Self-Determination, Democracy and Exclusion

Bennet Francis

UCL

Submitted for the Degree of MPhil Stud in Philosophical Studies

September 1st 2016

[Blank page]

I, Bennet Francis, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, this has been indicated in the thesis.

Signed .....

Date .....

[Blank page]

Abstract

This thesis addresses the question of whether the putative group right of collective self-determination can be invoked to justify the state's presumed right to exclude foreigners from its territory. This form of argument represents a growing trend in the literature on exclusion. Such arguments are potentially extremely powerful, as, if successful, they would vindicate a right to exclude largely at the discretion of the receiver state, rather than a right limited to certain cases. It is here argued that theorists who share certain commitments – here referred to as "liberal individualists" - cannot consistently defend a discretionary right to exclude through this approach. The argument proceeds by way of three "case studies". First, it is shown that the right to collective self-determination cannot be justified as an extension of *individual autonomy*. Recognising this, theorists with broadly individualist commitments defend the group right to self-determination on the basis of some irreducibly collective value it is said to serve – *collective property*, and *collective freedom of association*. Yet it is here argued these theorists are unsuccessful, as a result of their inability to square an irreducibly collective value with their individualistic commitments. It is then suggested that the nature of democratic institutions may be able to explain why we ought to respect group rights accorded to states in the same way we respect the autonomy of individuals. It is argued, however, that no realistically achievable system of democracy would be capable of furnishing such an explanation. An assessment of the reasons these three forms of argument fail provides evidence for a more definite claim: any defence of a right to collective self-determination that could justify a discretionary right to exclude must involve the wholesale rejection of *moral individualism*, the thesis that there are no intrinsically collective goods.

[Blank page]

Contents

[Blank page]

1. Introduction: The Right to Exclude

Why do states have the right to determine whether foreigners may enter their territory? This question is likely to seem frivolous to the average person. States *just are* entities which have that right, and so long as there are states, there will be border controls. Yet it is worth remembering that the system of border controls we encounter today is a recent phenomenon. Passports, for example, only became a requirement for travel in Europe during the First World War. Prior to this, governments may have issued letters to allow travellers to prove their identity and their business abroad, but the mere presence of a foreigner in a strange country without that country's permission would not automatically have been regarded as criminal behaviour. Certainly, immigrants were liable to be suspected of espionage or some other dark purpose, and may have been sanctioned as a result, but the concept of "illegal immigration" had yet to be invented. Today, when the issue of immigration makes newspaper headlines virtually every day, it is easy to forget that border controls are essentially a piece of government policy, introduced for specific reasons, and not simply a timeless fact of life.

Immanuel Kant, in his essay on Perpetual Peace, called 'universal hospitality' a 'cosmopolitan right', a right held by all individuals regardless of the state to which they belong. This granted travellers protection against being 'treated with hostility', although Kant writes that the would-be migrant 'can be turned away'. This right to hospitality was said to derive from our 'communal possession of the earth's surface', according to which 'no-one originally has any greater right than anyone else to occupy a particular portion of the globe' (Kant 1991 105-6). It is not clear exactly how far this article of right goes: Kant suggests that hospitality requires that receiver states are hospitable enough to ensure that it is possible for them to enter into peaceful relations that may eventually be regulated by public law. Given that the age during which Europe discovered the rest of the world is now over, and most countries are able to enter into diplomatic relations in some form or another, whether or not their citizens are able easily to visit each other, perhaps Kantian hospitality is not as far-reaching as it may first appear. Yet it is clear that Kant saw the freedom to move across the earth as the rightful condition of humankind, and a lack of cosmopolitan hospitality as an unfortunate product of the contemporary system of international lawlessness which would be eliminated as we moved closer to achieving his pacific federation.

In the English-speaking world it is scarcely possible to discuss the issue of immigration from a philosophical standpoint without mentioning the work of Joseph Carens. His 1987 argument for open borders stated what may have seemed an outlandish position in precisely the terms needed for the contemporary philosophical establishment to take his case seriously – Rawlsian, Nozickean and Utilitarian – and turned justifying the state's right to exclude, as well denying it, into subjects of mainstream philosophical activity. Carens emphasises, both in the 1987 paper and his recent book (Carens 2013), the Kant-inspired view that free movement should be considered a right, and that it is states which must justify their case for excluding migrants, not migrants who must justify their case to be admitted into states. For the purposes of this thesis, I follow both Kant and Carens by beginning from a presumption in favour of the freedom to move across borders. The subject of this chapter is thus *the right to exclude*, and *not the right to immigrate*. My aim is not, however, to defend the view that open borders should be adopted as *policy*; I merely wish to critique a certain form of argument in favour of the right to exclude.

In this chapter I shall focus on three approaches to the justification of the right to exclude: i) the realist defence, ii) the jurisdiction defence and iii) the self-determination defence. The aim is to demonstrate the merits of the self-determination defence from the perspective of liberal individualist political theory. This latter approach is attractive for those who wish to defend the presently predominant convention, in short, because if successful, it would allow them to defend states' claim to a *discretionary* right to exclude: the right to pick and choose immigrants according to criteria of their own devising. Moreover, it would do so for reasons acceptable within the dominant framework of liberal individualist political thought. The idea of collective autonomy is a powerful one. Autonomy is often held up as the primary value of the liberal ideology, and it is from this value that an entire system of individual rights and responsibilities is widely thought to derive. If groups of individuals, or institutions such as states, can be said to be autonomous in the same way, this would provide a robust justification for their rights. I do not believe that such a defence is in fact possible, and this thesis will go on to demonstrate the limitations of such forms of argument.

The realist defence

In the public discourse of the English-speaking world, the most prevalent argument against immigration (which is not the same as an argument against the *right* to immigrate)

is that immigration makes it more difficult for the "indigenous" population to find employment, and that it drives down wages at the lower end of the income scale. The typical response to such views is that, on the contrary, immigration is *good* for the economy; it helps businesses to create wealth and thus to create jobs. The assumption behind this debate is that immigration is purely a question for domestic policy to address. We set the rate of immigration in just the same way that we set the rate of taxation: by balancing, as far as possible, the various competing interests *within* our society. The interests of those *outside* our society, the very people who will be the primary subjects of immigration policy, do not enter into consideration except as means to our enrichment or objects of our distrust. This picture, insofar as it is accurately represents contemporary discourse, suggests that certain realist assumptions underpin policy-making on immigration.

Realism in international relations is a family of views which share in common the idea that states are best regarded as entities entirely concerned with their own national interest, and which play down the role of ethical norms in dealings between states and external actors. It was an ideology that enjoyed a long period of prominence in International Relations Theory, especially in the United States, beginning as a reactionary movement against the internationalism that was perceived to have failed in the outbreak of the Second World War, and continuing as a major current into the 1980s, where it saw a resurgence through the 'neorealism' of Kenneth Waltz. Realists tend to cite Thomas Hobbes as the father of their position. Hobbes took the view that individuals who did not live under a sovereign power were, as a result of their physical equality and their psychological propensity to seek advantage for themselves, necessarily in a state of war, and thus had 'a Right to every thing', a right do whatever they judged necessary for their own survival. Sovereigns, in turn, have no higher authority in their dealings with other sovereigns, and thus were equally in a state of war on the Hobbesian account. The strong conclusion Hobbes drew, arguably the most radical interpretation of the realist view, was 'where no Law, no Injustice' (Hobbes 1996 90-3): outside the authority of a sovereign, our domestic norms of political morality simply do not exist, as they are *constructed* by the power of the sovereign. Thus the sovereign would be entitled to treat foreigners in any manner he saw fit, which would of course include exclusion from the territory. The Hobbesian sovereign's condition of perfect right thus gave him *full discretion* over whom he allowed to gain entry into the territory.

The problem with this thesis is it requires one to hold a system of morality that is incongruous with *the very core* of our shared contemporary values. It is beyond the scope of the present project to explore the metatheory of politics and ethics, but suffice it to say that values thought of as "liberal" are so deeply implicated in our everyday moral thought that it would scarcely be possible for *people like us* to enter into productive discourse with anyone who believed he had no moral duties towards anyone outside of his own society or towards anyone designated an enemy of the state. This problem is explored with great sophistication in the later work of Bernard Williams. Williams endorses the Hobbesian, realist claim that the "first political question" should be 'the securing of order, protection, safety, trust and the conditions of cooperation' (Williams 2007 3), and condemns 'political moralism', the idea that political theory works out a system of ethical principles, and politics puts them into practice. He would doubtless thus come down on the side of realism rather than what might be called *naïve cosmopolitanism* in immigration debates (as opposed to a cosmopolitanism that limits its scope to liberal societies). It is simply pointless, he may have argued, to insist that all people are moral equals and thus have equal right to reside anywhere on earth, given that different societies exhibit a wide range of moral outlooks, many of which are dominated by values like allegiance and social trust.

Yet even Williams does not think that the story stops with Hobbes. The first political question requires not just a solution, but an 'acceptable' solution. Liberalism, notably in the person of Kant, advanced on the Hobbesian thesis, arguing that even if the state of nature is a state in which individuals may do anything they judge necessary for their preservation, once sovereignty is established, we enter a new condition, a *status iuridicus*, in which our moral sense can come to fruition. Even if we believe that the moral sphere is an outgrowth of political activity, carried out through particular institutions, we cannot then switch off our ethical norms when we turn our gaze outside of our own society. For Williams an acceptable answer to the 'first question', so long as we are liberals, will involve conditions on the ways in which states are allowed to treat strangers and enemies. History happens to have turned out such that "we" do in fact share a "liberal" outlook (where "liberal" is understood in the broadest sense and not as any comprehensive doctrine, and "we" can essentially mean whatever we take it mean, but at the very least stands for the sort of people reading books on political theory in English). That persons are worthy of respect, that their interests matter, simply because they are persons, is a

core feature of the prevailing morality, and one from which we cannot easily distance ourselves without losing part of our modern identity. Thus for *us* the extreme interpretation of Hobbes – that we can do no injustice in our dealings with foreigners – should be regarded as belonging to a bygone era, and cannot be treated as an acceptable position. 'There is no route back from reflectiveness', as Williams puts the point elsewhere (Williams 2006 163). I do not believe Williams' own version of realism has determinate implications for the right to exclude: certainly we would not have the resources to criticise the exclusionary policies of illiberal societies on this account, but there is room for an internal debate within liberalism regarding whether exclusion is compatible with liberal principles.

