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# Territorial Rights, Political Association, and Immigration

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## Abstract

Liberals conceive of territorial rights as dependent on the legitimacy of the state, which is in turn understood in terms of the state's protection of individual rights and freedoms. Such justifications of territorial rights have difficulties in addressing the right to control immigration, which is therefore in need of additional justification. The paper considers Christopher Heath Wellman's liberal proposal for justifying the right to control immigration, which understands the right as derivative of a general right to freedom of association held collectively by the people of the state. The paper argues that state legitimacy and freedom of political association fail to connect in the way required to justify a right to control immigration. Wellman's argument conflates the state as an institution and the people as a political collective and elides the difference between territorial jurisdiction and associational freedom.

## Keywords

Freedom of association, immigration, legitimacy, self-determination, state, territorial rights

## Introduction

This paper is about the relationship between the territorial rights of states and their right to control and limit immigration into their territories. I focus on a broadly liberal conception of territorial rights as dependent on the legitimacy of the state, which is in turn understood in terms of the state's protection of individual rights and freedoms. Such justifications of territorial rights are quite attractive, but have difficulties in addressing precisely the right to control immigration, which is therefore in need of additional justification. I will consider a specific proposal for how the right to control immigration can be justified without relying on ideas such as natural property rights or the self-determination of pre-political nations. The proposal understands the right to control immigration as derivative of a general right to freedom of association held collectively by the people of the state. Protection of individual rights and freedom of association are both core liberal values. Together they promise to provide a coherent justification of territorial states and the right such states are ordinarily thought to have to control immigration. If this justification works, liberals can rebut allegations that they are not able to address questions about borders and exclusion without either succumbing to radical cosmopolitanism or become parasitic on realist or nationalist assumptions.<sup>1</sup>

Although theoretically and normatively attractive, the liberal conception of territorial rights faces difficulties in the case of immigration. My claim is that state legitimacy and freedom of political association fail to connect in the way required to justify a right to control immigration. I will try to show this with regard to the particular version of the liberal conception presented by Andrew Altman and Christopher Heath Wellman in their liberal theory of international justice,

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<sup>1</sup> For an example of liberalism parasitic on nationalism, see Will Kymlicka, 'Territorial Boundaries: A Liberal Egalitarian Perspective,' in D. Miller and S.H. Hashmi (eds.), *Boundaries and Justice: Diverse Ethical Perspectives* (Princeton: Princeton University Press, 2001), pp. 249-275.

which is the most comprehensive articulation of this broad kind of view. My diagnosis of the problems facing the liberal conception in general, and Altman and Wellman's position in particular, is that it runs together the state as an institution and the people as a political collective and elides the difference between territorial jurisdiction and associational freedom.

While these conflation make things easier for liberals than they really are, my purpose is not to argue against either liberalism or any kind of immigration control. In fact, one of the points of my discussion is to highlight that Altman and Wellman's theory exemplifies how the discussion of immigration needs to address both territorial rights and other normative issues not directly related to territory; both are necessary for any plausible justification of a right to control immigration, and each is insufficient on its own. So my positive claim is that the *structure* of their justification is correct; my negative claim merely is that their particular proposal for how the liberal legitimacy theory of territorial rights should be complemented by considerations of freedom of association fails. In the course of showing this I make a number of theoretical distinctions relevant to theories of territorial rights more generally, which might be helpful for alternative attempts to formulate justification applicable to immigration.

## **Territorial Rights**

The territorial rights of states are the rights states have regarding their territory.<sup>2</sup> This can be analyzed as saying that the state is the subject of a right, the object of which involves reference to

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<sup>2</sup> While I limit my discussion to the territorial rights of states, I do not for present purposes take a stand on whether states are the only entities that can have territorial rights or whether non-state entities, e.g. national groups or the peoples of conquered states, might also have. The limitation is due to the fact that I am addressing liberal theories attempting to justify territorial rights of states without invoking pre-political territorial rights, such as both nationalist and traditional libertarian theories do. A separate reason for doubting whether non-state entities can have territorial

the territory. That the state has a right means that other agents are placed under duties or rendered morally disabled or liable in certain ways towards the state regarding the object of the right. There can then be different kinds of territorial rights depending on what claims or powers the state has and how these involve the territory. One, now standard, typology of territorial rights distinguishes between property rights, jurisdictional rights, and meta-jurisdictional rights. Property rights are rights of ownership over things. Jurisdictional rights are rights to make, adjudicate, and enforce rules, both for how property rights should be regulated as well as other kinds of regulations, e.g. criminal law or traffic regulations. And meta-jurisdictional rights are rights to determine and change jurisdictions.<sup>3</sup> States may have property rights over parts of their territory, but most of the territorial rights of states are not property rights. The main sense of territorial rights of states is jurisdictional. This captures a central aspect of a widely accepted Weberian understanding of states as institutions claiming a monopoly to the legitimate exercise of violence within a territory, i.e. the idea that a state not only regulates relations within a territory in a way backed by coercion, but also claims to be the only agency which can do this legitimately. To be a state then centrally involves claiming jurisdiction over a territory.<sup>4</sup>

Here I focus on one right states are commonly assumed to have, which is often listed among the territorial rights, since it clearly pertains to territory, namely the right to control

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rights is that they are arguably not able to exercise jurisdictional rights, and their rights regarding territory can therefore not be jurisdictional rights. Such groups might still have different kinds of territorial rights, e.g. a right, under suitable conditions, to have their own state (or, in the case of conquered states, to have it back).

<sup>3</sup> Allen Buchanan, 'The Making and Unmaking of Boundaries: What Liberalism Has to Say,' in A. Buchanan and M. Moore (eds.), *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press), pp. 231-61; Cara Nine, 'A Lockean Theory of Territory,' *Political Studies* 56:1 (2008): 148-65, p. 150; Anna Stilz, 'Why do States have Territorial Rights?' *International Theory* 1:2 (2009): 185-213, p. 195.

<sup>4</sup> Christopher W. Morris, *An Essay on the Modern State* (Cambridge: Cambridge University Press, 1998).

immigration.<sup>5</sup> Immigration is by definition movement of people into a state (the central case being people who move with a view to indefinite residence on its territory), so a right to control immigration accordingly involves a right to exclude immigrants from the territory. My question is whether and how the right to control immigration might be justified *in relation to* other territorial rights, or *on the basis of* the justification given for other territorial rights. This question is both interesting from the point of view of normative discussions of immigration, and as part of the theory of territorial rights and the state. I am not assuming that the discussion of the justification of territorial rights is the only relevant perspective on the issue of immigration – there may be other relevant considerations, e.g. global distributive justice or human rights. But a territorial rights perspective is crucial given the obvious territorial aspects of the issue of immigration: *if* there is a right to control immigration, this must apparently involve or relate to territorial rights, since immigration by definition is a matter of movement into a territory. And a theory of territorial rights would conversely be incomplete if it did not address the issue of immigration.

