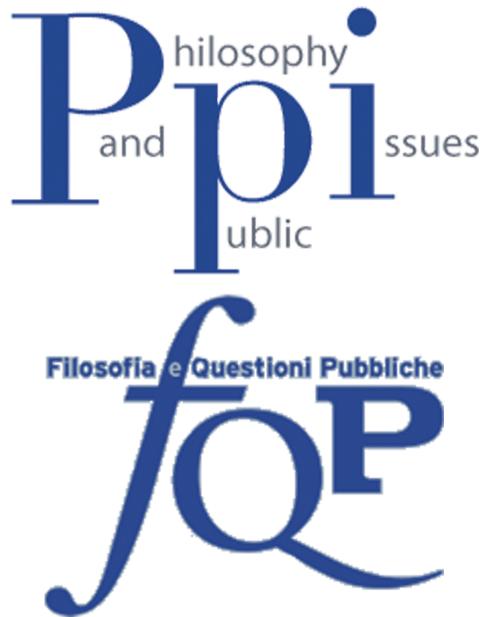


SYMPOSIUM
PEOPLE AND TERRITORY



SELF-DETERMINATION
AND TERRITORIAL RIGHTS

BY
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Self-Determination and Territorial Rights

A. John Simmons

The principle of national self-determination clearly lies near the center of the last century's reasoning about the rights of states, both in the actual development of international legal standards and in the theorizing of philosophers and political and legal theorists. The *United Nations Charter* identifies the U.N.'s purpose partly in terms of securing self-determination for all peoples. The U.N. aims "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace" (Chapter 1, Article 1, part 2). Similarly, the first article of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social, and Cultural 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." There is, of course, a widely recognized tension between peoples' legal rights of self-determination and the (even more firmly entrenched) legal rights of established states to maintain their territorial integrity (for instance, in the face of demands that they cede territory to internal or inter-state groups seeking independence).¹ And it is

¹ The principle of territorial integrity is widely acknowledged to have precedence over the principle of self-determination, resolving the tension in

widely acknowledged as well that international law is at best obscure on the question of precisely which kinds of groups count as the “peoples” that have these rights of self-determination (and whether [or when] non-state groups are supposed to be entitled under the principle of self-determination at most to “internal” self-determination or limited political autonomy).

Theorists of global justice and territorial rights, exploring the moral rights of nations, states, or peoples within the international order, have likewise identified a right of group self-determination as central to understanding groups’ moral standings; and they have tried in the process to resolve some of the tensions and ambiguities that appear to infect the legal principle of self-determination. Political philosophers have tailored their specific conceptions of group self-determination to fit their nationalist, Lockean, Kantian, or choice-based commitments, appearing to disagree more on the question of which groups possess rights of self-determination than on the question of what *follows* from that possession. For the most part, it seems, recent authors take the *content* of the principle of self-determination to be relatively transparent; and they have mostly found in the idea of national self-determination precisely those rights they are predisposed to believe that legitimate states possess. But this discovery typically proceeds with relatively little specific argument in support of the relevant inferences.

In the most recent systematic study of territorial rights, Margaret Moore’s *A Political Theory of Territory*, we find a defense of (what Moore calls) “a political self-determination theory of territory.”² A people’s territory, Moore argues, is the geographical

favor of preserving the territorial status quo. But numerous real-world cases seem to defy that resolution.

² M. Moore, *A Political Theory of Territory* (Oxford University Press, 2015), 7. Subsequent references to this work will be in parentheses in the text.

domain where that people collectively exercise self-determination (p. 27). With territory so defined, it is not surprising that the idea of self-determination is required to shoulder much of the argumentative load in Moore's account of states' territorial rights. And Moore's theory again, I think, focuses more on the question of which kinds of groups qualify for rights of political self-determination than it does on precisely how the concept of self-determination necessitates groups' possession of specific territorial rights. It is on that latter issue that I want to focus here. While I do in fact have some concerns about whether Moore extends rights of self-determination to the correct groups (or to groups that distinguish her position from those of other recent theorists), I will be concerned here primarily with Moore's claims about the kinds of group territorial rights that can be derived from that group's right to self-determination.