Contemporary realists offer a more 'acceptable' approach. John Mearscheimer has argued that the duty of states to secure the safety of their citizens (the first political question), is simply impossible to fulfil without adopting an aggressive stance against foreign powers and nationals, and striking first to achieve every possible advantage. 'The structure of the international system' he argues, 'forces states, which seek only to be secure nonetheless to act aggressively towards each other' (Mearscheimer 2001 3). This is, in a sense, a moralistic form of realism, in that it attempts to justify realpolitik in international relations to the liberal mainstream, through premises Mearscheimer believes they ought to be able to accept. If we take the Hobbesian analogy between the state of nature and the international situation seriously, states ought to seek every advantage, because it is *the only way* to secure themselves against other states seeking to do the same. To implement this view in defence of a full, discretionary right to exclude would be to argue that without the authority to prevent foreign nationals from entering the territory *without justification*, it would be impossible for the state adequately to respond to the 'first political question'. This now becomes a problem for empirical public policy and sociology. But the view does not seem particularly plausible. Even if borders are porous enough that various outsiders who wish to do harm to citizens are able to enter, the danger is not an existential one; it is not the case that the state necessarily *ought* to adopt a general policy of "exclude first, ask questions later" on pain of failing adequately to protect the security of its citizens. Security may provide a valid *reason* for exclusion on a case by case basis, but it does not give the liberal state a free hand to exclude whomsoever it likes without justification. The threat to security is simply not so grave that it cannot be managed in a way that respects the interests of would-be

immigrants, through for example, targeted policing rather than blanket suspicion. After all, the state would be able to protect the security of its citizens more effectively if it imposed nightly curfews and employed a secret police force to monitor citizens' every move. But this would be too great a cost in terms of the *other values* contemporary liberals take to be necessary conditions for the state to answer the 'first political question'. Many liberals would take a similar view of a discretionary right to exclude – in any case, that is the debate that needs to be had. Mearsheimer has thus failed to provide a case which both bypasses the debate surrounding the right to exclude as a problem within liberalism, and is cogent from a liberal perspective.

The jurisdiction defence

It has been argued that states must have the right to exclude because states are essentially entities that assert jurisdiction over territory. This assertion is potentially question-begging. Simply to claim that states have the right to exclude because it is in their nature is no argument at all, since it presupposes this nature, as presently conceived, is good. If it is in the nature of states to have the right to exclude, but this right is determinately not a right they ought to have, then we might equally conclude that states ought to be replaced by something other than states, perhaps like states in every respect apart from their possession of this right. One way of avoiding circularity is therefore to argue that some *good feature* of the state is dependent on its ability to exclude.

Michael Blake (2013, 2014) takes a different approach. He describes his method in the following way:

> I take for granted that states exist, and that they have certain characteristics without which we would not describe them as states — but not, of course, that they have any right to exclude. I want then to ask what, in these characteristics, might be invoked as the ground for a collective right to refuse would-be immigrants. (Blake 2013 109)

It may appear from this description that he makes exactly the mistake just described. Yet he does not, since he does not derive his conclusion from *the idea* of the state, but from the obligations we have when living under states. It remains open to a detractor to claim that the state should not exist – the argument is simply that so long as states exist, they have the right to exclude. He takes it to be a virtue of the approach that it does not rely upon asserting any particular *good* that is served by exclusion, as it is always possible

to deny that our interest, as citizens, in that good is not important enough to generate *a right.* Blake's argument can be summarised as follows:

1. The state's territory marks out a jurisdiction within which its laws are effective
2. If an immigrant crosses into the territory, she puts its inhabitants under an obligation to extend legal protection to that immigrant's basic rights
3. Individuals have the presumptive right not to be placed under an obligation without their consent
4. Therefore the current inhabitants have the right to prevent the immigrant from placing them under this obligation, by preventing her from entering the territory.

The first premise is uncontroversial, it is merely descriptive and therefore does not threaten any circularity. The second premise is supposed to follow from the first. The third premise is a principle posited by Blake, for which he admits he 'cannot provide an adequate justification' (Blake 2013 115). While we are often placed under obligations without our consent, this is because, on Blake's view, they arise from other standing obligations. Obligations are limits on our freedom; they prevent us from doing whatever we would do in absence of the obligation. Blake believes it should strike liberal readers as plausible that freedom ought not to be curtailed without warrant. The conclusion then follows directly from the second and third premises. The argument has several merits. Blake's observation that the state is a 'territorial and legal community' (Blake 2013 104) is a powerful one, because it provides an answer to the cosmopolitan challenge: if we accept the Kantian idea that no one has a greater claim to occupy any portion of the globe than anyone else, why should borders – these borders – have moral significance? The state has the right to defend precisely its actual borders, Blake argues, because it is precisely these borders that demarcate the extent of its jurisdiction. The extent of that jurisdiction may well have been smaller or larger if history had gone differently, but it is the very existence of lines separating one jurisdiction from another that is salient on this account. It also provides a reason for excluding immigrants that the immigrant herself ought to be able to accept, and thus is much more appealing from a liberal individualist standpoint than the "might-makes-right" realist position.

The first thing to note is that this argument does not justify a *full discretionary* right to exclude. We do not have an unqualified right to prevent others from placing us under obligations, but rather a *presumptive* right. Thus, competing claims have to be taken into consideration. If a would-be migrant's rights were inadequately protected in the

donor state, the citizens of the receiver state would not be able to complain that the migrant was imposing obligations upon them, as the migrant would have a standing claim to have her rights protected, which the receiver state would have a duty to uphold. This would mean refugees as defined by the 1951 Convention[1] would certainly be exempt from exclusion, as would, plausibly, citizens of countries rendered unsafe due to war, and citizens of states whose institutions are too weak to be relied upon to uphold their human rights. Blake acknowledges the theory is 'unable to defend the right of the government to exclude would-be immigrants from much of the world', and thus defends 'rather a weak' (Blake 2014 533) conception of the right to exclude.

Blake clearly regards the third premise as the most controversial and spends the bulk of his 2013 paper defending it. I do not wish to challenge it, but I do believe it stands in need of clarification. When Blake claims we have a right not to be placed under obligations without our consent, what kind of right is it? In Hohfeldian terms, should we regard it as a claim, or merely a privilege? In other words, are others under a duty to ensure I am not placed under new obligations without my consent, or are they merely under a duty to avoid placing obligations on me if possible? It must be the latter. Blake's argument is that 'someone who imposes an obligation on me is...impinging on my *freedom'* (Blake 2013 115, emphasis added), and thus they have *no right* to enter the state's territory without consent. Here we clearly see the Hohfeldian jural correlatives, "freedom/privilege" and "no right". To have a privilege to do something is to have no duty not to do that thing. This is our situation in Blake's case: because the immigrant's rights are adequately protected elsewhere, I simply have no duty to take on the obligation of protecting her. We may question, therefore, why some third party, the state, has the right to intervene – violently, as Carens reminds us[2] – to defend *my privilege*.

Privileges in the law can be viewed as the space of legitimate action left "between" particular prohibitions. Given that the state can enforce those prohibitions, one might think that the state does in a sense enforce privileges. Yet those prohibitions must be couched in terms of claim-right violations. I have the privilege to whistle outdoors in a

[1] 'Any person who... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it', 189 UNTS 137/ [1954] ATS 5, available at: http://www.ohchr.org/Documents/ProfessionalInterest/refugees.pdf, retrieved 9 August 2016

[2] 'Borders have guards and the guards have guns', Carens 1987 251

public place. If you accost me and threaten me with violence if I do not desist, the state might charge you with harassment or some other offense: harassment law can be seen as a protection of my claim-right not to be threatened when going about my legitimate business. It could not, however, punish you simply for denying my freedom to whistle in public. Thus we cannot say that the state, as lawgiver, may enforce individuals' privilege not to have obligations placed upon them, because we would have to show there were enforceable claim-rights which would have the effect of creating the space for this privilege. Yet the obvious candidate – the right to exclude – is exactly what we are trying to justify.

The problem I wish to focus on is this: the transition from Blake's first to his second premise is essentially a non sequitur. It assumes that it is we, the inhabitants of the state, who are under an obligation to make the state's laws effective. Clearly this is true to a certain extent: we are obliged to obey the law, and thus to make it effective. But this is a passive obligation, to 'respect' the law, and not an active obligation, to 'protect' and 'fulfil' the law (I follow Blake in invoking this three-part formula). Our passive obligation simply to refrain from breaking the law does not seem to change with the number of people who enter the territory. Rather, it is the supposed obligations to 'protect' and 'fulfil' the law in which Blake is interested. We are obliged, as citizens of the state, to create and sustain institutions that will protect and fulfil the rights of anyone who enters the territory. To whom, however, is this obligation owed? There can only be two plausible options: either we owe it to the state, or we owe it to each other. To my mind, the first of these looks immediately the more plausible. We are obliged by law, on pain of punishment, to pay taxes, and to participate in certain official capacities (for example as jurors) in order that the *state* can meet its obligation to protect and fulfil human rights within the territory under its jurisdiction. If this view is correct, then on entering the territory, it is not the case that the immigrant imposes an obligation upon me, but rather, she imposes it upon the *state*, and the state imposes a corresponding obligation upon me to pay taxes and contribute in official capacities, now to a greater extent. Thus, as I am not the patient of the immigrant's imposition, nor may I be the agent of retaliation to defend my privilege.

The state, however, *is* the patient of the immigrant's action. Thus it may seem easy to claim that the state ought to be able to assert its freedom in this regard. Yet we must be careful: the state is not an individual. Should we regard it as having a privilege-right not

to have obligations imposed upon it? If we are Hobbesians, the answer is surely yes: for Hobbes the state's privilege is unlimited, it has *a right to everything*. Yet for liberals such as Blake, this would be question-begging. If we accept some premise to the effect that rights can only be justified through reference to individuals – either to their special status as autonomous beings, or their interests – then it becomes more difficult to assert that the state has such a privilege. We may try to argue that the obligations that are imposed on individuals as an *indirect* result of the immigrant entering the territory can ground the state's right to exclude *instrumentally*. Respecting a group right, we might argue, serves the good of ensuring individuals do not incur such obligations. Yet this cannot be argued from the perspective of rights-based morality, as the state is supposed to be *entitled*, by virtue of its status as protector of rights, to impose obligations on its citizens, thus they have no particular complaint. And from the perspective of interest-based morality, it is not the case that the costs imposed on individuals, in terms of higher taxes and perhaps a loss of leisure time due to public service are of sufficient importance to justify the state's right to exclude *instrumentally*. The would-be immigrants will doubtless incur similar costs as a result of their exclusion. Furthermore, as Blake notes, the immigrant may 'actually be a financial blessing' (Blake 2013 115) to the receiver state. This would have to be weighed in a balance of competing claims, and it is unlikely the claims of denizens would be sufficiently strong.

