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# **Taking up Space on Earth: Theorizing Territorial Rights, the Justification of States and Immigration from a Global Standpoint**

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Abstract: The author's 2012 book *On Global Justice* gives pride of place to the idea that humanity collectively owns the earth. Independently of this approach there has been a flourishing literature on the justification of rights to territory. Central to this discussion are a Kantian approach and a Lockean approach to territory. This paper recapitulates the author's approach to humanity's collective ownership of the earth and argues that, properly understood, both the Kantian and the Lockean approach should integrate the global standpoint constituted thereby. But the goal here is not to amend the Kantian and Lockean approach to territory, but to refute them. The paper also argues that both approaches endorse an unacceptably strong view of the justifiability of states and should therefore be rejected. The author's standpoint in *On Global Justice* emerges vindicated, according to which territorial rights, the justification of states and immigration all need to be theorized together, and need to be theorized from a genuinely global standpoint.

1. Suppose in the future humankind migrates to an uninhabited planet.<sup>1</sup> The space fleet consists of groups that wish to continue to live together. They deny that they have a moral duty to found states, or that doing so is the most rational way to live. But the migrants realize that states are good at providing basic goods. Accustomed to a world of states, they decide to maintain a version of it. There are enough migrants to spread around the planet. How should they allocate the rights to rule over territory? That is, under what conditions could it be reasonably expected of outsiders to accept a state's decision to exclude them from its territory?

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<sup>1</sup> I am grateful to audiences at the Pacific APA in San Francisco in March 2013 and at the Wissenschaftszentrum Berlin in July 2013 as well as to Anna Stilz for very helpful comments.

One proposal is to allocate regions to groups in proportion to their size. Each group is charged with maintaining justice on its territory. Proportionality is as familiar a solution to fair division problems as statehood is as a model of organization. Proportionality does not turn on square-mileage, but on the usefulness for human purposes of three-dimensional regions with differential amounts of resources. Dividing up a planet to which they all have the same claims entails risks. Thugs might overrun a region. To address such hardship the emigrants should adopt a global regime of shared responsibilities. Participation in that regime and acceptance of an immigration scheme to maintain the proportionate distribution should be conditions on the right to rule over territory. There will be other proposals, but surely this one has some initial appeal.

“By virtue of being in a place, circumscribed by lines or markers,” Morris (1998) writes while discussing the state’s territoriality, “people acquire obligations, independently of personal relations, vows, faith, or origin” (p 37), which means independently of conditions that determined allegiances prior to the emergence of territorial states.<sup>2</sup> In light of its significance it is surprising that political philosophers have only recently subjected *territoriality* to sustained debate. Three major views have emerged, none of them quite like my proposal for the space migrants. According to the *Lockean* view, individual property rights pre-date states. The state rules over territory because individuals who subsequently subject themselves to it acquired property that then becomes part of its territory. According to the *Kantian* view, individuals are morally obligated to found states because only subjection to a public will makes sure individuals are not subject to another’s arbitrary will. The state’s right to rule rests on its ability to provide justice in its territory. The state must, and only the state can, provide determinate and secure

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<sup>2</sup> For the history of the state, especially its territoriality, see Skinner (1989). In his *Elements of Politics*, Sidgwick writes that “in modern political thought, the connection between a political society and its territory is so close that the two notions almost blend” ((2005), p 201).

property rights. Finally, according to the *nationalist view*, peoples predate states and have a right to self-determination. The state may rule over the territory occupied by the people because their continued existence requires a location, and their culture is interwoven with that location's geographical peculiarities.<sup>3</sup>

So according to Lockeans, the right to rule originates from *individuals*. The rationale for states is that individuals find it in their best interest to subject themselves to states to protect their rights. According to Kantians, that right originally belongs to the *state*. The rationale for states is to provide a space where individuals can be genuinely free, which they become through the realization of justice. According to the nationalist view, that right originates from the *people*. The rationale for states is to protect living arrangements that we naturally adopt. These views have two things in common. First, they look at territorial rights locally, "one state at a time." We can formulate the rationale of each view, and apply it to a given state, without considering what happens elsewhere. Matters of immigration, for instance, can only be settled once we know why

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<sup>3</sup> (1) The "Kantian" view is the view developed by Stilz (2009) and (2011). Views that make the present exercise of justice central to an account of the right to rule also appear in Buchanan (2004), pp 233-288, and Waldron (1993). Ypi (forthcoming) develops a Kantian view of a different sort. For Kant a unilateral act of acquisition implies a duty to enter into political relations so that the acquisition can be sanctioned by a collective will. Ypi argues that this point does not merely obligate individuals to found states. There also needs to be global public arbitration to terminate the provisional nature of frontiers. Ypi develops Kant's view through the kind of global standpoint that I also propose. Ripstein (2009), pp 227-228, too submits that there must be world-wide arrangements, but he thinks states among each other face fewer troubles than individuals in a state of nature. So at the international level a law court suffices. Ripstein submits that Kant thinks of territory as the *body* of the state seen as a person, rather than its *property*. In a related spirit to Ypi, Flikschuh (2010) argues that Kant faces a "sovereignty dilemma." His theory requires of states to submit to an international order but also entails that states must not be forced to do so. She resolves this predicament by arguing that a state that claims immunity from international legal coercion on the grounds of its sovereignty is for that reason obliged to enter into rightful relations with other states. My approach articulates a similar thought in a non-Kantian manner. (2) The "Lockean" view is the view developed by Simmons (2001a). Nine (2012) offers a view on territorial rights that combines a natural-law approach to establishing why there could be territorial rights in general with a collectivized Lockean approach to establishing claims to particular territories. On that account it is not individuals but certain collectives that appropriate land. Meisels (2005) presents an eclectic account of territorial rights that draws Lockean elements. She thinks boundaries should be drawn and redrawn primarily in accordance with existing settlements. This is so partly because of a Lockean idea of mixing labor with land, and partly because settlements shape the land in light of national culture.

there would be territorial rights.<sup>4</sup> Second, each of these views is an overall account of how states are justified, offering a view of the right to rule over territory as part of such an account. This is how it should be: unless we explain why there should be states it is hard to see why they should rule over anything. But each view offers a particularly strong justification according to which “there *ought* to be states” (i.e., we should found them if they did not exist already). The account of territorial rights draws on the rationale for why that should be so.<sup>5</sup>

I articulate a competing view, in line with my proposal for the space migrants and different from the others in those two regards. First of all, I justify the right to rule from a *global standpoint*. Such a right imposes burdens on those excluded, if only by keeping them from areas they could otherwise access. That right cannot be exclusively based on anything the inhabitants have done, or on their collective identity. Presumably theorizing about territory has been “local” partly because humanity’s manner of encountering the earth has been, unlike the way in which space migrants encounter new planets. But since humanity increasingly confronts problems that concern our way of dealing with the earth as a whole, a global standpoint is needed. Secondly, I justify the right to rule over territory without using a justification of states that implies that there ought to be states. States are justified only in a thinner sense, as historically contingent forms of political organization with advantages for the provision of goods. The first problem – absence of a global standpoint – is resolvable from within the Kantian and Lockean accounts. But my goal

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<sup>4</sup> Stilz (2009) is symptomatic: “In investigating state territorial rights, we will want to answer two important questions: first, what grounds a state’s right to jurisdictional authority over a given territory? From where might the state obtain this right, and how do we know if its claimed title is good? Second, what are the limits of the state’s right to jurisdiction over territory? (...) I must defer more sustained consideration of the second question (about the extent of those rights, including the extent of the right to exclude immigrants) to future work” (p 186).

<sup>5</sup> Kolers (2009) and Nine (2012) share a version of the first feature but not the second.

is to replace these theories, not to revise them. That is why I also discuss the second problem, which concerns the core rationales these approaches offer for states.

