rights to preserve the value of national culture. Not surprisingly, these arguments have been advanced by many of the same theorists whose more general accounts of territorial rights we examined in part II. Kit Wellman, for instance, takes the best analysis of a legitimate state's right to self-determination to include robust national rights of associational freedom. And freedom of association importantly includes, Wellman argues, the freedom *not* to associate with others when one so chooses.¹³ Self-determination must include the freedom not to associate because "an important part of group self-determination is having control over what the 'self' is."¹⁴ So when the self in question is a legitimately established association, self-determination includes a (defeasible¹⁵) right to determine who the self will be by determining who will be admitted to and excluded from the association. Just as individuals (who are otherwise doing no wrong) have the right to marry whomever they please (or remain unmarried) and to admit to their club (or exclude from it) whomever they please, so legitimate states have a robust discretionary right to admit or exclude outsiders to their political society.

(p.219) Prominent nationalist versions of the argument from self-determination to a right to exclude, not surprisingly, focus more on the idea of *cultural* self-determination (and thus more closely approximate Walzer's well-known arguments). National cultures play central roles in defining the identities of members, in providing contexts within which meaningful choices can be made by members, and more generally in making it possible for persons to experience a sense of belonging.¹⁶ In interacting with their lands, nations make their cultures and their environments shape one another. Nations make laws to govern their relationships with the land, add value to the land through development and public works,

Borders

imbue the land with various kinds of symbolic importance, bond their families to the land by burying deceased members in it, and so on. All of these kinds of ties to the land can be maintained only through autonomous jurisdiction over the land. But further, all of these sources of value for persons can be secured only if the borders of the land are secured; none can be reliably preserved if nations do not have the freedom to choose those national policies that they deem necessary for that preservation. And one clear aspect of this required national cultural self-determination, the argument goes, is immigration policy. Open borders would present a variety of severe obstacles to securing the values that a viable cultural context makes possible. And that kind of consideration is what justifies robust, discretionary rights for nation-states to exclude aliens.

Such cultural preservation is not only something in which citizens are typically (and justifiably) interested and which bears on their wellbeing,¹⁷ David Miller argues, but also something that is a key to maintaining the level of social solidarity that makes it possible for states to accomplish their morally important goals. Without a reasonable cultural homogeneity in a society, members are unlikely to feel the kinds of identification with and trust in their fellow members that undergird the willingness to accept burdens and endure sacrifices in their shared political lives. And it is on such willingness that the success of democratic institutions and the achievement of social justice depend.¹⁸

Margaret Moore defends another kind of “self-determination theory” of territory (and of the right to exclude) that appears to fit somewhere between the positions of Wellman and Miller. According to Moore’s account, “a ‘people’ has rights to jurisdictional authority over *the territory on which its members are legitimately residing* if and only if (a) there is a shared political commitment to establish rules and practices of self-determination on the part of *a wide majority of members*, (b) they have *the political capacity* to establish and sustain institutions of political self-determination, and (c) they possess an objective history (p.220) of political cooperation together, through, for example, state or sub-state institutions, or in a resistance movement.”¹⁹ The groups that qualify for territorial rightholding thus have much in common both with those described by Altman and Wellman (in their shared commitment to and capacity for political self-determination)

Borders

and those described by Miller (in their shared histories, collective identities, and group solidarity).²⁰ And like most nationalist theorists (but unlike Altman and Wellman), Moore adds specific requirements of “attachment” to (portions of) their claimed particular lands that refer centrally to groups’ identification with, projects that use, and symbolic or religious value conferred on those lands.²¹ Importantly, it is, according to Moore, the value of collective self-determination that establishes for qualifying “peoples” not only their rights to jurisdictional authority over their territories, but also robust, property-like rights to control the natural resources in those territories and to (within limits) exclude would-be immigrants.²²

The grand principle of national self-determination is thus very much at the center of recent attempts to justify robust discretionary rights for states to set their own immigration policies. There is also, of course, a host of more narrowly pragmatic reasons why states might be warranted in using their discretion to severely limit or to halt immigration—reasons that might apply only at particular times and/or in particular states. Massive or unexpected immigration could, for example, put intolerable strain on a state’s economy, its social programs, its (p.221) physical infrastructure, or its ecology.²³ Those who argue against robust state rights to exclude typically do not deny these possibilities—though they often aver that appeals to such reasons for restricting immigration by particular (usually wealthy) states are usually merely self-serving rationalizations—nor do they deny that such reasons might justify limiting or halting immigration.²⁴ Rather, the claim is typically only that states lack the right to exclude aliens at will (or to impose highly restrictive conditions on admission²⁵), that states instead have strong, but still *defeasible*, *prima facie* duties to permit immigration by those who pose no threat to the host state. In short, an important part of what is denied is just that honoring the self-determination of states requires acknowledging a robust discretionary right to exclude.

Much of the case in favor of *open* (or very soft) borders thus turns, *negatively*, on alleged weaknesses in the kinds of arguments we’ve just summarized—namely, those that purport to derive *robust* border rights from the idea of national self-determination. After presenting and questioning some of the arguments for open borders in the next section (“Open

Borders

Borders”), I will argue in the following section (“Border Rights: The Implications of the Standard Views”) that the defenders of open borders are in fact partly correct in thinking that simple appeals to the idea of national self-determination of this sort fail to establish a robust discretionary right to exclude. But I will argue as well (in this chapter’s final section, “Lockean Voluntarism on Borders and the Right to Exclude”) that there are other, better-principled arguments that *can* justify such a right. To foreclose *that* possibility, defenders of open borders require not just *negative* arguments against the purported implications of the self-determination principle, but *positive* arguments *for* open immigration that will defeat all *other* kinds of grounds for justified exclusion. The positive arguments offered in favor of mandatory open or soft immigration policies, however, strike me as unconvincing—or, more precisely, as arguments that would appear convincing only to those who have already *assumed* the failure of all of the possible principled arguments that might support justified exclusion.

(p.222) Open Borders

Of the main arguments for open borders that have been employed in recent theoretical debates on the subject, two sorts stand out: those that appeal to the moral arbitrariness of nationality, and those that appeal to rights of freedom of movement. We have, of course, already considered some aspects of Rawlsian arguments from moral arbitrariness (and their limitations) at several points in this book (most recently in chapter 8). The version of the arbitrariness argument at work here (most prominently in the writings of Joseph Carens) rests on the claim that *nationality* or *citizenship* (like gender or skin color) is an unchosen, arbitrary feature of persons’ genetic and social inheritance. Public institutions that distribute important benefits or burdens on the basis of characteristics over which persons have no control are unjust, at least according to liberal democratic conceptions of justice. But existing states in fact do distribute extremely important benefits and burdens in this way, reserving for their own members benefits that outsiders are denied. And in doing so, even modern liberal democracies do little better than feudal societies, awarding to a select few a set of inherited

Borders

“birthrights privileges” that greatly enhance their life chances (over the chances of those born into less fortunate states).²⁶

As we saw in chapters 2 and 3, the “arbitrariness” of national boundaries lies not only in their historical contingency—that they could just as easily have been located here as there—but further in the fact that these boundaries have so often been established through unjust uses of force. The fact that lands and persons have been illegitimately subjected to states’ political authority may require that state boundaries be adjusted in order to rectify such wrongs. And the equal claim to a fair share of the earth and its resources may require further adjustments. Those, however, are not normally the issues that concern defenders of arbitrariness arguments for open or soft national borders. They want to argue not for adjusting borders to rectify past rights violations, but rather for an ideal of justice that requires opening (or greatly softening) *existing* borders. Their primary appeal is to two simple (and indisputable) facts: (a) no person has any control over the country into which she is plunked at birth (any more than she does over her race or gender), and (b) states nonetheless assign membership or citizenship (and all that goes with them) differentially, according simply to which persons happen to be born where.

Should we take these facts to imply systematic injustice in “the state system,” an injustice to which open or soft national borders are the appropriate remedy? (p.223) It is important to remember that Rawls’s arbitrariness argument, in its original formulation, was operating within a number of background assumptions (as we saw in chapter 8). The first is that the sense in which our starting places in life are “morally arbitrary” is simply that they are *undeserved*. It is just a matter of good or bad luck that we were born here or there or with this or that set of inherited genetic and social assets, not something for which we merit credit or blame (or larger or smaller shares of societal benefits or burdens). As Rawls puts it, “no one deserves his place in the distribution of native endowments, any more than one deserves one’s initial starting place in society.”²⁷ “We can be said to deserve” nothing that is a simple function of either “the outcome of natural chance or the contingency of social circumstances” (for instance, of our being “better endowed” or “more fortunate in ... social

Borders

position”).²⁸ “From a moral point of view the two seem equally arbitrary.”²⁹ Rawls’s own principles of justice, then, “express the result of leaving aside those aspects of the social world that seem arbitrary from a moral point of view.”³⁰

But why does any of this matter? Saying that personal traits—say, gender or nationality—are arbitrary and undeserved in no obvious way implies that their possession is bad or wrong (so that such possession should be corrected) or that such traits or their uses are morally uninteresting (perhaps in ways having nothing to do with desert).³¹ For Rawls, personal assets being undeserved calls for distributive shares (*within* societies) to be made (roughly) equal at least in part because Rawls thinks he has eliminated in advance all *other* possible bases (p.224) (than desert) for distributive inequalities. If people had differential claims on society’s resources, based on something *other than* personal desert, then unequal distributions might *not* be unjust.³² It is not unjust for a society to allow an undeserving heir to inherit (a modest amount of) property, but only because it has determined in advance that heirs have special claims on certain goods, regardless of desert. If individuals (some of whom might nonetheless be undeserving) had special *natural* rights to larger shares of society’s resources, then it might not be unjust to allow those claims to determine or influence (and thus make unequal) societal distributive shares.