We may however, take the view that citizens have obligations to *each other* to ensure that rights are adequately protected on the state's territory. It is a widely accepted liberal premise, handed down from Kant, that individuals have an obligation to associate with one another, in order to form a state capable of defending their rights, and thus, we might think that by extension, the state's duty to protect and fulfil rights in its territory is actually in some way derivative from the duty of individuals. I am sceptical of this claim. We can accept that in theory, individuals in an extra-judicial condition would be obliged to found a state in order to protect their rights, but deny that in the condition in which we actually find ourselves, this duty is in some sense active, behind the scenes. Once a state is created, it exists as a corporate entity, distinct from its individual citizens, with powers and obligations independent of them. Historically, rights protections are concessions won from the state by the people. We can regard them as owed to citizens because of the state's status as dominator, rather than deriving the state's duty from the obligations of individual citizens in an imaginary pre-political condition.

If the state is required to defend rights in order to justify its power, one might argue that if the state failed to defend the rights of immigrants, it would be rendered illegitimate. On some views, this would have the further corollary that the people on its territory would be compelled to found a new state. In that sense, the people's 'latent sovereignty' (see Grimm 2015 67-77) would arguably mean immigration *really* did put them under an additional obligation, the obligation to found a new state that will uphold the rights of those immigrants *should the state fail* to protect their rights. Yet this argument faces a form of "boundary problem": the state having being declared illegitimate, who is to say what constitutes the political community upon that territory? In Kant's imaginary pre-political condition, it is not the case that individuals are required to form a single state. They could, if they chose, form several states, freely determining their membership as voluntary associations. Similarly, only the existing state marks out the boundary of Blake's 'territorial and legal community'. As he is deliberately silent when it comes to pre-political criteria of group membership, wishing to avoid grounding the right to exclude in an ascriptive account of nationality, the theoretical dissolution of the state would mean the dissolution of the polity. We cannot, therefore, say that obligations of this kind are imposed on any particular individuals, thus no one has a justified complaint.

In any case, the more fundamental point is this: if it is citizens who have obligations imposed upon them *directly* by immigrants, Blake has given us no reason why it should be *the state* that has the right to exclude. As a third party entity, it has no duty to enforce privileges, and thus any harm done to immigrants in the course of defending the privilege would be unjustified.

The self-determination defence

The realist defence had the advantage of purportedly being able to justify the kind of discretionary right to exclude that most modern states actually enjoy. The state is regarded as Hobbes' individual in the state of nature, who possesses the right to 'seek, and use, all helps and advantages of Warre' (Hobbes 1996 92) against all those outside its bounds. This fits well with attitudes about the importance of security which, worrying, are becoming increasingly prevalent at the time of writing, and which might be called the "fortress" approach to border controls. The problem with this view is that it is anathema to the core of prevailing morality. Individuals have moral rights in the face of states. Liberals tend to reject the thesis of international anarchy in favour of the

international human rights tradition. States do not enjoy the right to do anything they *judge* necessary for their survival. We only value the interests of states because they ultimately serve the interests of their individual citizens, and the survival of a given state may not be in the interest of its citizens if that state is extremely bad at defending their rights. Furthermore, there have to be some objective constraints on what counts as a reasonable judgement of necessity, which also take account of the competing claims of individuals outside the state.

In contrast, the jurisdiction view does (in theory at least) pay adequate attention to the rights of individuals; it functions by asserting a right not to be placed under unwarranted obligations, and squares this right against the interests immigrants have in entering the territory. Thus individual migrants are invited to accept that their claim to enter is not as strong as they thought. It is therefore eminently acceptable from a liberal individualist perspective. Its faults are that it can only justify a very limited right to exclude and that, as stated, it suffers from an explanatory gap between the assertion that *states* have certain rights and duties, and the assertion that *individuals* have them. In order to endow the state with the same kind of moral status that it has in the realist tradition, the view suggests that the state is the collective endeavour of individuals. When a state enacts an exclusionary policy, it seems Blake thinks of this as individuals *collectively asserting* their right not to be placed under new obligations. Yet he needs to say more about why the *state* should have the right to be the agent defending individuals' supposed rights in this way.

The self-determination view can be seen as a remedy against the failings of both these approaches. It asserts precisely the collective autonomy that seems to be an assumption of the jurisdiction view, thus giving the state the same kind of moral personality it has under realism, while remaining within a liberal individualist framework. If such a form of argument could be successful, it would be capable of justifying a system of exclusionary policies that were very close indeed to the status quo. To friends of the status quo, it is thus an extremely attractive view. To its enemies, it is the view most urgently in need of being debunked. The idea of collective self-determination is one that plays a key role in the history of international morality, and features prominently in the founding documents of the international human rights tradition. Yet it is a difficult concept to pin down, and is employed in markedly different ways by different theorists in different contexts. Allen Buchanan defines self-determination as 'the making and

implementation of significant decisions concerning the political life of the group that can be attributed to the group' (Buchanan 2016 450). On this definition, then (which I do not mean to assert should be considered canonical at this stage), to state that a group had a right to self-determination would be to assert its right to make political decisions for itself. Arguments for the right to exclude made on the basis of a right to self-determination take many forms, but the basic claim goes something like this: if a group has the right to make political decisions for itself, a key area of competence must be its ability to make decisions about the composition of the group that constitutes the 'self'. The group thus has the right to control membership, which given certain assumptions about the link between membership and territorial presence, would provide a case for a *discretionary* right to exclude: it provides a justification for the group's power to *choose* whom it wishes to admit.

The idea of collective self-determination is a feature of international morality which developed principally in the context of national liberation struggles in the face of imperialism. There has been some debate among both jurists and political theorists whether the right ought to apply only in cases of decolonisation, or whether it could also justify a right to succeed for sub-state groups of other kinds. In the 1990s, several authors developed normative theories of self-determination in the context of secession, a reflection, perhaps, of the key challenges facing the international community at that time: the conflicts ensuing from the breakup of the former Soviet Union and Yugoslavia. Several of these theorists, most notably David Miller and Christopher Heath Wellman, have more recently gone on to apply their theories of self-determination to the debate surrounding immigration - arguably the most pressing political question of the present era. This thesis will thus return to the earlier question: what justifies the right to collective self-determination itself? In doing so, it will be necessary to clarify the concept of collective self-determination. The concept, as applied from the perspective of liberal individualism, faces certain determinate limitations. These limitations mean that it cannot legitimately be invoked to justify the right to exclude in the way many liberal individualist theorists might hope. Or so the thesis will argue.

2. The Right to Collective Self-Determination

The idea of a right to collective self-determination has a specific history. This could be said of all putative rights, but unlike, for example, the idea of a right to property, its emergence is recent, and its relationship to material circumstances is quite manifest. Although it came to be recognised as a principle of customary international law at an earlier time, a key moment in its development was the international community's recognition, in the decade following the Second World War, of the importance of facilitating the process of decolonisation.

The International Covenant on Civil and Political Rights, adopted for signature by the UN General Assembly in 1966, declares a right to self-determination in the following terms:

> All peoples have a right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

This document and its companion, the International Covenant on Economic, Social and Cultural Rights, thus gave it the status of a human right. Unlike the other rights declared in the founding documents of the international human rights tradition, however, it was not ascribed to individuals, but only to a certain kind of group: "peoples". The proper site, scope and content of the right remain a matter of some debate among jurists, with Antonio Cassese observing that 'the principle neither points to the various specific areas to which the law should apply, nor to the final goal of self-determination' (Cassese 1995 320).

This is not, however, a thesis in international legal theory, but in political philosophy. What, if anything, could justify the assertion of a *moral* right to collective self-determination? Allen Buchanan believes that no such positive justification can be given; there is no *prima facie* right, but only a remedial right in the face of injustice (Buchanan 1997). He is among a number of scholars, both philosophers and lawyers, who believe that the good embodied by a stable international order, protected against the threat of "balkanisation", outweighs any good that might be achieved by acknowledging a right to self-determination. I do not wish to address this argument here, however: I will not take up the task of demonstrating that there *is* a positive right to self-determination. The

interest of the present project lies rather in addressing a *particular form of argument* advanced in favour of a right to collective self-determination.

Indeed I do not wish to begin by defending my own view on the proper site, scope and content of the putative right to self-determination, beyond what is necessary to define the subject area, as will be seen in what follows. Rather, my argument will take place at a more abstract level of analysis. My aim is to examine the limitations of a particular kind of *justificatory approach*. My claim is that when a justification for the right to exclude on the basis of a right to self-determination is advanced by theorists who share certain common commitments – which I will refer to simply as "liberal individualism" – the justification requires a conception of self-determination so demanding that is not instantiated by any contemporary state, nor could it be with foreseeable institutional reforms. Thus such theorists cannot legitimately invoke the right of self-determination in defence of the exclusionary policies of extant states, as such states would first have to *enjoy* self-determination in the given sense before immigration could be considered a threat to it.

Methodology and definitions

Site

Historically, collective self-determination has been invoked in three principal contexts:

1. Ethnic-national independence: the principle that state borders should follow the distribution of ethnicities in that territory. This conception was applied in the break-up of the Austro-Hungarian and Ottoman Empires precipitated by the First World War, and was championed by US President Woodrow Wilson, whose Fourteen Points speech contained several references to the adjustment of borders along 'lines of nationality'. After the Second World War, the principle of self-determination came to be applied almost exclusively to decolonisation. But during the break-up of the Soviet Union and Yugoslavia at the end of the twentieth century, the ethnic-national principle re-emerged, to lend legitimacy to independence struggles in the many regions of these former states that professed their own national identities. Yet contemporary international law is generally

thought not to recognise a *primary* (rather than a remedial) right to secede for sub-state national groups[3].

