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RE-STATING STATIST THEORIES
OF TERRITORY

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Re-Stating Statist Theories of Territory

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Most contemporary political philosophy focuses on the relationship between people and states. However, significantly less attention has been paid to the normative relationships people and states have with territory. The problems raised by political claims to land are particularly pressing, given that many contemporary international disputes—including ossified conflicts in Palestine and Kashmir as well as new ones in Crimea, the Donets Basin, and Kurdistan—are driven by disagreements over who should control territory. In this context, Margaret Moore's book is a timely and welcome contribution to the growing literature on territorial rights.¹ While her work clarifies many of the points of disagreement between already-existing theories in this area, its major contribution is staking out a political nationalist theory of territory, as distinct from cultural nationalist or statist theories.

In this commentary, I consider Moore's arguments against Kantian-inspired legitimate state theories of territory. I argue that legitimate state theorists can respond to those objections in part by using resources shared by their own theories and Moore's. My purpose is primarily defensive: I do not say much here about the merits of statist theories. However, since part of Moore's argument for her own theory is that it avoids pitfalls that doom

¹ Margaret Moore, *A Political Theory of Territory* (New York: Oxford University Press, 2015). Parenthetical references in this paper refer to pages in this work.

other accounts of territory rights, showing that statism is not ruled out as a plausible theory partially undermines the case for a political nationalism theory of territory. I conclude by discussing the significance of what I see as substantial convergence between statism and Moore's theory on several substantive issues.

I

What is the debate really about?

Moore discusses three main approaches to territory rights. *Property-based* theories conceive of territorial rights as either deriving from or analogous to property rights over land. Most property-based theorists are influenced by Locke's consent theory of political authority and his pre-institutional conception of property. They argue that individuals transfer jurisdictional rights over land they own to the state when they agree to join it (pp. 15-23).² Alternatively, *statist* approaches to territorial rights identify states or some other set of state-like institutions as the primary territorial rights-holder. Statist theories tend to be broadly functionalist, in that they justify a state's having territorial rights in terms of some worthwhile aim that states are supposed to achieve on behalf of their members, such as establishing a legitimate system of laws or of providing security (pp. 89-110).³

² For individualist Lockean approaches to territory, see A. John Simmons, "On the Territorial Rights of States," *Philosophical Issues* Vol. 11 (2001): pp. 300-26 and Hillel Steiner, "Territorial Justice," in Simon Caney, David George and Peter Jones (eds.), *National Rights, International Obligations* (Boulder, CO: Westview Press, 1996), pp. 139-48. For a collectivist account of territorial rights, see Cara Nine, *Global Justice and Territory* (Oxford: Oxford University Press, 2012).

³ There are numerous statist accounts of territory. Two prominent accounts, both broadly inspired by Kant, include Anna Stilz, "Nation, States, and Territory," *Ethics* Vol. 121, no. 3 (2011): pp. 572-601 and Lea Ypi, "A

Finally, *nationalist* approaches to territory identify preinstitutional groups, such as nations or peoples, as the primary holders of territorial rights. Most nationalist approaches to territory justify a nation's territorial rights on the basis of the cultural or symbolic value of a given piece of land for the group in question (pp. 71-88).⁴

This way of describing the distinction between statist and nationalists can be misleading. The labels “statist” and “nationalist” seem to suggest that the disagreement between the two approaches is mainly over what sort of entity should hold territorial rights. However, nationalist theories will need to leave some room open for states to have territorial rights, since nations or peoples need a state or state-like institutions in order to effectively maintain jurisdiction over a region. Moore claims that states hold territorial rights when they are vehicles of the self-determination of a group that can be the source of territorial rights (p.66). It seems that state institutions having some sort of jurisdiction rights over a territory will be necessary for a group's being able to exercise its territorial rights, even if that group's existence and its right to territory do not depend on the institutional structure of any particular state. On the other hand, the disagreement might be understood as one about what entity is wronged when territorial rights are violated. But it would be implausible to attribute to most statist the view that the state, understood as a collective agent, is primarily the group that is wronged by violations of territorial rights. According to statist, the point of states possessing territorial rights in the first place is

Permissive Theory of Territorial Rights,” *European Journal of Philosophy* Vol. 22, no. 2 (2012): pp. 288-312.

