



EUI Working Papers

SPS 2008/09

Taking rights territorially
On territorial rights and the right to exclude

Oliviero Angeli

EUROPEAN UNIVERSITY INSTITUTE
DEPARTMENT OF POLITICAL AND SOCIAL SCIENCES

Taking rights territorially
On territorial rights and the right to exclude

OLIVIERO ANGELI

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year, and the publisher.

The author(s)/editor(s) should inform the Political and Social Sciences Department of the EUI if the paper is to be published elsewhere, and should also assume responsibility for any consequent obligation(s).

ISSN 1725-6755

© 2008 Oliviero Angeli
Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy

<http://www.eui.eu/>
<http://cadmus.eui.eu/>

Abstract

What does it mean that rights are territorial? Do states have territorial rights? Do these rights justify the exclusion of would-be immigrants? This paper will address these questions and explore the problems associated. The objective is to show how the right to exclude can be justified on the grounds that it is functionally related to the idea of territorial rights and collective self-determination. In doing so, the paper does not aim at covering the entire field of global redistributive justice and migration ethics. Its focus is on the justification and scope of the state's territorial rights as well as, for analytical convenience, on the relation between territorial rights and the rights of non-forced migrants. By virtue of this focus, the key issue addressed will be what states can reasonably do as territorial states rather than what they owe others

Keywords

Territorial rights, collective self-determination, right to exclude, migration, global justice, territory, citizenship

Oliviero Angeli (University of the Saarland – Centre Marc Bloch)
EUI Visiting Student 2007/08

1. Introduction¹

This paper addresses the justification of the right to exclude migrants within a rights-based conception of global justice. The objective is to show how this right can be justified on the grounds that it is functionally related to the idea of territorial rights and collective self-determination. To this end, the present paper first undertakes some conceptual analysis in order to unravel possible inconsistencies in the understanding of the state's territorial rights and to differentiate between morally distinct categories of rights. In particular, it distinguishes between territorial rights and rights over the territory. Subsequently, the paper focuses on the justification and scope of these two categories of rights as well as on their relation with the rights of non-forced migrants². The theoretical approach taken in the present paper is a moral cosmopolitan one³. At the core of the argument lies the value of collective self-determination and its effective territorial implementation. The term collective self-determination is used in contradistinction to national self-determination to refer to the citizens of a state with no distinction of cultural or religious affiliation. Unlike extreme cosmopolitans⁴, however, I assume that, for a right to self-determination to exist, it must be grounded on the (sufficiently strong) interests of these citizens *as* citizens of particular states. In this sense, the argument developed can be said to accommodate the liberal nationalist quest for collective autonomy without relying on it. Yet, while I reject liberal nationalism, I will not pursue this criticism here because I believe that a nation need not be intrinsically valuable in order to enjoy collective rights to self-determination. Given that immigration has now become a highly charged moral and political issue, there is good reason to be suspicious of whether cosmopolitan and liberal nationalist principles can translate into a consensual interpretation of the relation between self-determination and immigration. Also, I am aware that cosmopolitanism and liberal nationalism can be thought of as being opposed to each other and hence irreconcilable both practically and theoretically. However, not all, and possibly very few cosmopolitans and liberal nationalists define themselves in such antagonistic terms. Yet in recent years an increasing number of cosmopolitan political theorists have attempted to deal with the question of how to justify immigration restrictions in a somewhat less universalistic way⁵. On their account, moral cosmopolitanism stands for the attempt to widen the scope of social justice, as equality of opportunity, beyond national boundaries, but without making national boundaries irrelevant. What they assume, then, is that immigration restrictions can be justified given the legitimate ends of territorial states and provided they do not themselves violate equality of opportunity. In the end, these authors grant that the right of states to restrict immigration can be justified on the grounds that restrictions to immigration support, or at least do not by themselves

¹ A previous version of this paper has been presented at the Summer Institute on Citizenship and Migration at Stanford University. I would like to thank the participants of this conference for their helpful suggestions. I am particularly indebted to its conveners, Eamonn Callan and David Miller. Special thanks go to Rainer Bauböck, Holger Kolb, Jean-Christophe Merle, Kieran Oberman and the anonymous reviewer.

² Forced migrants include not only refugees but also people facing serious risks to their lives (e.g. migrants fleeing hunger).

³ On moral cosmopolitanism see Pogge (Pogge 2002).

⁴ On the difference between extreme and moderate cosmopolitanism see Scheffler (2001: 112).

⁵ Two leading exponents of this approach are Ayelet Shachar (2008) and Eric Cavallero (2006).

undermine, the process of equalizing worldwide opportunities. However, no independent argument is given for determining who is morally entitled to restrict immigration and why.

While I am sympathetic to these approaches to the point of endorsing their version of moral cosmopolitanism and justice, I am also worried about their unjustified *conservatism* with regard to states' (territorial) claims. Restrictions to freedom of movement may be justified in the interest of greater distributive justice worldwide (cf. Pogge 1997), but some argument must be given for the claims that (1) *states* should have the right to restrict immigration and (2) exercise it *on a territorial basis*; or else the whole account ends up being excessively pragmatic. This said, my purpose here is not to indulge in elaborate criticism of the above-mentioned approaches, but to suggest an alternative cosmopolitan approach. The main goal, in brief, is to show that a value-individualistic⁶, territorial conception of collective self-determination can produce, if pushed to its extreme consequences, far-reaching egalitarian conclusions. What I cannot do, though, is to provide an independent argument for the reasonableness of a global egalitarian principle such as equality of opportunity. Rather, taking for granted that given understanding of global justice, my purpose is to show how that understanding is reflected in the conception of territorial rights I am outlining here.

Two clarifications are in order at this point. First, I suspect, the discussion on self-determination and territorial rights is complicated by two substantial difficulties: disagreements about the best concept of "right" and disagreements about the importance and implications of self-determination. In this paper I will address only the second difficulty. As for the first difficulty I will largely rely on Joseph Raz's discussion of the meaning of "right" and, partly, of "collective rights" in *The Morality of Freedom* (Raz 1986)⁷. Accordingly, my focus will be on identifying and isolating interests that are significant enough to justify holding others under one or more correlative duties. By contrast, Hohfeldian privileges are defined as interests that are important enough to impose a lack of a claim-right on some other person(s) (cf. Fabre 2000: 89). Since, as I will show, territorial rights can refer to various rights, the grounding of these rights is likely to involve different interests and rights as well as contingent considerations concerning, above all, the competing interests and rights of others. There are two interests and rights that are most crucial in this context: collective self-determination and welfare.

A brief clarification is in order on the relation between interests and rights⁸. By postulating too intimate a connection between rights and interests one might preclude, or at least complicate, the justification of rights that are not easily grounded in corresponding interests. Yet, as I shall argue below, territorial rights are such rights. These rights are not directly grounded in the right-holder's interest, but rather in another, more general right (such as the right to self-determination). Of course, there remains an important link between such derivative rights and the right-holder's interest. It is just that this link is not as direct as one might think at first. It requires some argument to show that the link between the core right and territorial rights is justified on

⁶ Value-individualism is the view according to which (1) only the interests of individuals have ultimate moral value and (2) that (all) collective entities derive their moral value from their contribution to these interests. On value-individualism see Hartney (1991).

⁷ For Raz' general analysis of rights, see Raz 1986: 165-216, 245-63. For his understanding of collective rights, see Raz 1986: 207-09.

⁸ On this point I draw on Raz's distinction between core and derivative rights (Raz 1986: 168-70).

the basis that the effective implementation of the former right requires the implementation of the latter rights. Put broadly, one has to show that without territorial rights the value of the core right is significantly decreased. In this sense, the route from the core right to the derivative one is always substantive, not purely formal or logical. It is also important to note that this route does not always establish the sufficient conditions for claiming an *actual* territorial right, since it might be outweighed by other moral considerations.