2. Independence of overseas colonies: the principle that former colonies should be free from their old colonial rulers, and should be able to form their own government was central to the prominence of references to self-determination in the formulation of the International Covenants, and predecessor documents, in the post-1945 period. The Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the General Assembly in 1960, prefigures the wording of the 1966 Covenants.
3. Respect for indigenous peoples: the principle that indigenous peoples should have some measure of jurisdiction in their own affairs, and should have influence over decisions of their settler state that may impinge on their way of life. The United Nations Declaration on the Rights of Indigenous Peoples, which had existed in draft form for in excess of two decades, was finally adopted by the General Assembly in 2007. It endorses indigenous peoples' right to self-determination using precisely the same phrase as the 1966 Covenants, although governments for which indigenous rights are politically controversial have denied the rights agreed in 2007 and 1966 amount to the same thing[4].

The content of the principle of collective self-determination has been taken to be markedly different in each of these contexts. Although certain theorists may take one context to be primary, I will not make any such assumption here. Historically, a multiplicity of factors have made it expedient for various actors to invoke a principle of self-determination. From the perspective of normative political theory, it is quite possible that different kinds of putative moral justification may underlie ascriptions of the right in each context; it is also possible that a unified principle lies behind the multiplicity of applications. Our subject will be the supposed moral principle, right or

---

[3] Principle 5, paragraph 7 of the Friendly Relations Declaration, 1970 (A/RES/25/2625) provides a "safeguard clause", according to which any government which represents its 'whole people' – which is to say 'without distinction as to race, creed or colour' – is expressly excluded from the scope of the self-determination principle; groups within them do not have the right to secede. A remedial right to secede when such groups are *not* granted equal rights *may* therefore be justified, although this remains controversial. In this interpretation I follow Crawford 2007 118.

[4] The United States' official declaration of endorsement specifically states: 'The United States is...pleased to support the Declaration's call to promote the development of *a new and distinct* international concept of self-determination specific to indigenous peoples' (emphasis added, see US State Department Announcement, p.8, http://www.state.gov/documents/organization/184099.pdf, retrieved 15 Jan 2016). The governments of Canada and Australia have made similar claims. All stress the document's non-binding status.

value of self-determination, rather than the legal status of self-determination. Nevertheless, as it is a supposed value that has evolved as a principle of international morality in a historically-situated way, it is, I believe, important to begin with the legal context of self-determination in order to isolate the subject matter. For our purposes, since we will be addressing particular arguments attempting to justify the prospective right, the justification offered will determine which applications are supported. Thus we will not begin by rejecting any particular application, though nor will we assume a vindication of one application entails a vindication of any other.

In what follows I will use the term "SD-group" as a placeholder term for whatever group or collective entity we take to be the bearer of a right to collective self-determination. Many of the authors to be discussed have determinate views on the site question. They will therefore use a term such as 'the state' when referring to it. It will usually be most expedient to adopt an author's preferred term for the site, as whether the reference is appropriate will be a central object of inquiry. However, on occasions where I wish to refer in general to *whatever it is that possesses a right to self-determination*, "SD-group" will be used.

Scope

It is significant that the right in international law was seen as falling within the purview of both International Covenants, the first of which mainly describes the kind of civil liberties handed down from the constitutions of the Enlightenment, which typically place obligations of non-interference on governments, and the second of which describes provisions, such as health and labour standards, that grew out of the socialist tradition and can be thought of as *positive* freedoms. The right to self-determination was arguably conceived as having a negative and a positive component. The 'Janus-faced' nature of the concept of self-determination lingers on in present day international morality: it is considered both a statist principle, which promotes stability by in some sense naturalising the system of territorial sovereignty, and a revolutionary principle of popular liberation. Inspired by Isiah Berlin (2002), I believe we can clarify this distinction as follows:

Negative self-determination: A putative immunity-right held by an SD-group, which places a duty on external actors not to interfere with the group's affairs, and is usually thought to include immunity from unauthorised territorial incursion and unauthorised involvement in governance by non-members.

Positive self-determination: A putative power-right held by SD-groups, which provides that the SD-group ought to have the positive capacity to determine its own fate, which is usually assumed to require collective action through an institutional structure of some determinate kind[5].

Although it may not be immediately obvious, these senses do come apart. Just because a group of people on a given territory is left to its own devices, it does not follow that it is free to direct its affairs in a positive sense. Perhaps the group comprises various solitary individuals and families, who rarely meet and have no common political institutions. It would arguably be correct to describe the group as self-determining in the negative sense, but not in the positive sense. Thus self-determination in the positive sense involves, at the very least, some kind of political organisation. Yet a right to positive self-determination should not necessarily be conflated with a right to democratic governance.

Content

Thus far, I have taken a loose attitude to whether I speak of self-determination as a value, a principle, or a right. Although I will be primarily discussing theories which take the basic currency of morality to be rights, many theorists who take morality to be structured primarily by interest and wellbeing are equally important participants in the debate. According to a widely adopted theory of the function of rights, defended by Joseph Raz,

> S has a right if and only if:
> a) S is capable of being a rights-bearer
> b) S has some interest(s) that constitute a sufficient reason for holding others to be under some duty. (Raz 1980, 1988)

---

[5] In International legal theory, there exists a distinction between 'internal self-determination' and 'external self-determination', which closely maps onto the distinction drawn here (see Hannum 1996, Senese 1989, Casese 1995). However, as there is some inconsistency in the usage of these terms, I have chosen to stipulate my own distinction. Allen Buchanan also uses the expression 'negative self-determination' in much the same fashion as just described. However, he contrasts it with self-determination *proper*. Self-determination proper on his account 'pre-supposes group agency' (Buchanan 2016 450). I adopt the more neutral 'positive self-determination', as to endorse Buchanan's view would pre-judge the argument of this thesis. Iris Marion Young (2001) has made use of a similar allusion to Berlin in her essay, *Two Concepts of Self-Determination*, although her concept of 'self-determination as non-domination' does not clearly map onto the concept of 'positive self-determination' invoked here. Robert Jackson (1990 26) draws a complementary, although not equivalent distinction between positive and negative *sovereignty.*

On this theory, in order to demonstrate that a given subject has a right, one must simply begin by pointing to some particularly salient interest that subject has, which provides a *pro tanto* reason for others to be under a duty to create the conditions in which that interest is satisfied. If that reason wins out when balanced against the competing claims of others, then the subject has a right. Thus, to say that self-determination is an important *value* is to say that if the right background circumstances are in place, a subject could be said to have a right to self-determination. I therefore take it to be of secondary importance whether one chooses as one's project justifying the *value* of self-determination, showing that a *claim* to self-determination can be justified, or showing that it is a *right*.

If a right to collective self-determination applies to anything, it applies to *groups*. Satisfying Raz's first condition, in the standard cases involves either being a natural person, whose wellbeing has 'ultimate value', or being an artificial person, whose wellbeing is not of ultimate value but may be of intrinsic value, or of instrumental value. Something is *intrinsically* valuable, to continue using Raz's terminology, when it is valued *for itself* - something with similar qualities will not do just as well. Something is *instrumentally* valuable when it is valuable in relation to the achievement of some other value - its consequence - and is thus interchangeable with anything that will have the same consequences. Journalists may have a right to protect the anonymity of their sources, yet this is not because the interest journalists have in protecting their sources is of *intrinsic value*, but because it is instrumental to the general public having access to information. Not everything that is intrinsically valuable has *ultimate* value. In Raz's example, a man may have an *intrinsically* valuable relationship with a dog, as it is the relationship he has built up with precisely *this* dog that is valuable. Yet (unless we believe dogs are persons), the dog is of *derivative* rather than *ultimate* value, in that its value lies in its 'contribution to the wellbeing of the man' (Raz 1988 178). 'Collective goods' are defined by Raz as inherently public goods, such as the good of living in a tolerant society, as opposed to contingently public goods, such as clean air (clean air could in principle be portioned out to individuals like fuel). Raz calls the thesis that only persons are of ultimate value '*humanism*'. The thesis that only individual goods, and no collective goods, can be intrinsically valuable, he calls '*moral individualism*' (Raz 1988 192-8).

The right to self-determination, therefore, may be said to be held by SD-groups directly, or only derivatively. They may have it because the *group itself* has some interest which

provides sufficient reason for others to be held to be under a duty (which creates the conditions of self-determination)[6]. Conversely, it may be that *individuals* have an interest that provides sufficient reason to hold others to be under such a duty, but it so happens that the individual interest is served by serving the group interest. This observation allowed us to characterise two distinct approaches to the justification of a right to self-determination:

Group approaches: These seek to show that the right of a group to self-determination is justified because of the interests of the *SD-group,* which are *intrinsically* valuable.

Individualist approaches: These seek to show that the right of a group to self-determination is justified because of the interests of *individuals,* which ground a group right because the group's interest in self-determination is *instrumentally* valuable, insofar as it promotes the interests of individuals.

Notable advocates of group approaches include Michael Walzer (1983, 1980), and Raz and Avishai Margalit (1990) in their classic paper on national self-determination. Such views, however, are problematic from a certain perspective: they are 'opposed in spirit to contractarian-individualistic approaches to politics' (Raz & Margalit 1990 456).

Provided we accept one further premise of Raz's - premise 1 below - this conclusion follows from the definitions already stipulated:

1. 'Only those whose well-being is intrinsically valuable can have rights' (Raz 1988 178-80)
2. SD-groups have important, irreducibly collective interests
3. These collective interests justify the SD-group's right to self-determination
4. Therefore the SD-group is capable of being a rights-bearer
5. Therefore it is not the case that no collective good is intrinsically valuable

In other words, one cannot simultaneously hold the thesis of moral individualism, and defend a group approach.