A state has the right to rule, and thus can reasonably expect others to accept exclusion, *only if* it (a) administers justice on its territory on behalf of its people, or at least makes credible efforts to that end,<sup>6</sup> (b) assumes its share of global responsibilities to ensure others can lead minimally decent lives where they reside, and (c) lets a number of people live on its territory in proportion to the value for human purposes of that region. I call (a) the *Justice Condition*, (b) the *Responsibility Condition* and (c) the *Proportionality Condition*. Like the Kantian approach my view makes justice central to territorial rights. But it does not depend on an implausibly strong view of the justification of states and adopts a global standpoint to justify that right. A morally acceptable immigration policy, in particular, is not an afterthought. Territorial rights, the justification of states and immigration should be theorized together.<sup>7</sup>

Sections 2 and 3 argue for the Responsibility and the Proportionality Condition. Sections 4 and 5 show that the Lockean and the Kantian views also lead to these conditions. Given how

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<sup>6</sup> “Or at least makes credible efforts to that end.” States should lose the right to rule on account of failing to provide justice only if they are plainly unconcerned with justice, not if they display shortfalls of full justice but still make efforts towards realizing it. This may be the case in at least the following two ways: The first is that states are recognizably committed to the pursuit of justice but experience severe difficulties in its implementation, perhaps because material deprivations make it hard to prioritize justice (an extreme case being Rawlsian (1999) burdened societies), or because justice competes with other values for political realization (such as an increase in well-being), or because political dynamics make it difficult for justice to prevail. The second sense is that they are what Rawlsian decent societies, societies committed to a recognizable “common good idea of justice” (1999), p 67) but not to full liberal justice. Adherence to the liberal ideal of justice is difficult to muster for such a society.

<sup>7</sup> Kolers (2009) uses the term “ethnogeographic community” to emphasize that, over time, communities adopt particular land-use patterns through which they control and shape space and which shape their cultural patterns. Their conception (“ontology”) of land becomes concrete through acts of bounding, controlling and shaping space. This view allows for a global standpoint, which would prescribe whose ontology of land matters in a region. But this view also highlights how intensively community-specific attitudes towards land-use are.

different those accounts are (including in the underlying conception of rights) this is striking.<sup>8</sup> Section 6 argues that those two views identify core rationales for states that are indefensible. I offer a different rationale that does not hold that there ought to be states. Distributive justice is concerned with stringent claims to relative or absolute shares of certain goods, especially goods that determine how well people get on in life. Distributive justice plays a central role in our lives because claims of justice are the hardest to overrule and because it deals with material and other holdings we need to survive and to flourish. In a world that gives the lion's share of power to states, governments must shoulder the lion's share of the execution of justice. Justice measures the moral success of states. A state should not rule if it is indifferent to justice. No state should if states as such are not justified. In light of the first point, adding the Justice Condition is straightforward. In light of the second, an apt time to do so is after discussing the sense in which states are justified. Section 7 explores how to transform those necessary conditions into jointly sufficient conditions for a right to rule over territory.

Let me add three remarks. I bring to bear some distinctive themes from my book *On Global Justice* on the debate about territorial rights. I sometimes reference the book for more complete treatment. My book offers a theory of different grounds of justice, characteristics of groups that render different principles of justice applicable. Strictly speaking, the Justice Condition should capture adherence to all principles that are forthcoming on different grounds (some of which entail the Responsibility Condition). But it would be too demanding to make the right to rule dependent on adherence to the full theory of global justice. So I identify which parts of the theory states must satisfy to have that right.

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<sup>8</sup> For Locke's and Kant's conceptions of rights, see Flikschuh (2008). See also Ripstein (2009), chapters 2 and 3.

Second, let me clarify the relationship between the literature on territory and my approach some more. Generally, when we inquire about a “right to rule over territory,” we consider three-dimensional spaces filled with people and/or resources and explore who has first-order property rights over the resources; who has jurisdictional powers to make, change or enforce rules concerning resources and people; and who has the power to determine who makes these rules in which territory. Theorists spell this out in different ways. For instance, Simmons (2001a) offers the best-known view of the right to rule, one according to which it consists of five different rights: the rights to exercise jurisdiction over those within the territory, to reasonably full control over land and resources within the territory that are not privately owned, to tax and regulate uses of land and resources that are privately owned, to control movement across borders, and to limit “dismemberment” of the territory.<sup>9</sup> The right to rule includes various incidents that could be held by different entities. On Simmons’s account individuals in a state hold all the incidents. But instead, property rights to certain resources and the right to control movement across borders might belong to an international body. Or the right to exclude may be seen as central to the right to rule whereas jurisdictional rights over persons and resources draw on international treaties.

But while such disagreement is conceptually possible, no major view on the right to rule makes the right to exclude central. Those views draw on their respective rationales for why there ought to be states to begin with. Developing that rationale becomes pivotal and in no case requires exploration of the right to exclude. But according to my global standpoint, the crux is to ask about the conditions under which one can reasonably expect of outsiders to respect that

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<sup>9</sup> Nine (2012), chapter 1 shows that definitions are not neutral in this debate. Stilz (2009) and (2011) and Miller (2011) and (2012) accordingly choose different definitions of territorial rights.



communities occupy regions to the exclusion of others. Since only a more moderate justification of states is available than the major views allow, its development can wait until later. Readers should thus keep in mind that the logic of my approach reverses the usual order of topics.<sup>10</sup>

Third, I do not engage much with the nationalist view. Among others, David Miller has argued for the moral significance of nationhood (1995) and for its importance for territorial rights ((2011), (2012)). A nation is a group whose members believe themselves to share certain cultural or ethnic characteristics, including language, traditions, a public culture, or lineage and history. Nationalists can explain well why a state should have rights over a particular region. Theorists that tie the right to rule to legitimacy (or other kinds of present performance), nationalists insist, have trouble explaining what is wrong with usurpation by a state with better credentials along that performance dimension. Nationalists appeal to the material and symbolic value that, through cultural practices, becomes embedded in territory.

That many people desire to live in nations is a *prima facie* reason to create political units for them, though not necessarily states that include all (or most) or only members of that nation. But we can, and should, accommodate this insight without making nationhood essential to the right to rule. The nationalist view might be plausible in a world where nations existed first and

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<sup>10</sup> States lack the right to rule if they do not meet one of the necessary conditions. A right to exclude is independent of other incidents of a right to rule in the sense that one can explore ways of sanctioning states that lack the right to rule, including a possible transfer of that right to an international body. However, my approach to the justification of states does not render it plausible that a right to exclude would just not be among the incidents of a right to rule that states normally hold. That justification includes an acceptance of the major contours of the global order (given that we cannot convincingly theorize alternatives). Among those contours is that the incidents of such a right all pertain to states, especially that states claim some version of the right to exclude. I explore under what conditions they have that right, not whether states might generically not have it. (The Schengen treaty, according to which EU members agree not to exclude citizens from other EU states is no counterexample: it is only because states normally claim, and are taken to have, the right to exclude that they can agree to waive that right *vis-à-vis* certain people.) Note that, in my view, if a state has the right to exclude, it has a right to exclude outsiders from using resources in its territory.

gave rise to states. But in our world states have done as much to create nations as nations have done to create states. Moreover, Stilz (2011) is right that cultural or ethnic distinctiveness is neither necessary nor sufficient to establish rights over territory. It is not necessary because even groups that nationalists may not consider nations may possess a shared political history and a capacity to maintain a legitimate state. Examples are India, Switzerland or Canada. It is not sufficient because a nation that is embedded into a wider people who jointly sustain a legitimate state has no right unilaterally to take a section of that state's territory.

2. *On Global Justice* gives prominence to the idea that humanity collectively owns the earth. That theme was pivotal in 17<sup>th</sup> century political philosophy. Philosophers such as Grotius, Hobbes, Pufendorf, Filmer and Locke had views on what this status amounted to. According to the Old Testament, God gave to humanity "dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth" (*Genesis* 26). The point of thinking about the earth as collectively owned outside of theology is to give a suitable place in political philosophy to the idea that all human beings, no matter when and where they were born, are in some sense symmetrically located with regard to the earth's resources and spaces and should not be excluded from them by accidents of space and time. These resources and spaces are not products of human accomplishments but are needed for our activities to unfold and for us to survive. It is based on those points that we should think of the earth as in some manner collectively owned across generations. Appropriate weight must be given to the moral and aesthetic value of the environment and of non-human life.