Even though liberalism is an essentially contested concept and there are many conceptions of liberalism, I will for present purposes distinguish between liberal justifications of territorial rights and libertarian, e.g. Lockean, theories according to which territorial rights of states derive from individual natural property rights in land.<sup>6</sup> Such libertarian theories are both simple and give an immediately understandable explanation for why states have territorial rights: the citizens of the state *own* the land constituting the state's territory and have somehow delegated the authority to

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<sup>5</sup> E.g. A. John Simmons, 'On the Territorial Rights of States,' *Philosophical Issues* 11 (2001): 300-26, p. 306; Michael Blake and Mathias Risse, 'Migration, Territoriality, and Culture,' in J. Ryberg, T.S. Petersen, and C. Wolf (eds.), *New Waves in Applied Ethics* (Basingstoke: Palgrave Macmillan, 2008), pp. 153-181; David Miller, 'Territorial Rights: Concept and Justification,' forthcoming in *Political Studies* (references are to the online early view version), p. 2.

<sup>6</sup> Hillel Steiner, 'Territorial Justice,' in S. Caney, D. George, and P. Jones (eds.), *National Rights, International Obligations* (Boulder: Westview, 1996), pp. 139-48; Simmons, 'On the Territorial Rights of States.'

enforce these property rights to the state. But there are a host of problems facing Lockean theories concerning the existence of natural property rights, legitimate acquisition, the rights of others after initial acquisition, delegation of enforcement to the state, and the problem that such theories have implications that differ radically from ordinary ideas about state authority and legitimacy. Attempts have been made to avoid some of these problems by adopting modified *collectivist* versions of Lockean theories, which either conceive of the state as a collective or focus on nations as pre-political collectives,<sup>7</sup> where the idea is that such collectives can become entitled to the land in a Lockean fashion.<sup>8</sup>

### **Liberal Legitimacy as a Basis for Territorial Rights**

For present purposes I will not go into substantial discussion of libertarian theories and their problems, which I simply note in order to focus on an alternative conception of territorial rights

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<sup>7</sup> For the conception of the state as a collective, see Nine, 'A Lockean Theory of Territory.' For nationalist versions, see Tamar Meisels, *Territorial Rights* (Dordrecht: Springer, 2005); David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007); Miller, 'Territorial Rights: Concept and Justification.'

<sup>8</sup> Another variation over property rights-based theories is the theory proposed by Ryan Pevnick, *Immigration and the Constraints of Justice: Between Open Borders and Absolute Sovereignty* (Cambridge: Cambridge University Press, 2011), according to which the group of citizens collectively upholding the institutions of the state have 'associative ownership' over the state and the public goods it produces. This theory is not a libertarian theory in the traditional sense, since the property in question is created rather than acquired. Also, the theory does not directly address the issue of *territorial* rights, only ownership over *institutions*. It therefore seems incomplete as a justification of territorial exclusion, as Pevnick notes (*Immigration and the Constraints of Justice*, p. 56). He nevertheless dismisses this objection by stating that 'there can be little doubt' that a group upholding institutions has 'a legitimate claim to its land' (*Immigration and the Constraints of Justice*, p. 57). But even if true, this seems theoretically unsatisfactory, since the theory still does not positively *explain* why such a group has territorial rights.

according to which territorial rights are not *materially derivable* from pre-political rights but are rather a *sui generis* kind of rights that *arise* with the state rather than substantially *precede* it. The liberal version of this alternative view claims that a state has territorial rights if it is legitimate.<sup>9</sup> Liberal legitimacy in turn does not depend on respect for pre-political natural property rights, but is a matter of states being justified in existing and carrying out the characteristic functions of states (have ‘a right to rule’) because of the unique kinds of benefits they thereby realize. Territorial rights, then, do not derive from pre-political rights over land, but arise together with the particular kind of organization of social life that states are. Modern states are characterized by the direct rule by an impersonal institutional organization by means of law enforced through a monopoly on legitimate violence within a territorially defined jurisdiction. According to the type of liberal theory I will consider here, the standard of state legitimacy is a sufficient degree of protection of and respect for general basic human rights.<sup>10</sup> These human rights are not to be understood as pre-political rights, e.g. as rights that people would have in a state of nature, but as measures of legitimacy specially tailored to assess the functioning of this kind of institution. Because human rights are in this context understood as measures of legitimacy, they are directed at the state in the sense that the primary bearer of the correlative duties is the state; and if the state fails to fulfill these duties, it is not legitimate and has no right to rule and hence no territorial rights.

Liberals are so-called *statists* when they claim that the state is *necessary* to avoid the insecurity and limitations on liberty of a state-less state of nature, or to provide similar important

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<sup>9</sup> Anna Stilz, ‘Nations, States, and Territory,’ *Ethics* 121: 3 (April 2011): 572-601, provides the most comprehensive account of a (Kantian version of) the legitimate state theory of territorial rights. Here I will not go into the details of Stilz’s theory, which includes some elements with no obvious counterpart in Altman and Wellman’s theory.

<sup>10</sup> Buchanan, ‘The Making and Unmaking of Boundaries,’ pp. 153-55; Stilz, ‘Nations, States, and Territory,’ pp. 587-89.



benefits that could not be provided otherwise.<sup>11</sup> This general justification for having states at all is then applied to the specifically territorial aspects of states, i.e. the fact that states claim and exert authority over all individuals within a territorially delimited jurisdiction: the upholding of a territorial jurisdiction is a basic public good necessary for the protection of individuals and the only way of successfully performing the other functions of states.<sup>12</sup>

Such justifications for territorial rights can be considered specifically *liberal* if the liberty the state is protecting, or the benefits it is providing, is liberty of or benefits to *individuals* and if territorial rights are *only* justified insofar as they are necessary for this purpose, which statist liberals claim they are. Further conditions are arguably required as well, e.g. that the state secures these benefits in a way properly respecting the moral equality of all individuals, which is why the measure of legitimacy is cast in terms of respect for individual human rights. The precise formulation of this condition is of course a challenge, especially for statist liberals who want to distinguish their position from more demanding forms of cosmopolitanism. For the purpose of the present paper I will not go into these details, however, but simply take a general liberal legitimacy view of territorial rights for granted, for the sake of argument. I therefore bracket wider discussions

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<sup>11</sup> This sense of statism is different from another, according to which statism is the view that considerations of justice are inapplicable beyond state borders (e.g. Pevnick, *Immigration and the Constraints of Justice*, pp. 8, 20 – Pevnick mentions the view I call statism as “the key point of social contract theory” on p. 68). The two views are independent: one might think that states are necessary, but that considerations of justice do apply beyond state borders, and possibly also that states are not necessary even though justice only applies within borders. I only discuss statism in the sense concerning the justification of states, not the sense concerning the scope of justice.