The second clarification relates to the relation between territorial rights and immigration. What I take for granted is that the legitimacy of the right to exclude cannot be reduced to a discussion of the legitimacy of the states' claims over their particular territories, and the main reason is that the territory is not just a material resource or ground upon which people move. Territories also serve as repositories of rights and opportunities. By the general rule under contemporary law a person's presence or absence on a particular state's territory can be decisive as to that person's rights and opportunities. As Bosniak put it: "The fact of a person's "hereness" itself triggers the extension of extensive rights and recognition". (Bosniak 2007: 391). This study's primary focus is on this aspect of territorial rights, namely the territoriality of rights, as a ground for rights over the territory. It defines territorial rights as rights whose attribution is contingent upon location in territory. Most crucial for present purposes is that citizenship rights fall into this category of rights. It is on these rights that the paper will focus⁹.

Why is it important to shift the focus from the territory to the territoriality of rights and opportunities? Let me briefly mention two reasons. *First*, the territorial modus by which legal systems allocate important rights (such as those connected with citizenship) is not something for which no one bears responsibilities. The relative richness of a territory may be contingent, but the existing pattern of legal territoriality is not. It reflects specific interests and is continually shaped in its different practical expressions by existing governments and their citizens. As a consequence, these governments and their citizens do carry a direct responsibility for the unjust disadvantages (if any) to which a territorial legal pattern may subject aliens and in particular would-be immigrants. In this sense, the exclusion of would-be immigrants from a territory coincides with exclusion from those rights and opportunities to which residents – qua residents – have access (such as the right to social and medical services, the right to education, the right to housing etc.). My task here is to ask whether these disadvantages *by law* are unjust in that they are not based on interests and rights that are sufficiently strong to hold others under a duty. *Second*, to focus on the territorial pattern by which states define the scope of their law helps to grasp the real nature of the duties that unwanted immigrants bear towards foreign territorial states. These duties do not (or not exclusively) arise out of rights *over* the territory, as in the case of landownership. Rather, these duties are correlated to the rights of communities to determine the scope of their membership on a territorial basis. These are typically the rights that invest their holder with the privilege of defining and organizing themselves as territorially identifiable communities.

The paper is divided into six sections. Following the introduction (section 1), section 2 attempts to provide the conceptual and legal background necessary to understand and evaluate normative accounts of territorial rights. To this end, I will draw a distinction

⁹ Note that, in what follows, I will disregard the difference between citizenship rights and the rights of legal residents (denizenship).

between rights over the territory and rights that are distributed territorially with particular emphasis on citizenship rights. Section 3 distinguishes between two justifications of the right to exclude: special rights-based and general rights-based ones. It then shows why special rights-based arguments do not justify the right to exclude. Section 4 explains why territorial rights are based on the right to collective self-determination. It addresses moral reasons for favouring a deontological interpretation of this right. Section 5 considers three important counterarguments. Finally, section 6 deals with the justification of citizenship rights that are several and distinct in character and moral weight. Its main purpose is to distinguish between two main sets of rights: political and social rights. The first class of rights is inherently tied to the right of states to control common features of the collective life of their citizens (the right to self-determination), whereas the second class is more tied to the interest in welfare. Based on this distinction, I will show that redistributive mechanisms pertain chiefly social rights. The task of working out a detailed blueprint for redistributive mechanisms, ideally by some kind of metric for redistributing basic resources, cannot be accomplished in this paper.

2. Allocating membership rights territorially

Most contemporary liberal theorists, whether cosmopolitan or not, grant Michael Walzer's presumption that states "must be prepared to enlarge their own membership" (Walzer 1983: 61) to resident immigrants, lest they make themselves responsible for the maintenance of a class of "live-in servants" (ibid: 52). On the other hand, if taken to its extreme, strict adherence to this (territorial) rule forces countries of immigration to extend citizenship to everyone who manages to literally set foot on their land. To avoid such consequence, liberal theorists have embarked on different strategies, most of which consisted in relaxing the territorial pattern of citizenship or coupling it with external exclusionary practices. It is important to note, however, that these worries cannot defeat the moral importance of setting territorial criteria for citizenship rights eligibility. To be sure, territorial rules need not be so stringent that they cannot be counteracted by conflicting considerations. Decidedly more troubling, though, is the fact that residence in a country of immigration is a limited *commodity*. While the value of legal and democratic inclusiveness applies within the state's boundaries, boundedness governs at the territory edges (cf. Bosniak 2007: 396).

Clearly, no such distinction between citizenship and migration policy could be drawn without a legally demarcated state's territory. The function of the territory is twofold: On the one hand, the territory serves as a mere object of control and use. It is in this sense that political theorists talk of the state's *rights over the territory*, including the right to exclude others from the territory. On the other hand, the territory serves as a mode by which rights and political affiliations are acquired or allocated. To see this it suffices to observe that states often attribute rights and duties to people due to their territorial location. It is in this sense that I will speak of *territorial rights*. Specifically, although territorial rights involve a constellation of Hohfeldian elements¹⁰, my focus

¹⁰ For instance, states have the *power* to change the legal relation to someone within the boundaries of the state simply due to their jurisdictional authority. And they have the *claim-right* that others do not interfere with their exercise of power over those who are in their territory.

here is on the state's *privilege* to grant membership rights *only* to people within their territory, whereby people outside the territory have no claim-right to membership¹¹. I will also focus on the relation between this privilege and one particular state's right over the territory: the *claim-right* to exclude from the territory¹².

	Rights over the territory	Territorial rights
Analysed right	Right to exclude from the territory	Right to grant membership on a territorial basis
Type of right	Claim-Right	Privilege

Noteworthy, territorial rights are not held by states against their citizens, but rather on behalf of them. More will be said about this below. For the moment it is sufficient to note that the relation between the state and the citizens is best captured in terms of a principal-agent relationship¹³. The role of the state is akin to that of an agent who performs certain functions in the name of a principal, the citizens. Accordingly, territorial rights of states are *already* held by citizens as part of a political community. This, in turn, does not mean that territorial rights do not bind the citizens of a legitimate state whenever they may disagree with the government's decisions as their agent. As long as the state acts within its mandate they are bound to accept its decisions.

Clearly, territorial rights are more complex than rights over the territory in that they incorporate a specific way of organizing legal relations between states or individuals around territorial entities. Central to their success have been its liberal and democratic implications. The territorial rule governing the ascription of citizenship rights is often seen as a way to guarantee protection to resident non-citizens against the exercise of the state power. In addition, it may also target the perpetuation of certain forms of exploitation of immigrant workers in liberal communities¹⁴. This is not to deny that, as I said, the territorial attribution of citizenship rights is sometimes subject to restrictions. However, for purposes of the present study, I accept the basic motivations behind the territorial ascription of membership rights as morally sound. What strikes me as much less clear is the justification of territorial rights as *rights* and the relation between the territorial rights and rights over the territory. Specifically, why is it important that states should enjoy some discretion with regard to the admission of new members? Is the right to exclude would-be immigrants from the territory based on the right of people to distribute rights on a territorial basis?