In the case of a theorist such as Walzer, this is not problematic – from an internal perspective at least – as Walzer is expressly concerned to position himself as an

[6] I adopt the language of a Razian theory of rights to clarify the concept of an irreducible group right, but I take it that this could be restated in terms acceptable to theorists who do not believe rights reduce to interests.

opponent of the dominant liberal framework. Walzer argues that 'communities of character' enjoy the value of 'fit' between the government and their community (Walzer 1980 216), and this value is worthy of outsiders' respect. Like Edmund Burke, he argues that state institutions that have grown up organically to follow the contours of a particular community are a rare and precious thing, which should not be toyed with lightly. This thesis generates many of the rights associated with the idea of self-determination. It grounds a duty for outsiders not to interfere in the state's internal affairs, as this could disrupt the fit between a people and its institutions. Moreover, Walzer contends, it generates a right to exclude:

> Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be *communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.
> (Walzer 1988 62)

This form of argument is powerful, though it does represent a radical departure from the prevailing moral outlook. Although Walzer does not express it in these Razian terms, the argument hangs on the idea that the particular relationship between a community and its political institutions is intrinsically valuable, in the same way that we sometimes judge a work of art to be valuable. Thus, it cannot be weighed in a 'contractarian-individualist' decision procedure, as this value is bound up with the 'internal life' of the community; outsiders simply do not have access to it. We cannot say, for example, that interests immigrants have in entering the territory are *more important* than the interest the indigenous population has in self-determination, as this is simply comparing apples with oranges; it is akin to saying that Michelangelo's David is more important than the Dome of the Rock.

Such a view comes head to head with the dominant liberal outlook on certain questions. Walzer maintained that even the individual human rights of the *indigenous* population could not be weighed against the value of community by outsiders. Humanitarian intervention, in his view, could only be justified in cases where there was an *existential* threat to the community as a whole, such as genocide or mass displacement, as only then could we clearly say that it was worth endangering the specific way of life that had grown up in that territory. Even if individual rights violations were widespread – the state was utterly tyrannical from a liberal perspective – it would be illegitimate for an external

actor to intervene to protect *individual* rights. Similarly, we would have no grounds, on Walzer's account, to condemn rights violations committed in the course of enacting exclusionary policy. Racist membership policies such as the "White Australia Policy" were founded precisely on the supposed need to preserve the character of the community. Within a liberal state, we would judge discrimination according to race to be a violation of human rights. Yet Walzer's view cannot condemn, and indeed does not condemn, exactly the same forms of treatment with respect to non-members. The denial of *moral individualism* therefore leads to the denial of *moral universalism*.

For Walzer, a self-described communitarian, this was precisely the point. Yet for theorists such as Raz and Margalit, who characterise their position as '*liberal* nationalism', an insistence on moral particularism might be regarded as a larger concession. The two authors argue that groups that qualify as 'encompassing groups' - defined, to give a cursory paraphrase, as groups which share a common culture and for whom group membership forms an essential part of their identity - ought to have the right to *decide* whether to become self-governing. Self-government is instrumentally valuable to the group because it is, as a matter of historical fact, likely to help the group secure the values of 'prosperity and dignity'. Self-determination conceived as the right to conduct a referendum on secession, is 'the method of implementing the case for self-government'. Whether or not there is *in fact* a strong case for self-government, therefore, encompassing groups are the *sort* of things that are often benefited by self-government, and thus they have an instrumentally justified right to self-determination. Neither Walzer nor Raz and Margalit deny humanism, they affirm the rights of SD-groups because protecting their interests is *likely* to serve the interests of persons, although they are not *reducible* to the interests of individuals. 'The group may flourish if its culture prospers' but, Raz and Margalit claim, 'this does not mean that the lot of its members or anyone else has improved' (Raz & Margalit 450).

Again, from a certain liberal perspective, this could be regarded as incipient totalitarianism. Given that there is no clear way to balance irreducible group interests with individual interests, we may be worried about what would happen when they come into conflict. The authors claim for example that it can be in America's interest to land on the moon, because of the collective good of international respect it will bring, even if individual Americans do not necessarily benefit from this. If one replaces America in this example with, say, Ceausescu's Romania, it becomes easy to see why liberals might

have reservations about the abandonment of moral individualism. When the good of the nation is an intrinsic good, there is no easy way in which we can balance it against the good of individuals, and thus one may think individuals are in danger of losing important protections. Raz and Margalit would doubtless urge moderation on this point. Although we cannot *reduce* the collective good to the individual good directly, we do know the *mechanism* by which they are connected: individuals identify with the group and therefore *subjectively* view its good as their good. Under a sufficiently exploitative or barbaric regime, this kind of identification with the nation-state would be impossible, and thus it would not qualify as an encompassing group. Yet, as we will see, theorists who do not have the resources to invoke subjective value in this way may be more threatened by the moral particularism requirement.

Three "individualistic" approaches will be discussed in the following sections. The first – individual autonomy-based approaches – expressly ground the value of collective self-determination in the value of *individual* autonomy. They are arguably unable to explain why this *individual value* should give rise to a *group* right. Two other theories attempt to get round this problem by positing a *group value* on which self-determination is grounded: the group's freedom to associate, and group property. In doing so, they attempt to solve the problem faced by individual autonomy theorists by simply claiming that they are not invoking an individual value, but a group value. Yet if this value is *irreducibly* collective, the liberal individualist position is under serious threat, as it would be to grant rights to collective entities that would conflict with and override the rights of individuals. Thus liberal individualists have reason to doubt these collective entities really have such rights. But if they argue that the group right is *derivative* of individual rights, they come up against the same problem as the individual autonomy theorists.

3. Three Defences of Self-Determination

3.1 Individual Autonomy

From a certain perspective, it is appealing to see collective self-determination as individual autonomy, writ large: the idea that a group of individuals should be just as free to determine its own ends as a single individual ought to be. Autonomy is variously regarded as the metaphysical precondition of agency, the condition of having a multiplicity of valuable options available, and as an intrinsic status, demanding respect. Liberals invoke Kant's name when declaring autonomy their primary value, however close their conception might be to his own. Kant believed that it was individuals' capacity to set morals ends according to reason that constituted their absolute moral worth as the final end of nature. In the political domain, he saw the capacity of individuals to view themselves as self-legislators to be the criterion of legitimate government. As such, he did not regard the *source* of law to be the foundation of its authority, but only its *content*; autonomy demanded a republican government, but not any particular decision-making structure.

Nevertheless, the status of individuals as autonomous has been argued to be the foundation of a right to *democratic* self-determination. Daniel Philpott has argued that the right to self-determination is a corollary of a right to democratic governance, and that 'the source of both concepts is autonomy' (Philpott 1995 356). The link between the two is made quickly: 'Democracy we may think of as the activity...of exercising one's autonomy in the political realm'. He takes the value of democracy to lie in 'participation and representation...the political activities of an autonomous person' (Philpott 1995 357), and further that these are also the values promoted by self-determination. Robert Dahl argued in a similar fashion, that democracy promotes 'the freedom to live under a law of one's own choosing' (Dahl 1989 89), on the grounds that if a person is a member of the majority, then she is completely autonomous in that decision, as autonomy can be defined as the condition of not being overruled. Given all other forms of government can be described as rule by a minority, democracy maximises the number of autonomous persons.

The connection Philpott draws between autonomy and democracy is not thick enough easily to determine the particular conception of democracy to which he is committed. Unsurprisingly, he seems to set upon the dominant form of existing democracy, with equal political rights, universal though non-mandatory suffrage and the ability to 'hold representatives accountable' (Philpott 1995). If one believes *participation* is the value of democracy, and thus mere participation, rather than having one's will actually realised, is regarded as achieving the value of autonomy in the political domain, one would have to believe the value lies in autonomy's *exercise*, rather than its results or its potential. If we therefore regard Philpott's conception of autonomy as something like the 'mental activity' (Mill 2001, *55*) of employing our faculty of choice, then, as J.S. Mill concluded, plural voting would ensure this value was given to all in some degree, while serving the greater good by giving more influence to superior intellects. Indeed, this value could be achieved by virtually any political system, democratic or not, which had sufficient scope for individual participation.

Furthermore, Philpott's case for a right to self-determination on the basis of autonomy would be extremely weak. If we focus, as does he, on the application of the principle to the right to secede, any territory that was provided with sufficient opportunity for democratic participation by the state to which it was subject, would seem on that account to have no grounds on which to claim its citizens were being denied their autonomy. Anna Stilz offers a powerful illustration of this point (Stilz 2015 10). Suppose that France, in annexing Algeria, had given Algerians exactly the same voting rights as metropolitan French citizens, such that the affairs of a single entity consisting of Algeria and France were governed by a demos composed of the combined citizen bodies of the two countries. If the value of self-determination is the same as the value of democratic participation, Algeria would in such a case have no claim to independence on the basis self-determination[7]. Yet this is the very opposite of what Philpott is trying to demonstrate. Thus it seems Philpott's account of the value of autonomy, which both democracy and self-determination through secession supposedly promote, is best understood not as mere participation, but as something more demanding: having one's will realised.

[7] Raz and Margalit (1990) make effectively the same point: they observe that a right to self-determination grounded in the intrinsic value of political expression cannot justify a right to secede, as this value could be realised within a 'multinational, multicultural polity', or indeed, presumably, in international affairs.

And indeed, his other remarks do point in this direction. I take it that Philpott is committed to a Rousseauian conception of democracy according to which the efficacy of popular will is a primary concern. Philpott argues for example that secession makes it more likely that the group's 'political will' will not be 'polluted or hindered' (Philpott 1995 360) though combination with the will of voters in the greater state. He states further that groups with a 'particular identity' would 'better participate and are better represented' through self-determination. It appears this point is intended as a principled philosophical claim rather than a sociological one. In other words, the claim is not simply that in actual societies, minority groups have typically been subject to structures that have excluded them from public life. Rather, it is that giving such groups territorial independence will, as an abstract result of majority rule, be more likely to result in desirable political outcomes for them.

But there are at least two ways in which individual preference can stand in a favourable relation with political outcomes at the group level. Niko Kolodny (2014) calls these 'correspondence' and 'influence'. An individual enjoys correspondence when her individual preference simply matches the policy decision made at group level. An individual has influence, meanwhile, if her preference has some *positive effect* on the policy outcome. To continue using Kolodny's terminology, one has 'relative influence' when one's individual input into the decision procedure (voting) has a definite effect on the outcome, without necessarily bringing it closer to one's preferred outcome. One enjoys 'absolute influence' when policy outcomes are sensitive to individual preference across a wide range of decisions. Philpott insists that autonomy means 'steering one's fate' (Philpott 1995 359). This could in principle point to the value of mere relative influence. Yet he also claims that an imagined society, which he calls Utopia, will be more likely to share a 'Utopian fate' if they enjoy self-determination. This suggests that they will achieve the value not simply of influence, but of *satisfied preferences*. Philpott's claim then amounts to this: through both democracy and secession, we promote our individual interest in absolute influence. This can also be termed *control*.