<sup>12</sup> Christopher Heath Wellman, ‘Samaritanism and the Duty to Obey the Law,’ in A.J. Simmons and C.H. Wellman, *Is there a Duty to Obey the Law?* (Cambridge: Cambridge University Press, 2005), pp. 3-89; Christopher Heath Wellman, *A Theory of Secession* (Cambridge: Cambridge University Press, 2005), pp. 14-15; Stilz, ‘Why do States have Territorial Rights?’

of the implications of liberalism, e.g. for global distributive justice. Even though this type of account of territorial rights is not without its problems, I will not argue for this point of departure. My aim is rather to explore some internal difficulties that arise for proponents of this type of position when they want to extend it to the important issue of immigration, which is precisely what Andrew Altman and Christopher Heath Wellman attempt to do.<sup>13</sup> I use their particular theory to draw out some general theoretical and normative points. My theoretical points concern the concepts used in discussing these issues, especially ‘territorial rights,’ ‘self-determination,’ ‘state,’ and ‘people.’ My normative points concern some difficulties in justifying a right of a state to control immigration in relation to its territorial rights that emerge once we appreciate the relationship between the theoretical concepts.

Altman and Wellman’s liberal theory of international justice is liberal in virtue of two features: a) it is based on *value individualism*, i.e. the axiological view that the well-being of individuals is the only thing that ultimately matters morally,<sup>14</sup> and b) on *human rights* as both constraints on the exercise of state power and the conditions, respect for which, is a necessary and sufficient condition for state legitimacy and hence for state’s having a right to self-determination.<sup>15</sup> Altman and Wellman distinguish their liberal theory from both nationalist theories, according to which legitimate states have to constitute pre-politically (e.g. culturally) defined ‘nations’ and institutional forms of cosmopolitanism, according to which states have no right to self-determination and should ideally be replaced by global political institutions.

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<sup>13</sup> Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009).

<sup>14</sup> Altman and Wellman, *A Liberal Theory of International Justice*, pp. 5, 37-41.

<sup>15</sup> Altman and Wellman, *A Liberal Theory of International Justice*, pp. 2-5

While they do not formulate their theory in these terms, I interpret Altman and Wellman's theory as incorporating a liberal legitimacy theory of territorial rights. They take their point of departure in the common Weberian conception of the state as a political organization that 'employ[s] coercion and, more generally, exercise[s] ultimate decision-making power over a territorially based population on a wide range of matters.'<sup>16</sup> The central question about states thus understood is whether they enjoy the bundle of rights traditionally referred to as sovereignty. Sovereignty rights can, according to Altman and Wellman, be understood as tied together by an abstract right of the state to self-determination. Both sovereignty and self-determination involve territorial aspects since they concern the rights of the state to exist and to make, adjudicate, and enforce law within the territory. The central question, then, is when a state has the right to self-determination. Altman and Wellman propose the simple liberal answer that:

Legitimacy rests on the ability and willingness of a state to adequately protect the human rights of its constituents and to respect the rights of all others. If a state adequately protects and respects human rights ... it successfully carries out the "requisite political functions." That is, the state is doing the job that it needs to do in order to justify its coercive power and thereby be legitimate.<sup>17</sup>

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<sup>16</sup> Altman and Wellman, *A Liberal Theory of International Justice*, p. 3.

<sup>17</sup> Altman and Wellman, *A Liberal Theory of International Justice*, p. 3. Wellman also relies on similar formulations elsewhere, e.g. on p. 16 in Christopher Heath Wellman, 'In Defense of the Right to Exclude,' in P. Cole and C.H. Wellman, *Debating the Ethics of Immigration: Is there a Right to Exclude?* (Oxford: Oxford University Press, 2011), pp. 13-56. On p. 102, note 10, in 'The Democratic Case for Open Borders,' in P. Cole and C.H. Wellman, *Debating the Ethics of Immigration: Is there a Right to Exclude?* (Oxford: Oxford University Press, 2011), pp. 93-103, Wellman explicitly connects state legitimacy to territorial rights: 'other things being equal, those who occupy a territory enjoy jurisdictional rights over this land as long as they are able and willing to perform the requisite political functions.'

So if a state performs the ‘requisite political functions’ in terms of human rights protection, then it is legitimate. Altman and Wellman then add that:

only a *legitimate* state has a *moral right of self-determination*. Moreover, we hold that this right is irreducible to the individual rights of the constituents of the state. The right is a group right: it belongs to the members of the state as a collective body, because it can only be exercised jointly by its members.<sup>18</sup>

These are substantial normative claims, since Altman and Wellman understand the status of legitimacy and the accompanying collective right of self-determination not only as Hohfeldian liberty rights to rule, but also as Hohfeldian claim rights that ‘other agents have a duty to respect the decisions made in the exercise of that power,’<sup>19</sup> which binds both members subjected to the internal authority of the state and foreign persons and powers.

### **Immigration and Territorial Rights**

Even if one accepts a general liberal legitimacy theory of territorial rights according to which adequate protection of and respect for human rights renders a state legitimate, which gives the state the territorial right to make, adjudicate, and enforce law within its territory, it is still problematic to extend this territorial right to a right to control immigration:

The problem is that the two rights are conceptually different in a way which arguably also makes them normatively different in the sense that what suffices as a justification for the

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<sup>18</sup> Altman and Wellman, *A Liberal Theory of International Justice*, p. 4.

<sup>19</sup> Altman and Wellman, *A Liberal Theory of International Justice*, p. 3.

former right may not adequately justify the latter.<sup>20</sup> This difference is denied by some theorists. David Miller, for instance, writes that the authority of a state over any particular piece of land must include the right to require immigrants to leave ‘since a system of territorial authority cannot function without some control over who falls within its scope.’<sup>21</sup> But this is a contingent empirical question the answer to which is not as clear as Miller takes it to be. If the function of political authority is to uphold law and order within a territory in a way protecting and respecting human rights, nothing in this political function or its justification necessarily *requires* the right to control immigration and exclude unwanted immigrants. Political authority thus understood and justified is compatible with the state not having a right to control immigration; the other powers of sovereignty are not necessarily undermined or rendered void if the state does not have the right to control immigration. It is of course true that immigration might be so massive that it would severely burden the receiving society and undermine the ability of the state to perform the requisite political functions. But this is a contingent matter that cannot justify a *general* right to control immigration also in cases where there is no prospect of such consequences.<sup>22</sup> So I am not saying that there are no good reasons for controlling immigration to states. My point is that a right to control immigration *to* the territory of the state is distinct from and *does not follow* from the state’s jurisdictional rights *within* the territory. Additional argument is needed in order to justify such a general right.

What does it mean to speak about a ‘general’ right and why does it matter for present purposes whether the right to exclude immigration is general? The distinction is between whether there is a right to exclude immigrants in all cases or only in a more circumscribed number of cases. This generality/specificity distinction is separate from another distinction, namely the distinction

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<sup>20</sup> Sune Lægaard, ‘What is the Right to Exclude Immigrants?’ *Res Publica* 16:3 (October 2010): 245–262.