Before discussing these issues, let me address a possible objection to the notion of territorial rights. Admittedly, this understanding has the possible disadvantage of

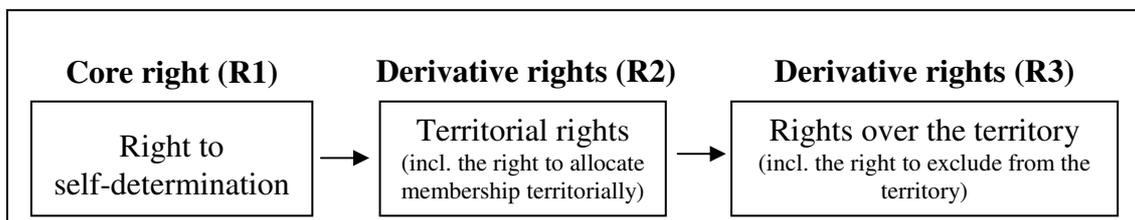
¹¹ Note that this privilege does not entail the duty, on the part of the privilege-holder, not to ascribe membership to people outside the territory (for instance to expatriates). Also, as most (if not all) rights, this privilege is not absolute. Cultural minorities, like expatriates, may, under certain circumstances, have a claim-right to retain or acquire the membership of their country of origin. These cases alone, however, do not establish a general case against the state's privilege to grant membership rights *only* to people within their territory.

¹² On the reasons why I talk about a *claim-right* to exclude see section 5.

¹³ I owe this point to Annie Stilz.

¹⁴ Both arguments are developed by Michael Walzer (1983). See also Bosniak (2007).

inducing spurious consistency among rights that are different in nature and justification. In fact, many are the rights that states distribute on a territorial basis and their justification is likely to involve different moral considerations (cf. Raustiala 2006). Sometimes it is the idea of democratic legitimacy that induces states to allocate rights on a territorial basis; sometimes it is just a matter of effectiveness (cf. Sack 1986). These are undoubtedly important points and they should be taken into account when it comes to determining the validity of different sets of rights that states allocate on a territorial basis. In the end, however, whether we regard territorial rights as a morally meaningful category of rights depends on the argument we want to put forward¹⁵. If the argument focuses, as in the present case, on the autonomy of groups and how this autonomy can be effectively reconciled with liberal and cosmopolitan values, then, as I will show, it is difficult to escape the conclusion that the place in which people reside should play a decisive role in determining these people's right to be members of a state. Similarly, if the argument is meant to address the reasons for which the distribution of important resources is contingent upon a seemingly arbitrary factor such as the territorial location and persons, then it is again important to point out that citizenship too distributes resources (such as health care and education) on a territorial basis. In sum, my focus on territorial rights, while reflecting the cosmopolitan concern about the distributive impact of territorial patterns of wealth distribution, does not by itself contradict the idea of collective autonomy. On the contrary, it strengthens it in one important respect. As I will show, while rights over the territory cannot be easily justified by reference to self-determination, the importance of distributing membership rights territorially proves to be inherently tied to the right to self-determination. In order to graphically illustrate this, consider the following chart.



There are two considerations with regard to the chart. *First*, in the above chart I have outlined two successions of rights deriving from the core right to self-determination. Noteworthy, each set of rights derives its legitimacy from the previous right as well as, indirectly, from the interest that grounds the core right. I shall say more on these two derivative relations shortly, but let me emphasize now how a right can imply another. In broad terms, I assume that R1 justifies R2 if, and only if, the effective implementation of R1 requires the implementation of R2, even if R2 is not commonly thought to be included in the scope of R1 (cf. Nickel 1987: 101). The same reasoning applies to the

¹⁵ Jeremy Waldron makes this point very clearly in relation to conceptions of private property: “[W]e cannot simply opt for one conception of harm or another in the context of Mill’s famous ‘Harm Principle’. Everything depends on the arguments used to defend the ‘Harm Principle’: for example, one set of arguments may have as its upshot a conception of harm that necessarily includes moral offences; another set of arguments may have as its upshot a conception excludes this. Since our arguments are our connections with the considerations that ultimately *matter* to us, we should take their upshot more seriously than we take the results of any independent ‘conceptual analysis’. For if we really worry about the ‘proper’ analysis of the concepts we are using, we can always express our conclusions in terms of fresh concepts, even ones we have newly invented” (Waldron 1988: 433). See also Hart (1961: 209).

relation between R2 and R3. To put it in more concrete terms, the relation between the right to (national) self-determination and territorial rights is thought to be a derivative one in that the former implies the latter for practical reasons (in that the effective implementation of the core right to self-determination is likely to require the implementation of other rights, among which territorial rights). Similarly, I assume that states are effectively incapable of fulfilling the purpose for which they allocate membership rights on a territorial basis, if they lack an exclusionary control over the territory as a whole. This, in brief, is the reason for conceptualizing territorial rights as intermediate rights between the right to self-determination and rights over the territory. *Second*, to say that the right to self-determination justifies territorial rights is not to assume that the self-determination grounds *all* territorial rights in equal measure. Yet, the main difficulty in the present context resides in showing that citizenship rights, as an exemplary case for rights that states allocate territorially, are *all* equally justified as based on the right to self-determination and, in particular, that their value suffice to ground a *prima facie* right to exclude. In order to do this, however, we need first to say something about the importance of self-determination as a *general* right.

3. Is the right to exclude a *special* right?

In Jeremy Waldron's language of rights a general rights-based conception of the right to exclude would imply that this right attaches to its bearers in virtue of some of their inherent characteristics or interests, and do not depend upon any contingent action that might have been undertaken for its grounding. As I said, self-determination would be an obvious candidate for such an interest that could, at least indirectly, ground the right to exclude. But is this right based on the interest or right to self-determination? So far, I have assumed that this question has to be answered in the positive and I have shown that the justification would consist of two steps (see the above chart). But of course this is open to question. Yet as it turns out in recent literature the right to exclude is often portrayed as a right that arises directly from the people's rights over the territory. It is a right that a group has in a territory because it was first to occupy or cultivate it and not, or at least not primarily, because the group possesses the characteristic of being self-determining¹⁶. Accordingly, rights over the territory are thought to be rights that arise out of historical acts like acquisitions or occupations. No reference is made to the fact that exclusive rights over the territory allow states to distribute rights territorially. In so doing, these political theorists have de facto adhered to a special rights-based conception of the right to exclude.

A brief clarification is in order at this point. To avoid confusion, note that Waldron's distinction between general and special rights is somewhat different from H.L.A. Hart's renowned one in that it makes no reference to the parties involved in the right. What is essential is exclusively the mode by which rights are acquired. Accordingly, there can be special rights that arise out of particular (contingent) events in history (such as the occupation or cultivation of a piece of land) and are held against the world (rights in rem), while others (most notably those based on contracts) apply only against certain people (rights in personam). General rights, on the other hand, are rights that attach to

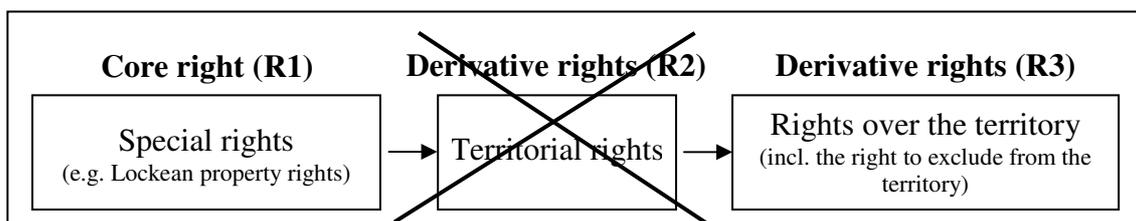
¹⁶ For an overview of the debate see Schmücker (2006).

the rights-holders because of their particular status as individuals or groups and are always *in rem* in that it is impossible to think of general rights that apply only against a particular class of individuals. For a summary of Waldron’s useful categorization see the following table (adapted from Waldron 1988: 107).

1. Rights which are special and <i>in personam</i>	2. Rights which are special and <i>in rem</i>
3. Rights which are general and <i>in personam</i>	4. Rights which are general and <i>in rem</i>

In the present analysis I am interested in analysing cases 2 and 4 with regard to the justification of the right to exclude as a right that is held against the world. While I do believe that there can be no morally sound special rights-based justification of this right (*case 2*), I assume that the right to exclude can be justified (although not absolutely) on the basis of a general right (*case 4*), most notably the right to self-determination. For the sake of completeness, before I show how this justification is to be accomplished, let me say a few words on why special rights-based approaches alone fail to provide a sound justification for territorial rights.