⁴ Two major nationalist accounts include David Miller, “Territorial Rights: Concept and Justification,” *Political Studies* Vol. 60 (2012): pp. 252-68 and Tamar Meisels, *Territorial Rights* (Dordrecht: Springer 2005).

to achieve goods for those living under the state's jurisdiction. So when a state's territory is compromised, it is more plausible to think on this view that their citizens and not the state are the ones who are ultimately wronged.

The dispute between statist and nationalists seems instead to be primarily about how territorial rights are justified. According to statist, the ultimate justification for territorial rights rests on the state's normative relationship with those under its jurisdiction. For nationalists, territorial rights are justified by the existence of group rights or group-dependent interests that members of a national community have in maintaining control over a piece of land. The important contribution Moore's account brings to the discussion is that she provides a political, not cultural, explanation for the group-dependent interests co-nationals have in controlling territory. Moore argues that control over territory is necessary for a people to exercise its collective right of self-determination.

It is worth keeping track of the real point of disagreement between statist and nationalist approaches to territory. Moore makes three main objections to statist theories that I will discuss here:

- (1) **THE ATTACHMENT PROBLEM:** Because they focus only on the normative adequacy of a state's relationship with its citizens, statist theories of territory have difficulty explaining why particular states ought to have rights over particular pieces of territory. For instance, a state may be legitimate or just without having a right to some particular piece of territory.
- (2) **LEGITIMATE ANNEXATION:** Statist theories have trouble explaining why states that better perform the proper function of states may not permissibly annex the territory of states that fail to perform these functions or that perform them less well.

(3) FAILED STATES: Likewise, statist theories have difficulty explaining why states that successfully perform the function of states may not permissibly annex the territory of failed states.

The last two of these objections are primarily directed at the claim that the state is the primary or ultimate holder of territorial rights. The idea is that, without supposing that a territorial right held by people who occupy some region in the absence of a state, statist cannot explain why these cases of annexation seem to us to be morally impermissible. However, as I have suggested, the disagreement between statist and nationalists is not mainly about whether states or peoples primarily exercise territorial rights. Instead, it is about what sorts of considerations ultimately justify territorial rights. It is open for statist to respond to objections (2) and (3) by insisting that whatever explains our intuitions in those cases is not the same thing that does the primary work in justifying territorial rights on the part of states. Perhaps a rational reconstruction of the moral principles that undergird international law excludes annexation without just cause. Or it may simply be that the appropriate remedy for territory held by a state that falls short of the normative criteria that would justify territorial rights is not annexation but assistance, encouragement, or international pressure. One might worry that appealing to something other than what mainly justifies territorial rights to explain why annexation is wrong is objectionably ad hoc. But there's no reason to expect that a single justificatory strategy will explain every feature of the normative landscape surrounding territory. If we think statist justifications for territorial rights are normatively attractive for other reasons (a claim I accept but do not defend here), then we should not be worried if they have to be supplemented by other moral principles. I discuss objections (2) and (3) in section IV.

The worry over how states attach to particular regions ((1) above) does strike at the heart of the approach statistes use to justify territorial rights. If territorial rights are justified on the grounds that they are necessary for states to achieve some good on behalf of those living under the state, then some separate strategy is necessary to explain why particular states ought to have control over particular territories. This is a problem for any theory, including Moore's, that justifies territorial rights on the basis of the general political interests the people living there, such as living under legitimate laws or being part of a self-determining political group. Fortunately, this problem can be solved by determining when individuals or groups can permissibly occupy a given region. I discuss this problem in the next two sections.