<sup>21</sup> Miller, *National Responsibility and Global Justice*, pp. 215–16.

<sup>22</sup> Cf. Sarah Fine, ‘Freedom of Association Is Not the Answer,’ *Ethics* 120 (2010): 338–356, p. 355.

between whether a right is absolute and unconstrained or *pro tanto* and subject to being overridden by other considerations. There are arguably no rights that are absolute and completely unconstrained; the state cannot exercise any rights in complete disregard of other normative considerations or the possible consequences. But there are general *pro tanto* rights, which means that the state may have rights that hold in all cases, but which are constrained or subject to being overridden by other normative considerations. The general right to self-determination defended by Altman and Wellman is general but constrained, since their point precisely is that legitimate states enjoy sovereignty over *all* self-regarding matters, but that the resulting right to freedom of association is merely ‘presumptive.’<sup>23</sup> The debate over a right to exclude immigrants concerns the question whether there is a general *pro tanto* right to control immigration, not whether states can legitimately control immigration in specific cases, which could be justified without relying on such a right.

Returning to the conceptual and normative distinctness of territorial rights and a right to control immigration, Altman and Wellman are apparently well aware of the need to provide a separate justification for the right to control immigration. Their proposal is that the right to control immigration is a corollary of a more general right to freedom of association, which all legitimate states enjoy in virtue of their right to self-determination. Wellman has elsewhere formulated their argument simply as follows:

This type of argument involves three basic premises (1) legitimate states have a right to political self-determination, (2) freedom of association is an essential component of

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<sup>23</sup> Altman and Wellman, *A Liberal Theory of International Justice*, pp. 160-61, 162, 165, cf. Christopher Heath Wellman, ‘Immigration and Freedom of Association,’ *Ethics* 119 (2008): 109–41, pp. 111, 113-14, 117.

self-determination, and (3) freedom of association entitles one to refuse to associate with others.<sup>24</sup>

The conclusion is that ‘a legitimate state's right to freedom of association entitles it to choose whether or not to admit any given immigrants.’ The question then is 1) why one should accept the three premises, and 2) whether the conclusion that legitimate states have a right to control immigration follows from these premises?

The first premise is a basic building block of Altman and Wellman’s liberal theory. It is not specific to the issue of immigration but general; it both explains the value of democratic governance, the existence of a primary right to secession for groups able and willing to constitute legitimate states, and is crucial to whether military interventions are permissible. It is also expressed in their liberal legitimacy theory of territorial rights. Since the present paper is an internal critique of their argument regarding immigration, I will simply accept the first premise in the form needed to justify these other elements of Altman and Wellman’s theory for the purpose of my argument.

The second and third premises are supported through what might be called a ‘reflective equilibrium’ argument, namely that they are necessary to answer the so-called particularity problem. The particularity problem is that even if adequate protection of and respect for human rights justifies political authority over a territory, this justification does not in itself explain why a *particular* state should have this authority rather than another state that could fulfill

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<sup>24</sup> Christopher Heath Wellman, ‘Immigration,’ in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2010 Edition), sect. 1.6, available at: <http://plato.stanford.edu/archives/sum2010/entries/immigration/> A similar formulation is found in Wellman, ‘In Defense of the Right to Exclude,’ p. 13.

the requisite political functions equally well.<sup>25</sup> The particularity problem for legitimacy theories is dramatized by the annexation objection:

Imagine, for instance, that a series of plebiscites revealed both that an overwhelming majority of Americans wanted to merge with Canada and that an equally high proportion of Canadians preferred to maintain their independence. Would it be permissible for the United States to forcibly annex Canada... if the United States could execute this unilateral merger without disrupting the peace or violating the individual rights of any Canadians[?]<sup>26</sup>

The point of the objection is that the liberal legitimacy view of territorial rights apparently cannot explain what is intuitively wrong in such cases of annexation, since human rights are not violated in the annexation process. So a pure legitimacy theory focusing only on respect for human rights of individuals is inadequate to address annexation cases. What is missing is, according to Altman and Wellman, a right of political communities as collectives:

The crucial point for our purposes is that one cannot explain the wrongness of unilateral annexations such as this unless one supposes that countries like Canada

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<sup>25</sup> Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), p. 158.

<sup>26</sup> Altman and Wellman, *A Liberal Theory of International Justice*, p. 161, cf. Christopher Heath Wellman, 'Immigration and Freedom of Association,' *Ethics* 119 (2008): 109–41, p. 112, and Wellman, 'In Defense of the Right to Exclude,' pp. 21-22. See also Stilz, 'Why do states have territorial rights?' p. 206, and Stilz, 'Nations, States, and Territory,' pp. 590-91.



enjoy a right to self-determination that includes the right of Canadians, as a political community, to associate with others as they see fit.<sup>27</sup>

This right to freedom of association is not necessarily final and absolute, since there may be other competing considerations that outweigh it in some circumstances. But a presumptive right to freedom of association is sufficient to answer the annexation objection.

Altman and Wellman additionally support the ascription of a right to freedom of association to states by arguments from analogy and by suggesting that there is a plausible theoretical rationale for it. They argue for states' freedom of association by analogy to other forms of association, e.g. marriage and voluntary associations. Furthermore, 'Freedom of association is not something that requires an elaborate justification ... since it is simply one component of the self-determination which is owed to all individuals and legitimate states.'<sup>28</sup> The right is a reasonable corollary of the normative status of legitimacy in the sense that it is natural to ascribe such a right to an entity which has the status of legitimacy. So the right of states to freedom of association needed to answer the annexation objection can be derived from, or is simply a component of, a more fundamental collective right to self-determination of legitimate states, which according to Altman and Wellman enjoys independent intuitive and theoretical plausibility. The right to exclude is finally a natural and necessary corollary of freedom of association, since the latter would not have the value we generally think it has without this right.

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<sup>27</sup> Altman and Wellman, *A Liberal Theory of International Justice*, p. 161; cf. Wellman, 'Immigration and Freedom of Association,' pp. 112-13.

<sup>28</sup> Altman and Wellman, *A Liberal Theory of International Justice*, p.: 162, cf. 'Immigration and Freedom of Association,' p. 114.

## Problems for the Freedom of Association Argument

There are a number of possible criticisms of Altman and Wellman's freedom of association argument. Two have already been prominently formulated in the literature: 1) a rejection of freedom of association as relevant in relation to states, and 2) a rejection of the right to exclude as being sufficiently unconstrained in relation to immigration. David Miller has for instance pointed out that freedom of association derives its importance from a deep interest in not being forced into association with others against our wishes, but that this interest has much less, if any, weight in the case of large, anonymous political communities such as states.<sup>29</sup> Sarah Fine has marshalled a range of objections, one being that freedom of association is restricted to 'self-regarding' affairs, which exclusion of immigrants is not, since it may harm outsiders.<sup>30</sup> The force of these objections is to undermine the analogy between states and other associations and to diminish the general scope and strength of freedom of association.