But Rawls rejects on independent grounds claims of (logically prepolitical) natural rights over distributable resources.³³ The reasoning of which Rawls’s claims about moral arbitrariness is a part is precisely designed to *determine* all bases for differential claims, not to rest on them. If all this is correct, though, the open-borders argument from the moral arbitrariness of nationality looks as if it must either be confused—supposing (as it often appears to) that the arbitrariness of nationality *by itself* calls for equal access for all to all societies’ membership rights—or be tacitly accepting the entire body of Rawlsian (or similar) political philosophy, along with its (in my view, indefensible) rationale for dismissing all claims of natural rights to goods. Perhaps some who employ the argument from the arbitrariness of nationality confusedly suppose that moral claims of *desert* are the only kinds of moral claims there are—so that if national “birthrights” are undeserved, distributions based on them *must* be unjust—or perhaps they are simply assuming (without

Borders

supporting the assumption with the requisite systematic argument) that all defenses of states' differential claims over lands, resources, and wealth have failed. Either problem would be fatal to the argument. And the latter problem would involve just assuming what must be (p.225) shown: namely, that states have no property-like territorial rights that might justify their choices to harden their borders and reserve (admittedly undeserved) citizenship for those they select.

It is also worth reiterating, second, that Rawls's arbitrariness claims are made by him quite explicitly as part of an argument for *domestic* distributive equality, *within* states. Arbitrariness arguments cannot be used to establish the injustice of "the state system" because there *is* no state system of a sort suitably analogous to a single bounded state. There are only separate states, dealing coercively with their own jurisdictional tasks. And there is, Rawls thinks, a special burden of justification that states owe their own citizens for the systematic coercion to which they, unlike outsiders, are nonvoluntarily subjected (as we saw in the introduction). States can justify their unsolicited use of coercion over, and adequately justify this *to*, their (nonvoluntarily subjected) "captive audiences" only by insuring that they are all treated as fairly as possible by the institutional structure that will inevitably shape their lives and determine their prospects. No such justification is owed to those who live outside the state's domain of direct coercion, to those whose life prospects, while obviously sometimes affected by the state's domestic policies, are not so directly, immediately, and intentionally determined by them. So the Rawlsian argument from moral arbitrariness to equal distributions is conceived by him as part of an especially strict and demanding justificatory requirement, one that is (arguably, at least, and certainly in Rawls's view) not at issue in the same way in the international context (as we will see below). One will need, then, a great deal more argument for open borders than simply citing the egalitarian conclusions that appear to flow from Rawlsian arbitrariness arguments.

Consider next the freedom of movement arguments for open borders. Again, Carens is perhaps the best-known proponent of such arguments. According to Carens, we liberals believe that "people should be free to pursue their own projects and to make their own choices about how to live their lives so long as this does not interfere with the legitimate claims of other individuals to do likewise."³⁴ Believing this, we also are

Borders

committed to regarding freedom of mobility within a state's borders as a fundamental right in liberal societies, since restricting internal mobility would undermine this essential freedom. But the very same interests that support such a right of internal mobility, Carens argues, support a right of free movement *across* national borders. Each kind of reason a person might have for moving within a state's borders she could also have for moving across a state's borders.³⁵

(p.226) A natural way to resist such claims is to try to deny the analogy—between the interests at stake in domestic and international movement—on which the argument rests, perhaps using some of the same kinds of points employed above against arbitrariness arguments. When one's own state denies one freedom of movement, the freedom to formulate and pursue one's own life plans is also deeply and systematically restricted. By contrast, when one is denied the opportunity to move between countries, one still has access to the opportunities to pursue projects and make one's own choices that are available domestically (and in countries that opt not to exclude aliens from their territories). If conditions are sufficiently bad in one's home country that minimally acceptable opportunities for an autonomous life are *not* available there, then other arguments come into play that might ground obligations of international assistance or accommodation. But these new arguments would be ones that could be accepted even by those who defend broad (but defeasible) discretionary state rights to exclude aliens—especially given that such assistance can often be given in forms that do not involve opening one's borders to some or all of those aliens suffering from poverty and oppression.

Carens has responded to arguments of this sort, observing that most liberals would not be willing to accept the domestic analog of this stance—namely, that societies might acceptably restrict movement considerably *within* their overall territories, provided only that minimally acceptable opportunities for an autonomous life were available in smaller portions of those territories. If I can freely formulate and pursue a life plan without leaving my province (state, county, city, neighborhood), what would then be wrong with my state's hardening its *internal* borders to restrict my freedom of movement to movement within my province or town?³⁶ The

Borders

importance of autonomy (for liberals), Carens holds, is simply too great for such domestic interference with free movement to be morally acceptable.

That might, in fact, all be true. But I do not think even an admission of that sort should be thought to compel acceptance of open borders. For this argument from freedom of movement *again* has force only if all *other* grounds for justifiably excluding aliens—grounds that might yield conflicting or superior moral claims for states to exclude aliens—have already been assumed away. Just as my discretionary rights to restrict others' movement on my own property are far more extensive than my rights to restrict their movement elsewhere, a state's right to restrict international movement onto its territories might be a *special* right, grounded in the nature of its history with the land in question. And this special right to secure its borders might be one that it simply cannot hold internally, against its own subjects—perhaps because those subjects (in legitimate (p.227) states) have surrendered to their state only rights to govern the state's *external* boundaries (as I will argue below). Only an assumption (that I do not accept) that such arguments are off the table from the start—an assumption that we have somehow accomplished a Rawlsian clearing of the moral decks before our real debate begins—allows analogical freedom of movement arguments to (appear to) yield the desired conclusions.

Arash Abizadeh has defended a slightly different version of a freedom of movement argument for soft borders, one that appeals to the need to justify the *coercion* involved in closing borders to aliens. Liberals (including Rawls) believe, as we have just seen, that the coercive political power exercised by states over their subjects requires special justification (*to* those subjects). But, argues Abizadeh, "the regime of border control of a bounded political community subjects both members and nonmembers to the state's coercive exercise of power. Therefore, the justification for a particular regime of border control is owed not just to those whom the boundary marks as members, but to nonmembers as well."³⁷ The only adequate justification of this sort requires inclusion for those excluded by closed borders, an expansion of the (presumed) *demos*. The state's supposed unilateral discretionary right to exclude is thus undercut from the start by the same kinds of

Borders

moral considerations that undercut domestic injustice and tyranny.

One obvious way to challenge claims like these is to dispute either the technical idea of “coercion” at work within the argument or the assumption that all kinds of “coercion” equally require moral justification. David Miller, for instance, responds to Abizadeh’s argument by distinguishing between “coercion” proper and mere “prevention.” Prevention, Miller claims, does of course in one way reduce freedom to act; but it does so without undermining autonomy (and so without requiring the kind of democratic justification that coercion requires).³⁸ Now I do not, myself, believe that any of the various technical accounts of coercion on offer (including the one employed by Abizadeh) can be counted as simply the best account, *tout court*—as opposed to just being the best account for illuminating some particular set of philosophically interesting distinctions. But even if, against Miller, we do insist that one account of coercion (namely, the one preferred by Abizadeh) is correct, and that what Miller calls “prevention” is really just “coercion,” Miller is surely right at least about this: there is a morally interesting difference between *kinds* of coercion—that being “stopped from” doing some specific act (such as crossing a border) is different from being “forced to” do a specific act (such as serving in your country’s military), at least partly because a wide range of viable, related options remains in former case, (p.228) but not in the latter.³⁹ While a state’s closing its borders does involve threatening with a coercive response those who attempt unpermitted border crossings, it also straightforwardly involves *declining* to use state coercion to compel any other particular conduct by aliens.

More generally (and as Miller’s arguments also suggest), the plausibility of coercion-based arguments (of the sort used by Abizadeh) depends on two assumptions, neither of which seems true. It depends first on there being no differences in the kinds of required moral justifications for using coercion that turn on how wide-ranging or systematic the coercion in question is. And it seems obvious that there *are* such differences. Isolated or minimal coercion is simply easier to justify than is more enduring, more extensive coercion. The relevance of this point is obvious, and it is part of what drives the Rawlsian distinction between the domestic and the international political conditions. The coercion to which aliens

Borders

are subjected by the presence of closed borders is of a completely different kind and order from the wide-ranging, systematic coercion to which states subject their subjects. Aliens are denied the opportunity to make one particular choice (or set of choices)—namely, to cross the particular closed border and reside in that particular country. This may, of course, have a considerable impact on would-be immigrants, by denying them things of great importance (or of great importance to them). But citizens subject to their own states' laws, even under the least intrusive existing legal systems, are subject to coercion across an enormous range of the most central areas and activities of life. It is this more systematic coercion that grounds for states a special, different burden of justification owed to their own subjects than is owed to any excluded aliens.⁴⁰ (This is, roughly, the position of many theorists who defend broadly Rawlsian views, such as Thomas Nagel and Michael Blake.⁴¹) And the lesser burden in the latter case (of excluded aliens), of course, means that states may well be able to meet it by offering less than they offer their subjects—that is, by offering things far short of simply opening their borders, or opening their society's system of political participation, to those who are excluded.⁴²

(p.229) But the case for exclusion does not need to be made in such relative terms, comparing two kinds of burdens of justification; because, second, coercion-based arguments for open borders again depend on there being no *special, direct* moral justifications available for coercive exclusion of aliens. But such direct justifications are, in fact, a commonplace in what appear to be analogous cases. Landowners, for instance, while perhaps precluded from using certain kinds of coercion against trespassers, are certainly permitted to lock their gates against them. Homeowners may lock their doors against would-be intruders, even against those who seem likely to be harmless and those who are not fellow citizens. (Indeed, my own view is that this would be true even in a state of nature.) If such "coercion" is simply directly defensible (without the necessity of including would-be intruders in some sort of "justifying process")⁴³—say, because of the kinds of important interests at stake in legitimate claims to property—why may states not lock their border gates with similar warrant? The coercion at issue in property cases is *disanalogous* to that used by states in excluding aliens *only if* we assume in advance that states can *have* no special property-like claims to their

Borders

territories. And that—again—is precisely one of the central points at issue in the debate. No argument that must in this way simply *assume* the falsity of state claims to property-like rights can have any *independent* force in a debate about the moral justification of states' rights to exclude. It can at best just illustrate the hypothetical moral consequences of states' *lacking* property-like territorial rights.