II

The Attachment Problem

Territory is a particular good. People and states have normatively significant relationships to particular pieces of land. So we need an account of territory to explain why *particular* territorial rights-holders should have jurisdiction over *particular* regions. Moore calls this the *attachment problem* (pp. 9-10). This problem is distinct from the problem of explaining why certain types of entities ought to have territorial rights in general. It may be that a potential territorial rights-holder meets the normative requirements necessary to permissibly exercise jurisdiction over some territory without having a right to do so over any particular region. Or it may be the case that some territorial rights-holders legitimately exercise control over some particular territory but not another. (Contrast British jurisdiction over London with British jurisdiction over India prior to 1947.) So the challenge for a theory of territory is to explain not only why territorial rights-

holders may permissibly control some territory, but why also they should control the particular geographic regions they have territorial rights over.

Property-based theories have little difficulty solving the attachment problem because they treat territorial rights analogously to ownership rights over real estate, as particular rights over particular areas of land. According to individualist Lockeans, for example, individuals acquire property rights in some piece of land outside of legal institutions somehow (e.g., by mixing their labor with it while leaving as much and as good land left for others), and then cede some of the rights to control that land to a state when they consent to join it. This cession may be permanent, or it might be contingent on the ongoing consent to live in the state by those subject to its jurisdiction. The state acquires a moral right to exercise jurisdiction over a given region, not directly because it achieves some good for its citizens, but simply because it has been granted those rights by individuals with ownership rights over the particular parcels of land that make up its territory. As Moore points out, individualist Lockean approaches are problematic, because no actual state has ever had the consent of all those subject to it, and this fact about states is not likely to change. Theories that require a state to obtain consent from those subject to its jurisdiction in order to exercise territorial rights have the perhaps unappealing consequence that no existing states have territorial rights (pp. 20-21). For the purposes of this section, however, it is worth noting that Lockean theories don't have trouble solving the attachment problem, because they treat territorial rights as consisting in nothing more than a set of particular rights over particular regions of the planet's surface.

An alternative approach to justifying territorial rights starts with a general justification for why a certain kind of entity ought

to be able to hold territorial rights in general, and then provides a separate explanation for how such entities can gain rights over particular regions. Statist theories of territory usually take this form. For instance, Anna Stilz argues that a state's right to administer territory is justified in virtue of the need to establish a legitimate system of laws within a region, especially laws governing property, in order to secure the autonomy of members of society. Stilz's approach is broadly Kantian, in that she thinks that without a legal system to arbitrate disputes over rights, individuals cannot be assured that their independence will be protected, since in cases of disputes their rights will be subject to the unilateral interpretation of their rights by others. So the general rationale for territorial rights according to Stilz is that states will protect individuals' independence.⁵ However, in order to justify a state's rights over a particular territory, Stilz appeals to pre-institutional occupancy rights held by individuals living in the territory under the state's jurisdiction. These occupancy rights are justified by the interests of those living within a particular territory, including the dependence of their life plans on continuous occupancy along with their co-nationals. So while a statist theory like Stilz's can explain when and why states should have jurisdictional authority by appealing to features of the state, a statist solution to the attachment problem involves appealing to rights that are pre-institutional in the sense that they do not depend on the state, such as Stilz's right of occupancy.⁶

Moore claims that statist theories have a difficult time solving the attachment problem. The logic of Kantian theories, she writes, "is distinctly cosmopolitan: there is no reason internal to the theory why the jurisdiction [of a state over territory] should not be universal why we would not end up in a global state" (p.

⁵ Anna Stilz, "Nation, States, and Territory," pp. 580-82.

⁶ *Ibid.*, 582-87.