The first, and to me greatest, problem of special rights-based approaches is a conceptual one. These approaches seem particularly, if not exclusively, suited to ground rights over a physical place (i.e. what I previously called rights over the territory), in much the same way as they justify the right of private landowners to exclude trespassers from their territory by reason of their ownership of the land. A classical example would be the Lockean justification of property rights, which political theorists have recently extended to territorial rights (cf. Simmons 2001; Nine 2008). In order to graphically illustrate this, consider the following chart.



As the chart shows Lockean theorists (along with most special rights-based approaches) do not integrate arguments about the importance of allocating rights territorially into the justification of the rights over the territory. This is to me an important limitation. In reality the physical place itself is not so much the object from which exclusion is sought as the rights and opportunities to which immigrants would have access by settling down in a foreign territory. Hence, to focus exclusively on the territory and ignore the territorial nature of rights and opportunities is to give a distorted picture of the nature of

the duties with which particularly immigrants have to comply. A complete normative account of territorial rights must therefore provide, *first*, an account of why rights and opportunities need to be distributed on a territorial basis and *second* show how the effective distribution of these rights and opportunities is dependent upon the state's rights over a territory – rights that include the right to exclude from the territory.

This objection notwithstanding, special rights-based accounts of territorial rights are susceptible to at least three further kinds of criticism. First, territorial entitlements are notoriously difficult to verify. In brief, since territories have been occupied and cultivated by several nations it is difficult to set objective criteria for who should be entitled to them. In the end, as pointed out by Margaret Moore, historical claims depend “on where in history one starts, and whose history one accepts. Appealing to historical links can legitimize claims to vast areas and many different irredentist claims” (Moore 1998: 145). Second, an entitlement-based conception of territorial rights seems particularly well suited for describing the kind of relation that exists between concrete groups and what these groups conceive to be *their* territory. This is its strength *and* its limitation. An entitlement-based conception justifies, if anything, the rights of *particular* groups over *particular* territories, but it is largely silent on the question of why groups in general should have a claim to territorial self-determination. Although territorial rights are typically rights *in rem*, entitlement-based theories do not purport to justify them by reference to the interests that any individual (as group member) or group has¹⁷. This leads me to my third, related criticism. An entitlement-based conception of territorial rights naturally tends to misrepresent the claims of the duty-bearers, of those obligated to respect states' territorial rights. To be sure, territorial rights can have deep distributive implications. “A right to sovereignty over a given territory means a power to subject the whole world to the right-holder's decisions regarding life within this territory and to his or her decisions regarding the use and enjoyment of this territory and the resources that it contains. To sustain such significant consequences, a claim to such a right must be backed by powerful considerations” (Gans 2003: 112). This means, the exclusionary nature of territorial rights requires their enforcement to be justifiable to those who will be (or remain) excluded from the territory, and the justification will presumably turn on the importance that the territory has in connection with the communities and individuals who claim rights to it. This concern about the reasonableness of territorial rights is entirely applicable to the situation of economic migrants. For it seems hardly fair to expect people to comply with rules that would condemn them to starvation or a life in misery, even where these rules may not have been established through fraud and violence (which is notoriously the exception).

In concluding this section, a word of caution should be given. My criticism of special rights-based justification of the right to exclude does not extend to special rights-based arguments as such. Political theorists may well endorse these arguments in other contexts, for instance, when dealing with territorial disputes between states. Also, I am willing to concede that special rights-based conceptions play an important role in determining the *location* of territorial self-determination. Indeed, if a state's rights over its territory are in question, what is needed is not just a justification of the state's right to some territory somewhere, but also a justification its right to the particular territory that it actually claims as its territory. This is no doubt an intricate issue and its solution may

¹⁷ As a matter of fact, not every group can be first in occupying a particular territory. The territorial right so acquired is therefore peculiar to the group who has it. On the other hand, the right is a right against the world at large insofar as anyone who interferes with it violates his duty of non-interference.

indeed require quite extensive knowledge of the relevant historical background. But again the *prior* question is that about the general state's claims to territorial self-determination. The answer to this question forms the background against which such special claims to a particular territory are made.

4. The right to self-determination and the right to exclude

Let me now turn to the general rights-based justification of the right to exclude. As mentioned, such a justification would require that the holders of this right acquire it by virtue of belonging to general categories such as a self-determining collective entity. In other words, holding the right to exclude would be seen as valuable or necessary for collective self-determination, with collective self-determination acknowledged as an important value. In an abbreviated form, the argument would go like this:

- 1) Collective self-determination is morally valuable
- 2) Therefore, it ought to be protected
- 3) Therefore, self-determining entities have the privilege to grant membership on a territorial basis
- 4) Therefore, self-determining entities have rights over the territory (including the right to exclude from the territory)

None of these propositions is trivial. Especially proposition 3 can be criticised on the grounds that the link between territorial rights and collective self-determination is rather obscure and, in any case, seldom established as a necessary connection. I will address this issue shortly. For now it is important to be clear about the meaning of proposition 1 and 2. Most political theorists nowadays embrace a consequentialist picture of self-determination. Consider David Miller's recent analysis of the impact of immigration on the receiving societies' self-determination. Miller provides several examples that illustrate how immigrants influence "the general goals of the [receiving] society" (Miller 2007: 222), for instance by placing additional demands "on the education system, the health care system, and other social services" (ibid) or simply by changing the overall demographic structure of the population. What these examples reveal is an *impoverished* conception of self-determination as entirely dependent upon the promotion of certain collective goals. Miller may reply that these goals are not fixed as they change over time and through democratic deliberation. Still, this does not imply that he regards self-determination as independently valuable. Self-determination is valuable if, and only if, it promotes goals that are themselves valuable, be these the promotion of a culture or the protection of certain common goods. Yet, as Miller puts it, right to self-determination is ultimately the right to *do the right thing* under given circumstances. Some residual room for controversy will of course remain as to what is the *best* way of achieving a given moral goal. In so doing, a consequentialist justification of the right to self-determination necessarily relies to some extent on empirical predictions concerning which ascriptions of rights produces which consequences, and there will typically be much approximation in these empirical

predictions for consequentialist theorists to fudge their derivations in order to reach the desired rights¹⁸.

To illustrate my general criticism of the consequentialist interpretation of the right to self-determination, consider the following example¹⁹. Imagine two peaceful and democratic countries, A and B, with essentially comparable cultures, political institutions and levels of living. However, while A is successful in fighting corruption, B has found no way to overcome this problem. Now, suppose that A unilaterally considers the (peaceful) occupation of B in order to extend its jurisdictional authority to B's territory so as to effectively establish greater justice in B. Most people will probably argue that such an act is illegitimate, no matter whether A succeeds in establishing greater justice in B. And the argument will presumably be that B's citizens are entitled to decide for themselves whether or not they would like to be annexed by A. So if B's citizens decide that they prefer to maintain their independence, A would wrong them by ignoring their decision, even though B would do best by accepting A's invasion. In sum, if one argues, as I do, that the B's citizens can be wronged by being annexed against their collective will one has to acknowledge that states should be eligible for rights to self-determination for deontological reasons.