Border Rights: The Implications of the Standard Views

Those who have written about states' territorial rights have, by and large, had considerably less to say about states' border rights—and states' property-like rights generally—than they have about states' jurisdictional rights. This is not surprising. Most recent discussions of territorial rights have (as we've seen) either been functionalist through and through or built around a functionalist account of state legitimacy. And functionalism operates most naturally and (p.230) plausibly when it is attempting to explain states' core jurisdictional authority. Certain kinds of territorial control do indeed seem essential to states successfully discharging their morally mandated functions (such as doing or making possible justice).

What is far less clear is why we should think that the more property-like aspects of states' claimed territorial rights—such as robust rights of control over (or “ownership” of) natural resources in (or around) the effectively governed territory, or a robust discretionary right to exclude aliens from crossing or living within the borders of the effectively governed territory—*also* are essential for fulfilling states' moral mandates. Indeed (and again, as we've seen throughout this book), functionalist theories have struggled to plausibly locate the moral boundaries of legitimate states at all—that is, struggled to explain why we should identify the morally legitimate borders of states' political authority with the *de facto* reach of their effective, justice-administering institutions. How states *came to* administer justice over particular lands and people seems vitally important to the legitimacy—and, hence, to the valid extent—of their territorial claims. And this fact piles worries about functionalist justifications for robust (property-like) border control upon the more basic worry that the functionally

Borders

specified borders themselves are not even the legitimate boundaries of states' mundane jurisdictional activities.

Can functionalism deal with these problems? We have already seen (in our discussion of resource rights) some strong reasons to think it cannot. Even if we simply *disregard* the boundary problem for functionalist theories (detailed in part I) —by supposing for the moment that functionalism can somehow identify specific and morally legitimate borders over which states may justifiably exercise discretionary control— there is no apparent reason why discharging a moral mandate to do justice or promote utility requires that states possess a unilateral right to exclude aliens. Doing (or making possible) justice, by instituting and enforcing a particular regime of property rights or by making holdings more equal, say, does appear to require jurisdictional rights over (some) territory. But it does not obviously require unilateral state discretion to exclude aliens who pose no threats to justice-administering institutions. And the promotion of utility (the concern of utilitarian functionalists) may often in fact require substantially curtailing such state discretion.⁴⁴ There may, of course, be circumstantial (p.231) limits to the numbers or kinds of immigrants that states can absorb while still effectively administering justice to all members (or successfully promoting social utility). But these limits establish no *principled* reason—of the sort necessary to ground a *right* of pure discretion—why states require the power to unilaterally exclude aliens.

The very same problems appear to face those accounts of territorial rights that rest on functionalist theories of state legitimacy, but that are not functionalist through and through (such as Altman's and Wellman's plebiscitary voluntarism or Nine's "Lockean" account of territorial rights). It is at this point, of course, that the arguments from self-determination (introduced above) are supposed to enter to save the day. Respect for collective self-determination, for an incorporated group's free political choice, is supposed to require that states be able to exclude aliens according to their own, procedurally legitimated immigration policies.⁴⁵ Otherwise, groups are not genuinely self-determining, not able to control their own fates by their own choices, not able to express their chosen ways of life in their rules and policies.

Borders

But why—short of eagerness to embrace whatever definition of “self-determination” yields the desired conclusions here—should we accept such claims? Can we not respect an autonomous state’s right to be self-determining without also permitting it to simply choose as it pleases in the matter of excluding aliens? Can’t it count as self-determining in virtue of its having independently constituted itself as a political entity, combined with the self-governing practices of its members, practices operating independent of outside interference, without also needing to have that membership itself determined solely in accordance with its own will? Whether we count a group as self-determining—just as whether we count an individual as free or autonomous—clearly depends on which areas of activity (or “determination”) we think important to the group’s functioning and on the extent to which activity in those areas “flows” acceptably from the “self” in question. Thus, self-determination is also plainly a matter of kind and degree, rather than a simple, all-or-nothing concept. Theorists trying to extract conclusions about territorial rights from the very idea of group self-determination—an idea of which, of course, we all enthusiastically approve (without, though, agreeing on a definition of it)—often find themselves (p.232) legislating among the possible understandings of self-determination, insisting that it is groups’ rights to “genuine” or “true” or “robust” self-determination that imply the desired conclusions.

But surely, even if we thought (as I do not) that there were one “genuine” way in which a group could qualify as fully self-determining, there are obviously (and as we have seen) other weighty moral considerations in play that argue *against* group rights of full self-determination. Our concern should not be to ask what makes a group *fully* (genuinely, robustly) self-determining—as if self-determination were the *only* value of interest—but rather what makes it adequately or acceptably self-determining (in the same way that we insist that individuals, in order to count as free or autonomous, require an adequate or acceptable—but not necessarily the maximal possible—range of real options in important areas from which to choose). After all, no group in a world of multiple sovereign states can expect to be *entirely* self-determining, can expect not to have other groups’ (e.g.) economic or political choices at all affect and limit their own range of available economic or political choices. So our question(s) here should be: can states

Borders

or nations or peoples be acceptably or adequately self-determining *without* holding property-like territorial rights over all resources in and around their places of residence and *without* holding property-like discretionary territorial rights to exclude aliens? In the last chapter, I defended an affirmative answer to the former question. And I have seen no ~~very~~ good reasons offered to support a negative answer to the latter.

It is true, of course, that settled groups often have an “interest” in restricting immigration, in order to “prevent unwanted changes in their environment” and preserve the “character of their community.” Setting their own rules concerning entry and exit is undoubtedly one way in which groups foster their “own conception of how they want to organize their society.”⁴⁶ But why should we suppose that groups have a moral right to simply legislate their tastes and preferences in these ways? Not, I think, because they would fail to count as having a real or adequate right to be self-determining if they did not. If affluent nations were required to accept some reasonable quota of unwanted immigrants, it would seem a bit hysterical to assert that they, as a result, no longer counted as self-determining polities (any more than their accepting the authority of the World Court would count as rendering them interestingly non-self-determining). The vaunted right of self-determination is thought by almost nobody to be an *unlimited* right to act according to the group’s expressed will, a will which could, of course, dictate human rights violations, the expulsion of desperately endangered refugees, and so on.

(p.233) “Unwanted changes” in our communities are, of course, unwanted. But we enjoy no general moral right to be free of unwanted changes, either individually or collectively.⁴⁷ When old folks (like me) lament the passing of “the good old days,” the lament may seem pathetic. But it is a lament that sometimes flows from genuine, even quite serious, feelings of alienation, irrelevance, loss, or outrage. When the young no longer value what we value, no longer feel about their countries, neighborhoods, or families the way we feel, no longer dress, talk, or eat as we do, the changes in lifestyle to which we are then forced to adjust are, for many, mostly “unwanted.” Yet we rightly feel nonetheless that it would be deeply wrong to use the coercive powers of the state to prevent such change. Much of the threat posed by immigration to culture or collective identity is of this same order. And we

Borders

should feel it similarly wrong in the latter case to use the jurisdictional authority of the state to “protect ourselves” from such change.

While we no doubt tend to romanticize a bit the cultures and lifestyles of aboriginal or exotic peoples, it is undoubtedly true that many unwanted changes to those cultures have had profound and enduring negative impacts on the quality of life of group members. But most contemporary cultures are far less unique and vulnerable; they overlap significantly with others and are far less fragile in the face of change.⁴⁸

Distinctive, sacrosanct practices that might be undermined by “cultural dilution” grow fewer and fewer with the homogenization wrought by global society. And many of the most contentious differences between contemporary cultures are based in ethnic or racial biases and in histories of hatred and warfare, differences that we should be happy to see lessened (and changed in ways that are no doubt “unwanted” by insiders), rather than scrupulously preserved.

In this context, we should also remember that most of the “supersessionists” who advance arguments proceeding from (collective or cultural) self-determination to a group’s right to exclude are happy enough to follow Waldron in allowing that aboriginal peoples were obligated as a matter of justice to share their lands with settlers, thereby permitting (very unwanted) changes in the (much more vulnerable) “characters of *their* communities.”⁴⁹ The majority groups that are said by self-determinists to possess rights of jurisdictional (p.234) authority in “their” territories have, by contrast, relatively little to fear (and stand a good chance of reaping unexpected enrichment) from reasonable levels of unwanted immigration. The majority controls the laws, the politics, the social and economic policies of their states. Their “collective identities” seem certain to survive a fair bit of unwanted immigration. That they want to control more, to be still more “self-determining” than this, exercising unilateral control over their immigration policies, is perhaps unsurprising, but surely does not describe plausible grounds for asserting a moral right to do so.