97). In other words, since the aim of the state is mainly to establish laws that secure each person's rights, there is no principled reason entailed by that aim to limit a legitimate legal system to one particular region.⁷ The same could be said of other statist views that hold that the function of the state is to establish security or to improve the well-being of people living under it. If a state is particularly good at performing the relevant functions that provides a moral basis for statist territorial rights, then, aside from the practical limitations of administering a diverse and wide swathe of humanity, there is little reason to limit a state's territorial rights to any particular region. As we have seen, this sort of worry leads statist like Stilz to go outside of the state and to appeal to pre-institutional occupancy rights on the part of the state's subjects as a necessary condition for its territorial rights.

Moore responds to Stilz's account of occupancy rights by accusing it of being viciously circular. According to Stilz, a necessary condition for a person to have a right to occupy a given territory is that "legal residence within that territory is fundamental to the integrity of his structure of personal relationships, goals, and pursuits."⁸ Moore argues that, by making *legal* residency a condition of a moral right of occupancy, presupposes that a legitimate legal system exists in the relevant territory. But occupancy rights are supposed to explain (in part) why a state can establish a some system of laws within a particular territory in the first place. So according to Moore's objection, we're left with a narrow justificatory circle in which a state's

⁷ Of course, Kant did not support establishing a global state. However, his reluctance stemmed, not from wavering commitment to moral cosmopolitanism, but because he thought that a world-state would be unstable unless it resorted to tyranny to try to keep disparate groups together. See Kant, *Toward Perpetual Peace*, in *Practical Philosophy*, trans. Mary J. Gregor (New York: Cambridge University Press, 1996), p. 328.

⁸ Anna Stilz, "Nation, States, and Territory," p. 585.

territorial rights are supposed to underwrite occupancy rights, and occupancy rights are supposed to justify a state's territorial rights (pp. 99 & 103).

Here, however, Moore's objection seems to miss her target. Stilz does not claim that legal residency is a necessary condition of a person's having occupancy rights. Rather, she argues that in order to have an occupancy right, a person must have a morally weighty interest in legally occupying the region in question. Again, here Stilz follows Kant: because all human beings "have a right to be wherever nature or chance (apart from their will) has placed them,"⁹ they have, according to Stilz, a "need for stable legal residence."¹⁰ So while occupancy rights on the part of its subjects explains why a state has territorial jurisdiction over a particular territory on Stilz's account, occupancy rights are justified not by legal residence (which presupposes a state), but rather the central interest individuals have in having their residence in some region be legally protected.

III

Moore's Solution to the Attachment Problem

Like statist accounts, Moore's political theory of territory treats the general question of territorial rights separately from her solution to the attachment problem. According to Moore, *peoples*, not states, are the fundamental bearers of territorial rights. Peoples are collective agents whose members are engaged in a common political project and possess both the capacity to govern themselves as a collective as well as a history of political cooperation (p. 50). Moore argues that peoples are justified in

⁹ Kant, *The Metaphysics of Morals*, 6:262. Quoted in Stilz, 584.

¹⁰ Anna Stilz, "Nation, States, and Territory," p. 584; emphasis added.

wielding territorial jurisdiction in virtue of their members' interests in exercising self-determination, a kind of collective autonomy, as part of a group that contains normatively significant political attachments among its members. This exercise of self-determination necessarily involves jurisdiction over territory (pp. 49-54 & 62-65).

But the fact that peoples are a kind of agents that can possess territorial rights in general does not show how any given people can come to have an exclusive claim to a particular piece of territory. In order to show that—in other words, to solve the attachment problem—Moore, like Stilz, resorts to a separate theory of occupancy rights. For Moore, occupancy rights are collective rights held by members of groups in virtue of sharing a common identity. Occupancy rights include a liberty to settle on an area, as well as claims against other groups from settling the same region in a way that adversely impacts the community there. Additionally, occupancy rights include some measure of control over a group's environment (pp. 39-46). Not all groups with occupancy rights on Moore's account will have full-fledged rights to administer territory. Some groups, such as indigenous groups or political minorities widely dispersed throughout a population, may lack the means with which to effectively administer territory or exercise national self-determination. While these groups may find their territories embedded in larger states, according to Moore, they retain a moral right to control their communities in virtue of their occupancy rights over a given region, and are entitled to some sub-national autonomy. On the other hand, a people capable of exercising political self-determination has rights over a particular territory in virtue of its also having collective occupancy rights in that region (p. 66).