As this example shows, I am doubtful whether the consequentialist view gives self-determination the importance it deserves in moral thinking. As I want to suggest, the essence of a right to collective self-determination is best captured as a deontological right. This right is based on the importance of the choices for the lives of the members of the group who is making them. In a sense, to make a decision in these areas is to decide what group one is a member of. Decisions about who is the 'self' that is self-determining belong to those key areas of decision-making within which the bearer of the right should be free to choose among a range of options, yet sometimes even to do what is morally wrong (cf. Waldron 1993: 63-87). This is the price that a moral theory should be willing to pay, if the ideal of autonomy is given sufficient moral weight. Granting the right to exclude is a way of respecting this autonomy. But whose autonomy exactly? When talking about private associations the focus is generally not on the autonomy of the associations themselves, but on individuals and their autonomy *as* members of associations. Likewise, my focus will be on the autonomy of individuals *as* members of states. In saying this, I do not commit myself to the view that the rights of associations and of states are equally important. Instead, what I assume is that their right to exclude is based on the idea of collective self-determination. In both cases it is true to say that if the right to admit would lie elsewhere than in the hands of the members, members would certainly be less self-determining.

All this said, I should hasten to add that the wrong that states are at liberty to commit due to their self-determination is not of the kind of those who go against fundamental human rights. It is not my purpose here to argue that the interest in self-determination is sufficient to justify such crimes. There are various cases in which the right to self-determination is overridden by other, more important rights. Refugees would be one of these cases. However, here I will not deal with these cases since, as I said in the

¹⁸ This criticism is usually meant to target justifications for restrictive admission policies, but they apply just as well against cosmopolitan approaches. "Nobody can claim to know in any detail what would be the consequences of a worldwide system of open borders sustained over a number of decades" (Barry 1992: 280). It proves extremely hard to deal with the consequences of immigration without getting into a host of speculative questions that political theorists are ill-equipped to answer.

¹⁹ See also Wellman who draws a similar scenario (Wellman 2008).

introduction, my focus is on the relation between collective self-determination and non-forced migration. In this respect, I am not going to attempt anything like a full account of the grounds for which there can be no general right to freedom of movement. The general idea is that so long as people have an adequate range of opportunities within the boundaries of their own state, their interest in crossing state borders will not be sufficiently strong to hold receiving states under the duty to admit them²⁰.

In addition, I should emphasize that the mere fact of having the right to perform some particular action (for instance, restricting immigration) does not by itself provide a moral reason for performing that action. Or, to put it in more precise terms, that A has a right to do x does not mean that A is morally justified in doing x, but rather that others are bound to refrain from interfering with A doing x. The claim that a state has the right to restrict immigration refers to the area of choices, in which such an action is located and in which alternatives are available. It only asserts that the state's decision making in immigration matters is to be protected at the risk of allowing the state to take the morally wrong decision. Along the same lines, though in a somewhat different context, Margalit and Raz argue that "the right to self-determination answers the question 'who is to decide?', not 'what is the best decision?'. In exercising the right," Margalit and Raz continue, "the group should act responsibly in light of all the considerations we mentioned so far. It should, in particular, consider not only the interests of its members but those of others who may be affected by its decision. But if it has the right to decide, its decision is binding *even if it is wrong*" (Margalit & Raz 1990: 454; my emphasis).

Note that up to this point, I have addressed only reasons for which citizens should enjoy some discretion in migration matters. But I did not establish a moral connection between collective self-determination and the state's privilege to grant membership rights *on a territorial basis*. Admittedly, at first sight, such a connection seems to run against the conclusion I just reached. After all, the requirement to attribute membership on a territorial basis represents an important limitation of the autonomy of members. Citizens should be free to choose their new fellow citizens (like clubs) on a personal rather than territorial basis for the same reason for which they cannot be forced to pursue an open borders policy. On the other hand, my purpose here has not been to argue that the states should have no right to confer citizenship status on someone who lives in a foreign country. Rather, what I assumed is that there is a strong moral presumption, a *prima facie* right, for providing resident immigrants with a path to citizenship. In making this presumption, I have assumed that the interest that resident immigrants have in being treated equally on a legal level outweighs the interest that citizens have in deciding who (if any) should be invited to join their political community. Clearly this is a presumption for granting the citizenship status on a territorial basis. Given this presumption, it follows that exclusion can only occur at the border, not inside the territory. This form of external closure is required to make sure that citizens still preserve their self-determination in matters that concern their 'self'. In sum, the statement that territorial rights are morally legitimate can be seen as an intermediate assumption in arguments that start by assessing the importance of the interest in collective self-determination and end with justifying the duty to refrain from migrating to foreign countries without prior consent.

²⁰ This idea is developed further in Miller's recent book (Miller 2007: 204-9).

5. Three objections

Let me now consider three important objections against a deontological right to self-determination as a basis for the (territorial) right to exclude.

First, the above conception of collective self-determination may attract criticism on the ground that states are non-voluntary associations. For no one really chooses her or his citizenship as one does with the membership in clubs or associations. Since this fact, by itself, already constitutes a limitation to individual autonomy, it is difficult to see how collective autonomy of states should be preserved for the sake of the individual autonomy of the citizens. Moreover, voluntariness aside, there remains the basic objection that collective autonomy is not necessarily reducible to individual autonomy. Hence, what is true for individuals (namely that they sometimes have the right to do what is morally wrong) does not always apply to groups or states. States have no interest in freedom as individuals do. Now, to do justice to this series of objections would probably require an extended discussion of the relation between collective rights and individual rights, which is beyond the scope of the present study. Obviously, I acknowledge that states are not entirely constructed from the autonomous choices of their members. However, this fact alone provides no ground for believing that the state's self-determination is necessarily disjointed from individual autonomy, let alone that states are necessarily illegitimate. While not voluntary in the sense commonly attributed to associations or clubs, citizens often regard the decisions of their states as their own, and not as something imposed from the outside or as a forced limitation of their autonomy. Especially the sovereignty of liberal democratic states is thought to be representative of individual interests, for which reason it that cannot be dismissed as having no moral force. With this said, I do acknowledge that the moral force of collective self-determination depends on how far the state can be said to effectively represent the shared interests of all members, instead of just some of them (cf. Hartney 1991); not to mention that collective rights are sometimes asserted against fundamental individual rights (Dworkin 1978: 194). Although this is a reason for taking collective rights carefully, it is not a sufficient one for depriving groups altogether of the right to order their affairs in a matter responsive to the interests of their members. What critics of collective rights often ignore is that collective rights are rights oriented as much as to exercise of authority inside the group as they are to relations between the group and outsiders. These two dimensions are related to each other, but not to the extent that they cannot be considered separately. As noted by Waldron, collective rights whose validity is internally disputed "may still be asserted against other respondents – the members of other groups or the overarching federation. Though the impact of the group right on the federation may eventually trickle down to the group's members, still the interests of theirs that are eventually affected may not be the same as the interests in terms of which their rights were originally defined" (Waldron 1993: 366).

Let me provide an example. A community A is said to have the right to exclude others from its territory. This right is based in the interest that A's members have in exercising some discretion in matters that concern their identity as members of a group. Suppose now that the identity of A is disputed since a subgroup S of A (call it A_S) disagrees with the majority of A (A_M) with regard to the terms by which the A's identity as a group is defined. To make the example more concrete, let's suppose that A_S demands official recognition for its particular identity and language. Now, unless A_S attempts to secede

from A, it seems unreasonable to argue that A's members have no interest in exercising self-determination in migration matters. The fact that their identity is disputed does not by itself imply that A's members are less involved in how migration is regulated and who their (new) fellow members will be. Contrary to what liberal nationalists tend to think, exercising some degree of autonomy in matters that concern their identity as members of a group is an interest that individuals *share* as long as they belong to the same group, hence regardless of the strength of their shared identity. But what if A_S's and A_M's disagreement revolves precisely around the question whether A should open up its borders to immigrants and the parties do not agree on a devolution of immigration policy? Even in such a case, and provided the disagreement is not as deep as to undermine the unity of A, it is apparent that both parts see their own interests as members of A better served by uniting around a common solution, than they would be by losing decisional autonomy on migration policy altogether.