Humanity faces a number of problems concerning our use of our planet as such. Climate change is one example, or more generally our obligations to future generations who inhabit the earth after us. Immigration is another, concerning the distribution of people across this planet. Generally what is at stake is ownership of, as John Passmore put it, “our sole habitation (...) in which we live and move and have our being” ((1974), p 3), or in Henry George’s words, of “the storehouse upon which [man] must draw for all his needs, and the material to which his labor must be applied for the supply of all his desires” (1871, p 27). Or, as Hannah Arendt says in *The Human Condition*, “The earth is the very quintessence of the human condition, and earthly nature, for all we know, may be unique in the universe in providing human beings with a habitat in which they can move and breathe without effort and without artifice” (1958, p 2).

That humanity collectively owns the earth must be understood in a thinner sense than ownership in the civil law. It might mean that everyone has a claim to an equal share of the planet’s overall resources; or that a collective process is needed to satisfy each co-owner as far as any use of the resources is concerned; or that the earth as a whole is like the town commons of old, where each co-owner had a right of use within certain constraints. This latter view I call Common Ownership, and is the view I have argued is philosophically preferred. I do not repeat that argument here (see Risse (2012), chapter 6), nor do I repeat the exploration of the many complexities associated with the ownership approach.

According to Common Ownership all co-owners ought to have an equal opportunity to satisfy basic needs to the extent that this turns on collectively owned resources.<sup>11</sup> In the standard

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<sup>11</sup> I mean by “basic needs” merely Doyal and Gough’s (1991) fundamental needs: physical health and a mental competence to choose and deliberate.

Hohfeldian rights terminology, common ownership rights include liberty rights accompanied by what Hart (1982) calls a “protective perimeter” of claim rights (p 171). To have a liberty right is to be free of duties to the contrary. Co-owners are under no duty to refrain from using resources. However, were co-ownership reducible to such rights, a Hobbesian state of nature would arise where everybody is allowed to interfere with anything. Common Ownership guarantees minimal access to resources by adding a protective perimeter of claim rights. There might be further-reaching natural rights with respect to these resources, including exclusive rights to bits of the earth arising from such actions as occupation, consent, and so on. And there will be positive law that regulates access to resources in legal systems. If conflicts arise, natural rights prevail.

Property arrangements of the positive law may be conventions where access to resources plays little immediate role for most people. A necessary condition for the acceptability of such conventions is that the core purpose of the original rights is still met. That purpose is to ensure that co-owners have the opportunity to meet basic needs. In Hohfeldian terminology, co-owners have an *immunity* from living under arrangements that interfere with their having such opportunities. The right involved in common ownership is a disjunctive right to either use (in the narrow sense) resources and spaces to satisfy one's basic needs, or else to live in a society that does not deny one the opportunity to satisfy basic needs in ways in which it otherwise could have been done through original resources and spaces.

Libertarians like to belittle collective ownership. They have asked whether, say, a nugget of gold found on the ocean floor belongs to all of humanity, and how we should divide its value. But none of these ways of spelling out collective ownership applies object by object. What matters is that each person has a share in the world's resources, and there are various ways of developing that idea. To be sure, the argument is concerned only with natural conditions and

resources. The distinction between what “is just there” and what has been shaped by humans can be blurred, given that we wrest land from the sea, natural gas from garbage deposits, and so forth. But by and large we grasp well enough the idea of what exists without human interference.

Crucially, the arrangement to which individuals are subject is not merely the state in which they reside, but the system of states as a whole. Each state, in virtue of its access to their bodies and assets, might deprive individuals of opportunities. But so might other states by refusing them entry if they cannot satisfy basic needs where they live. Other states that could provide this ability but refuse do not merely fail to offer aid; they deny people the opportunity to satisfy basic needs. Guarantees must be given to co-owners that institutional power will not be used to violate their status. Responsibilities must be allocated at the level of the state system, as collective responsibilities, rather than resting exclusively with individual states and then only with regard to their citizens. That each state accepts a share of these responsibilities is a condition for its being allowed to claim for itself the control of access to a part of the collectively owned planet.<sup>12</sup> The flip side of these responsibilities is a set of rights individuals hold vis-à-vis the global order. Reflection on ownership of the earth lead to what Risse (2012) calls *membership rights in the global order*, which I argue are human rights.

The reasoning in the preceding paragraph generates two fundamental guarantees whose realization is a global responsibility: first, states must ensure that their power does not render individuals incapable of meeting basic needs; second, they must create opportunities for them to meet basic needs. Such guarantees neutralize the dangers that the global order poses for individuals’ co-ownership status. The first guarantee leads to rights to life and bodily integrity as

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<sup>12</sup> This is where my argument makes contact with Flikschuh (2010).

well as to individual liberties (e.g., freedom from forced labor, of conscience, of expression and association, of movement, and freedom to emigrate) and political rights (e.g., to accountable representation), and due process rights (e.g., to a fair trial). The second leads to the need for an assured opportunity to enjoy a minimally adequate standard of living, as far as food, clothing, and housing are concerned. At least in societies with sophisticated economies that make it hard to satisfy needs without actively participating in society we must add an elementary right to education and a right to work understood as a right not to be excluded from labor markets.

So a necessary condition for any state to be permitted to assert the right to rule over its territory is that it shoulder an appropriate share of global responsibilities to provide individuals with opportunities to meet basic needs. I cannot explore what such an appropriate share would look like. But crucially, there is an argument that ties the right to rule over a portion of the earth to the acceptance of responsibilities for what happens elsewhere. We have established the *Responsibility Condition* on the right to rule.

3. Another implication of Common Ownership is that outsiders can be reasonably expected to accept exclusion from an area only if sufficiently many people populate that space. This is the *Proportionality Condition*. “Sufficiently many” describes when the number of occupants is proportionate to the value for human purposes of the spaces and resources excluded from general use. *On Global Justice* derives membership rights in the global order (thus the Responsibility Condition) as a matter of *justice*. The Proportionality Condition applies (merely) as a matter of reasonable conduct. As a matter of justice, in light of Common Ownership, people may occupy as much territory as they wish if others can meet basic needs. But then others could not be

reasonably expected to stay away. That would be the case, however, if people in a country merely occupy a proportionate share. They do not on average have access to more of what is needed by all but has not been created by anybody than the average person around the globe. It is for this reason that I understand the right to rule over territory as something whose exercise others should reasonably accept. Both the Responsibility Condition and the Proportionality Condition then enter into an account of that right.<sup>13</sup>

To develop this idea, we need a measure of the usefulness for human purposes of three-dimensional space. Such a measure must include the size of the land, but also resources like minerals and water, and the quality of the location as captured by biophysical factors. This measure must permit comparisons of different sets of such factors. This is most readily accomplished by a one-dimensional measure, something like an aggregated world-market dollar value. After all, we want to use this measure to say that one area, plus resources and biophysical parameters, is taken up to a *larger* or *smaller* extent than others. Using a world-market value reflects the demand for sets of commodities in light of supply constraints. Prices reflect the usefulness of entities for human purposes given the state of technology and limitations on availability. This does not mean there could be no other value to the assessed entities; or that those who possess resources may do with them entirely as they please. But none of this is true for objects that usually have a market value. World-market prices also reflect technological constraints. Precious materials below the surface that we cannot (yet) extract add to the overall value in a discounted way. Some of the required pricing is novel: biophysical factors shaping the

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<sup>13</sup> Proportionality is concerned with admitting people to the territory who should then become members of the state. Generally moral and prudential reasons count against permanent partial citizenship arrangements the state might make in addition, though they count less heavily against temporary arrangements (e.g., work permits to generate remittances). Partial citizenship raises complex issues; see Blake (2002).

usefulness for human purposes of geographical locations are not normally priced. But humanity has rarely had trouble increasing the range of entities with a price ticket.<sup>14</sup>

For state S our measure delivers an index VS, measuring the value of collectively owned resources on S's territory, as well as those of the biophysical conditions determining the usefulness of this area for human purposes. To assess the extent to which S's territory is used one would divide VS by the number PS of people in S. VS/PS is the *per-capita use rate* of commonly-owned resources on S's territory. VS/PS includes resources that are not in circulation (not literally used), such as unmined minerals and unextracted oil. The point is to have a measure of what is at society's disposal, broadly speaking. The territory of S is *relatively underused* (or, simply, underused) if VS/PS is bigger than the average of these values across states (in which case the average person in S uses a resource bundle of higher value than the average person in the average country). It is *relatively overused* (overused) if this value is below average.