Altman and Wellman might have answers to these objections. Even though a state is not a voluntary or intimate association, it is a very important association, which members reasonably care about.<sup>31</sup> Altman and Wellman might fall back on freedom of association as necessary for answering the annexation objection. Miller would here counter that this can be explained in nationalist terms, so this answer would boil down to whether or not liberals can accept nationalism, which it is precisely Altman and Wellman's aim to deny. Fine's claim that states may harm immigrants if it 'wrongly causes them to be worse off than they would be otherwise'<sup>32</sup> simply begs the question against Altman and Wellman, since exclusion is not wrongful if the state has a

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<sup>29</sup> Miller, *National Responsibility and Global Justice*, p. 211.

<sup>30</sup> Fine, 'Freedom of Association Is Not the Answer,' pp. 345-48.

<sup>31</sup> Altman and Wellman, *A Liberal Theory of International Justice*, pp. 160-163; Wellman, 'Immigration and Freedom of Association,' pp. 113-14.

<sup>32</sup> Fine, 'Freedom of Association Is Not the Answer,' p. 345.

right to exclude. If the wrongness is explained in terms of a comparison with members of the state, then the criticism presupposes some form of global egalitarianism, which Altman and Wellman reject, and therefore Fine's objection is not an internal criticism, as she claims. But even if we grant these objections, legitimate states might still have a *pro tanto* right to freedom of association, which is merely more easily overridden and more circumscribed than Altman and Wellman think.

I want to present a different criticism, which mainly trades on the theoretical concepts used in formulating the argument. It is therefore both independent of the intuitive disagreements between Miller, Fine, and Altman and Wellman, and of broader relevance. There are two parts to my criticism. The first is to question the move from a right of self-determination for legitimate states to a right to freedom of association understood in the way Altman and Wellman do for the purpose of their argument about immigration. The second is to argue that even if one grants a right to freedom of association, it does not follow from this that legitimate states have even a *pro tanto* right to control immigration.

### **Legitimacy as a Ground for Self-Determination**

A central part of Altman and Wellman's rationale for why states have a right to freedom of association is that legitimacy grounds a right to self-determination. What does this mean and is it plausible? In relation to states, self-determination traditionally means that other states are bound by duties of *non-intervention*. If a state is indeed legitimate, then this seems plausible, since intervention would minimally require justification in terms of a need to protect human rights.<sup>33</sup>

But Altman and Wellman take self-determination to mean more than a right to non-intervention. Self-determination only implies the right to freedom of association needed to justify a right to control immigration if it also includes the right to determine what the "self" in question is:

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<sup>33</sup> Altman and Wellman, *A Liberal Theory of International Justice*, p. 100

Because the members of a group can change, an important part of group self-determination is having control over what the “self” is. In other words, unlike individual self-determination, a significant component of group self-determination is having control over the group which in turn gets to be self-determining.<sup>34</sup>

So self-determination is not a purely external matter, but also an internal matter, and not only a right of the state *vis-a-vis* other states, but a right over its own people as well. Rights over the people are well-known from the doctrine of popular sovereignty, according to which the people have a right to *rule* over themselves (this right is reflective in the sense that its subject and object are identical). Altman and Wellman also subscribe to a version of this view, since their central principle is that any group able and willing to constitute a legitimate state has a collective right to self-determination, which among other things explains the intrinsic value of democratic rule.<sup>35</sup> Only legitimate states can appeal to such a right, since a main reason for denying a right to rule is that the rule fails to represent the people. The connection between legitimacy as protection of individual human rights and the collective right to self-rule is weaker than that between legitimacy and the right to non-intervention, however, since Altman and Wellman reject reduction of collective self-rule to individual autonomy.<sup>36</sup> Liberal legitimacy is only concerned with human rights as necessary constraints on political rule, not necessarily with democracy, so there is not an immediate rationale for a collective right to self-rule based on legitimacy.

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<sup>34</sup> Altman and Wellman, *A Liberal Theory of International Justice*, p. 163; Wellman, ‘Immigration and Freedom of Association,’ p. 115; Wellman, ‘In Defense of the Right to Exclude,’ pp. 40-41, compare Miller, ‘Territorial Rights: Concept and Justification,’ p. 14.

<sup>35</sup> Altman and Wellman, *A Liberal Theory of International Justice*, pp. 16-18.

<sup>36</sup> Altman and Wellman, *A Liberal Theory of International Justice*, p. 19.

But Altman and Wellman's understanding of self-determination takes a radical step beyond self-rule: as expressed in the above quote, it not only concerns a people's right to rule over themselves but the people's right to determine the *composition* of its 'self.' There are three things to say about this: First, this is a completely different sense of self-determination than non-intervention and collective self-rule; the objects of and rights incidents involved in the three rights to self-determination are different. Non-intervention is a negative claim right obliging other states not to interfere. Self-rule is a liberty, positive claim right and power to make, adjudicate, and enforce law within a territorial jurisdiction, which obliges individuals within the jurisdiction to obey the law, and makes the collective immune from competing authorities. Self-composition is apparently a liberty, positive claim right, and power to determine who are members of the people, which apparently, although this is unclear from Altman and Wellman's formulation, not only can grant them the status of membership but also oblige individuals in this respect. The question is whether there is reason to accept such a new sense of self-determination.

Recall that Altman and Wellman support their principle of collective self-determination by its capacity to explain why unilateral annexation is wrong. This is a strong intuition, but the sense of self-determination as self-composition is not necessary to explain this. Self-determination as non-intervention will amply do the trick. The right to self-determination is also supported by its role in explaining the value of democracy, but what is required for this purpose is only self-determination as self-rule, not as self-composition. Altman and Wellman do, of course, give other examples to support the claim that a right to freedom of association is an important part of self-determination for both individuals and groups, e.g. in cases of marriage and golf club membership.<sup>37</sup> But the question, especially in light of Miller's criticism noted above, precisely is

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<sup>37</sup> Altman and Wellman, *A Liberal Theory of International Justice*, pp. 159-60; Wellman, 'Immigration and Freedom of Association,' pp. 110-11.

whether the uncontroversial value of freedom of association at the individual and civil associational levels extends to states. This is what has to be shown, and this is why Altman and Wellman need the annexation case. My point is that at the state level, the independent intuitive support for a collective right of self-determination supports only non-intervention and self-rule, not self-composition; one is not given any reason at all to accept self-determination as self-composition even if one accepts all the intuitions about annexation, the value of democracy, etc. which Altman and Wellman invoke to support it. What they are doing here is actually introducing a completely new notion of self-determination rather than just articulating the already existing implications of an already established notion. And this new principle of self-determination as self-composition is not supported at all through the reflective equilibrium arguments at the state level.