Part of Moore's argument for her conception of territorial rights is that it avoids what she identifies as major limitations of

alternative approaches, including what she takes to be the failure of statist theories to provide an adequate response to the attachment problem. So it's worth noting that Moore's solution to that problem is essentially the same as Stilz's: both theories must appeal to pre-institutional occupancy rights to explain why particular states have rights over particular territories. This is because both approaches, to the extent to which they are *political* approaches to territory, do not begin with pre-political property rights as on the Lockean account, but instead with some sort of morally weighty interest persons might have in an entity (a state or a people) having jurisdiction over territory. This strategy by itself will leave open the question of which (if any) particular geographic regions may be controlled by a territorial rights-holder in order to advance those interests. In order to answer *that* problem, we have to look beyond which entities the theory claims should have territorial rights in general—legitimate states or peoples—in order to find some way in which those territorial rights are grounded in a particular region.

IV

Annexation and Failed States

Moore raises two additional objections to statist theories of territory, broadly related to their ability to explain a state's normative relationship with a particular territory. First, she argues that statist theories cannot adequately explain what's wrong with state annexation, because they cannot explain why it would be impermissible for an otherwise legitimate (or just) state to annex an illegitimate (or unjust) state. Second, Moore argues that statist theories cannot explain our intuition that the territory of failed states do not thereby become *terra nullius*, unclaimed by any

appropriate territorial rights-holder. Here, I briefly respond to these objections.

LEGITIMATE ANNEXATION. Suppose that there are two states: *A*, a legitimate state, and *B*, an illegitimate one. According to a legitimate state theory of territory like Stilz's, *B* fails to achieve a crucial function of states, to establish a legitimate system of laws, so *B* lacks territorial rights. This means that *B* lacks a claim against other states, including *A*, to respect its territorial rights. Suppose that *A* fights a just war against *B*, one that ends with *A* occupying *B*'s territory. In this case, we have, according to Moore, a strong intuition that, despite the absence of a legitimate state in control of *B*'s territory, *A* cannot permissibly annex *B*. For example, we have the intuition that the United States could not have permissibly annexed Allied-occupied German territory following the Second World War, even though Nazi Germany was a paradigmatically illegitimate state. Moore thinks that the only way we can explain this intuition is if we think that some other entity, the German people, are the ultimate bearers of territorial rights, whose right persists even when the state that rules over them is illegitimate (pp. 103-04).

A general response can be made to cases like LEGITIMATE ANNEXATION on behalf of statist theories. It does not follow from the fact that a state fails to achieve a standard of legitimacy necessary for territorial rights that any action that would restore legitimacy, including annexation, would be a permissible way to remedy this failure. This point may be made by pointing to an analogous case in just war theory. It does not automatically follow from the fact that a state lacks external legitimacy (understood as a general *pro tanto* moral claim against interference from outside states) that other states may permissibly invade it to establish a legitimate state. In addition to external illegitimacy, a state subject to attack in a just war must also have committed an aggressive act