At this point, I suspect, liberal nationalists may object that the conception of collective rights outlined so far is far too broad in that it includes any set of individuals who happen to share a significant interest at any point of time, while sharing nothing else than that interest. In response to this, I should remind that the present study reserves the term "collective rights" specifically for individuals *as* citizens of states. In making this remark I do not mean to rule out that other groups (like cultural minorities or seceding groups) may be themselves be regarded as bearers of such rights. These are simply not the cases I am dealing with in the present study. Also, to briefly address another liberal nationalist concern, I do not deny that national groups tend to value their self-determination higher than non-national or multinational groups. However, as stated above, the right to self-determination should be seen as largely immune from consequential reasons to respect it. In addition, it is important to see that in cases in which *nation* states claim their right to exclude others on the ground that they want to preserve certain cultural goods, their right to exclude is ultimately parasitic of the self-determination of all citizens as citizens. Their right to do so will be due to their political organization as territorial states rather than their status as nations (cf. Lægaard, 2007).

Second, one might concede that a link between self-determination and the right to exclude exists, but insist that its moral strength has to be decided on a case-by-case basis, i.e. evaluating in each single case whether the state's right is supported by compelling interests in self-determination. In other words, while state A can be thought to have a right to exclude based on self-determination, A's right to exclude the immigrant x might not be based on a sufficiently strong interest in self-determination to hold x under the duty not to immigrate. Clearly, this objection revolves around the question of whether state A should have the right to exclude x, if it has no morally compelling interest to do so. This question brings me back to my earlier point about the distinction between core and derivative rights. As I said, I regard territorial rights and the rights derived from them (such as the right to restrict immigration) as derivative rights of the more fundamental (core) right to self-determination. In this sense, it is misleading to make their validity dependent on whether or not they are based in corresponding interests in self-determination. Strictly speaking, only core rights need to be in the right-holder's interest. Consider Raz's example: "My right to walk on my hands is not directly based on an interest served either by doing so or by others having duties not to stop me. It is based on my interest in being free to do as I wish, on which my general right to personal liberty is directly based" (Raz 1986: 169). This is not to say that the rights-holders may have a direct interest to the action covered by their

derivative rights. Most often they do. But these interests do not necessarily ground their rights. “A right is based on the interest which figures essentially in the justification of the statement that the right exists. The interest relates directly to the core right and indirectly to its derivatives” (ibid). Applied to the case under consideration, this means that whether or not it is in the interest of state A to exercise its right to exclude x is ultimately irrelevant to whether it has this right. What is important is that this right is justified in terms of its derivation from the core right, the right to self-determination²¹. Of course, every derivative right may still be challenged on other grounds. For instance, one might argue that the right of state A to self-determination can conflict with the right of x to assistance (given that x is a forced migrant) and that in such circumstances the reasons against self-determination override those in favour of it. However, while state A has no right to exclude x, this would not necessarily imply that it has no right to exclude y or z. For it is important to keep in mind that the right to exclude provides only a *prima facie* ground for the existence of a particular right in circumstances to which it applies. And if the right is defeated in some circumstances but not all, there is no reason to think that it has no validity.

Three, the perhaps most serious objection raised concerns the relation between self-determination and freedom of movement as an important liberal value. Clearly, if states have a right to exclude based on their deontological right to self-determination then freedom of movement entails no stringent duty to admit immigrants. Due to the complexity of this issue, I am not going to attempt anything like a full account of the grounds for which there can be no general right to freedom of movement. The basic idea is that so long as people have an adequate range of opportunities within the boundaries of their own state, their interest in crossing state borders will not be sufficiently strong to hold receiving states under the duty to admit them²².

On the other hand, as I have shown, the mere fact of having the right to exclude does not by itself provide a moral reason for excluding non-forced immigrants. Yet states have imperfect duties towards these immigrants, but these duties do not by themselves outweigh their right to exclude. Spelled out in this way, the right to exclude can be thought of as a freedom (or privilege in the Hohfeldian sense) involving the lack of a *stringent* duty to admit immigrants. But does the right to exclude also entail a duty upon would-be immigrants not to enter without permission? The chosen definition of a right as an interest that merits the imposition of duties on others seems to imply that such a duty exists. But one could certainly think of a modified Razian account that defines a right as an interest that is important enough to impose on others the lack a claim-right. By so doing, one would overcome the criticism of those political theorists that – like Michael Blake and Thomas Nagel – have cast serious doubt on whether immigrants can be asked to uphold the restrictive immigration law of foreign countries (cf. Nagel 2005). After all, so Nagel’s argument goes, immigration law is not made and carried out in their names.

As compelling as this argument may be, it rests on assumptions that are in open conflict with the moral cosmopolitan tenor of the present study. For Nagel, in fact, the existence

²¹ Note that for one right B to be derivative of right A, it is neither necessary nor sufficient that a statement of the existence of right A logically entails a statement of the existence of right B. The route from right A to rights B is always substantive, not formal. So it is always a substantive, normative question which derivative rights are derived from a core right.

²² This idea is developed further in Miller’s recent book (Miller 2007: 204-9). For a criticism of it see Carens (forthcoming).

of a state is necessary to trigger moral norms that go beyond mere humanitarianism²³. Since I reject this statist approach, I do not see why the right to exclude should not entail a duty not to immigrate. Yet, from a cosmopolitan prospective, if there is a morally compelling reason for granting the state the right to decide on immigration matters then there is an equally strong reason for holding others to be under the duty not to immigrate. Such a reason in fact is thought to be universally valid.

6. The right to exclude and egalitarianism

The problem with the notion of the state's territorial rights outlined so far is that it works under the premise that the rights that states allocate on a territorial basis (1) are morally indistinguishable and/or (2) that the interest and right to self-determination grounds them *tout court*. Such a premise may be heuristically useful, but only as a temporary device. For citizenship rights are not one right, but an aggregate or bundle of rights, each of which has its distinctive content. Needless to say, this fact complicates considerably moral reasoning on this issue. It ultimately requires us to clearly define *which* citizenship rights are linked to the right to self-determination and *which* not (or less so). In particular, my purpose in this last section is ask whether political and social rights, as two classes of citizenship rights, are equally grounded in the right to self-determination, as a deontological principle.

Admittedly, at first sight this question may sound somewhat paradoxical. Political and social rights appear to be so intimately related to each other that either one without the other would fail to qualify as a *real* citizenship right. Such an understanding, however, is a mere matter of convention, not something rooted in the very nature of citizenship. Citizenship rights are not a monolithic category. In principle, they can be unbundled (or rebundled) into diverse sets of rights, each of which can be said to perform different functions and to serve different interests. Social rights are representative of one particular set of rights according to T.H. Marshall's triad of citizenship rights. Unlike political rights, social rights are rights *to* goods and services. In what follows, I will refer to these goods and services as "social resources". These resources include, among other things, social welfare and public health. My goal is not to ask whether social rights are morally essential to the idea of citizenship²⁴. As I said, my goal is to examine whether social rights justify (territorial) exclusion on the basis of the right to collective self-determination as political rights do.

Political rights are understood as broadly comprehending the citizens' rights participate in the political decision-making process. To see the importance of these rights, it is useful to recall that rights-based arguments justify the right to self-determination on the basis of the moral importance that citizens attach to the faculty to choose from a range of valuable options. The collective dimension of such a right resides in the fact that for people to exercise their freedom it is important to have some control over the social and

²³ For a nearly analogous account see Blake (2002). For a criticism of Nagel's view see Van Parijs (2006).