Since we are talking about rights entailed by common ownership of the earth, their satisfaction must take on the form of permitting immigration. States could also reduce the value of what they control by ceding territory or certain resources on the land. But they could not unilaterally elect to pay others off, say, by offering more development aid. Such compensation is acceptable only if those who have a right to migrate consent to it. This standpoint does not support open borders. But as long as a country underuses its resources and refuses to permit

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<sup>14</sup> Kolers (2009) argues that a right to rule exists if an ethnogeographic community demonstrably achieved plentitude in a territory and if there is no competing right of that sort to the territory. A community "achieves plentitude" if by their standards their land-use patterns push the use of the land to its limits. This way of thinking is very different from what is presupposed in my Proportionality Condition. Kolers denies that we need a universal criterion of use. Instead we need a universally fair way of testing criteria of use. The idea of plentitude is meant to do this work. However, we do need comparability across groups to regulate immigration. In light of the importance of having a universal criterion I propose we think of cultural patterns that cannot be integrated into a measure that generates cross-cultural comparability at least in a pragmatic sense as non-standard scenarios that must be accommodated, much as some minorities should be accommodated in liberal states.



more immigration in response, illegal immigration cannot be morally condemned. Immigration is not a matter for the respective country alone to sort out. This approach may not reflect would-be immigrants' desires to join wealthy societies. But it shows why immigration is not a discretionary matter for states to decide as they see fit.<sup>15</sup>

4. Resorting to collective ownership of the earth I have argued that the Responsibility and Proportionality Conditions constrain the right to rule over territory. Both also emerge from the Lockean and the Kantian approach. Let us first explore the Lockean analysis in Simmons (2001a). Simmons distinguishes among different rights that constitute state sovereignty: rights over subjects, against aliens, and over territory. As we noted, rights over territory encompass several specific rights. Rights over subjects are basic: they derive from consent, and other rights

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<sup>15</sup> (1) Steiner (1996) argues that everyone has a claim to an equal share of resources. He proposes Equal Division as a competing view to Common Ownership. He could endorse the Proportionality Condition, but allows underusers to pay into a global fund. No claim to immigration is forthcoming. One might object that I have argued the right involved in Common Ownership is the disjunctive right to use resources and spaces to satisfy basic needs, or else to live in a society that does not deny one the opportunity to satisfy basic needs in ways in which it otherwise could have been done through original resources and spaces, and therefore I cannot insist that there is anything other than a right to support. But that is not so. The point earlier was that modern states would not have to grant to all individuals on its territory actual access to resources. Nowadays many do not directly work with resources. There is nothing about Common Ownership that requires that they be allowed to. Proportionality concerns the distribution of people across resources and spaces. That condition might generate an entitlement for people to move to a certain country. But they would not therefore have a claim to a share of resources there. Nonetheless, their claim has a spatial dimension. (2) Moore (2012) argues that collective self-determination should carry the greatest weight when it comes to assigning control over resources. However, she also justifies global redistribution of wealth. Proportionality further constrains her reasoning. Wellman (2008) champions the overriding importance of self-determination for matters of immigration. This approach too needs to be reconsidered in light of that condition. (3) Proportionality supports Waldron's (1992) supersession thesis: territorial arrangements that are reasonably acceptable at time t1 (or just, in Waldron's approach) may no longer be at t2. A case in point is immigration to areas belonging to indigenous people. At the time of the original immigration the Proportionality Condition may not have licensed immigration. But the subsequent distribution of people may be proportionate. The violation has been superseded. For critical discussion see e.g., Meisels (2005), chapter 5 and Nine (2008). (4) Both Nine (2012) and Meisels (2005) think efficiency in using land has moral value. Proportionality captures an idea of efficiency at the global level. But Nine and Meisels also talk about efficiency in terms of what inhabitants add to locations. In my view, what people add to resources and spaces must be distinguished from resources and spaces that are collectively owned and thereby generate claims to immigration. (5) Gans (2001) distinguishes between first occupancy rights and rights to "formative territories." Both rights create claims to land, but not the kind that outweigh claims of current occupants. Gans adds that the claims of current occupants, in turn, are qualified in terms of proportionality.

derive from them. A state's territory is the territory justly acquired by individuals who join a state. Where territories have histories in which persons have (relatively) innocently acquired or (relatively) exclusively used land that has been (relatively) freely subjected to state jurisdiction, Simmons submits, we should be least skeptical about claims to sovereignty.<sup>16</sup>

Locke seeks to determine the limits of justified state power and especially to justify the existence of property vis-à-vis possible interferences by the government. "The Supreme Power cannot take from any Man any part of his Property without his own consent," he writes; "it is a mistake to think, that the Supreme or Legislative Power of any Commonwealth, can do what it will, and dispose of the Estate of the Subject arbitrarily, or take any part of them at pleasure" (II, 138). Those outside of the state are mostly ignored. Nevertheless, Simmons' Lockean account offers resources to determine the conditions under which immigration is permissible. As Simmons points out, Locke assumes there will be no "interior dissenters," and that the state can appropriate land in between parcels (p 314). Simmons explains that

the spirit of Locke's theory of property is, I think, consistent with allowing that *modest* common holdings of land can be legitimated by the exclusive use of the commons by society's members for gathering, recreation, or shared activities, independently of any "common consent" to this that other societies may have given. (p 314, italics in original)

This thought provides the beginnings of a Lockean account of immigration. The state must allow immigration up to a point where the enclosed areas are indeed reduced to *modest* common holdings. It would not be entitled, say, to keep land free for future purpose.

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<sup>16</sup> Baldwin (1992) argues that other modern thinkers took the same approach to territory (that is, based it on acquisition of individuals, to the extent that they thought about it at all). On Locke also see Tully (1993), chapter 1. Locke's treatises are commonly quoted by first specifying the treatise and then the section. So (II, 138) means Section 138 in the Second Treatise. Concerns about migration were important to writers in Locke's age primarily because of a need for some philosophical account to ground the legitimacy of colonization (see Tuck (1999)).

This much is straightforward, but not very illuminating since the “age of abundance” (Olivecrona (1974)), where land is still available for acquisition, is a temporary stage. All land will be acquired before questions about large-scale immigration arise. In the “age of scarcity,” there will be people without any opportunity to acquire land. They pose a problem because Locke holds an account of collective ownership, claiming God gave the “Earth, and all that is therein” and “all the Fruits it naturally produces, and Beasts it feeds” (II, 26) to mankind in common. Collective ownership provides the background to Locke’s account of appropriation, which focuses on the idea of an individual’s “mixing his labor” with resources (see II, 27). Such mixing is subject to constraints. One constraint is a spoilage proviso, which limits appropriation to “[a]s much as any one can make us of to any advantage in life before it spoils” (II, 31). A possible additional constraint is the “enough and as good” proviso (see II, 33), according to which appropriation is also limited by the need to leave sufficiently much for others. The account of privatization must be devised such that collective ownership is respected.