According to Moore's theory of territory, a 'people' has rights to jurisdictional authority over the land on which its members reside if (a) the group occupies that land in a morally legitimate fashion, (b) a large majority of the group share a commitment to political self-determination,³ (c) the group has the capacity to establish and sustain institutions of public self-determination, and (d) they possess an objective history of political cooperation together (pp. 35-6, p. 50). Like most nationalist theorists, Moore adds specific requirements of "attachment" to (portions of) groups' particular claimed land, attachments that involve the group's identification with the land, engagement in projects that use the land, or symbolic or religious value conferred on the land

³ Which Moore understands as seeking either the institutional organization of a *state* or organization in some "less formal" way (which remains unspecified)(*ibid.*, 79). Moore does emphasize the typical need for (but not the necessity of?) "institutional mechanisms" to accomplish this (*ibid.*, 65).

(pp. 118-20).⁴ 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 land, but also robust, property-like territorial rights to control the natural resources in those territories and to (within limits) exclude would-be immigrants (pp. 40, 162, 166, 175, 189, 195-6).

The importance of self-determination has also, of course, been cited in previous theories as crucial to the derivation of groups' territorial rights. And the groups identified (as entitled to self-determination) in Moore's theory obviously have much in common with the groups described by others. Functionalists (like Stilz⁵) and voluntarists (like Altman and Wellman⁶) have also stressed the need for groups' shared commitment to and capacity for political self-determination. Nationalists (like Miller⁷) have also emphasized groups' shared histories, collective identities, and solidarity, while even groups' histories of political cooperation in certain ways resembles a requirement (like Nine's) that they share a "common conception of justice".⁸

Moore distinguishes her position from those of nationalists like Miller chiefly by denying that the "shared political identity"

⁴ These arguments, Moore contends, are sufficient to identify groups' "heartlands", but may not be able to precisely identify the boundaries of groups' territorial authority.

⁵ Anna Stilz, "Nations, States, and Territory", *Ethics* 121 (2011), 572-601.

⁶ Andrew Altman and C. H. Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009).

⁷ David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007).

⁸ Cara Nine, *Global Justice and Territory* (Oxford University Press, 2012), 3, 45-7. The "common conception of justice" requirement is Nine's (broadly Rawlsian) way of understanding the unique identity of a particular unified people with "common sympathies", but doing so without any appeal to national or cultural qualities.

required (on her account) for a group to count as a “people” needs to involve a shared national *culture* (p. 71, pp. 79-80). She distinguishes her position from Altman and Wellman’s brand of voluntarism by arguing that voting patterns are insufficient to indicate a shared political commitment, instead of which she insists on a shared past history of political cooperation (p. 69 fn 25, fn 30). And Moore insists, against functionalists like Stilz, that groups that qualify for jurisdictional authority over a territory need not actually be *states* (pp. 71, 96-7, 106-7).

But (on the first point) it seems very likely (though it is not, of course, necessary) that most (if not all) of the groups that satisfy Moore’s conditions for territorial rightholding will *also* share a culture, at least to the extent that such sharing is required by most (cultural) nationalist theorists. And (on the second point) Moore’s groups are still identified in majoritarian terms (like Altman and Wellman’s—so nothing like *unanimity* of purpose is required); and the requirement of a shared political history seems mostly just to be an empirical indicator of likely future success in political endeavors (p. 52) and so to be just another way of determining the group’s *capacity* for self-determination. Indeed, it seems clear as well that most (if not all) of the groups that Moore’s account selects for self-determination will also be states (on some reasonable, commonsense view of what counts as a “state”). So in the end it is not apparent to what extent (if any) the groups Moore’s theory picks out for rights of self-determination will *in practice* differ much from those picked out by others who have written on this subject.

That, of course, is not to argue that Moore’s view is mistaken. It may simply be the case that these theories all converge to correctly pick out roughly the same set of real-world groups as entitled to jurisdictional authority and territorial self-determination. What is less satisfactory—in Moore’s account as in

the others I have mentioned—is that nations’ (states’, groups’) broad, over-arching rights of self-determination seem mostly to be discussed as if we not only know and agree on what it *means* to be self-determining but know and agree about which more specific rights are *implied* by the right of self-determination. In fact, neither of these subjects seems to me to have been satisfactorily resolved (or even very carefully addressed) in the existing theoretical literature.