²⁴ See in particular Barbalet, who casts doubt on whether social rights can be considered as rights at all (Barbalet 1988). By contrast, leftist legal theorists such as Charles Reich have attempted to reconceptualize social rights as part of a "new property" urging that it ought to be protected in ways that traditional forms of property have been protected for the simple reason that citizens rely upon them to secure at least some degree of autonomy (Reich 1964).

political environment within which people live. This form of control is the object of political rights. Note that “control” is understood not only negatively, as freedom from restraint, but also positively, as power to make decisions about public or collective goods. It does not suffice that people are free to make choices if they are not able to make them (say, because they are starving). Members must be materially *enabled* to make choices. Given this, a representative statement of a rights-based argument for the exercise of collective self-determination goes about as follows:

To say that A has a right to choose means, negatively, that no one ought to interfere with A’s choosing (even if the choice is wrong) and, positively, that A ought to have the effective power to choose.

As shown in the preceding sections, the *political* right of citizens to exclude from membership, as part of the right to collective self-determination, can be understood in terms of the above statement. However, not all citizenship rights are formulated in this way. While political rights are primarily participatory rights, social rights are thought to put citizens in the position to claim certain things or services, where others have a duty to provide these things or services. Put differently, while political rights typically protect interests associated with collective autonomy, social rights typically protect interests associated with individual well-being. Additionally, these two sets of rights can be contrasted on the basis of whether their justifications award priority to the right or the right’s object. As I said, political rights can be justified by reference to the importance of having some autonomy in decisions concerning the life of individuals as citizens. In this sense, political rights can be viewed as goals in themselves. They are important because they create barriers of non-interference within which citizens can pursue their projects. Social rights, by contrast, are usually justified in instrumental terms. Their goal is to provide the resident population with certain (basic) goods like social security and education.

The reason why the distinction between political and social rights is so crucial is that, strictly speaking, only political rights justify territorial exclusion on the basis of collective self-determination. The importance of social rights can, at best, justify a *contingent* right to exclude in situations where the value that is claimed by these rights would be seriously endangered through unconstrained immigration. Where these conditions are not fulfilled, affluent states facing economically motivated immigration have the duty to redistribute social resources in accordance with an egalitarian principle that takes all relevant claims and circumstances of justice into account²⁵.

I suspect, this argument can be challenged on several grounds. Let me focus on two possible objections against my distinction between social and political rights. *First*, one might argue that whatever self-determination political rights defend, social rights do as well because they extend the amount of wealth under one’s control. To put it simply, if a citizen holds social rights to some valuable resource, the wealth she can earn from them will allow her to extend the range of options available. *Second*, one might argue that political rights are significantly weakened if their bearers have no full entitlement to the benefits that can be derived by making use of them. Yet, if citizens make a political decision to redistribute certain goods and services, why should they be hindered in turning this decision into reality? Pushing this logic further, one could argue that political rights without social rights do not make any sense at all.

²⁵ As mentioned in the introduction the development of an egalitarian principle goes beyond the scope of this paper. As an example of how such a principle can be elaborated see Cavallero (2006).

Admittedly, these objections have some merit, but their force extend only to the need of great care in distinguishing political and social rights. In particular, with respect to the first objection, I accept that social rights may also indirectly serve collective self-determination. Self-determination instrumentally justifies assigning citizens social rights to decent levels of minimum income, education and other basic services. The reason is that without these resources especially poor citizens would be unable to develop the physical and mental capacities necessary to participate fully and meaningfully in society. Yet, in concrete terms, it is difficult to imagine how individuals that are continuously under the threat of poverty and disease can appreciate the value of the options available to them as citizens in a particular society. On the other hand, self-determination, as a deontological right, requires that individuals be provided not with the specific means to meet specific goals, but rather with the basic goods that are necessary for the pursuit of any good at all. The value of autonomy mandates that states secure a threshold level of the basic goods of life to each citizen, but it does not justifies redistribution among (and to) people above that threshold²⁶. Again, if collective autonomy is viewed as a deontological principle, it is unlikely to sustain the exclusion of immigrants on the basis the right of states to achieve a high level of collective welfare.

This brings me to the second objection, which holds that the right to exclude from membership has some value only if it is linked to an equally strong right to achieve the goals for which membership has been established. And the goal of distributing valuable resources to members is one of these goals. I believe, the intuitive appeal of this objection comes from the idea that collective autonomy, if it is to be meaningful and valuable, requires that the options available can be carried out effectively, or else they are pointless. Yet, in a sense, to grant the right to exclude from some but not all membership rights is to take away with one hand what one has given with the other. I am inclined to accept this view, although these types of considerations strike me as being somewhat beside the point. Of course, citizens do not exclude immigrants for the sake of exclusion, but because they seek to preserve other privileges such as their social rights. However, my claim here is not that states should not have the right to pursue their social policy. Instead my claim is that their right to do so is contingent upon moral considerations that do not affect political rights. These considerations relate to the fact that while political rights are intrinsically grounded in the idea of self-determination, social rights are not. As I said, social rights relate to resources whose function and distribution are morally questionable.

To illustrate this point, consider the following scenario. Suppose a people called *solitaria* has a legitimate claim to self-determination within a particular territory. Assume, further, that *solitaria* decides to allocate membership rights on a territorial basis so as to prevent undue discrimination of resident immigrants, who otherwise would not (or not easily) arise out of their status as foreigners or second-class citizens. Membership rights, then, can be seen as territorial rights. As enforceable rights, though, these rights are thought to entail negative duties on the part of others not to interfere with their exercise. What actions do these duties consist of? Generally speaking, which actions a right justifies on the part of the duty-bearers depends on the considerations justifying its existence as well as on conflicting considerations. Accordingly, the members of *solitaria* may claim that (their) collective self-determination is morally of

²⁶ Please accept that I am not in the position here to determine where this threshold lies.

such an overwhelming importance that it justifies holding others under the duty not to interfere with solitaria's membership rules by immigrating into its territory, exceptional cases aside. Suppose that such a conclusion is challenged by another people, call it *nomadica*, on the grounds that it unduly broadens the scope of solitaria's privileges in membership matters. Specifically, *nomadica* maintains that exclusion from a territory implies that immigrants from *nomadica* are not only excluded from membership in a foreign state but also from the various benefits that this membership confers. Given this, *nomadica* contends that the right of solitaria's members to benefit from their social resources is not based, in the same direct way, on the interest in self-determination as does the right to choose one's own members. Now, I suppose solitaria's answer to this may be that the right to exclude is important in order to create or preserve an egalitarian welfare state. Clearly, such an argument would contravene the idea of a *deontological* right to self-determination as outlined above. For its aim is to show this right is justified on the ground that it allows the bearer to achieve a specific purpose, namely securing its social resources. But even from a consequentialist view, solitaria's defence of its social rights presents various difficulties. To say that solitaria has the *political* right to decide what social policy to adopt does not necessarily imply that it has a right to the full outcome of its choices²⁷. In this sense, solitaria's choice-making capacity remains intact even if it assigns a share of its social resources to *nomadica*. To understand why this is so, it is important to see that social rights refer to resources whose effective value is dependent upon factors beyond the state's control. Consequently, only self-sufficient bounded societies can possibly claim that a particular policy outcome derives entirely from the autonomous choices of their citizens. In brief, the outcome of a particular policy decision is tied to the idea of collective autonomy, but not in the same straightforward way as their decision-making power, i.e. their right to decide.

Before concluding this section, I should clarify that my purpose here has not been to argue that exclusion from social rights cannot be justified on other grounds than on the basis of a deontological right to collective self-determination. I have criticized self-determination-based defences of these rights since it is precisely to the value of collective self-determination that liberal nationalist theorists appeal, when they justify the state's territorial right to protect social resources from mass immigration (cf. Miller 2007: 222-3). If justified on instrumental grounds, social rights can at best ground a contingent right to exclude in situations in which the values defended by these rights is manifestly threatened by immigration²⁸. If these circumstances are not given, the right of states to exclude poorer immigrants from their territory must be coupled with a duty to redistribute social resources or else it represents an unjustified privilege.