Perhaps, though, the appeals to self-determination at work in the specific plebiscitary voluntarist and nationalist positions described above will be found more effective. Wellman, remember, fills out his notion of group self-determination in

Borders

terms of freedom of association. If groups are compelled to admit unchosen outsiders to their group, they are not free to create or sustain a group that reflects their own values or preferences—that is, they are not being permitted to *not* associate. Hence, they do not really count as enjoying a right to freely associate, hence to be self-determining, at all. Wellman supports these claims, as we've seen, largely by citing analogies to our understandings of other kinds of associations, like families⁵⁰ and clubs.⁵¹ But it seems plausible to respond to such claims that states are not really much like clubs or other local associations of this sort, at least given the ways in which the state system currently operates.

If you decide to reject my proposal and marry someone else (or remain unmarried), there are still, as they say, plenty of other fish in the sea for me. If you and your associates exclude me from your club, I can always go and (at least try to) make a club of my own (from which *I'll* then exclude *you*). But states, unlike clubs, control all of the viable land on which new, rival states might be established.⁵² And even if they did not, the difficulties and costs involved in finding, organizing, and relocating the like-minded potential members of a new state—along with the difficulties of establishing a brand new basic structure of institutional rules for them—would be prohibitive (especially when compared to the possibly quite minimal costs of simply joining the already established society). An even more obvious disanalogy between marriages or clubs and states, of course, is that marriages and clubs are (typically) fully voluntary associations, where modern states never are (including any states that might be counted as legitimate by Wellman, who [remember] characterizes legitimate states as “nonconsensual (p.235) associations”). And given that legitimate states are supposed to operate according to majority rule, many “members” of political “clubs” can thus both be trapped (nonconsensually) within the claimed borders of functionally legitimated states and systematically outvoted on crucial matters by stable majorities of fellow citizens (like the kidnapped club member discussed in chapter 3). Such “members” don't in the end really much resemble the members of the nonpolitical clubs, marriages, or other kinds of voluntary associations with which we are familiar.⁵³

Borders

Could the right to *secede*, whereby trapped minorities might use for their new association some of the territory claimed by some state(s), solve any of the problems here? Not if (as we also saw in chapter 4) existing states may simply stop groups from acquiring those characteristics (such as territorial contiguity, wealth, or political capacity) on which the right to secede is said to rest. Worse, of course, while I set it aside momentarily (in order to explore functionalism's additional problems), the boundary problem persists as a continuing defect of all theories built on functionalist foundations. Unless we just assume with them (without compelling reasons) that the mere effective reach of contemporary states' institutions, no matter how despicably achieved, is what determines states' legitimate territorial extent—and that the rights to land of all prior occupants have been conveniently superseded—functionalist accounts of state legitimacy seem to lack the resources to explain what it is that “attaches” functional polities to any specific, bounded territorial domain. And trying to justify the use of nonfunctionalist additions to their theories to handle this problem, as we've seen, appears to be a losing proposition.

When all is said and done, then, it may seem that nationalist theories of territorial rights are the best positioned (of the three standard views on the subject) to answer skeptical concerns about justifying states' border rights, states' rights to exclude—just as nationalism at least appeared to be better positioned (than its rivals among the standard accounts) to justify the particular claimed borders of particular states and their rights of resource control within those borders. The alleged *essential* connection between particular nations and particular territories seems to be an especially natural argumentative route to justifying the property-like territorial rights claimed by states. But we have already seen some of the problems that appear to block that route.

David Miller, for instance, says that using his own nationalist account to motivate states' *jurisdictional* rights is easy:

Borders

[it is] not difficult to justify rights of jurisdiction on the basis of what has been said. Rights of private property alone will not do the job of (p.236) protecting . . . this added cultural value because a) such rights are always susceptible to being redrawn by whoever holds rights of jurisdiction and b) much of the embodied value that the group has created is likely to be located in public space—in public architecture, landscapes of historic significance, and so forth. The group needs to maintain overall control over the territory in order to secure that value over time, and for that it needs rights of jurisdiction such as those normally exercised by a state.⁵⁴

Suppose we allow this, *arguendo*; so far, so good, we might say. But what is it that justifies the property-like territorial rights that extend beyond such merely jurisdictional rights? We have already seen (in chapter 8) that nationalist reasoning does a poor job of justifying anything like the full range of rights over natural resources that are claimed by modern states—and that the Lockean approach offers a more internally consistent and intuitively compelling account (indeed, an account from which nationalists tend to borrow) of the kinds of resource rights (and of claims to “added cultural value”) that nationalist reasoning does seem capable of motivating. What about states’ rights to exclude aliens?

Here, remember, the standard nationalist moves echo Walzer’s appeal to the importance of “communities of character”: nationalists tend to point to the value of particular national cultures and the “contexts of choice” that they provide their members, along with the vital ways in which members’ very identities turn on the preservation of those particular cultures. Without the right to decide unilaterally to exclude (all or specific) aliens, nations cannot preserve these important goods for or with their members. It is thus rights of “cultural self-determination” that are alleged to underlie states’ discretionary rights to exclude aliens. Miller, for instance, says that “a common public culture . . . in part constitutes the political identity of [states’] members.”⁵⁵ And insofar as undermining the features essential to peoples’ capacities for self-identification is a great harm to them, cultural self-determination is a legitimate interest of national groups.

Borders

Nation-states cannot protect their cultures and their members' access to it (e.g., through preserving a common first national language) without the right to restrict invasive, pluralizing or homogenizing immigration.⁵⁶

But it is hard, first, to see how such nationalist reasoning will yield anything like clear borders for states to control. Since national groups, including groups with political ambitions and identities, often spill across state borders or lay rival claims to the same border areas, it appears that nationalist reasoning must appeal (p.237) to either functionalist or conventionalist reasoning—neither of which, as we've seen, deals well with the boundary problem either—to try to resolve this difficulty. More obviously perhaps, the idea of "culture" is something of a moving target in such nationalist arguments. Nobody thinks, of course, that there is a clear, all-purpose definition of "culture" available for use here. But the nationalist argument tends to equivocate between two quite different notions of culture, sliding from one to the other as the immediate rhetorical need dictates.⁵⁷ As we have seen (in chapter 4), Miller, with many other liberal nationalists, acknowledges the point that modern nation-states are simply *not* culturally uniform in the sense of "way of life culture," culture that involves shared traditions, religion, language, history, lifestyles, and so on. Modern states are irreversibly culturally pluralistic in this sense of "culture." That fact by itself threatens to short-circuit from the start nationalist arguments for self-determination—or to unhelpfully limit their applicability to multiple, possibly "layered," substate groups, typically with overlapping, conflicting, or interstate territorial claims.

So Miller (with others) slides in his arguments to the idea of a statewide *public political culture*, and it appears to be the value of national "culture" so understood that is said to ground national rights of self-determination. But shared public political cultures (in liberal polities) will both tend to be quite similar to one another in important ways—compare the political cultures of the various Western liberal democracies—and to consist primarily in shared commitments to certain broad political principles and to shared reverence for certain defining political events and foundational documents—such as principles of democratic proceduralism or respect for human rights and reverence for the society's political constitution and the events commemorated by national holidays.⁵⁸ It is simply

Borders

unclear why “culture” understood in this way should be thought capable of playing the same role in nationalist arguments for a right to exclude that “way of life culture” appeared to play in communitarian arguments like Walzer’s.⁵⁹

A particular shared public political culture—while undoubtedly important in a variety of ways (e.g., to maintaining societal “stability for the right reasons”) and implicated in various ways in our senses of “who we are”—is still merely a “foreground” behind which operate a host of other nonpolitical societal features (such as family, language, work, neighborhood, friends, church, lifestyle, cuisine, economic class, etc.) that provide independent contexts of meaningful choice (p.238) and bases for self-ascriptions of identity. Some groups’ “way of life cultures” (say, the culture of an aboriginal people in a colonized land) can perhaps plausibly be said to be vital to sustaining the very identities or contexts of meaningful choice for those groups’ members. But a state’s public political culture seems much less the kind of thing that would be naturally threatened by soft immigration policies than does a particular, distinctive “way of life culture.” In the latter case, but not the former, it is easy to imagine a “culture” being diluted, altered, or corrupted by a steady flow of immigrants, immigrants who bring with them their new and different languages, lifestyles, and histories. “Way of life cultures” thus might seem sensitive to immigration in the right way—that is, in the way the nationalist arguments require—but they are plainly not uniform across modern states (or even across substantial regions) in the right way to yield the desired nationalist conclusions concerning states. Political cultures, by contrast, are (or, at least, may be) uniform across states in the right way, even if they may not yield clear moral boundaries for states; but they seem not to be the kinds of things that are inevitably affected (to their detriment) by an influx of immigrants, at least in the right ways for nationalist arguments from cultural self-determination to succeed.⁶⁰

A state’s public political culture in fact appears to be far more vulnerable to internal and generational (as well as international) forces for change than it does to the influence of typical immigrants, who are often eager to fit into their new communities and avoid calling unwanted attention to themselves or rocking the boat. And public education concerning the political culture, not the systematic exclusion of alien influence, seems the natural (and far more obviously

Borders

morally defensible) strategy for addressing any undesirable threats to “culture” (understood politically). Immigration seems to genuinely threaten a state’s public political culture primarily when excessive immigration threatens the state’s very viability, by overwhelming its social programs, infrastructure, police, or governmental and legal structures. And in that kind of case, nationalists are far from being the only ones with plausible arguments supporting a state’s right to restrict or halt immigration. Arguments for states’ rights to exclude that appeal to the importance of cultural self-determination thus seem to me to fail on their own terms. It is, I think, only a kind of equivocation on the idea of culture (or, less charitably perhaps, the kind of desperate conservatism that we all sometimes experience in the face of lost ways of life) that makes such arguments seem initially compelling.