We are not helped much, of course, by examining more carefully the references to self-determination in international covenants and declarations. We know from those sources that groups’ rights of self-determination include the rights “to freely determine their political status and freely pursue their economic, social and cultural development”. But what exactly does any of that mean? Is it only forcible imposition by outsiders that violates such rights to freedom? Most groups’ “cultural development” is regularly and inevitably affected, often profoundly, by a wide array of (non-coercive) outside influences. Do such limits to domestic “free determination” violate groups’ rights of self-determination? Most groups’ economic development is limited and shaped by the geography and the human and natural resources in their territories, by the nature of foreign markets, by others’ trade arrangements, by war or famine in their own or in nearby nations, etc. And groups’ decisions about how to structure their legal and political institutions are routinely responsive to foreign influences, pressures, or examples. When, exactly, do these kinds of limits on groups’ free “determinations and pursuits” count as violations of groups’ rights? International law provides little apparent guidance in answering such questions, being largely concerned with prohibiting more obvious and uncontroversial forcible violations.

The precise content of the right of self-determination might plausibly be thought to be best approached not by trying to analyze the various existing conventions and covenants, but rather by discussing that right's moral foundation or grounding. The nature and importance of national or group self-determination is often, for instance, discussed by analogy with the importance of personal *autonomy*. The ideal of *collective* autonomy is what is taken to undergird or justify group rights of self-determination, and the value of collective autonomy is modelled on the value of personal autonomy. In this spirit Moore argues that “the reason why collective autonomy is valuable mirrors some of the considerations or arguments underlying the value of personal autonomy” (p. 65). Personal autonomy, as this is ordinarily understood, requires (internally) that we be guided by reasons and values that are our own, that we can on reflection endorse or affirm. When this is the case not only are our lives not simply directed or controlled by others, they are guided in some acceptable measure by our own authentic selves.

Further, true personal autonomy requires (externally) that persons have an adequate range of real options from which to choose. We cannot (at least normally) freely choose our life's course unless we confront some reasonable menu of life options.⁹ So personal autonomy has both internal and external requirements; only when both are satisfied will a person count as the “author” of her choices and her life. Living our personal lives in a way that is “authentic” and uncontrolled—in a way that adequately tracks our own values or own aims in life—does seem

⁹ Jeremy Waldron defends the view that while these options, in order to be meaningful, need to involve *culturally* defined goods, they do not need to be drawn from any *particular* culture (as opposed to coming from some multicultural “menu”). J. Waldron, “Two Conceptions of Self-Determination”, in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law*, (Oxford University Press, 2010), pp. 402-3.

undeniably important, perhaps even essential, to really *living* our lives (rather than merely being a part of something governed by alien forces), and so it appears to indeed have great value. *Collective* autonomy, then, along with the right of national self-determination that is said to follow from it, appears by analogy to be a similarly important value, since it allows a group's decisions, laws, and policies to express the true values and commitments of the group, to guide the group in a fashion adequately free from external control. The people are then the joint authors of their shared lives.

The analogy between (the values of) personal and collective autonomy begins to look inapt, though, the moment we try to use it to illuminate the rights of real-world territorial groups. While persons are often sufficiently unified that their choices can be said to genuinely reflect their true, considered values and commitments, modern nations (and other groups that are in any part territorially-defined) are almost never so unified. There is nothing even approaching unanimity of values or commitments in any existing (territorially-specified) group, each substantial territory containing significant dissenting minority individuals and groups within the specified territorial boundaries. Cultural, ideological, and economic divisions are routine within any geographical region that might qualify as a "people's" territory. What, for instance, is the "true self" of Turkey or Israel or Spain or Pakistan (the list of such cases, of course, can be extended almost indefinitely)? This simple fact of national/group heterogeneity by itself means that the purported value of collective self-determination rests on something more like the value of "autonomy" for a schizophrenic or deeply ambivalent person than like the value of autonomy for a self-guided person in touch with her true self. It is, of course, not only far less clear what counts as autonomy in such schizophrenic cases, but far less clear that anything that *does* count has great value—let alone the

kind of *overriding* value that could ground fundamental group rights.