Precisely what all this entails for the age of scarcity is disputed. Collective ownership entitles late-comers to some demands. In addition, Locke introduces a duty to preserve humankind to which everybody should contribute to the extent that his own preservation is not endangered (II, 6; see also I, 42). However, Waldron (1988) argues that the “enough and as good” statement does not constrain acquisition, but makes a statement of fact about acquisition at the age of abundance. Late-comers are entitled to be employed if able-bodied, or else to be given charity. But they are not entitled to appropriation. At the same time, Waldron insists that Locke’s theory of appropriation is unacceptable because it could not possibly command the (hypothetical) consent of all those affected by it. After all, late-comers are disadvantaged. As opposed to that, Sreenivasan (1995) argues that, since Locke does mean for the enough-and-as-good proviso to be

a limitation on property acquisition after all, late-comers are entitled to a share of collectively owned resources. The enough-and-as-good proviso then “limits property in land to the greatest universalisable share” (p 117). What that is must be reconsidered for each generation.

Co-ownership exerts some form of continuing moral restraint on acceptable divisions of land beyond the initial territorial acquisitions. I follow Sreenivasan, taking the enough-and-as-good condition to be a genuine (currently applicable) constraint on appropriation. If, following Waldron, we do not take this condition to be such a constraint, Locke’s theory fails because the privileged status of those who come early enough to appropriate will be unjustifiable to late-comers. Either way, collective ownership generates entitlements for late-comers.<sup>17</sup> An account that “limits property in land to the greatest universalisable share” (p 117) must mean universalisability across all living co-owners, not merely those who happen to inhabit a given state. In the age of scarcity no country is expected to allow entry to an unlimited number of people. But they can reasonably be expected to allow entry up to a point where they have admitted a number of immigrants appropriate to the amount of commonly owned resources and spaces on that territory. The Lockean approach must be supplemented with an account of immigration that requires a state to allow for immigration if its territory is underused, but also permits it to block demands if it is overused.

Territory is not fixed through appropriation in the age of abundance. Any number of people may join in society “because it injures not the freedom of the rest; they are left as they were in the liberty of the state of nature” (II, 95). But the freedom of those excluded will be injured if their status as co-owners is not considered the way I propose. Moreover, parallel to

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<sup>17</sup> See Waldron (1988), pp 209-218 on the enough-and-as-good phrase, and Chapter 7 on the rejection of Locke’s account of appropriation (as well as other account of appropriation that turn on individual actions). Cf. Sreenivasan (1995), pp 113-118, and for his discussion of Waldron pp 37-41. See also Tully (1993), chapter 4.

what we just saw about immigration, we are pushed to an account of rights to rule over territory that integrates ideas about over-and underuse into an account of what moral right to territory a state may have. So we must add the Proportionality Condition to the Lockean account.

The Responsibility Condition is easily obtained. Creatures of God have the duty to preserve themselves and to help others with their preservation where possible:

Every one, as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice on an offender, take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another. (II, 6)

But the imposition of a state system creates dangers that must be neutralized through the imposition of a global regime that makes sure each co-owner's rights are preserved. The reasoning in section 2 then delivers the Responsibility Condition.<sup>18</sup>

5. Stilz ((2009), (2011)) argues that Lockean accounts cannot explain how the state can establish a continuous territory, why later generations consent to its jurisdiction, and why non-consenting owners cannot secede. The reason is that Lockean accounts derive the right to rule from individual acquisitions. Unlike Locke, Kant argues that subjection to a state is the only way to possess conclusive property rights. Property rights become interpersonally binding and determinate only under public authority that delineates and enforces them. Human beings have a

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<sup>18</sup> (1) The theological reference is not required. What matters is that the co-ownership status is put in jeopardy by the existence of a system of states. (2) Nine (2012) recognizes a very limited version of a responsibility condition. On her view, it is certain collectives that appropriate territories (by building a just regime, shaping the land, and by using it efficiently). It may happen, especially through ecological disasters, that one such collective loses its territory. Under certain conditions, such a collective should be given a new territory. But although Nine adopts many Lockean elements, she does not adopt the idea of humanity's collective ownership of the earth. Her approach is resilient to my proposed revision of the Lockean (and Kantian) approach.

moral duty to accept the authority of states, and found states when they do not exist. Only in this way can they reassure each other in the possession of rights and thus be free. The conditions under which states have the right to rule are that they guarantee basic rights, effectively implement law to regulate property, and do all that in a way that renders it meaningful to say a state rules in the name of its people. States have a claim to a territory because that is where they define and enforce property rights.<sup>19</sup>

The concern with freedom drives Kant's political philosophy. He did not think freedom was secured once everybody lived in a state "The peoples of the earth have thus entered in varying degrees into a universal community," Kant states in *Perpetual Peace*, "and it has developed to a point where a violation of rights in one part of the world is felt everywhere" (pp 107-8). There needs to be a federation of states to secure peace, which is necessary for everybody to realize their freedom. Perpetual peace, for Kant, is the "ultimate end of all international right" (*Metaphysics of Morals*, section 61, p 171). As the seventh proposition in his *Idea for a Universal History with a Cosmopolitan Purpose* states: "The problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states, and cannot be solved unless the latter is also solved" (p 47).

One element of Perpetual Peace is the Cosmopolitan Right of Hospitality that regulates the relationship between individuals and the governments of foreign countries. Individuals and states, seen as persons, are citizens of a "universal state of mankind," and thus share a political space (pp 98-99). Within this space, five kinds of relationships arise: (1) among citizens of a state; (2) between citizens and their state; (3) among different states; (4) among citizens from

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<sup>19</sup> Kant references are to Reiss (1970). Sometimes I translate directly from Kant's texts.

different states; (5) among citizens and states other than their own. To address these relationships Kant introduces three kinds of right (*Recht*). The civil right addresses (1) and (2), the international right (3), and the Cosmopolitan Right (4) and (5). Kant neglects (4), presumably because the relationship among citizens from different states would be mediated through governments on whose territory they interact.

The Cosmopolitan Right grants charitable treatment to individuals in their interaction with foreign governments (and interactions supervised by those). It entitles people to be treated as guests by foreign governments. Guests may *propose* dealings, especially trade, but not *demand* them. Guests may pass through, but not stay against the will of the inhabitants. That is so even if according to the guests' view of what it is to make proper use of territory the inhabitants fail to do so. Guests are entitled to more lasting hospitality if refusal involves their "destruction" (*Untergang*, p 106).

As Kleingeld (1998) argues, the Cosmopolitan Right is much stronger than a right to asylum from persecution. Starvation, lack of public health infrastructure and pervasive discrimination too may threaten (mental or physical) destruction. Kleingeld submits that we can also derive from Kant limitations regarding legitimate reasons for rejection, excluding those that would involve rejection before attempts have been made, such as skin color.<sup>20</sup> Valdez (2012) argues that attention to the context suggests a more radical reading of the Cosmopolitan Right. While one would naturally think a right to hospitality protects visitors presenting themselves on foreign shores, *Perpetual Peace* is mostly concerned with protecting *hosts* from foreign governments sending envoys to establish colonies and trade relations by force. The

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<sup>20</sup> See also Kleingeld (2012).

Cosmopolitan Right governs interactions between governments and individuals as they expand beyond interactions among individuals and their own governments. It requires charitable treatment by foreign governments. Those most likely to suffer are citizens of weaker countries. In the 18<sup>th</sup> century this occurred through intrusions of foreign governments into distant parts of the world. Today, this happens when these individuals travel to stronger states. The direction of travel has reversed, but the power differential remains. Strengthening the position of the weakest for Kant meant strengthening sovereign rights of weaker states. Now it means weakening sovereign rights of strong states vis-à-vis migrants from weaker states.