So, to summarize the results of this section: all of the standard approaches to territorial rights seem unable to convincingly defend robust rights for states to exclude aliens—just as they seemed unable to defend other aspects of states’ (p.239) claimed property-like territorial rights. This failure can, of course, be taken in two different ways. We might conclude, first, that all of these theories are simply defective. And perhaps many of these theories’ defenders would agree that my arguments, *if* they were successful, should be understood to have that conclusion. Alternatively, we might conclude that states simply *lack* many of the property-like territorial rights that they claim for themselves, and that the standard approaches in fact successfully converge to confirm that truth. I believe that this latter conclusion is partly correct. As my arguments in this book have suggested, many of the property-like rights that states claim, like some aspects of their jurisdictional claims, are simply incapable of moral justification (according to the dictates of *any* plausible political philosophy). But even once that is conceded, many will no doubt be left with the sense that this cannot be the whole story. Surely legitimate states, even if they lack *some* of the property-like rights they claim, must still at least have *more* of a discretionary right to exclude aliens than any of the standard approaches has been able to demonstrate. The Lockean theory that I support shows us, I think, the rest of that story.

Lockean Voluntarism on Borders and the Right to Exclude

The border rights for states that can be justified within a Lockean voluntarist theory of territory are far from absolute rights to pure discretionary exclusion. But the Lockean theory I support does at least show how such state rights *could be* relatively robust (while the competing accounts we've just considered seem unable even to show that). And it shows this by according precisely with commonsense intuitions about *why* it seems acceptable for states to decide to exclude outsiders. That, I think, is yet another indication of the fact that the Lockean theory best articulates the principles that actually structure our ordinary view of states' territorial rights—principles that are often co-opted, without adequate justification (and sometimes in ways that are inconsistent with their cores), in theories that utilize “Lockean” elements or analogies.

The Lockean ideal of the legitimate state (or civil/political society), remember, is that of a substantial group of persons who willingly create (or join) a group committed to persisting as a viable, governed territorial polity. Agreement to be a member of such a group implies agreement to (among other things) “join” any holdings in land (that is, land over which the member has moral rights of exclusive use) to the political territory over which the group will collectively exercise jurisdiction. Provided that this accumulated territory does not exceed the quality and amount that the proviso dictates must be left for others, its creation and preservation do no harm to the freedom of others. States of this sort may expand (p.240) their legitimate territories by adding new, consenting members along with their just holdings, or by additional mixing of labor with land by either individual members or members acting collectively, on behalf of the whole (provided, as always, that the additions satisfy the proviso). The state may create public spaces by collective labor or by lawful appropriation of portions of private holdings, making room for roads, bridges, schools, parks, and so on. And it will inevitably create as well formal institutions of government and law, through which the state's jurisdictional and property-like territorial rights will be administered.

Borders

What is distinctive about this Lockean ideal of the legitimate state, of course, is not only that such a state governs no unwilling subjects, but that it claims territorial rights over no land or resources over which its members, individually and/or collectively, do not have strong exclusionary rights. Land that is privately owned in such a state will be protected by both the rights reserved for individual landowners and the rights landowners are required to surrender to the state (such as those rights which permit the state to exercise jurisdiction, control national boundaries, regulate uses of resources, etc.). The rights over land that are thus shared between landholders and state add up to (since they were derived from splitting the incidents of) the strong ownership rights over land which individuals may naturally acquire by their labor (subject to the proviso's constraints). Further, land that is public in such a state will be owned in just as strong a fashion by the people as a whole (holding their rights as an incorporated, collective agent), along with the public spaces, buildings, roads, schools (etc.) built on public land.

A state, so conceived, is entitled to fence, control, and exclude in the same ways that an individual landowner is. Moreover, of course, the members are collectively entitled to exercise unilateral control over whatever nonterritorial products flow from their individual and collective labors—including control over the institutions and practices that they create and sustain. The society may (as a landowner may) decide to allow some (or all, or no) outsiders to reside in its territories or become members of the society, as these policy decisions flow from the society's chosen mechanisms for dispute resolution (to whose operations all members have necessarily consented, explicitly or implicitly, in becoming members). And all of this, I think, accurately reflects the reasoning that would likely be cited by most to support the ordinary belief that good states are morally permitted to (e.g.) set their own immigration policies. That from which the members of legitimate political societies exclude the alien is, quite simply, *theirs*, and they may decide for themselves when and how to share what is theirs. A compassionate state, like a compassionate property owner, will share freely. But no legitimate state is *obligated* to share what is theirs with whoever requests it. They may use their own discretion in such matters—at least within limits,

Borders

limits that are *also* effectively captured by Lockean ideal theory.

(p.241) For there are several natural limits to what may be held under claims of Lockean territorial right, even beyond those established by the proviso's constraints on legitimate appropriations and holdings. We saw in chapter 8 what some of those limits are with respect to state claims over resources. Further, in my view, the legitimacy of private appropriation of portions of the world—and hence also that of collective jurisdictional and property-like territorial rights for states—turns on the fact that appropriation of portions of the common must be possible if individuals are to have an effective right to be genuinely self-governing and independent. Hence, the Lockean theory I support holds that those who are incapable of such independence, even when they are left enough and as good by the appropriations of others, have rights to what they need to lead self-governing lives. There are thus individual natural duties on us to do our fair share of the work required to assist the world's less fortunate inhabitants—duties that must be discharged either individually by societies' members or collectively by their societies.

Legitimate states' rights to exclude—and to be clear, we are still discussing only *ideal theory* (and are still assuming full compliance with the demands of morality by all parties)—are thus not absolute, since it may be necessary for a state to admit its fair share of those willing aliens who cannot otherwise (i.e., without admission) be assisted in living self-governing lives. But states' border rights are certainly *robust* discretionary rights on this model, identical to those that an individual with exclusive property rights in land may exercise with respect to that land. Once all obligations to aliens have been met (by required assistance to outsiders and by satisfying the proviso's requirements), no alien has any valid basis for complaint about being excluded. Nor may outsiders reasonably complain because they are not permitted to control or participate in the institutions and practices that the state's members have collectively created. This all assumes, of course, that the states in question have not entered into any (binding) special agreements concerning these matters with other states, groups, or persons. On the Lockean model, absent such agreements states (and their rightful members) remain in the state of nature with respect to all alien persons and groups, bound to them only by the rules of natural

Borders

morality (to which all remain always subject). Further, because legitimate states' territories are possessed with the force of property rights, not only are states generally at liberty to exclude aliens, but aliens (like would-be trespassers) usually have moral duties to refrain from unpermitted border crossings.⁶¹

(p.242) Lea Ypi is among those who argue that while such Lockean reasoning might be able to explain states' *liberty* rights to *use* portions of the world, it cannot ground states' rights to exclude others from the portions they use, their rights to employ coercion to exclude aliens (in the manner of an owner of property). This is true, she contends, even of Lockean theories that acknowledge limits to states' rights set by some version of the Lockean proviso.⁶² Her principal example to illustrate the problem for Lockeans is that of a public bench in a pleasant spot, used regularly by friends. No matter how attached the friends may become to "their" bench, no matter how regularly they use or even maintain it, they cannot by such means acquire any right to exclude others from using it as well.⁶³ But as the example makes clear, the force of Ypi's argument depends on our simply accepting her Kantian assumption that in state-of-nature relationships, persons (and hence ultimately states, depending for their territorial rights on portions of persons' state-of-nature rights over things) can acquire at most only (provisional?) moral rights to use things, not property-like claim rights with legitimately controlled boundaries. Ypi, for instance, says that Lockean-style "acquisition-based" theories of territory try to explain states' rights to exclude aliens by asserting individual (and state) property claims that illegitimately "disrupt" the regime of "communal use" with which such theories begin their reasoning.⁶⁴

A properly developed Lockean theory, though (as we have seen), has the resources to answer such objections. The relevant background regime of communal use of the world, in a Lockean theory like my own, is one of (limited) unilaterally divisible positive community. Permissible unilateral divisions result in property rights that are (also within limits) fully exclusionary. The relevant regime of communal use, while in some sense "disrupted" by private appropriation, is in no sense *corrupted* by it, since all continue to enjoy the same opportunities to use their fair shares of the world or to appropriate holdings as good and as extensive as those

Borders

already appropriated. If, for instance, instead of one public bench in a lovely spot, there were as many such benches as people who wanted (p.243) to use them, all equally pleasant and convenient, there would be no obvious reason why the use, attention, and labor lavished on one such bench by friends should *not* give them exclusionary claims over it. Others' objections to being excluded from using that particular bench (and thus from benefiting from the labor the friends have invested in it) would in that case just look like an unreasonable demand to ride (sit?) free.

The Lockean (ideal-theoretical) claim that legitimate states' territories are simply *theirs* may, at first, seem similar to another position that has been recently defended in discussing immigration theory. Ryan Pevnick, in defending his "associative ownership view," also characterizes legitimate states as associations that possess (broadly) Lockean rights over their societal accomplishments (including their political institutions, their public infrastructure, economy, educational system, etc.).⁶⁵ Those who contribute to the creation and maintenance of such things have a (limited) right to determine who will have access to them—that is, a (limited) right to exclude the alien from the kinds of presence in their territories that will give the alien access to those societal creations. And Pevnick, like the Lockean, locates some of the limits to this right to exclude in our moral duties of rescue to those in dire need, such as asylum seekers and the desperately poor.⁶⁶ While Pevnick emphasizes societies' collective ownership of their institutional achievements—rather than their collective rights over their territories, as is central to the Lockean view⁶⁷—the positions seem, at least initially, to be similar in basic orientation.