There might of course still be other reasons to accept a collective right to self-determination as self-composition. My second point is that this new principle is much less intuitive than the other senses of self-determination and that we therefore do not have any good reason to accept a general collective right to self-composition. The idea that a state, as a collective, has the right to determine its membership, if understood as a general right in the sense noted earlier, not only implies a right to control immigration. Immigration is not the primary or most important source of reproduction of the collective; it is mainly reproduced by existing members giving birth to children who usually become members of the people automatically. If the existing collective has a right to control what it is going to be in the future, this not only means that it can exclude would-be immigrants, but also that it can direct its reproduction through birth. This can be done a) quantitatively, by regulating the *number* of children existing members are permitted or required to have, and b) qualitatively, by selecting *which* children existing members are permitted or required to have. Such policies are extremely invasive and illiberal. An example of the former is a policy like China's one-child rule, which some already consider problematic. But a general collective right to

control the composition of the collective ‘self’ – a right which Altman and Wellman acknowledge takes precedence over individual rights<sup>38</sup> – would also justify policies like those adopted by the Third Reich, including bans on racially mixed offspring, coercive abortions of unwanted children, sterilizations of unwanted parents, state regulated breeding programs, etc.

Since the right to self-determination as self-composition is independent of the self-determination as non-intervention and self-rule, and therefore a separate principle, the plausibility of self-composition has to be assessed on its own and on the basis of the implications of such a right. As shown above, some of the implications are radically counterintuitive because a general right to collective self-composition would seem to justify unacceptable forms of population control.

Altman and Wellman might reply, however, that the counterintuitive implications can be avoided by constraining the right properly. They take the right to self-determination to be conditional: only legitimate states that respect human rights have the right in the first place. So if state interference in the reproductive choices of citizens is a human rights violation,<sup>39</sup> Altman and Wellman can avoid this implication.

But then the third thing to note concerning Altman and Wellman’s notion of self-determination as self-composition is that the supportive relationship between legitimacy and self-determination in this sense is missing. Where legitimacy naturally and plausibly grounds a right to non-intervention, it is elusive why the fact that a state protects and respects human rights should give the people of the state the right to control its own composition. There is no material connection between legitimacy and composition that makes such a link plausible. This was also the case for self-determination as self-rule, but in the case of self-determination as self-composition the problem

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<sup>38</sup> Altman and Wellman, *A Liberal Theory of International Justice*, pp. 176-78.

<sup>39</sup> E.g. against the right to privacy and family life as articulated in §§ 12 and 16 of the *Universal Declaration of Human Rights*.

is worse: the fact that a right to control composition violates human rights unless constrained shows that not only is such a right *not derivable* from a concern with human rights; it *directly contradicts* human rights. So my objection here is that Altman and Wellman's rationale for the right to freedom of association in terms of its connection through self-determination to legitimacy is implausible.

It might be objected that even though not all means of population control are legitimate, the aim of limiting the population surely is legitimate under certain conditions, e.g. the threat of over-population, and that this supports a collective right to self-composition. I have two answers to this objection: First, many legitimate forms of population policy do not require a right to self-composition, which as I noted above involves claim rights against members of the people, since they can often be effectively pursued by states in ways not involving the imposition of duties on members of the population to have or not have children – economic incentives might for instance be effective without violating human rights. Secondly, even if it is justified in special cases to require people not to reproduce, e.g. because of catastrophic consequences of unregulated reproduction, this is not equivalent to there being a *general* collective right to self-composition. Such a right would give the state a *pro tanto* right to impose duties on people regarding reproduction in all cases. That it is justified to impose such duties in special cases neither shows that there is a *pro tanto* right to do so in other cases, nor is such a general right necessary to justify the special cases, since they might be justified on other, e.g. consequentialist, grounds.

To summarize: The notion of self-determination as a general right to self-composition needed in Altman and Wellman's argument for a right to control immigration is different from self-determination as non-intervention and as self-rule. Therefore it is not supported by the reflective equilibrium arguments justifying the other rights. And considered as an independent principle, it is counterintuitive and unnecessary. Even as constrained by human rights, there is therefore no reason to accept this independent principle.



### **States have Territorial Rights, Peoples have Freedom of Association**

The second part of my criticism can be presented on the basis of another problem noted by Fine. She points out that the argument for a right to control immigration based on freedom of association presupposes territorial rights: ‘the citizens of a state are not entitled to stop noncitizens from settling there, despite their claim to control access to membership, without a further entitlement to control access to the territory in the first place.’<sup>40</sup> This is of course entirely true. But when viewed in the context of Altman and Wellman’s broader theory as presented above, they have an answer to this objection which apparently retains a coherent unity in their position, since their theory incorporates a liberal legitimacy theory of territorial rights. *If* it is true that legitimacy both grounds territorial rights and the right to freedom of association of states, then Fine’s objection is answered.

My second objection now is that, irrespective of my first objection to self-determination as self-composition, it still *does not follow* from the fact that the state has 1) territorial rights, and 2) a right to freedom of association, that 3) it has a right to control immigration. To see why, consider more carefully what kinds of rights we are dealing with and who the rights-holders are. Altman and Wellman are in fact not very clear about who the holder of the rights in question is. The rights-holder might either be the state as an institution or the people as a political collective.<sup>41</sup> Altman and Wellman often go from one answer to the other within the space of two sentences, e.g.:

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<sup>40</sup> Fine, ‘Freedom of Association Is Not the Answer,’ p. 355.

<sup>41</sup> Altman and Wellman deliberately avoid using the term ‘the people,’ since they consider it as having connotations of common decent, i.e. as a pre-political nationalist notion (Altman and Wellman, *A Liberal Theory of International Justice*, p. 190). They rather talk about ‘groups’ or ‘collectives.’ I nevertheless use the term ‘people’ since the group relevant to the issue of immigration is the group consisting of the existing population of the state receiving immigrants.

As long as a *state* adequately protects and respects human rights, *it* possesses such a right of self-determination. Moreover, we contend that this right of self-determination is irreducibly collective and so *held by the group of persons who constitute the state*.<sup>42</sup>

Here it seems that the state and the people are simply considered as one and the same.<sup>43</sup> But this is hardly a correct characterization. The state is an institution (a set of rules defining roles with specific rights) with a specific mode of functioning (promulgation of laws within a territorially defined jurisdiction backed by a claim for a monopoly on legitimate violence). As such the state is distinct both from the persons who staff it (officials) and direct it (judges, members of parliament, and government) as well as those who are regularly subjected to it and provide its legitimation (citizens).