In response to Philpott, Allen Buchanan has observed that no extant democratic system is capable of delivering the degree of control that would seem to be required if one is to justify a right of self-determination on the basis of individual autonomy: 'it is simply false to say that an individual who participates in a democratic decision-making process is self-governing; he or she is governed by the majority' (Buchanan 1998 17). Given that

one is liable to be over-ruled by the majority on any given question, one cannot be said to be in control of one's fate. Dahl's argument is that we are *more* autonomous under majority rule than under minority rule, because majority rule ensures the largest possible number of people are not overruled on any given decision, thus maximising autonomy. Creating a more homogenous community would advance autonomy in the same way. Yet for one thing, this argument implies unanimity would be the best decision rule of all (as Dahl acknowledges). Furthermore the view assumes that every individual has an equal *ex ante* chance of being in the majority. If we allow for the possibility of persistent minorities, the thesis no longer holds true. Say there are four interests groups, who have to choose between three options, and the choice is iterated several times. In such a case, it is no longer true that majority rule always minimises the number of people who are overruled. Take for example a case of four sailors on a long voyage, who have to choose what to have for dinner each evening. They vote on whether to have meat, fish or a vegetarian meal. Alexei always opts for meat, Boris always chooses the fish, and Casimir the vegetarian option. Dima is a floating voter, he alternates each night between the meat and the fish. Although the largest possible number of people get what they want each night, because of the fixed distribution of interests, majority rule gives Dima complete autonomy, and Casimir no autonomy whatsoever. Although majority rule would maximise the number of individuals who were autonomous each night, giving Casimir the right to choose once every three nights would maximise the number of individuals who were autonomous over a three-night period. Thus it is not in any simple sense true that majority rule allows the maximum possible number of individuals to be autonomous.

Neither Philpott nor Dahl seek to apply their arguments to the idea of exclusion. Yet it is easy to imagine how they might be developed in this regard. If we accept that there is a right to secede grounded in the right to 'steer one's fate', by engineering a demos that is more closely aligned with one's own interests, then we would likely also accept a right to prevent certain individuals from entering the territory, if in doing so they would gain the right to join the demos and steer our fate in an unwelcome direction. It is a widely accepted premise that an immigrant who remains on a state territory for a period of time must automatically be given the right to join the demos, given that the democratic theory of popular sovereignty demands that individuals who are subject to state coercion ought to be entitled to be involved in making the laws by which they will be coerced. Yet in no

democracy, actual or ideal, does participation in voting by majority rule necessarily promote individual autonomy when autonomy is conceived as *control* – indeed, it is rarely *compatible* with individual autonomy so conceived. Thus is it not the case that any particular exclusionary policy enacted by the state can be thought of as an expression of individual autonomy, as individuals lack *control* over the policy. Collective self-determination conceived as an expression of individual autonomy therefore cannot be used to justify the state's right to exclude, as we have no grounds to say that in upholding the state's right to exclude we uphold individual autonomy. Democratic self-determination as individual autonomy simply does not exist, thus immigration cannot threaten it.

Although individual autonomy-based accounts of the right to self-determination have been quite effectively dismissed, they serve as a model, I believe, for a recurrent form of misguided reasoning in the immigration debate. Liberal individualists defend the right to collective self-determination on the basis of some typically individual right. Many such theorists believe rights function in a similar way to the value of autonomy. As we have seen, to be autonomous in a domain is to have 'control' over that domain. If we follow Christopher Heath Wellman (after Carl Wellman), 'A's right against B necessarily gives A freedom and control over A's relation to B' (Wellman 1999 19). In the next two sections, we will examine defences of the right to collective self-determination based on freedom of association, and upon property. These views claim to get round the problem faced by individual autonomy-based arguments, by claiming that it is irreducibly a *group* that possess the right in which the state's right to exclude is grounded. Yet liberal individualism, I will argue, leaves them committed to the claim that the group right is derived from an individual right, and thus leaves them facing the same problem faced by the likes of Philpott.

3.2 Freedom of Association

Christopher Heath Wellman's argument for exclusion is based on three premises:

> (1) legitimate states are entitled to self-determination
> (2) freedom of association is an integral component of self-determination, and
> (3) freedom of association entitles one to refuse to associate with others as one sees fit
> (Wellman 2016 81, Wellman & Cole 2011 21)

Thus we must first enquire what, on Wellman's account, makes it the case that states have a right to self-determination? Unfortunately, Wellman states 'there is no obvious way to theoretically ground my first premise' (Wellman & Cole 2011 21). He views collective self-determination as analogous to the idea of autonomy in the case of individuals. Why? If we respect the autonomy of individuals, it is a small step towards accepting the autonomy of voluntary associations, because such associations are themselves part of the autonomous activity of individuals. Yet we cannot say the same for states, as Wellman acknowledges. Membership of the state is not something we chose, and we are often unable to leave without great cost, thus it cannot be considered part of our sphere of individual autonomous action. Yet while he recognises this 'slide from an individual's right to a state's right to freedom of association' (Altman & Wellman 2009 161) is problematic, he simply asks us to suspend our reservations, and to observe several features of commonplace international morality that he believes cannot be explained without attributing an 'irreducible' right of freedom of association to states. On the other hand, though he pretends to offer no full explanation, several of his remarks do suggest the state's freedom to associate is explained by the individual's freedom to associate. Thus in what follows I will explore the implications of each of these approaches in turn. I argue that it is possible to explain the norms governing relations between states which Wellman isolates without attributing them to a right to freedom of association – at least, not one that will do the job he needs it to. Yet if Wellman is forced to rely on individual freedom of association to explain the state's right to exclude, this is even more problematic.

Freedom of association and the state

States are generally thought to have a right not be annexed by their neighbours by force. Wellman contends this is the very same right which justifies the exclusion of migrants:

'if legitimate political regimes enjoy a sphere of self-determination which allows them to refuse relations with foreign countries and international organizations' he writes, 'it seems only natural to conclude that they are similarly entitled to decline to associate with individual foreigners' (Wellman 2016 84). Yet this claim is perplexing, as it is quite easy to see these two as utterly distinct kinds of right with unrelated moral grounds. The right to freedom of association is generally conceived as a political right, which protects citizens' meetings (archetypically, the meetings of trade unions or political clubs) from interference, and is not typically applied outside the context of a particular society. There are innumerable reasons why we might think one country had no right to annexe another that have nothing to do with freedom of association. The prohibition against wars of aggression is arguably the fundamental principle of international law, going back to the time of Vitoria, and was deemed 'the supreme international crime'[8] in the Nuremburg Judgment. This principle would be adequate to explain the wrongness of forcible annexation, and would have no corollary regarding the right to exclude individuals[9]. Wellman and Andrew Altman suggest we could describe, by way of a thought experiment, a case in which one country annexed another 'without disrupting the peace or violating the individual rights' (Altman & Wellman 2009 161) of its citizens, so that our negative judgment on the case could only be explained by concerns about free association. But this is far-fetched. A forcible annexation effected without the threat of force would not be forcible but voluntary. Even if we imagine a country of pacifists, tragically unable to resist, the invasion would still involve the seizure of lands or property, such as government buildings, which would constitute wrongdoing capable of accounting for our judgment of condemnation. If it did not, then it would not be an annexation at all, but mere empty words, comparable to Idi Amin's claim to be King of Scotland.

Take another example: Wellman observes that states have the right to refuse to join trade agreements such as NAFTA, and political unions such as the European Union (Altman & Wellman 2009 161). To force a state to join such an association would be to violate their freedom of association. Yet again, there is no reason why we should draw

---

[8] "Two hundred and seventeenth day, Monday 30 September 1946", *Nuremberg Trials Proceedings Volume 22*. The Avalon Project, Yale School of Law Lilian Goldman Law Library, available at: http://avalon.law.yale.edu/imt/09-30-46.asp, retrieved 15 August 2016

[9] Raz and Margalit (1990) make a similar point. They observe that while self-determination is 'a source of title', the right not to be invaded or occupied is 'a possessory right based largely upon public order considerations'. There is a general prohibition against the use of violence in dispute resolution, violations of which mandate redress before considerations of title - such as self-determination - come into effect, or so the authors claim.

any analogy between the rights of states and individuals here. If the United States had forced Canada to "join" NAFTA through threat of military force, this would scarcely amount to *joining an association*. It would more accurately be characterised as the USA strong-arming Canada into removing tariffs from US imports, and into accepting various other trade regulations. This can clearly be thought of as a violation of self-determination, but not necessarily of freedom of association. Similarly, if powerful member states forced Norway to join the EU, this would be to forcibly reorganise its legal system and demand the payment of "tribute", in other words, an act of imperialism. Simply as a descriptive matter, international legal norms are such that the right to self-determination is precisely a protection against imperialism. But the wrong of imperialism, whatever we take it to be, is plausibly very different from any wrong that might be involved in non-consensual immigration, owing to the specific forms of harm domination by another state power can engender, that unwanted incursion by an individual cannot.

Thus there seems no reason to regard states as being bearers of a right to free association in of themselves. Yet it may be argued that this dismissal of an international right of free association is too quick. It is not enough to say that our negative judgement in cases of forcible annexation can be explained as a condemnation of the violence involved, as this leaves us unable to distinguish justified and unjustified cases of military intervention. If we believe, for example, that it is legitimate to invade a state in order to rid it of an unpopular dictator, when such intervention has the "consent of the people" (assuming we have some means of obtaining this consent), we need an explanation for *why* we do not condemn violence in this case, but do condemn cases of illegitimate annexation. A plausible response, it might be suggested, is that cases of justified intervention respect the autonomy of the people (rather than the state), and in that sense, their freedom to associate.