One kind of objection that has been raised against Pevnick's view is that the "associative ownership" view in fact yields the wrong collections of associate owners—that is, the wrong ones to support legitimate states' discretionary rights to exclude. Not all insiders or residents of a state (for instance, young children) actually contribute to their own societies' accomplishments, while many outsiders or aliens may have contributed quite a lot to other societies (especially in cases of outside disaster relief, postwar rebuilding efforts, and colonial development).⁶⁸ I think such complaints can probably be

Borders

answered by Pevnick.⁶⁹ But I have more basic concerns of my own about his position, concerns that (p.244) (by now, predictably) involve the ways the Lockean elements of Pevnick's view are detached from their Lockean motivations.

At times Pevnick seems content to characterize his position weakly, as holding merely "that it is *possible* for a group to have legitimate claims of collective ownership over the institutions they construct" or that "the view that states *cannot* claim territorial rights" is (as a result of his arguments) unconvincing.⁷⁰ And a Lockean political philosopher, of course, should agree with these claims. A Lockean would add, however, that they are correct only provided that the group in question is a consensual association and that its members and territories were acquired legitimately. Pevnick, however, seems eager to distance his own view from any Lockean insistence that political societies be consensual or that territories not be wrongfully subjected to political authority. He says, for example, that while the "not fully consensual" nature of political societies might bear on the question of "whether or not a citizen has the right to disobey the government," it should not "be thought to call into question the rights citizens hold against *outsiders*."⁷¹ And while "particular historical injustices ... must be considered when we consider the legitimacy of restrictions on immigration," the fact that "all claims in our world lie on a bed of injustices" means that some claims resting on that bed must be accepted as legitimate.⁷²

But it is important to remember here just *why* the Lockean stresses issues of political consent and wrongful subjection. Where persons or land are illegitimately subjected to a society's political authority, they simply do not count (morally) as members or territory of the state in question, and the state is morally bound to refrain from exercising control over those persons or lands. The legitimate boundaries of the state's authority are then other than the claimed boundaries. The *state's* right to exclude aliens cannot be unaffected by this, since it *has* no right to exclude aliens from lands that are not part of its rightful territories (which, of course, includes that land over which nonconsenting persons have *individual* rights of control). Nonconsenters have (limited) rights to exclude others from their just holdings, but these are neither *collective* rights nor rights held *as citizens*.⁷³ So from a Lockean perspective, the contours of the (p.245) association that can

Borders

assert associative ownership over anything will be crucially determined by precisely the Lockean considerations (concerning consent and wrongful subjection) that Pevnick tries to deemphasize in his account. In the end, then, I think the associative ownership view again involves grafting intuitively compelling Lockean parts onto a theory that in fact fails to acknowledge the sources of the intuitive force of those very parts.

Let us turn finally (in closing) from ideal Lockean theory to more of the principles to which Lockean voluntarism is committed for guiding our practical political lives in the real world, the nonideal world replete with its wrongdoings and injustice—that is, to Lockean principles of the *nonideal theory* of state territoriality, primarily now as these concern border control and exclusion of aliens.⁷⁴ We have seen the target Lockean ideal toward which nonideal theory must guide us—nonideal theory (remember) being understood here as a transitional theory, consisting in rules for achieving the target ideal in ways that are morally permissible, likely to be effective, and politically feasible. The nonideal theory of property-like state territorial rights, like that of state jurisdictional rights, will not yield conclusions about policy that are deeply radical or dramatic. Nonideal theory in this domain is by its very nature both reasonably imprecise and reasonably conservative. It is imprecise both because (as we saw in chapters 7 and 8) morally required rectifications for past wrongs will often involve rights to rectifications “within an acceptable range,” rather than rights to a specific outcome, and because which policies are politically feasible and likely to be effective tends not to be something that can be determined with much exactitude (even supposing that all the facts of a particular state’s societal, political, and international condition are well understood). Nonideal theory is also, of course, by its nature reasonably conservative: the best path forward toward the moral ideal will be the one that can effectively circumvent the often considerable real-world obstacles to achieving an ideally rightful condition (since the path must be politically (p.246) feasible and likely to be effective). Such obstacles will tend to be substantial, because real societies’ institutions will typically be wrongfully structured and real peoples’ expectations will be correspondingly distorted (with their lives built around those expectations).

Borders

All that acknowledged, we can still give some substantial content to Lockean voluntarist nonideal theory. In the real world, the kinds of standard departures from the Lockean target ideal—that is, the things that make real-world territorial claims by states wrongful according to these Lockean standards—are (for our purposes here) primarily four. First, the land possessed by individuals and incorporated into state territories is often not *innocently* possessed, possession instead resting on a history of unjust and violent seizures or deceptive negotiations (by individuals, groups, and states). Second, real states subject to their political authority many unwilling persons and groups. Third, the land and resources held as property by individuals and/or as territory by their states often do not satisfy the proviso's requirement that a fair share of the earth be left available for all. And fourth, private landowners claim rights over things they are not productively using, while states claim rights over things not being productively used by their members.

The required moral remedies for such wrongs have already been partly described. The specific policies that will be required in particular states (in order to eventually fully accomplish such remedies) will partly turn on local political feasibility and likely effectiveness. But real states are always morally required to be honestly working toward full rectification. As we have seen, the most natural rectifications of historical wrongs in the acquisition of subjects and territories—including wrongful seizure of land or resources and wrongful subjection or expulsion of persons or groups (including, but not limited to, those innocently in residence on wrongfully seized lands)—involve granting full or partial autonomy to those wrongfully subjected and/or downsizing of the relevant territorial claims (along the lines detailed in chapter 7), in order to provide access to unsubjected land for those wronged by the state.⁷⁵ It may be necessary for states (p.247) (instead or as well) to offer those who were unwillingly subjected (or wrongfully expelled), or their heirs, favorable terms of membership; and it may be necessary for states to tolerate the existence of independent political (or nonpolitical) territories within their legitimate domains or to contract their outer boundaries in order to create external space for such territories.⁷⁶

Borders

Wrongs by states may also relate to the proviso's requirement of fair shares for all or to the Lockean requirement that others be excluded only from that part (of the share permitted by the proviso) that is being productively used. In such cases, the required remedies again flow naturally from the arguments of the preceding chapters. Downsizing territorial holdings and relinquishing control over resources—by removing state-created obstacles to use by others—is again the most obvious remedy. But it is also possible to remedy under-use of land and resources by recruiting additional productive users as willing members of the political society in question, since the extent of justifiable territorial claims by states expand (all else equal) with the numbers of those who employ the land and resources in their life projects. Thus, softer, “targeted” immigration policies may be another way in which states can satisfy the requirements of the Lockean proviso.⁷⁷

There is a final aspect of nonideal theory on which I have not yet commented in this book (and on which I will comment now largely only in order to distinguish it from other aspects). Suppose we stretch our imaginations to consider a state that is has made itself fully legitimate by Lockean standards, exercising its political authority exclusively over willing subjects and over land and resources legitimately held. All rectifications of past wrongs have been fully accomplished, and the state has done its share (or more) in assisting the desperate and the oppressed outside its boundaries. In those circumstances, what are the (fully legitimate) state's obligations when other states are *not* doing their morally required parts?

Must a legitimate state liberate the unwilling subjects of other states, redistribute the territories or resources they hold that were unjustly seized or that now exceed their fair shares, remedy other states' failures to assist those beyond their borders? This, of course, is a part of nonideal theory that concerns neither the state's obligations to those it has *itself* wronged in its history (which I have emphasized in this book) nor its obligations to reform its institutions and laws in order to do domestic justice for its members (as emphasized in Rawls's early (p.248) work on civil disobedience, discussed in chapter 2). Rather, the problem more closely resembles, though in international terms, the kind of moral problem that occupies Liam Murphy in his discussion of (primarily interpersonal) nonideal theory.⁷⁸ In situations of partial

Borders

compliance with morality's demands, must we do more than we would be morally required to do were all others fully compliant with those demands?

On the one hand, of course, it seems unfair that those (persons or states) that willingly conform their conduct to morality's requirements must then sacrifice still more simply because others decline to do their parts. On the other hand, when others don't do their parts, people (and peoples) suffer unjustly, often desperately, and simple decency seems to require that we help those suffering if we can, at least if we can do so without great loss to ourselves—even if we *have* already done "more than enough." Consider, for instance, the kind of case that causes Murphy such discomfort.⁷⁹ Imagine a shallow (Singer-style) pond in which six children are drowning, the pond surrounded by six competent adult (potential) rescuers. Five of the adults do their fair shares of the moral work, saving a child apiece, while the sixth walks away, leaving one unrescued child in the pond. Any of the five who remain could relatively easily save that sixth child as well; but all have already done (what ideal, full-compliance theory specifies as) their duties. May they, without wrongdoing, simply leave the sixth child to his desperate fate?

Consider now an international analog of Murphy's case: some or most states are not doing what morality requires of them, increasing the need for action by legitimate states (that have done what they should, according to ideal theory). Murphy's interpersonal case, I'm afraid, is simple by comparison with this international one. For the international case involves numerous additional considerations, not (typically) present in cases of drowning children. States do wrong not only by failing to help others when they need help (or by failing to maximize overall social utility), but also by wrongfully subjecting people and territory to illegitimate political control. So doing the moral work that should be done by illegitimate states will inevitably involve not just additional efforts to help the world's needy, but may require coercively intervening in the domestic affairs of illegitimate states, in the process possibly destabilizing the political/legal order there and jeopardizing international peace. Such international intervention would thus be more closely analogous (in interpersonal cases) to forcing other people to do their morally required tasks (say, by

Borders

coercing at gunpoint the sixth potential rescuer) than it would be to doing those tasks in their steads. But the (p.249) stakes involved in the international case would almost certainly be vastly higher than in such a coercion-filled interpersonal case.