If the state and the people are distinct entities, which one is the holder of the rights in question? Altman and Wellman elsewhere remark that:

This right of self-determination ... inheres not in governmental institutions, much less in the officials who occupy these institutions. Rather, it inheres in a political society as a whole. Institutions are the means through which protection of human rights is provided and made secure by society.<sup>44</sup>

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So 'people' in my usage is a strictly *politically* delineated collective. This usage is reminiscent of that in Stiliz, 'Nations, States, and Territory,' p. 591, although I do not here go into the possible 'morally salient bonds' uniting a people.

<sup>42</sup> Altman and Wellman, *A Liberal Theory of International Justice*, p. 1, emphases added.

<sup>43</sup> Cf. the conception of the state as a collective in Nine, 'A Lockean Theory of Territory,' pp. 154-55.

<sup>44</sup> Altman and Wellman, *A Liberal Theory of International Justice*, p. 189.

This seems plausible, but it is too imprecise. One reason is that ‘political society’ is completely vague. Another reason is that the general right to self-determination is not the right directly implicated in the argument for a right to control immigration; rather, the relevant rights are the territorial rights and the right to freedom of association. The question is who the holders of these specific derivative or component rights are?

It seems that the right to freedom of association must be held by the people, at least insofar as the association in question is with other persons (citizens or immigrants), as opposed to other states, for only people can associate. The association in question is that of becoming a member of a group of persons, and only persons and groups of persons can do this; institutions cannot. To take an analogous example: even if the people affiliated to an institution such as a university have freedom of association to form clubs and fraternities, it would not make sense to say that it is the university as such that is the holder of the right to associate, because the university cannot be a member of a university club or fraternity. So even if staffs and students of the university only have the right to freely form associations within the university because they are affiliated to the institution, it is the members of the group of affiliates who have this right, not the institution.

On the other hand, if the territorial rights are jurisdictional rights to make, adjudicate, and enforce law, it seems that only the state can have such rights.<sup>45</sup> Recall that the liberal argument for territorial rights is that a state, understood as an artificial agent making, adjudicating and enforcing law within a territorially defined jurisdiction, is *necessary* to protect the liberty and rights of individuals.<sup>46</sup> If the state is indeed necessary for this purpose and if territorial rights are simply the rights to perform these requisite political functions, then only the state can have these rights. Not only is the state not identical to the people; the state also functions in ways which the group of

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<sup>45</sup> Cf. Stilz, ‘Why do states have territorial rights?’ p. 198.

<sup>46</sup> Wellman, ‘Samaritanism and the Duty to Obey the Law.’

citizens cannot do on their own. So even if the reason for having a state, and thus for ascribing the state territorial rights, makes reference to the liberty and rights of the people of the state, it must be the state, not the people, which is the holder of the territorial rights. Analogously, even if the point of having universities is exhausted by the activities of the staffs and students made possible by such institutions, the staffs, and students cannot make decisions and act on behalf of the institution if this does not happen through the correct institutional mechanisms.

One objection here might be that, if a state is an institution in the sense of a public system of rules defining specific positions and mechanisms, an institution in this sense simply cannot be the subject of rights. Moral rights must somehow be held by persons, since only persons have intrinsic moral status. This might be a reason for either vesting the rights in question in the people of the state, the interests of whom the state is in any event justified as protecting, or to identify the state with the collective body of citizens rather than with a system of rules. But even if the objection correctly points out that the justification of rights can only appeal to the interests of individual persons, it does not follow from this that only individual persons can have rights. Rights are ways of protecting interests of individuals or respecting individuals and of formulating what such protection and respect requires. But such protection or respect can be cashed out in rights assigned to entities that are not individual persons. This is not controversial. Think for instance of the rights of contract of corporations: even though a private company is an artificial entity, we are perfectly used to ascribing such entities legal rights, and at least some of these rights arguably reflect moral rights, which, although the entity itself is not a subject of intrinsic moral respect and concern, are moral rights because they can be justified as a way of protecting and respecting individuals, e.g. the stakeholders of the corporation. But even though the moral justification for the rights must refer to the interests of individual persons, this does not mean that the individual stakeholders of a corporation are the holders of the rights of the corporation. Only the corporation

as an institutional entity can exercise these rights. And analogously: only the state can exercise the jurisdictional rights the performance of which not only provides the justification for having the state, but for which, according to the liberal statist argument, the state is necessary.

So we have three distinctions: 1) contrary to what Altman and Wellman's somewhat casual formulations suggest, the state and the people are not identical; 2) jurisdictional rights are territorial whereas the right to freedom of association is not, and 3) territorial rights are held by the state whereas the right to freedom of association is held by the people. Consider now again Altman and Wellman's argument for a right to control immigration supplemented so as to answer Fine's objection:

- (1) Legitimate states have a right to political self-determination
- (2) Freedom of association is an essential component of self-determination
- (3) Freedom of association entitles one to refuse to associate with others
- (4) Legitimate states also have territorial rights over their territories
- (5) Therefore legitimate states have a right to control immigration to their territories

If my three distinctions hold, the territorial rights of states (4) and the right to freedom of association (2, 3) are not rights held by the same agent or entity. Therefore one cannot conclude (5) on the basis of (1-4); it does not follow from the premise that the people have a right to freedom of association, that the state has a right to control immigration, even if the state also enjoys territorial rights. There is a justification for excluding immigrants, to be sure, which refers to the freedom of association that I here for the sake of argument assume the people have. But this right is only a right of the people not to associate and at most grounds a duty on others not to impose themselves on the association. But it does not follow from this that *the state* has a right to exclude unwanted

immigrants from the *territory*, for two reasons: first, the people holding the right to freedom of association cannot perform the territorial exclusion, and secondly, freedom of association only justifies *associational* exclusion. The state, on the other hand, could perform the territorial exclusion, but it is not justified in doing so, since it only holds territorial rights which do not imply a right to exclude immigrants.<sup>47</sup>

One might grant my distinction between rights-holders and types of rights but nevertheless object to my claim that the right to exclude does not follow from Altman and Wellman's argument. Even if the right to freedom of association is held by the people and territorial rights are held by the state, it is after all the people who are supposed to be in control of the state and the state is supposed to represent the people. So why can the state not perform the territorial exclusion on behalf of the people? To take an analogous example: university affiliates have freedom of association, which includes the freedom to disassociate, and the university has the right to make and apply rules within the university premises. If a group of university scholars conduct a seminar on the university premises and uninvited outsiders barge in, the scholars can call on the university to exclude the intruders from the seminar room. Even if the scholars as individuals and as a seminar group do not have the right to exclude intruders from university premises, the university can be called upon to perform the physical exclusion required to uphold the freedom of association of the seminar group. If the analogy holds, why can the state not similarly exclude immigrants to uphold the freedom of association of the people?

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<sup>47</sup> In fact, Wellman acknowledges this problem elsewhere: 'it is not clear that the analogy between personal and political freedom of association is even apt, because states that deny immigrants do not merely refuse to politically associate with those who seek to migrate, they also forcibly exclude them from the state's territory' (Wellman, 'Immigration,' sect. 1.6).