To make this kind of argument, however, would in my view be to defend a controversial line of argument by means of an equally controversial one. In contemporary international law, there is no norm which provides that military interventions that have the "consent of the people" in the target state are permissible. Rather, the consent of the international community (through the UN Security Council) is required, and the intervention needs to serve a policing function with limited aims: the prevention of war

crimes, genocide, or crimes against humanity[10]. Although it has been argued that the "Responsibility to Protect" in international relations should be interpreted to mean that a failure on the part of a state to protect the basic human rights of its citizens should give an *automatic* mandate to other states to take up the role of protector (see Buchanan & Keohane 2011, Welsh & Banda 2010), it is arguably still the more common interpretation that intervention is justified only to avert specific breeches of international law, and the R2P principle in general is still contested. In any case, it is certainly arguable that there is no case in which we judge intervention to be justified, which cannot be explained without the idea of collective autonomy. We may simply judge in such cases that the norm of respect for sovereignty has been overridden by the need to prevent a moral emergency.

In response, a defender of the right to freedom of association in international relations might adapt the thought experiment, and propose we imagine a case in which an intervention had the consent of the people although their government *was* preserving basic human rights. But imagining such a case is very difficult. Many commentators would simply deny that such an intervention could be justified. Granting that we do think it could be justified, our judgement could be explained by prior assumptions about the conditions of legitimacy, rather than anything directly to do with freedom of association. If the people is to have succeeded in expressing its consent, although that consent is not shared by state officials, it is difficult to imagine a situation in which this was possible without the people having established some kind of political organisation, which repudiated the authority of the old state and which the annexing state was entitled to regard as the people's legitimate representative. Given that this organisation would *ex hypothesi* represent the citizen body, it may be that we regard this shadow government as the sovereign authority in the territory. The former state, therefore, as an entity which claimed the right to use coercive force but lacked the authority to do so, could be regarded as a violent criminal organisation. The violence committed by the invading country against the original state would thus not be an act of inter-state aggression, but an act of justified state coercion carried out by an appointed agent of the new state. If we think state violence against domestic criminals is justified, then the violence

[10] Outcome Document of the 2005 United Nations World Summit, A/RES/60/1, para. 138-140, Available at: http://www.un.org/en/preventgenocide/adviser/pdf/World%20Summit%20Outcome%20Document.pdf, retrieved 15 August 2016

perpetrated by the intervening state would be justified for the same reason. Such an explanation would not require us to invoke concepts like freedom of association or collective autonomy.

Wellman also supports his argument by means of an analogy between the right of an *individual* to choose whom to marry, and the right of *states* to exclude immigrants. Yet if we believe this right is *irreducibly* held by states, it is difficult to say what features of these two rights should be considered analogous, and why. The right to choose whom to marry is a protection against a form of social-structural oppression. Marital traditions typically grant husbands power over their wives' behaviour, thus if marriage contracts entered under duress are considered valid, this could be tantamount to a kind of slavery. It is hard to imagine a situation in which the state's relationship with a potential immigrant would be like this. Although hypothetically a massive influx of migrants could cause socially destructive harm analogous to the harm inflicted upon the victim of forced marriage, an argument made on this basis could not justify a *discretionary* right to exclude, only a right to take exceptional measures in the face of levels of immigration which posed an existential threat to the state. Such considerations need not be described as violations of a right to free association, but would come under more general principles of harm prevention.

Sarah Fine (Fine 2010 355) makes a similar counter-argument against an analogy Wellman draws between religious associations and states. Religious associations are important sources of value in peoples' lives. If the inability to control membership led to the inability to deliver that value, this would provide good reason for the right to discretionary membership control. In order to show that states had the right to exclude migrants at their discretion, Wellman would have to provide an account of what values he takes states to deliver, and to show that it would be impossible to deliver those values without the right to discretionary border controls. This may prove difficult. For example, if we take security to be one of the key values delivered by states, this would provide an argument for the right to exclude dangerous individuals, but could not justify the exclusion of the law-abiding.

A defender of the application of a right to freedom of association in the case of marriage might point out that we need some further explanation of *why* forced marriage should be considered particularly wrong. Surely, they might say, a forced marriage that left the victim better off in all relevant senses ought to still to be criticisable, and order to do that

we need to invoke the value of autonomy, involving some idea that one should be free to choose with whom one enters legal and political unions. But we can just refuse to accept this kind of reasoning: either a forced marriage is harmful, or it is not. If it is not harmful, then there is no problem. If, due to some exceptional circumstances – clairvoyant powers, say - a father *actually did* know best about whom his daughter should marry, we should be prepared to accept that forced marriage would not be wrong, so long as we also affirm that such circumstances are so improbable that people's interests are best served by a blanket ban on forced marriage. If we follow Raz, and contend that the value of autonomy is the value of being able to pursue willingly-embraced valuable options (Raz 1988 369), then trade-offs in autonomy are possible: although it would be a disvalue to remove an important choice, such as marriage, from an individual's option set, it could in theory be mitigated if doing so greatly enlarged that individuals set of valuable options. Similarly, if removing some of my options were necessary to secure the interests of many other people, this would provide a reason for doing so. The Augusta National Golf Club in the US, and more recently the Muirfield Golf Club in the UK, have been criticised for their sexist membership policies. Wellman claims that even if we censure these organisations for particular discriminatory membership polices, we still endorse their 'presumptive right' (Wellman 2009 160) to determine their own membership. But we may equally well judge that such controversies show precisely that there *is no blanket right to exclude*, only a balance of competing interests that tends to come down in favour of club members, as in most cases to do so is relatively harmless. When exclusion is likely to reproduce discriminatory structures and attitudes in wider society, the value of "autonomy" is easily outweighed[11].

In sum, suggesting that the relationship between a state and an immigrant is like the relationship between an individual and a potential forced marriage partner, or between a club or religious association and a would-be member, is not enough to justify a right to self-determination that includes a right to exclude. Even if we accept the analogy, we still need to consider *why* we have a right to autonomous associations and unforced marriages, in terms of determinate ways in which people are made worse off by a lack of autonomy in these areas. Wellman's argument relies on a series of equivalence statements: the right not to be forced into marriage is a right of freedom of association,

---

11 As Fine puts the point, 'states' rights to exclude are far more significant in people's lives than the rights of voluntary associations exclude' (Fine 2010 263).

the state's right to self-determination is a right of freedom of association, therefore the right against forced marriage is the same as the state's right to freedom of association, and thus just as individuals ought not to be forced into unwanted unions with other individuals, neither should states and individuals. But though these rights have some similarities, the transitivity of any particular features of the right cannot be inferred.

Freedom of association and individuals

It looks like Wellman's best chance of justifying the state's right to exclude via the idea of freedom of association, is if the group's freedom of association is being viewed as a kind of proxy for the freedom of association of the individuals that comprise the group. In the context the right to collective self-determination as applied to the question of secession, Wellman *has* offered an argument according to which he attempts to justify the rights of the state by directly linking them to the rights of individuals (Wellman 2013 148-157, Wellman 2005 34-65). I believe this argument is problematic, and its problems bring into sharp focus the difficulties associated with linking individual rights to group rights.

Wellman grounded the right to collective self-determination in the respect owed to persons. He argues that legitimate states are worthy of respect in virtue of their 'ability and willingness to perform the requisite political functions' (Wellman 2005 57). The argument is that because this ability is the result of the collective action of individuals, we can say this respect is ultimately owed to individuals. The idea is that the state, although a separate entity from the aggregate of its citizens, is in some sense the rightful 'dominion' of its people, and thus that infringement upon its functioning is an infringement upon the autonomy of individuals. This approach is very similar to the one adopted by Ryan Pevnick (2011), who argues on similar premises that state institutions should be considered the 'collective property' of citizens. The archaic term "dominion" evokes Locke, who argued that dominion over land was not granted to kings by God, but rather was granted for the "industrious and rational" use of it. Property-based arguments will be examined at length in the next section, so I will confine myself here to making remarks specific to the idea of dominion as distinct from property. Wellman draws an analogy between our relationship with the state and a parent's relationship with a child (the direction of the relation inverts the classic formula). If, he claims, a teacher took whole milk from the lunchboxes of children in his charge and replaced it with skimmed milk, on the grounds that it was healthier, this would be wrong because it

would be disrespectful to the children's parents and the way they have decided to bring up their children. The dietary choices of a young child are the proper *dominion* of its parents and therefore outsiders do wrong to interfere. The argument is that states are the proper dominion of their citizens in just the same way (Wellman 2005 56).

This argument is problematic, chiefly because it provides an unconvincing picture of the right to self-determination in its central context - decolonisation. Colonial governments were very often both willing and able to form the requisite political functions, so *prima facie* Wellman would have provided an argument *against* the right to self-determination rather than the converse. Thus in the case of colonised peoples, respect is said to be owed for something that it is 'within the capabilities of the group to achieve' namely a state that instantiates self-government. Although he does not express himself in these terms, it seems fair to take Wellman's position to be that colonialism is a form of paternalism, and the value of collective self-determination is the value of the absence of paternalism. This can be clearly seen from the way he sets out the view, as an interjection between an imagined coloniser and an imagined colonial subject: "'you cannot govern yourselves properly, and so we must govern you"' (Wellman 2005 57). If Wellman's argument were simply that that government by an external force was an affront to individual autonomy, this would be an argument for anarchy, not an argument for the particular value of collective self-determination in cases of colonialism. He therefore condemns another feature of the relationship in addition to mere domination: disrespect for capacities.

Wellman's imagined interjection is presumably meant to show not just that it is problematic for people to be denied the opportunity for self-government, but that the mere suggestion the colonised would be unable to govern themselves itself is a wrong. This would cohere with a class of theories that take the wrong of paternalism to inhere in a particular judgement (Shriffin 2000, Quong 2010, Tsai 2014). According to such theories, the presence of a paternalistic relationship depends on the presence of a particular belief state in the paternaliser, in this case, the belief that the subject is incapable of self-government. Yet there seems no reason why any such belief state should be present at all - the coloniser may think the subject perfectly competent, but colonise none the less. Historically of course, many colonial enterprises did express "civilising" aims from the very start. In the case of the British colonisation of India or Hong Kong, however, this would be more difficult to argue, as the project evolved from

one of establishing trade relations within a highly developed civil society, into one of total economic and political domination. In any case, whatever the facts about the attitudes of colonial powers throughout history, it seems inappropriate to ground the value of self-determination in the value of being untroubled by something as trivial as other people's disrespectful *beliefs*.