My inclination in such cases is to say that states that satisfy Lockean standards of legitimacy are morally required to do no more than their fair shares of helping the world's desperate denizens. Doing that fair share may sometimes involve selectively opening their borders and may sometimes involve participating in interventions in other states. But legitimate states are not morally required to take up all morally imperative tasks, even if those tasks are roundly ignored by others. As we conclude in the individual case, so we should conclude in the international case: legitimate societies, on the Lockean model, can owe no more to others than the sum of their members' moral debts. And the natural moral duties of individual persons to help others and to combat injustices are, I believe (and as Murphy believes for slightly different reasons), only to do a fair share of the overall moral task. It may be that caring people simply cannot stand by, even after doing what morality demands, in the face of further human suffering (caused by the moral failings of others). But people would breach no clear natural duties by turning away at that point. Given that few of us ever really approach doing our fair shares of the moral work that would be required in even a fully compliant world, of course, this is perhaps a conclusion of only limited practical relevance. And I will not, in any case, attempt here to defend it any further.

Lockean nonideal theory thus requires that contemporary states (and their subjects) make sincere efforts to do their parts in moving us toward a fully rightful world, one that contains no states that are not voluntary political associations on legitimately controlled territories. The actual policies this will mandate, for both individuals and their societies, will depend deeply on specific societal conditions and the socially available opportunities for change. But the Lockean target ideal offers a distinctive guiding beacon for these policies. The Lockean ideal also demands in this distinctive way, I think, much of what its rival ideals demand. It requires that justice be done for all—not merely by creating and maintaining basic institutions to resolve disputes over rights, but also by respecting the rights of those outside our polities—including even the rights of those residing in *no* polity—and by rectifying

Borders

the wrongs done by our states in their bloody-handed transformations into their contemporary forms. The Lockean ideal requires as well that choices to be self-determining be respected, whether those are choices to make self-determining political societies or choices to remain self-governing outside them. And it requires that we permit peoples to practice and protect their inherited cultures, traditions, and lifestyles, that we permit them to be culturally self-determining. But the Lockean ideal requires all this only on the condition that none are trapped, forgotten, compelled to (p.250) subjection, denied their fair shares, or robbed of their just heritages along the way. It demands a political universe that contains only those districted “common worlds” that are *genuinely* common, not ones that are only really common for the numerous and the powerful. And in that sense, I think, the Lockean ideal may be truer to the political ideals that have guided rival theories than those theories have been themselves.

Notes:

- (1) Each state, Sidgwick says, has “the right to admit aliens on its own terms, imposing any conditions on entrance” (Sidgwick [1897], 248 [15, 2]).
- (2) Property fences are often governed as well by local legal limits—on, e.g., height and style—that are motivated principally by aesthetic concerns and concerns for neighbors’ interests. I know of no international legal restrictions of this sort on territorial border barriers.
- (3) What Sidgwick calls “the right of each state to exclude foreigners” (Sidgwick [1897], 251 [15, 3]).
- (4) Under the 1951 United Nations *Convention Relating to the Status of Refugees* (and under customary international law), qualifying refugees outside their countries of habitual residence (and with a “well-founded fear of persecution”) may not be expelled or returned to a territory in which their life or freedom are threatened (under the so-called principle of “no forcible return” or “non-refoulement”).
- (5) Under Article 12 of the *International Covenant on Civil and Political Rights*.
- (6) See Fine (2013), 255.

Borders

(7) Many recent discussions of immigration have included consideration of what is owed by states to the illegal or “irregular” immigrants who have resided for some time in state territories. I do not take up that problem here.

(8) As Phillip Cole argues, the vaunted liberal “freedom to exit” one’s own country is not worth much if there is no corresponding freedom to enter any other country (Wellman and Cole [2011], 197–207).

(9) Article 1, section 1 of the *International Covenant on Civil and Political Rights* reads: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

(10) Walzer (1983), 61.

(11) According to Walzer, “communities of character” are “historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life” (Walzer [1981], 33).

(12) A group’s right to self-determination is not, of course, on any analysis simply equivalent to its right to be self-governing (and so to craft and enforce exclusive immigration policies). The right to be self-determining is, in my view, the right to *choose* whether to be and act as a (political or nonpolitical) self-governing entity or to be ungoverned or externally governed. This is consistent with the distinction between “constitutive” self-determination (i.e., choice of political status) and “ongoing” self-determination (i.e., self-government) (used in Buchanan [2004], 332–3). For a different view of the relation between self-determination and self-government, see Margalit and Raz (1990), 126–7, 139, 144.

(13) Wellman and Cole (2011), 13. “Legitimate political states may permissibly refuse to associate with any and all potential immigrants who would like to enter their political communities” (36–7).

(14) Altman and Wellman (2009), 163. See also Wellman (2014), 186, Wellman and Cole (2011), 40–41.

(15) Wellman and Cole (2011), 34–6.

Borders

(16) Miller (1995), 85–6.

(17) Margalit and Raz (1990), 134.

(18) See Miller (1995), 90–98, and Miller (2005).

(19) Moore (2014), 127–8 (all emphases mine); see also Moore (2015), 35–6. Moore’s self-determining peoples are thus understood in both majoritarian and “capacitarian” terms, and (as in most of the views we have examined) there is a strong, but lightly defended, presumption of “legitimate residence” (through supersession of prior rights to the land). As noted above, these facts about it leave Moore’s account vulnerable to the same arguments that I advanced (in chapter 4) against Altman and Wellman’s voluntarist theory and that I advanced (in chapter 7) against the various Waldron-style “supersessionist” arguments.

(20) Moore tries to distinguish her position from Miller’s chiefly by denying that the “shared political identity” required (on her account) to count as a “people” needs to involve a shared national *culture* (Moore [2015], 71, 79–80); and she distinguishes her position from Wellman’s by not taking voting patterns to be sufficient to indicate a shared political commitment and by insisting instead on a shared past history of political cooperation (69 [nn25, 30]). But (on the first point) it seems very likely (though not, of course, necessary) that most (if not all) of the groups that satisfy Moore’s conditions for rightholding will *also* share a culture. And (on the second) Moore’s groups are still identified in majoritarian terms (like Wellman’s), while the requirement of a shared political history seems mostly just to be an empirical indicator of likely future success in political endeavors (52)—and so to be just another way of determining the group’s *capacity* for self-determination. So it is unclear to what extent (if any) the groups Moore’s theory picks out for rights of self-determination will *in practice* differ from those picked out by Wellman or Miller.

(21) *Ibid.*, 118–20. These arguments, Moore contends, are sufficient to identify groups’ “heartlands,” but may not be able to precisely identify the boundaries of groups’ territorial authority.

(22) *Ibid.*, 162, 166, 175, 189, 195–6.

Borders

(23) Indeed, even limited immigration might be thought to unfairly impose on the host society burdens of a different sort—namely, the burden of an imposed obligation “to create and support institutions capable of protecting and fulfilling the rights of the newcomer[s]” (Blake [2013], 114). See the similar suggestion in Wellman (2014), 186.

(24) See, e.g., Carens (1987), 260.

(25) Conditions such as the possession of wealth, of particular professional skills, or of a certain race or ethnicity. Many states currently give preferred consideration to groups of potential immigrants such as residents of former colonies, members of certain tribal or ethnic groups, family members of citizens, etc.

(26) Carens (1987), 262, 261–2; Carens (2013), 226. See also Phillip Cole’s similar claims in Wellman and Cole (2011), 179.

(27) Rawls (1971), 104. As has been frequently observed, Rawls comes close to denying the very *possibility* of personal desert by appearing to suggest that *everything* we are or do is a direct consequence of good or bad luck in the natural lottery, that nothing (good or ill) could be a product or an indication of individual merit.

(28) *Ibid.*, 15.

(29) *Ibid.*, 75.

(30) *Ibid.*, 15.

(31) Risse (2012), 288–9. So-called luck egalitarians, of course, may argue that justice requires that societies “neutralize” the products of good or bad luck in the natural lottery. But apart from the obvious difficulties involved in distinguishing the results of brute luck from the results for which individuals’ choices and efforts are responsible, it seems clear that it might be wrong to deprive people of advantages that societies assign them based on their possession of undeserved traits *if* those advantages constitute “compensation” for *disadvantages* imposed on them for possession of those same traits. Suppose for some reason that a society had to assign to all of its largest people its (socially necessary) dangerous or strenuous work. It might then not be unjust for the society to reward large people with higher pay—despite physical size being a morally

Borders

arbitrary trait. (This kind of inequality, absent the duress, might, in fact, be one that Rawls's own Difference Principle would permit.) A similar argument can be made (see below) that the differential "rewards" societies give their own birth members are in fact fair compensation for the burdens to which members, but not outsiders, are (necessarily but nonvoluntarily) subjected by their societies—despite the arbitrariness of national birthplace.

(32) This is part of what makes Nozick's well-known response to Rawls's arbitrariness argument both compelling and puzzling (see Nozick [1974], 213–27). Nozick seems right that desert is not *all* that matters to legitimating differential claims to things; but he also seems to ignore the fact that Rawls's reasoning presupposes that natural entitlements to things are not in play.