One feature of the analogy between personal autonomy and national self-determination, however, is illuminating despite the analogy's obvious limits. Personal autonomy, like national self-determination, is plainly a matter of degree, with at best a very thick gray line dividing acceptable (or valuable or adequate) from unacceptable (or inadequate) levels of either. The degree of my personal autonomy is plainly limited by such simple things as natural and social facts about the world (e.g., the career choice of "blacksmith" is largely closed to me), by the choices of others (e.g., the woman whose affections I am bent on winning chooses to marry another), and by the peculiarities of my own, non-pathological desires and values (e.g., my modest compulsiveness makes only relatively orderly relationships and lifestyles eligible options for me). Am I (or is my life), as a result, unautonomous?

Any autonomy in evidence is certainly not *perfect* autonomy. But personal autonomy plainly need not be perfect in order to have the value normally ascribed to it; a reasonable or satisfactory autonomy still has obvious value. As Moore rightly maintains, there is a difference between loss of autonomy and a mere "reduction in one's opportunity sets". "There are many opportunities that we don't have and yet we still live autonomous lives" (p. 144). Autonomy requires a range of valuable options, she says, but not "maximal scope for choice or maximal options" (p. 205). And the same seems clearly true of collective autonomy. That my group's autonomy is limited in familiar, undramatic ways—by outside cultural influences, by our own limited resources or the state of the world economy, by non-coercive political pressure—does not appear to undermine claims to (or the value of) collective autonomy.

But if collective autonomy, like personal autonomy, still has great value even when limited in such ways, then the right of group self-determination that is based on the value of collective autonomy may also be a correspondingly weak or interestingly limited right. 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. We know that a group's appeal to its right of self-determination cannot suffice to justify the group's violating the human rights of its members or outsiders, or its violating the autonomy of other groups. As Moore says, appeals to self-determination do not "show that people are entitled to do anything they please to give effect to their control over places—for example, they cannot violate human rights in the process" (pp. 195-6).

And if the right of self-determination is limited in that way by the weight of strong competing moral considerations, there is no reason in principle why other kinds of moral limits on self-determination might not also be justified. Moore in fact mentions another kind of limit of this sort: peoples' rights of self-determination must be understood as "consistent with" their discharging their duty of global redistribution, their duty to (help) insure the satisfaction of every person's right to a "basic minimum" (p. 174, p. 182). But once Moore in this way acknowledges some of the plausible moral limits to peoples' rights of self-determination, her remaining arguments, the arguments intended to support other kinds of strong territorial rights for peoples, begin to look vulnerable as well.

Moore, remember, argues that it is the value of collective self-determination that "generates" both the right of a people to

territorial jurisdictional authority and their right to control the natural resources within that territory (p. 162, p. 175). Her central argument for groups' resource rights is that they are required for a group to be self-determining, since the rules in a territory that govern the extraction and use of resources "impinge on many different aspects of the collective life of the community" (p. 166). While Moore argues from the value of self-determination only to "a limited and defeasible right to control the rules governing the acquisition, transfer, and use of natural resources" (rather than "a right to the full stream of benefit from the resource") (p. 174), she does maintain that "if people lack this kind of control, then, to that extent they lack robust forms of self-determination" (p. 175).

That same kind of self-determination argument, Moore says, also justifies for states "a pro tanto, qualified right to exclude immigrants" (p. 189). "Jurisdictional authority is a mechanism by which members of political communities implement and maintain their own conception of how they want to organize their society, and so it is a necessary condition for exercising the right of self-determination" (p. 196). And, Moore argues, "there are good reasons why a collectively self-determining group, which has significant forms of control over the conditions of their existence, would seek to have control over who and how many enter their community" (p. 196). Groups naturally try to "prevent unwanted changes in their environment" and to preserve the "character of their community" (pp. 195-6). "If members of the group collectively lack this power," Moore claims, "they also lack the ability to exercise robust forms of self-determination" (p. 197).

I find puzzling the appeals in these arguments to what is required for "robust forms" of self-determination. Do qualifying groups actually have a right to "robust" self-determination, or will lesser degrees of self-determination satisfy their rights? And what exactly is it that makes a group "robustly" self-determining? Is the

idea supposed to be that “robust” self-determination has “the most” value, while lesser degrees have less value? Or is robust self-determination the only kind of “real” self-determination, the only kind that has value (or that has value sufficient to ground a collective right to it)? The fact, noted above (and confirmed by Moore’s arguments) that there are *degrees* of personal autonomy, all of which are valuable and few of which are perfect, strongly suggests that the same is true of collective autonomy. In that case, though, while preserving “robust” self-determination for groups (however “robust” is ultimately defined) might require that those groups have the kinds of territorial rights Moore describes, simply *adequately* respecting groups’ self-determination may not.