This understanding of the Cosmopolitan Right is surprisingly different from what one might think initially. For instance, Kant approves of immigration barriers that, as he sees it, China and Japan imposed after encountering European colonizers (pp 106-7). He apparently supports immigration restrictions unless applicants are threatened by destruction. But that is not the point. China and Japan may impose restrictions only if *that* is what is required to protect their citizens from assault, that is, only if *that* is what the maintenance of charitable treatment of individuals by foreign government requires. European powers had undermined that requirement. Protection against their intrusion was needed. But if charitable treatment requires more permissive immigration rules, then *that* is what is required.<sup>21</sup>

To see whether such a broad understanding is acceptable, let us see how Kant can argue for the Cosmopolitan Right. The best place to look is section 62 of *Metaphysics of Morals*, in the

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<sup>21</sup> (1) Kant rarely addresses immigration, but where he does seems to have a positive attitude: “The supreme power, as master of the country, has the right to favor immigration and the settlement of strangers and colonists. This will hold even although the natives of the country may be unfavorably disposed to it, if their private property in the soil is not diminished or interfered with” (*Metaphysics of Morals*, p 160). (2) Ripstein (2009) does not offer such an expansive understanding of the Cosmopolitan Right. He says, for instance, that “[t]he cosmopolitan analogue of the duty to support the poor is not world citizenship, but the division of the world into states in a way that guarantees that each person has a home state to return to” (p 297).



Doctrine of Right (pp 172-73).<sup>22</sup> The starting point is that each person has a right to freedom (not to be subject to another's arbitrary will). Therefore everybody may take up some space on earth. In virtue of the spherical nature of the earth, we potentially or actually encounter each other. Proximity harbors potential for injury. Moral norms must determine how people are allowed to take up space, and when it becomes acceptable that people acquire parts of the earth to the exclusion of others. There must be the possibility to acquire property, in virtue of the right to freedom. But one cannot establish property (and impose duties) unilaterally. It is only possible rightfully to have something external as one's own if, in one's acts of acquisition, one accepts the necessity of a collectively established political authority ruling in the name of all. Kant submits that humans form a community with the (sole) duty of regulating property acquisition. To that community Kant ascribes a collective will charged with this regulation.

In one way of thinking about this, this community makes sure each act of acquisition makes a commitment to systematic and determinate property regulation by states as well as international law backing up the peaceful arrangements needed to secure property. In another way of thinking about Kant's argument, this community is concerned with spelling out what the exercise of freedom on the limited spherical space of the earth can amount to for each person in light of the fact that there are many others with the same right to freedom. No injury must flow from the exercises of that right and thus from the right to take up space.

Kant's argument delivers the broad view proposed by Valdez. The general concern is that no injury flow from the right to take up space. The Cosmopolitan Right makes sure of that in one context: interaction among individuals and foreign governments. Charitable treatment by foreign

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<sup>22</sup> For this nexus between the Cosmopolitan Right and section 62 of the Doctrine of Right, see also Brandt (1995).

governments is required to that end. What this means depends on the circumstances. Under certain conditions it may require borders closings. Under current conditions, it arguably requires more permissive immigration policies. But crucially, Kant's argument reaches beyond even Valdez's broad understanding. It takes us to the Responsibility and Proportionality Conditions. Both capture duties of states to outsiders. The Responsibility Condition guarantees that the existence of states causes no injury to individuals qua co-owners. The Proportionality Condition makes sure countries do not exclude people beyond what is reasonably acceptable to co-owners.

I do not claim that textual evidence shows that Kant endorsed these conditions. But I submit that the Cosmopolitan Right, understood in Valdez's broad sense, still understates what Kant's argument delivers. The reason is that at the point to which we have tracked Kant's reasoning – as requiring that injury through sharing the earth be avoided, specifically in interactions between individuals and foreign states -- we can enlist the reasoning in support of Common Ownership and then my arguments for the Responsibility and Proportionality Condition in sections 2 and 3.<sup>23</sup>

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<sup>23</sup> (1) In *Perpetual Peace* Kant insists that “no state shall forcibly interfere in the constitution and government of another state” (p 96.). But his prohibition is limited. The emphasis is on *forceful* intervention. Moreover, Kant is concerned with a situation where existing civil strife has not yet come to a conclusion. Non-violent intervention may be acceptable even in such a situation; and intervention may be acceptable when there is no ongoing strife. Also, in the Doctrine of Right, Kant denies that there is a right to revolution (pp 143-147). But possibilities of intervening can fall short of instigating revolution. (2) One might say Kant rejects proportionality reasoning. In section 62 of the Doctrine of Right he explains that in “newly discovered countries” (p 172), settlers may take up space without asking those who live there “if the new settlement takes place at such a distance from the seat of the former that neither would restrict or injure the other in the use of their territory.” But he also emphasizes that “in the case of nomadic peoples, or tribes of shepherds and hunters (such as the Hottentots, the Tunguses, and most of the American Indians), whose support is derived from wide desert tracts, such occupation should never take place by force, but only by contract; and any such contract ought never to take advantage of the ignorance of the original dwellers in regard to the cession of their lands.” Violent appropriation can never be excused by the claim that it serves the general good of humanity. By way of contrast, consider statements by John Winthrop (1588–1649), first governor of the Massachusetts-Bay Company. Winthrop refers to Genesis I:28: “The whole earth,” he says, “is the Lord’s garden, and He has given it to the sons of men with a general commission. . . . Why then should we stand striving here [in England] for places of habitation . . . and in the meantime suffer a whole continent as fruitful and convenient for the use of man to lie waste without any improvement?” “As for the natives,” he reasons, “they enclose no land, neither have any settled habitation, nor any tame cattle to improve the land by, and so have no other

6. So both the Lockean and the Kantian account should incorporate the Responsibility and the Proportionality Condition. This result adds a global dimension to the debate about territorial rights. But the opponents could insist that their rationale for grounding a state's right to rule remains undisputed and conceivably adopt the views I have proposed so far. However, we should reject both accounts. Both offer a justification of states far richer than what is defensible, and so also ground a right to rule in a way that is indefensible.

I do not merely discuss the justification of states to differentiate my approach from Locke and Kant. A justification strong enough to imply that there ought to be states makes the global entanglements of the right to rule appear as afterthoughts. Immigration registers as a subject we need to discuss only before the background of an established justification of states. But if it is not the case that there ought to be states, an account of what movement of people around the globe is acceptable becomes an integral component of what justification remains available. Yet another reason for proceeding to this discussion now is that I wish to add the Justice Condition to the other two conditions on the right to rule. One way of approaching that condition is to explain in what sense states are justified. Justice measures the moral success of states. In light of the significance of justice for human affairs a particular state does not have the right to rule if it is indifferent to justice. No state does if states are not in some sense justified to begin with. In light

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but a natural right to those countries. So as if we leave them sufficient for their use, we may lawfully take the rest, there being more than enough for them and us" ((1869), 1:309–12). Winthrop is right that, as a matter of justice, immigration could not be denied if immigrants "leave [the inhabitants] sufficient for their use." But considerations of reasonable acceptability should determine how to share the space. This appears to be a very different attitude from Kant's. Kant says, however, that the territory in question consists of "wide desert tracts." So proportionality reasoning does enter. Kant does not discuss what happens if the area claimed by nomads is of great value. See also Sidgwick (2005), chapter XV, section 4. (3) For more discussion of Kant on original ownership, see Flikschuh (2000), chapter 5, section 2, Byrd and Hruschka (2010), chapter 6, sections 2-4, and Kersting (1984), pp 113-154.

of the first point, adding the Justice Condition is straightforward. In light of the second, an appropriate time to do so is after discussing the sense in which the state is justified.

Following Simmons (2001b), to offer a *justification* for X (e.g., acts, policies, institutions) is to argue that X is rationally or morally acceptable. We offer justifications if there is opposition, and thus in response to objections. We seek to justify states because we cannot take for granted that human beings live in states simply because it suits their nature. Justifications may include comparative and non-comparative considerations. Entities can be praised for prudential or moral advantages in a manner that does not involve comparisons. They can also be praised vis-à-vis alternatives. “Justifying the state” cannot mean showing the prudential or moral superiority of *any* state over all *possible* alternatives. It means to show the superiority of *particular* forms of the state over all *relevant* alternatives.