(33) In Rawls's later political philosophy, derivations from natural-right premises are excluded because natural-right claims can be reasonably rejected by adherents to other comprehensive doctrines. In his earlier political philosophy, Rawls might be taken to have accepted one broad (Kantian) natural right—namely, a right to be subject to a just basic structure—but he certainly could not accept natural rights to property that could exist prior to political society, since these would ground claims of justice in addition to (and possibly in conflict with) those generated under Rawls's two principles. Rawls does in a few places suggest that justice as fairness "has the characteristic marks of a natural rights theory" (Rawls [1971], 505–6n, 28, 32). But these claims seem to be based simply on the fact that justice as fairness derives from the two principles real *rights*, rights that both persist in the face of utilitarian arguments against them and that are independent of "social conventions and legal norms." Rawls never appears (in *A Theory of Justice* or earlier work) to argue directly against the possibility of (logically) prepolitical natural rights, rights of the sort that Nozick (with Locke) has in mind.

(34) Carens (1992), 26.

(35) *Ibid.*, 28.

(36) Carens (2013), 236–49.

Borders

(37) Abizadeh (2008), 45. See the similar claims in Cole (2000), 186.

(38) Miller (2010), 114–15.

(39) *Ibid.*, 116.

(40) Pevnick objects that such systematic state coercion “requires no further justification” than the state’s provision of the important public goods citizens reap by being subject to it (Pevnick [2011], 70–71). But even *beneficial* coercion requires justification when it is imposed on persons without their consent—and Pevnick admits that most citizens even in good states are not consenters (28–9). This is the point of our objections to political paternalism. And the more extensive such coercion is, the greater the burden of justification on the coercer.

(41) Nagel (2005), Blake (2001).

(42) Abizadeh elsewhere attempts to answer such objections—objections from what he calls “the coercion theory,” supplemented “with elements from the pervasive impact theory” (Abizadeh [2007], 349)—by simply asserting that closed borders “do ‘profoundly and pervasively’ affect human beings’ life chances in our world” (350). But this response (apart from being factually true of only that minority of persons in the world who both want to and could, in the absence of closed borders, emigrate) appears to beg the crucial normative question: namely, whether border closure is *responsible* for the “life chances” of those outside the border *in the same way* that the state’s more systematic and pervasive coercion of its subjects is responsible for their life prospects.

(43) See, e.g., Wellman and Cole (2011), 97–8; Wellman (2014), 203.

Borders

(44) Sidgwick, despite his apparent acceptance of states' rights to exclude, acknowledges that if states possess territory that is "under-peopled," or if they possess "waste land suitable for cultivation," immigration must be permitted to remedy this inefficiency (Sidgwick [1897], 255 [15, 4]). And it is, of course, easy to imagine a host of other broadly utilitarian reasons why permitting immigration might be required (e.g., immigration by those whose talents will otherwise be seriously underutilized in their native countries). See Risse's related "underuse" arguments for an obligation on states to admit immigrants (in Risse [2012], chap. 8).

(45) To be clear: virtually nobody in these debates thinks that states owe no obligations at all to aliens, and virtually nobody thinks that there could not be circumstances in which states were morally obligated to accept unchosen immigrants. Legitimate states' rights to exclude are not supposed to be *absolute* with respect to such matters. Indeed, such rights are not fully absolute even under applicable international law (as we have seen). Those who defend a unilateral right to exclude instead typically hold that where states can discharge their moral obligations to aliens *without* admitting them as immigrants—as they hold to be often or normally the case—they are entitled to unilaterally decide to do so.

(46) Moore (2015), 195–6.

(47) As Waldron suggests, once we examine the actual arguments in favor of cultural integrity, "its being properly protected comes to seem more like a preference than a necessity" (Waldron [2010], 406).

(48) "Life in a modern multicultural society includes elements of many different cultures, but their boundaries tend to blur, they are each permeable to influence from the others and their purity and independence are inevitably compromised" (*ibid.*, 402).

(49) And it is, of course, not contemporary, more homogenized cultures, but aboriginal and exotic cultures—such as those of the Maori or the Lakota or the Bedouin—that are typically used by these theorists as illustrations of how outside influences can destroy a way of life.

Borders

(50) Wellman draws analogies both with the rights of parents to “dominion” over their children (e.g., Wellman and Cole [2011], 23–4) and with the rights of any individual “to determine whom (if anyone) he or she would like to marry” (54). Interestingly, Miller also employs this analogy between an individual’s right to marry and a nation’s right to exclude (Miller [2007], 209).

(51) Wellman and Cole (2011), 34–5; Wellman (2014), 189.

(52) Fine (2014), 263.

(53) A point also made in Pevnick (2011), 28–30.

(54) Miller (2012), 263.

(55) Miller (2005), 199.

(56) *Ibid.*, 200.

(57) See Moore (2015), 79–82.

(58) Rawls defines the “public political culture of a democratic society” as “the political institutions of a constitutional regime and the public traditions of their interpretation (including those of the judiciary), as well as historic texts and documents that are common knowledge” (Rawls [1993], 13–14).

(59) Here my argument follows, at least in broad outline, that in Laegaard (2007), 292–4.

(60) See the related argument in Pevnick (2011), 140–41.

(61) See the discussion in Laegaard (2010), esp. 255–6, 260. Most of my discussion here has been aimed at illuminating the nature of states’ discretionary rights to control residence (and rules governing citizenship) in their countries. Rights of free movement, when we understand them more generally, are also more complicated. Because (I believe) individual self-government requires rights to reasonably free movement in the pursuit of legitimate projects, it may also sometimes ground moral rights to necessary “easements” or “rights of way” on land owned by others. Because any such rights held by nonmembers could not be extinguished simply by members joining together in political society, aliens may continue to possess moral rights to pass through (or over) the collected individual property that constitutes the basis of state territory

Borders

(and so, aliens may possess moral rights to limited use of other states' infrastructures and institutions). States' general exclusionary rights may thus be somewhat constrained, even if their more specific rights to deny residence or citizenship to aliens are confirmed, by Lockean reasoning. Free *domestic* movement (i.e., by members) on the Lockean view is a matter to be either left as in the state of nature or regulated by consensual domestic arrangements.

(62) Ypi (2013), 246.

(63) *Ibid.*, 248.

(64) *Ibid.*, 245.

(65) Pevnick (2011), 13, 33–5.

(66) *Ibid.*, 12.

(67) Pevnick does not appear to treat the land itself as something over which associations have strong, exclusionary rights. Borders matter morally in his theory because those within them can gain unfair access to societal accomplishments.

(68) See, e.g., Fine (2013), 264.

(69) The rights of some resident noncontributors can be covered by thinking of the ownership rights as genuinely collective rights; and collectives can simply opt to include the infirm, the native-born who rise to adulthood (etc.) as full associates. Some other noncontributors (like career criminals) perhaps ought not to be viewed as associate rightholders at all. As for outside or alien contributors, some of their contributions (such as disaster relief) should surely be regarded as either morally required or as freely given charity, acts which normally result in no rights over the “product”; and other contributions (by postwar rebuilders or colonial powers) are at least often owed to the society for prior harms or wrongs—which again would yield no rights over the product.

(70) Pevnick (2011), 41 (my emphasis), 59.

(71) *Ibid.*, 58. See also 37.

(72) *Ibid.*, 58, 42; see also 41, 119. Pevnick takes no stance on the question of Waldron-style supersession of rights.

Borders

(73) Pevnick's argument that "lasting claims of ownership can originate in non-voluntary associations" (ibid., 36–7) is thus misleading. Because the "association" in Pevnick's example is produced by kidnapping, its creation in no way morally limits its "members' " rights. Any "claims of ownership" that flow from its members' labors will thus be *individual* claims, not collective ones (as required by Pevnick's claims about nonconsensual political associations).

(74) This, again, will concern just a portion of Lockean nonideal theory. But it is a portion that will include elements of all three branches of nonideal theory (as these are outlined in chapter 2): the relevant noncompliance with ideal principles of right (in establishing borders and in dealing with aliens—as in claiming resources) has been a function of wrongful actions by individuals, by states within their own borders, and by states interacting with those outside their borders. Further, this noncompliance has typically fallen within the category of deliberate, not merely unfortunate, wrongdoing, thus calling for more severe moral requirements of restitution or compensation in our transition to an ideally rightful condition. While some individuals (such as aggressive "settlers") may in fact owe *personal* duties of restitution to wronged persons and peoples, the principal culprits in these matters have plainly been states. So I will focus here primarily on the principles of nonideal theory that govern the conduct of noncompliant states.

(75) The Lockean voluntarist theory of permissible and justified *secession* that follows from such reasoning has two essential parts. The first part concerns the binding duration of the consent that subjects persons to the authority of legitimate states. If (as I believe) such consent cannot be "in perpetuity," but requires periodic reaffirmation, individual or group "secession" from a legitimate state may be permissible when that consent's binding force lapses. The second part concerns the right of wrongfully subjected or internally abused persons or groups to form their own autonomous political society (on the lands the state wrongfully seized or on lands over which the state forfeited its rights by abuse). In both cases, secession will be permissible if it can be accomplished without wronging innocents (such as newly trapped minorities or individuals) and will be justified on balance in terms of the severity of the

Borders

wrong being righted and the weight of the likely consequences of secession in the particular case.

(76) This concerns, of course, only rectification for wrongs actually done by the state. Those to whom such responses are owed may *themselves* have obligations to rectify wrongs that *they* have done to prior occupants.

(77) While at the same time satisfying utilitarian (and Risse's version of contractalist) requirements to avoid inefficient under-use.

(78) Murphy (2000).

(79) *Ibid.*, 127–33.