And on the face of it, it is hard to see why just any kinds of externally (say, internationally) imposed limits on states’ rights to govern their resources or to exclude would-be immigrants would necessarily reduce states to inadequately self-determining entities or to entities that no longer count as self-determining in important and valuable ways. 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 or controlling resources? 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, say, to have that membership itself determined solely in accordance with its own will? So our question(s) here should be: can states or nations or peoples be acceptably or adequately self-determining *without* holding property-like territorial rights over all resources in their territories and *without* holding property-like discretionary territorial rights to exclude aliens? I can myself see no very good reasons to support a negative answer to that question. But worse, it is difficult to see

why we should expect any *clear* answer at all to flow merely from gesturing to the value of group self-determination.

Moore's arguments for a "robust" right of group self-determination—and consequently for relatively "robust" territorial rights for those groups—are forced to rely centrally on simple facts about what those groups might identify as "unwanted changes" to their communities and to what would or would not be consistent with the groups' "conception of how they want to organize their society". But surely our respecting groups' desires in such matters seems no more essential to their societal lives being (acceptably) collectively autonomous than respecting my desires not to be precluded from being a blacksmith or from marrying the woman I most desire seems essential to my life being (acceptably) personally autonomous. Why, after all, should we suppose that groups have a moral right to simply legislate their tastes and preferences in these ways, especially when their doing so has obvious and possibly severe consequences for outsiders? 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 or to permit some outside control over how they dealt with some of their resources, it would seem a bit hysterical to assert that they, as a result, no longer really counted as self-determining polities or that the self-determination they continued to exercise had no real value.

We surely enjoy no general moral right as individuals simply to be free of unwanted changes. And we should be similarly skeptical about the claim that groups have a right to use their jurisdictional authority over a territory to protect themselves from such change. Simply appealing to the facts that my collective *wants* to maximize its wealth, *wants* to keep other groups from using or profiting from what is closer to us, or *wants* to exclude immigrants

seems to give us little reason to think that a basic group *right* is at issue. The (slightly romanticized) image most of us have of exotic or aboriginal lifestyles, destroyed by outside influences, tends, I think, to mislead us here. It is undoubtedly true that many “unwanted changes” forced on the lifestyles of groups like the Lakota, the Maori, the Inuit, or the Bedouin had profound and enduring negative impacts on the quality of life of group members. The internationalization of trade and communication, however, have resulted in contemporary peoples enjoying lifestyles that are far less distinctive and vulnerable; they overlap significantly with the lifestyles of other groups and are far less fragile in the face of change. Such groups’ having to accept some unwanted changes to their lifestyles—say, because of policies (governing in some ways their control over immigration or resources) that are not self-chosen—may make these peoples less happy or less fully free to control their environments than they might otherwise be. But their collective lives are unlikely to be ruined, and their senses of being genuinely self-determining are unlikely to be permanently undermined, so long as such external influences or control remain relatively limited. Where genuinely harmful change is at issue, we have one kind of moral concern; where merely unwanted change is at issue, we have quite another. Precisely *where* the limits on what counts as “real” self-determination need to be set is certainly not clear or obvious. But I think Moore has given us little reason to agree with her that they must be set in exactly the places she has identified.

Drawing on the analogy between personal and collective autonomy (and the rights to or reasons for valuing each) thus does not appear to generate even a clear outline of the nature of a moral right to group self-determination, let alone to explain what more specific territorial rights are derivable from it. The analogy is, in short, an unhelpful analogy to employ in an effort to justify the kinds of territorial rights that modern states claim. A better

comparison for these purposes, I think, is the comparison between the territorial authority claimed by states and the property rights claimed by individuals and groups. This, of course, is one of the approaches to territorial rights that Moore rejects early on (in Chapter 2 of her book). But I think this (broadly Lockean) approach deserves a better hearing than it gets there.¹⁰

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¹⁰ For an extended defense of the Lockean, property-based justification of states' territorial rights, see my *Boundaries of Authority* (Oxford University Press, forthcoming).

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