7. Conclusion

One primary purpose of the present study has been to critically examine a general rights-based approach to the relationship between right to self-determination and territorial rights as a relation between a core right and its derivative rights. This approach represents an alternative to the now popular special rights-based (and in particular Lockean) approaches to the justification of territorial rights as a reason for

²⁷ See Christman who makes a similar distinction with regard to property rights (Christman 1994).

²⁸ For a discussion of social rights as contingent rights to exclude see Bauböck (Bauböck 2008).

exclusion. In this respect, I have already said enough to indicate unmistakably that I reject the simplistic view according to which the right to exclude can be justified merely by reference to the state's title over its territory. What is profoundly mistaken about this view is that it reduces the territory to a passive and neutral object of possession and control, while territories themselves are decisive as to people's rights and opportunities in that they typically serve as a means through which important rights (such as citizenship rights) are allocated.

Approaching this issue from the idea of collective self-determination gives a different and more plausible picture of the relation between states and their territories. The right to allocate rights to people on a territorial basis (i.e. what I call territorial rights) derives from the right to self-determination in that it allows the citizens of a state to freely determine with whom to share commitments and obligations in a way consistent with liberal and democratic principles. In this sense, the effective implementation of the right to self-determination can be said to require the implementation of territorial rights. The morally more challenging issue, though, concerns the next step: the move from the idea that states allocate membership rights on a territorial basis to the idea that states must be predicated on some form of territorial closure. My own argument in this respect has been that this form of closure (e.g. the territorial right to exclude) is required to make sure that the territorial ascription of membership rights is not eluded through unconstrained movement across boundaries. In this sense, the statement that territorial rule governing the distribution of membership rights are morally legitimate can be seen as an intermediate assumption in arguments that start by assessing the importance of the interest in collective self-determination and end with justifying the duty to refrain from migrating to foreign countries without prior consent. Territorial rights are therefore neither *directly* based on the interest in self-determination nor *directly* linked to the right to exclude. Rather these relations are inextricably tied up with considerations about the effective implementation of a right in circumstances in which it is exercised.

Contrary to what people commonly assume, a presumptive right to exclude does not necessarily sit uncomfortably with the idea of equality of opportunity. As I have argued in the last section, the justifications that can be offered to the excluded do not cover the ample extent of privileges that states nowadays enjoy. In particular, these justifications do not by themselves support the right to exclude economic immigrants from social resources. While political rights are, by themselves, expressions of a group's interest in collective self-determination, social rights primarily serve welfare interests and only incidentally autonomy. And it is essentially for this reason, I suggest, that justifying exclusion on the basis of political rights proves easier than by reference to social rights.

Bibliography

Books:

- Barbalet, J., 1988, *Citizenship*, Milton Keynes: Open University Press.
- Carens, J., forthcoming, *Who Belongs? Immigration, Democracy, and Citizenship*, book manuscript.
- Christman, J., 1994, *The myth of property: toward an egalitarian theory of ownership*, Oxford University Press, Oxford UK.
- Dworkin, R., 1978, *Taking rights seriously*, Harvard University Press, Cambridge, MA.
- Fabre, C., 2000, *Social Rights Under the Constitution*, Oxford University Press, New York.
- Gans, C., 2003, *The Limits of Nationalism*, Cambridge University Press, Cambridge UK.
- Hart, HLA, 1961, *The Concept of Law*, Clarendon Press, Oxford UK.
- Marshall, T.H., 1965, *Class, Citizenship, and Social Development*, Doubleday, New York.
- Miller, D., 2007, *National Responsibility and Global Justice*, Oxford University Press, Oxford UK.
- Nickel, J.W., 1987, *Making Sense of Human Rights*, University of California Press, Berkeley, U.S..
- Pogge, T., 2002, *World Poverty and Human Rights*, Polity, Cambridge., UK
- Raz, J., 1986, *The morality of freedom*, Clarendon Press, Oxford UK.
- Sack, R., 1986, *Human territoriality*, Cambridge University Press, Cambridge UK.
- Scheffler, S., 2001, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*, Oxford University Press, Oxford UK.
- Shachar, A., 2008 (forthcoming), *The Birthright Lottery: Citizenship and Global Inequality*, Harvard University Press, US.
- Waldron, J., 1988, *The Right to Private Property*, Oxford University Press, Oxford, UK.
- Waldron, J., 1993, *Liberal Rights: Collected Papers 1981-1991*, Cambridge University Press, New York.
- Walzer, M., 1983, *Spheres of justice*, Basics Books, New York.

Articles:

- Blake, M. & Risse, M., 2007, Is there a Human Right to Free Movement? Immigration and Original Ownership of the Earth, *KSG Faculty Research Working Paper Series*, Working Paper Nr.: RWP06-012.
- Bosniak, L., 2007, Being Here: Ethical Territoriality and the Rights of Immigrants, *Theoretical Inquiries in Law*: 8(2): 389-410. Available at: <http://www.bepress.com/til/default/vol8/iss2/art3>
- Blake, M., 2001, Distributive Justice, State Coercion, and Autonomy, *Philosophy and Public Affairs*, 30(3):257—296.
- Cavallero, E., 2006, An immigration-pressure Model of Global Distributive Justice“, *Politics, Philosophy & Economics* 5:97-127.
- Hartney, M., 1991, Some Confusions concerning Collective Rights, in: *Canadian Journal of Law and Jurisprudence*, 4:293-314.

- Lægaard, S., 2007, David Miller on Immigration Policy and Nationality, *Journal of Applied Philosophy*, **24**(3):283-298
- Margalit, A. and J. Raz, 1990, National Self-Determination, *Journal of Philosophy*, **87**(9):439–461.
- Nagel, T., 2005, The Problem of Global Justice, *Philosophy and Public Affairs*, **33**(2):113-147.
- Nine, C., 2008, A Lockean Theory of Territory, *Political Studies* **56**(1):148–165.
- Reich, C., 1964, The New Property, *Yale Law Journal*, **73**(3):733-87.
- Schmücker, R., 2006, Gerechtigkeit und Territorialität, *Deutsche Zeitschrift für Philosophie*, **54**(4):597-621
- Simmons, A.J., 2001, On the Territorial Rights of States, *Philosophical Issues* **11**: pp. 300-326.
- Wellman, C.W., 2008 (forthcoming), Immigration and Freedom of Association, *Ethics*.

Contributions to a volume:

- Moore, M., 1998, The Territorial Dimension of Self-determination, in: *National Self-Determination and Secession*, M. Moore, ed., Oxford University Press, Oxford, UK.
- Pogge, T., 1997, Migration and Poverty, in: *Citizenship and Exclusion*, V. Bader, ed., Macmillan, UK, pp. 12–27.
- Raustiala, K., 2006, The Evolution of Territoriality: International Relations & American Law, in: *Territoriality and Conflict in an Era of Globalization*, M. Kahler and B. Walter (eds.), Cambridge University Press, New York, pp. 219-50.
- Steiner, H., 1992, Libertarianism and the transnational migration of people, in: *Free movement*, B. Barry and R. Goodin, eds., Harvester Wheatsheaf, London, pp. 87-94
- Van Parijs, P., 2006, Global Distributive Justice, in: *Blackwell's Companion to Political Philosophy*, R. Goodin et al., eds. Blackwell, Oxford.

Conference papers:

- Bauböck, R., 2008, *Citizenship and Free Movement*, delivered at: Penn University workshop Democracy, Citizenship and Constitutionalism, 9 May 2008