The state must be justified especially over the objections of two kinds of skeptics. On the one hand, there are the philosophical anarchists or, as I call them, “skeptics from below,” who favor living arrangements that lack certain features of states, especially their coerciveness, or who anyway consider organized power illegitimate. The philosophical anarchist has been to modern political philosophy what the moral skeptic has been to ethics. On the other hand, there are the “skeptics from above,” who do not question coercive power per se, but insist that such power should not be organized in a plurality of states. Alternatives to a system of states that such skeptics may favor include a world state, a world with federative structures much stronger than the UN, with a more comprehensive system of collective security, one where jurisdictions are disaggregated, or where border-control is collectively administered or abandoned entirely.

Justifications of states can be more or less strong, depending on how broad a range of concerns they seek to rebut. To be entitled to say “there ought to be states,” and thus that we have a duty to found states where they do not exist, we must refute both kinds of skeptics. A justification that lets us conclude that there ought to be states would be very strong. A weaker version – which I favor – only draws attention to certain advantages of states and insists we should continue to live in states because we have no action-guiding alternative ideal of political order. This justification does not claim it has successful responses to the skeptics.

A *prima facie* case in support of the existence of states is easily made. Consider Kavka’s (1986) notion of the state:

To be a State, an organization must be *preponderant* in power, in a given geographic region, in the sense that it can physically overpower internal competitors and generally discourage aggression by outsiders. This means it can successfully enforce its rules and judgments against any public internal opposition if it chooses to do so, except possibly in the special case of its being replaced in accordance with established and recognized internal procedures, for example, elections. And it provides sufficient actual enforcement against internal and external transgressors that its citizens are seldom forced to resort to anticipatory action (...) to protect themselves. (...) And a State is simply an organized society with a territory and government. (p 158)

These criteria apply in degrees. Many states have low state capabilities (abilities to provide security, efficient institutions, capable administration). But to the extent that states look like what Kavka describes, they excel at producing the kind of goods humans need for survival or desire for a flourishing life. They make life more predictable, allow people to plan, and set the parameters within which economic interaction can unfold. Life in states has prudential virtues. By allowing for the development of the human personality that becomes possible under such circumstances the state also has moral virtues.

But such a justification does not by itself refute either kind of skepticism. Let me focus on skepticism from below. Right-libertarians are among the most vocal skeptics from below. They submit there are alternative ways of securing the benefits of states and that states provide them at too high a price. *On balance*, states have done more harm than good, rendering the development of the system of states irrational. Murray Rothbard, for one, regards the state as

the supreme, the eternal, the best organized aggressor against the persons and property of the mass of the public. *All States* everywhere, whether democratic, dictatorial, or monarchical, whether red, white, blue, or brown. (...) And historically, by far the overwhelming portion of all enslavement and murder in the history of the world have come from the hands of government. ((1996) pp 46f)

Right-libertarians offer formal models of public choice (mathematical models of how collective decision making could function) that dispense with states. In addition they seek to identify historical societies that realized libertarian ideals. In ancient Ireland and pre-colonial Africa people apparently enjoyed adequate security and had sophisticated property arrangements without the kind of coercive enforcement practiced by states.<sup>24</sup>

Political scientist James Scott has done much to question the moral success of the state. Scott (1998) explains how developments since the late 18<sup>th</sup> century -- increasingly direct access of the state to citizens, a belief in progress and technology, an authoritarian state, and an incompletely evolved civil society -- led to the disastrous wars of the 20<sup>th</sup> century. Scott (2009) explores how ordinary people resist predatory states. He focuses on the populations in the hills of Zomia, a mountainous region in South East Asia that includes parts of Burma, Cambodia, China, India, Laos, Vietnam and Thailand, the largest area on earth not integrated into states. Scott

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<sup>24</sup> For the Irish case, see Peden (1977). The classical reference for African societies is E. E. Evans-Pritchard's controversial work on the Nuer (Fortes and Evans-Pritchard (1940)). Right-libertarians like to enlist support from political anthropologists and take heart in statements like this: "In many societies government simply does not exist" (Lewellen (1992), p 1). See Pennock and Chapman (1978) for perspectives on anarchism. Barclay (1982) offers an anthropological look at anarchy. For Africa, see Horton (1985) and Herbst (2000).

argues that those populations chose to be outside the reach of states to avoid conscription, slavery, excessive taxes, forced labor and war. Relations and structures in the highlands generate widespread order, although of a different type than what states provide.

A perception that states create problems has increasingly influenced the debate about whether states are justified. “Religion and philosophy have claimed their martyrs, as have family, friendship, and office,” writes Walzer (1970), but “there has never been a more successful claimant of human lives than the state” (p 77). Coining the term “democide” (murder by governments), Rummel (1994) insists that a “preeminent fact about government is that some of them murder millions in cold blood” (p 27). A genocide expert adds that

in total, during the first eighty-eight years of the [twentieth] century, 170 million men, women, and children were shot, beaten, tortured, knifed, burned, starved, frozen, crushed or worked to death; buried alive, drowned, hanged, bombed, or killed in any other of the myriad other ways governments have inflicted deaths on unarmed helpless citizens and foreigners (Charny (1999), p 28).

Depending on the estimates the dead could conceivably be more than 360 million people. “It is as though our species has been devastated by a modern Black Plague” (p 28).<sup>25</sup>

Skeptics from below cannot *demonstrate* that founding states was tragically misguided. But they do call into doubt the self-interest-based rationale for states in Hobbes’s *Leviathan* or Locke’s *Second Treatise*. Hobbes envisages a state of nature where people engage in second-guessing and embrace preemptive aggression. Only social contracts to found states solve the security problem in the state of nature. Hobbes rebuts solutions to that problem that dispense with coercive structures, thus addressing skepticism from below. Other solutions he considers include lying low to avoid conflict and forming smaller defense alliances that are less tightly

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<sup>25</sup> Cf. also Bull (1977), pp 282-84, Pogge (2002), pp 183-190.

organized than states. Lying low fails because of the rationality of anticipation. Smaller groups are internally unreliable and are in the same situation vis-à-vis each other as individuals are without them.

Locke too believes rationality gets people to exit the state of nature. He does not envisage as horrific a state of nature as Hobbes does. However, in conflicts individuals must be judges in their own affairs. But then

selflove will make men partial to themselves and their friends: and on the other side, that ill nature, passion and revenge will carry them too far in punishing others; and hence nothing but confusion and disorder will follow, and that therefore God hath certainly appointed government to restrain the partiality and violence of men. (II, 13)

This is Locke's case for states. While Locke does not insist that there is an obligation to found states, as Kant does, he, like Hobbes, recommends it as the uniquely rational course of action. But one must wonder whether it is true that "God hath certainly appointed government to restrain the partiality and violence of men," or if He did, how much success this endeavor has seen. Consider the following striking statement:

Within certain limits set by military and political power considerations, the modern state may do anything it wishes to those under its control. . . . In matters of ethics and morality, the situation of the individual in the modern state is in principle roughly equivalent to the situation of the prisoner in Auschwitz: either act in accordance with the prevailing standards of conduct enforced by those in authority, or risk whatever consequence they may wish to impose. . . . Existence now is more and more recognizably in accord with the principles that governed life and death in Auschwitz. (Kren and Rappoport (1980), 140, quoted in Bauman (1989), 86–87)

States have removed much violence from everyday life. But the state also provides the machinery for the systematic exercise of violence against those who do not belong to it, or against those who are unwelcome in the eyes of an ideology. Historian Charles Tilly insists that states make wars and wars make states ((1990), chapter 3). The state can use projections of value



to inspire individuals to make sacrifices or instigate them to commit atrocities and it might bestow an overarching meaning on their lives that would otherwise escape them. Kren and Rappoport (1980) urge us to consider the extent to which life in states as such resembles life in Auschwitz, submitting that such a life is the price to pay for what the state provides. They are going too far, but Auschwitz itself is an egregious symptom of the ensuing potential.<sup>26</sup>

Once we consider that alternative solutions to the security problem might have received insufficient attention, and that the existence of a state system generates considerable problems of its own, it becomes doubtful if on balance, founding states is rational. Doubts about Kant draw on these doubts about the social contract argument. Kant never explains, as Simmons (2001b), rightly argues, why we have a duty to live in states rather than a general duty to respect rights. Nor does Kant explain why anybody inflicts an injury by refusing membership in society if others have accepted it and thus solve each other's security problem. Perhaps Kant thought there is *no other way* of securing these benefits. But then the doubts about the social contract case re-enter. Kant might have concluded too quickly that there were no alternative solutions to the security problem, without considering that states also generate problems.