that constitutes a just cause to go to war. In cases where there is no just cause, other states may not permissibly attack the illegitimate state, even if doing so would result in the formation of a legitimate state. Outside states may interfere in other ways, but there are moral limits to what steps they may take to remedy another state's illegitimacy. Moore employs a similar argument in her discussion of the right of materially burdened peoples' rights over territory. On her account, some peoples lack the means to exercise self-determination, as when they would need outside assistance to do so. Likewise, a legitimate state theorist can respond to LEGITIMATE ANNEXATION by insisting that, even in the absence of another state's right over a region, legitimate states need sufficient moral cause to annex part of another state. This response is similar to the response Moore makes for why burdened peoples do not forfeit their territorial rights. Like illegitimate states on a statist view, burdened peoples for Moore lack an important condition for territorial rights since they are unable to exercise a right to self-determination. In this case, the appropriate response on the part of other peoples to the fact that a burdened people is unable to exercise effective self-determination would not be to treat them as though they lack territorial rights or a right to self-determination at all, but to assist them (pp. 51). Likewise, in the case of occupied illegitimate states, the morally appropriate response to their lacking territorial rights will usually not be to annex them, but to encourage or to assist such states in building legitimate institutions.

FAILED STATES. Some states are unable to exercise control of the territory under their jurisdiction. This will make it impossible for these states to fulfill the function that justifies control over territory (such as establishing a legitimate legal system). We have the strong intuition that legitimate states cannot colonize or annex the territory of failed states, but it's hard to see how a statist theory could explain that intuition, given that failed states

are unable to satisfy the main condition that justifies territorial rights for states. We have the strong intuition that Sweden may not permissibly occupy parts of Somalia or Afghanistan over which their respective states have lost control. Again, Moore thinks that in order to explain this, we will need to appeal to territorial rights held not by states but by the relevant people whose right persists despite the failures of the state (105-06).

My response to the previous objection also applies here. Even though a failed state has lost territorial rights according to the statist theory, the morally appropriate response by legitimate states is not to seize land from the failed state, but to assist it in whatever way practicable in restoring legitimate control over the region. (Again, this is Moore's approach to the case of burdened peoples.) Additionally, it is not clear that Moore's theory fares much better in the case of failed states than do statist theories. On Moore's account, though peoples are the primary territorial rights-holder, peoples *exercise* territorial rights primarily through state institutions (p. 65). In the case of failed states, the problem is often not the unwillingness on the part of a state to administer control over a region, but its inability to do so, sometimes due to structural problems with the state itself. The same kind of threats that make states unable to control territory may also render a people unable to exercise self-determination through a state or state-like institutions. Since the ability to exercise self-determination is a necessary condition for a people to have territorial rights according to Moore's theory, she is as much in need of an explanation for the wrong of seizing territory in regions rendered ungovernable as a statist theory.

V

Conclusion

A major contribution of Moore's theory is that it carves out logical space between cultural nationalist and statist theories of territory. Unlike the former, Moore's account is grounded in a political and not cultural account of peoples. Unlike the latter, Moore does not justify territorial rights on the basis of assessing the justifiability of states. Given that statist and cultural nationalist theories of territorial rights do not seem to share many common assumptions, it is significant that Moore presents a plausible account of territorial rights that captures some of the motivation of both views.

In this paper, I have argued that statist accounts of territorial rights have many of the same resources available to address challenges to their views as Moore's political nationalist theory of territorial rights. My purpose has not been to argue that statist theories of territory are a better approach than Moore's. Instead, I think that it is significant that two different approaches to territorial rights can arrive at many of the same substantial conclusions about territorial rights. The justification for territorial rights on Moore's theory and that of legitimate state theorists follows the same basic pattern of justification and responds to a similar set of concerns. Both approaches give a general justification for territorial rights, and then provide a separate justification for why particular territorial rights-holders attach to particular territories. To accomplish this latter task, both theories need to appeal to some sort of individual or group right of occupancy that is not dependent on the existence of either a people or a state, and which depends on the value people have in occupying a particular geographic regions. Finally, both statist and political nationalist theories will need to be able to explain why failure on the part of a territorial rights-holder to satisfy the

necessary conditions of having territorial rights will not automatically leave their territory open to permissible annexation by other territorial rights-holders. The observation that theories that ground territorial rights in different sets of normative considerations end up converging on similar solutions to problems raised by territory points to significant theoretical progress with respect to territorial rights, and hopefully provides a useful guide for further theorizing.¹¹

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