My reply to the objection is that the analogy does not hold in one crucial respect: the whole point of Altman and Wellman's argument is to provide a justification for the right of states to exclude immigrants. Since the right to exclude from the territory is what has to be justified, it cannot be taken for granted. But in the university example, it is taken for granted that the university has the right to exclude unwanted people obstructing university activities from its premises. So in effect the university is assumed to have not only what is analogous to territorial rights, but also what is analogous to the right to exclude immigrants, which was what had to be established. So my criticism still stands: the right to exclude immigrants does not follow from Altman and Wellman's argument.

My criticism might be countered by arguing that the distinction between state and people is a mere conceptual distinction without any normative import, because the rights held by the state are really the rights of the people. The state is not a person and does not have non-instrumental value, and therefore it cannot be the holder of rights. But, as already noted, this challenge to the normative salience of my distinction elides two questions: One is who the *holder* of the right in question is; the other is what the *justification* for the right is. As argued above, the state must be the holder of territorial rights, for otherwise the liberal statist justification of state legitimacy collapses. But the justification of territorial rights only treats the state as a (necessary) means to secure the rights of individuals. So the state has no moral standing independently of the people; it is a construct with purely instrumental value. According to Altman and Wellman, if the state's right of self-determination is violated:

it would not be the state that is wronged. It would be inconsistent with value individualism to posit that the state is the wronged party, because the state is not an individual whose well-being or life ultimately matters morally. Rather, the individual

members of the state are the ones whose lives matter, and they are the ones who would be wronged. It is the wrong to them that requires respect for the self-determination of their state<sup>48</sup>

Because the duties of non-interference corresponding to the right of self-determination are duties towards legitimate states, it is legitimate states that are the holders of rights of self-determination.

To see my point in a different way, recall that Altman and Wellman presented freedom of association as justified because it provides an answer to the particularity problem. The problem, dramatized by the annexation objection, was that even if a state adequately protects human rights, this is not in itself a reason why this state rather than another should hold territorial rights over a specific area. Freedom of association works as an answer to the annexation objection because a state annexing another is forcing the citizens of the annexed state into an association with its own citizens, which violates their right to freedom of association. The problem is that immigration is crucially different from annexation. Immigration is a matter of individuals taking up residence within the territory of a state, whereas annexation is a matter of one state taking over another, subjecting its people to its own authority and including the latter's territory in its jurisdiction. There are several dis-analogies: 1) Immigration is an *individual* phenomenon, whereas annexation is collective and institutional; 2) annexation involves a *change* in jurisdiction (it is a unilateral exercise of meta-jurisdictional power), whereas immigration does not (it involves acceptance of the jurisdiction of the receiving state), and 3) annexation is a breach of freedom of association because the people of the annexed state are forcibly incorporated into the people of the annexing state, whereas immigration in itself only involves granting residence permission. These dis-analogies

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<sup>48</sup> Altman and Wellman, *A Liberal Theory of International Justice*, p. 7.



show that even if freedom of association is necessary to answer the annexation objection, it does not *for that reason* apply to the issue of immigration.

There are of course ways to challenge this conceptual separation of immigration and association. One is to invoke the principle that all persons regularly subjected to the political power of a state should also have status as citizens with equal rights. This (at least) implies that permanent residents within a state should have a real opportunity to become citizens of that state. Altman and Wellman affirm such a principle as one requirement of liberal legitimacy.<sup>49</sup> On this basis one might argue that since peoples have freedom of association as citizen collectives, and since permanently admitted immigrants have a right to become full citizens as a requirement of legitimacy then the right of the people not to associate extends to the admittance of immigrants to the territory. States must have a right to control immigration because this is the only way the requirement of legitimacy and freedom of association can be fulfilled together.<sup>50</sup>

But this argument is not conclusive. If (the possibility for eventual) access to citizenship for all permanent residents is indeed a requirement of legitimacy, then only states that fulfill this requirement have the right to self-determination, according to Altman and Wellman's theory. So the legitimacy requirement is both logically and normatively primary. One way to escape the conclusion of the argument would be, as I did above, to deny that self-determination includes a right to determine the future composition of the people. There is no positive rationale connecting freedom of association to territorial exclusion (cf. my distinction between the two), and we have no reason to accept the sense of self-determination as self-composition grounding freedom of

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<sup>49</sup> Altman and Wellman, *A Liberal Theory of International Justice*, p. 172; Wellman, 'Immigration and Freedom of Association,' p. 131.

<sup>50</sup> Fine, 'Freedom of Association Is Not the Answer,' pp. 343-44.

association. One might of course also deny that the relevant unit of legitimacy is the state.<sup>51</sup> But one need not invoke such strong cosmopolitan premises in order to deflect the argument; the fact that there is no reason to accept one of the premises is sufficient.

## Conclusion

At the normative level the paper has been primarily a negative argument pointing out what I take to be some failures in a specific argumentative strategy for justifying a right to exclude immigrants on the basis of the territorial rights of states. Even though I have presented this argument as a criticism of Altman and Wellman's theory, I believe that it is of wider relevance, and it is furthermore not intended as a rejection of their general liberal position on legitimacy and territorial rights. At a more general theoretical level, the paper is not only negative and critical. One general lesson of my discussion is that Altman and Wellman's liberal theory in fact has the right structure to address the problem. Immigration is by its very nature a territorial issue, so an account of territorial rights is necessary to mount any justification for a right to control immigration. But the right to exclude immigrants does not in itself follow from a right to territorial jurisdiction. I have shown that Altman and Wellman implicitly acknowledge both of these points. My point has been to make it explicit that an account of territorial rights of jurisdiction is *necessary* but *not sufficient* for a justification of a right to exclude immigrants. I have then further argued that Altman and Wellman's substantial proposal for the additional justification fails. In doing this I have analyzed and elucidated some of the central concepts used when discussing these issues. There is much complexity here which is both normatively relevant and often glossed over in debates about specific normative issues. I hope

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<sup>51</sup> Lea Ypi, 'A Permissive Theory of Territorial Rights,' forthcoming in *European Journal of Philosophy*.

my discussion of Altman and Wellman has not only illustrated these points, but might also be of constructive use in further debates about territory, immigration, and the state.<sup>52</sup>

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<sup>52</sup> Earlier versions of this paper were presented to the Criminal Justice Ethics research group at Roskilde University, at the Centre for the Study of Equality and Multiculturalism, University of Copenhagen, and at a workshop on territorial rights funded by the Nordic Network for Political Ethics held at the University of Oslo. Thanks go to participants at those occasions for comments, especially Kim Angell, Chris Bertram, Nils Holtug, Morten Ebbe Juul Nielsen, Cara Nine, Ingmar Persson, Thomas Søbirk Petersen, Jouni Reinikainen, Kit Wellman and Jörgen Ödalen, as well as two anonymous reviewers for the *Journal of Moral Philosophy*.