Maybe we set the standards too high for a successful refutation. To argue for anarchy, and thus to support skepticism from below, says Wolff (1996),

it is not enough to point out the peculiarity of the state and the difficulties with many of the arguments in favor of it. Rather, in contractualist terms, it has to be shown that reasonable people seeking agreement on the nature of the social world would prefer anarchy to the state. (...) The defense of the state, we may say, needs only to meet the burden of proof assumed in the civil, not the criminal, courts: not beyond reasonable doubt, but by the balance of probabilities. (p 115)

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<sup>26</sup> For the themes in this paragraph, see Elias (1994), Bauman (1989), and Giddens (1984).

Wolff appeals to epistemic standards. As far as Hobbes and Locke are concerned, Wolff's point is that "by the balance of probabilities" states solve the security problem best. As far as Kant is concerned, there should be *enough* confidence in the success of the moral argument for states, as well as *enough* abhorrence for the costs associated with omitting the founding of states, to make that case acceptable. Both times skeptics from below demand too much if they ask for more.

Yet once we recognize troubles arising from the interactions *among* states, Wolff's conclusion may well not follow. Would it *really* be rational to found states "by the balance of probabilities," rather than try to arrange affairs without creating multiple centers of coercive power? Would it *really* be immoral not to do so, given the limited confidence we should have in arguments for states and given the moral costs of founding states erroneously? It seems we are in no position to answer affirmatively. The strength of skepticism from below is often underappreciated, especially when we update it in light of the existence of multiple states.

There *ought to be states* only if both types of skepticisms can be refuted. But skepticism from below remains unrefuted. The Lockean approach cannot establish that the founding of states is the uniquely rational action in a state of nature. The Kantian approach fails to establish that founding states is morally required. But a state system may still be *justified* all things considered although we are not entitled to say *there ought to be* such a system. That is the case if the following conditions hold: (1) The state system has certain moral or prudential advantages. (2) To the best of our understanding, no alternative political system has moral or prudential advantages that outweigh those of a state system. (3) Nonetheless, there remain nagging doubts about the acceptability of the state system; so we cannot conclude that there ought to be such a system. In the moderate sense captured by these conditions the state system is justified. I do not pursue this matter further since my point is to argue against the Kantian and Lockean approach.

But while Lockeans and Kantians offer too strong a justification, the state is indeed justified. Along the moral dimension, its performance must be measured in terms of justice. If a state is indifferent to justice it has no right to rule over its territory. Being concerned with justice is a minimal condition on the acceptability of any state. So we can and must add the Justice Condition to the Responsibility and Proportionality Conditions. Doing so is straightforward once we see that, and how, states are justified.<sup>27</sup>

7. The state has the right to rule and thus may reasonably expect of others to accept exclusion *only if* it (a) administers justice on its territory, or at least makes credible efforts to that end (Justice Condition), (b) assumes its share of global responsibilities so that others can lead minimally decent lives where they reside (Responsibility Condition), and (c) lets a number of people live on its territory in proportion to the value for human purposes of that part of the world (Proportionality Condition). The conditions apply as a threshold. If another state meets, say, the Justice Condition to a larger degree this does not generate a stronger claim to the territory. If they persistently violate these conditions, states no longer have the right to rule (e.g., cannot resort to that right to resist annexation of its territory). It is a separate matter, however, what reactions are appropriate to such violations. What matters then is both the nature of the violation and how a proposed sanction would bear on the realization of other values. That the state does not have a right to rule is only one consideration that will enter into that deliberation. Outright annexation, in particular, will rarely be appropriate in light of the threat it poses to many values.

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<sup>27</sup> Condition (2) has been argued for in Risse (2012), chapters 15 and 16. See also James (2012), chapter 4 for these epistemic considerations regarding the justification of states. See again the earlier footnote on what it does, and does not, mean to be unconcerned with justice.

From here, how do we obtain jointly sufficient conditions for a right to rule? That right would still be undermined even if all three conditions hold if the state *should not* have control over the territory to begin with. This may be so in four ways. Let me explain what they are, and sketch how to proceed when these circumstances obtain. These cases raise complex issues that I largely ignore. I merely wish to give a sense of how the conditions I have introduced can be transformed into sufficient conditions for the right to rule.

- (1) **Occupation:** Some of the territory was annexed against the will of its inhabitants but those were not expelled. If the inhabitants did not have the right to rule but now wish to exercise it, they should be allowed to do so once they can maintain a state, exercise justice, and (at least in due course) implement the Responsibility and Proportionality Conditions. If too few people are involved to maintain a state they should be compensated instead. If the original population did have the right to rule, the occupation must end. In both cases I am envisaging occupations that occurred in recent memory. In other cases the situation should be treated as a case of secession (demanded by an ascriptive group one of whose characteristics is that they or their ancestors suffered an injustice), rather than an undoing of an occupation. Their claims weaken over time to the extent that the original population or their offspring had opportunities to adjust their lives.
- (2) **Expulsion:** Some of the territory was annexed and the original inhabitants were expelled. Regardless of whether that population had the right to rule, unless the original inhabitants had obtained the territory by expelling others who continue to have claims, such an expulsion is a violation of their claim right to resources and spaces of the earth for whose exercise they had chosen that location.<sup>28</sup> If this violation occurred in recent memory it should be undone. The claims of the original population and their offspring grow weaker to the extent that they had opportunities to be integrated into another society.
- (3) **Secession:** The state includes a population with a right to secede but is prevented from exercising it. We need not decide when precisely there is such a right. Buchanan (1997) distinguishes three views: the remedial-right-only theory (allowing secession only if substantive human rights violations occur or if the territory was forcefully taken); the primary-right theory limited to ascriptive groups (e.g., nations, ethnic groups, or groups tied together by the collective memory of past injustice); and the primary-right theory applied to all groups (i.e., any group who wishes to found a state may do so). Presumably

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<sup>28</sup> Stilz (2011) argues that a history of political cooperation generates a valuable political relationship. That relationship provides a reason for certain responses on the part of insiders (to sustain and value their association) and of outsiders (to refrain from dissolving it). Respecting a people's claims in their territory is a way of honoring this relationship. Such an argument could supplement my collective-ownership based argument. Both arguments articulate the wrongness of expulsion without presupposing that we already know what a right to rule consists in.

the second and third theory must consider the costs of separation for the parties involved, and insist that in the end there are two at least reasonably just states. If the first theory is right Secession does not add anything to Occupation.<sup>29</sup>

(4) **Break-up:** The state has arisen through an illegitimate secession.

Our three conditions turn into sufficient conditions to generate the right to rule if the state does not occupy territory in the sense sketched, does not have to confront claims from people who have been expelled, does not include a population with a right to secede, and has not emerged from an illegitimate secession. What I have said should give a sense of how to complete this discussion of the right to rule over territory.

Let us conclude. A broad range of demands on particular territories can succeed as long as the Justice, Proportionality and Responsibility Conditions are met and the four scenarios we considered do not obtain. While, say, historical or nationalistic claims can go a long way toward showing why a group should have the right to be in a certain region, such claims must be squared with everybody else's claims to take up space on earth. We must see the right to rule in global perspective. Once we do so, we also see that the right to rule, the justification of states, and immigration must be theorized together. That is the thought this paper has sought to articulate.

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<sup>29</sup> Buchanan (1997) and (1991) takes the first kind of view on secession. Wellman (2005) thinks there is a right to secede whenever this generates two at least reasonably just states.

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