If we try to transpose this argument to the application of self-determination in which we are primarily interested - immigration control - the case looks even weaker. No attitude of disrespect is involved in immigration; in fact, *admiration* for the functioning of the receiver state's institutions is more likely, given that migrants have in many cases been convinced to leave their homelands by the prospect of greater opportunity. Wellman's argument seems to be that states have a right to *autonomy* because the state is owed respect due to the dominion relationship between a people and its state. But even if we grant that the state is owed respect, it does not follow that it is owed exactly the same *form* of respect as a person, including a right of freedom to associate.

Thus it looks like this avenue for "connecting" the individual to the group right is closed to Wellman. Returning to the marriage analogy, it is obvious that the connection cannot be made in a simple fashion. The *individual's* freedom to choose with whom she shares a state territory is clearly nothing like the freedom to choose whom she marries. For a start, she is born already sharing a state with millions of people, the vast majority of whom she will never meet, and while forced marriage is a potentially devastating experience, to be forced to live in the same country as someone else would just be to add one more person among these millions over whose presence she had no choice. Wellman thinks we can find a less direct comparison. There are more general benefits of a right of free association that *can* be compared to a right not to be compelled to share a territory with certain would-be immigrants. Just as for members of a golf club 'caring about our experience as a club member gives one reason for caring about the rules for admitting new members' (Wellman 2016 83), so too does our interest in self-determination give rise to an interest in exclusion.

Yet adopting this approach is a large concession: it represents the abandonment of an irreducibly rights-based approach to the justification of the right to self-determination, in favour of an interest-based approach, and appealing to *subjective values*. To say that we care about the rules for admitting new members to the state is simply to say that membership control is a *value* for members. But it is open to a detractor to claim that

this value is simply not of sufficient importance to justify a right. Advocates of interest-based justifications for exclusion are often acutely aware of this. David Miller, for example, whose arguments rest on the value of national culture, is at pains to provide reasons why this value is of special importance, over and above others: culture is 'a source of identity' (Miller 2016 68) which determines our values both in private and public affairs, and if immigration leads society to fracture into various identities which either compete to dominate the state's public culture, or retreat into closed enclaves, this would be seriously detrimental to the interests of the 'indigenous' population both politically and privately. Even so, Miller is left with an account on which 'self-determination is an interest rather than a right' which contends that 'what justice requires is that the interest of a particular immigrant...[be] weighted against the interests of citizens in self-determination' (Miller 2016 71). Wellman provides no such detail regarding *why* he takes our 'experience as members' of the state to be of such paramount importance as a value, and yet he feels entitled to rest a *discretionary right* to exclude on this foundation. We may rightly doubt that he has succeeded in justifying such a right.

Freedom of association and control

Wellman's position seems to be that the state has a discretionary right to exclude because individuals have a right to freedom of association, which is itself grounded in the value of their 'experience as citizens' being conformable to their particular 'preferences' and 'tastes' (Wellman 2016 87). This gives a more determinate character to the problem of how the individual right (or interest) is to be transposed into a group right: why should we think that the state's having a right to free association would make the composition of the polity conformable to the tastes of individuals? We may think that all that was required was for the state to be sufficiently aligned with public opinion that it would tend to admit immigrants its citizens would find congenial. This would leave Wellman in a position rather close to Walzer's; it would be a right of state-based communities to maintain a distinctive character (Walzer 1983 62), which is entrusted to state institutions based on the assumption they constitute a 'union of people and government' (Walzer 1980 212) which may be instantiated by any number of organisational structures depending on the particular history of the state in question. Yet this picture of the state acting on behalf of individuals cannot be characterised as exercising a *positive* freedom choose whom to allow into the state 'club'. It seems

Wellman's main concern cannot be mere 'correspondence' in Kolodny's terms, but our interest in *positive influence*. We care about admitting the right sort of people, because we care about 'what course [our] political community will take', thus 'an essential part of group self-determination is exercising *control* over what the "self" is' (Wellman 2016 85, emphasis added). In other words, we don't just care that those who come into the country happen to correspond to our preferences, we care that we are in *control* of who comes into the country, as this is part of charting our 'course'.

Notice it must be *individual* 'preferences' and 'tastes' that ultimately matter for Wellman. Yet he asserts it is the *group* that is entitled to exercise control over its membership. The claim that *I* have an interest in what course my political community takes, and thus that *I* have an interest in being in control of that course, is very straightforward. But the claim I have an interest in *the group's* being in control of that course is utterly dependent on how the group's decision-making structures function, and my precise relationship to them. We might think the latter claim is analogous to the following one: "as a shareholder in a company, it is in my interest that the company should be able to hire whomsoever it likes". Most likely, this claim strikes us as broadly true. Yet consider the background assumptions that render it true. First, we assume that companies are structured and run primarily for the benefit of their shareholders. Second, we assume that the managers in charge of recruitment are competent enough to achieve that purpose. Do these assumptions hold, mutatis mutandis, for governments?

One important disanalogy between the two cases is that company managers know that shareholders want the same thing, namely profit. In the case of states, however, even if we grant the first assumption - that countries are run for the benefit of their citizens - those citizens might have such diverse preferences when it comes to policy areas such as immigration that it is unlikely an official could be fully competent to ensure everybody benefits. Thus, whether or not it was in one's interest for the "group" to have control, where the "group" is understood as the state, would depend on the probability that the group's decision would correspond to one's own. Yet again, if this it to be more than a matter of sheer good fortune, and indeed a matter of a positive freedom to associate, this probability must be a result of the responsiveness of the group to individual preference. In other words, policy must track preference across a broad range of political decisions. Like Philpott, Wellman has claimed a link between the value of self-

determination and the value of democracy. Yet where for Philpott the value of democracy and of self-determination are both explained by the value of individual autonomy, for Wellman and Altman, the 'irreducibly collective moral right to self-determination' (Altman & Wellman 2009 17) explains the value of democracy. Although, as seen in the previous section, Buchanan is right to point out that democracy cannot serve individual autonomy, the Wellman and Altman argue that democracy serves *collective autonomy.* The question to be answered, then is this: is it possible for democracy to give a group control over policy to such an extent that it tracks individual preferences across a broad range of policy areas, thus justifying a particular policy as an expression of collective autonomy? This question will be taken up in the fourth chapter.

3.3 Associative Ownership

Ryan Pevnick argues that a state's right to collective self-determination is essentially a form of collective ownership. The state is, in Rawls's phrase, a 'scheme of social cooperation', and such a scheme is, in Pevnick's view, a kind of collective labour, which entitles us to group ownership of the social product. He argues that we own state institutions because it is only through our labour, channelled through the activities of 'paying taxes and contributing to collective political decisions' (Pevnick 2011 35), that those institutions come into being. Pevnick contends that we come to own the state through a 'Lockean' mechanism. Although he recognises that Locke's assertion that we are self-owners is problematic, Pevnick believes we can defend an account of property acquisition along broadly Lockean lines that does not depend on this notion. If we create value through our own activity, we make no one else worse off by claiming property in this value, as were it not for our labour the added value would not exist anyway. Pevnick's position is an endorsement of the following argument from Lawrence Becker:

> When the labor is (1) beyond what is required, morally, that one do for others; (2) produces something which would not have existed except for it; and (3) its product is something which others lose nothing by being excluded from; then (4) it is not wrong for producers to exclude others from the possession, use, etc. of the fruits of their labors. It is not so much that the producers deserve the produce of their labors. It is rather that no one else does, and it is not wrong for the laborer to have them.
> (Becker 1977, 41 cited in Pevnick 2011)

Becker and Locke's arguments, however, describe a mechanism for the acquisition of *individual property*. Pevnick believes it can be used to ground a form of *group property* which he calls 'associative ownership' (precisely what kind remains to be seen). If we citizens of the state are also the owners of its institutions, then this can be seen to ground self-determination in both its negative and positive aspects. Property is best understood as a bundle of rights: it is made up of other rights, which vary from case to case and may include the right to use, the right to prevent others from using, the right to destroy, the right to alienate or transfer and the right to use as capital, among others. Yet of these, the right to deny others access to item of property can arguably be thought of as the *core right* (Honoré 1961 113), as it is included in the bundle of right in virtually every instance of a relationship termed "property". It is thus easy to see how it could be used to build a case for negative self-determination: the interference with domestic institutions by a foreign power or foreign agent could, on this view, be regarded as a breach of our

property rights similar to trespass. Property is also a kind of *authority*. It allows an owner to *do things* with that to which she stands in the property relation. Thus, the idea of *collective* ownership may imply a collective decision-making structure about how the article of property is to be managed: it thus can be seen to provide a justification for a right to positive self-determination.

In order to grasp the shape of the property rights bundle Pevnick claims we have, it is helpful to consider the different ways in which it is possible to own things *together*. The first (1) is typified by Locke's claim that the earth was given to us in common by God. In this sense, we own the earth together, insofar as any of us can privatise any part of it as long as we meet certain conditions: that we are not wasteful and that we leave enough and as good for others. For Locke's purposes, it was important to use this language of common ownership to counter Filmer's defence of feudalism, whereby only kings had full title to land, inherited from Adam, and their subjects merely various kinds of usufruct rights. *Common ownership* was Locke's competing interpretation of the Biblical account of the earth having been *given* to Adam: that it was given not to him as an individual, and then to royal successors, but to the entire human race. If we follow Robert Nozick, we might think that on a secularised version of this view, it was not necessary to describe the original common ownership of *everything* as a form of ownership at all; it would be equally adequate to describe it as an absence of ownership, coupled with a mechanism of acquisition that demands respect for the interests of others.

Another way (2) in which we can own things together is *equal private ownership*. It might be said that a group of individuals owns a piece of land, simply because each individual owns 1/n of the land, where n is the number of people in the group. Sometimes, however, we own things together that do not divide up in this way. If a group of individuals own a house, they may say that they own a 1/nth share of the house. Usually, however, this does not mean that there is a 1/nth section of the physical property over which they have a full bundle of rights, but rather (3) that they each have a more limited bundle of rights over the entire house, constrained by the parallel rights of the others. This might be called *joint ownership*[12].

[12] In this taxonomy 1-3 I follow Risse 2012, Chp. 6

Finally, (4) we can own things together through *corporate ownership*. In such cases, the group comprises a corporate entity, which has independent status, and this corporate entity owns the good in question, while no individual has a direct claim of ownership. Depending on the constitution of the corporate entity, this may in the end look similar to (3) – if the company is a general partnership, for example. Or it may look quite different, for example if the owners are shareholders in a limited liability company. In this latter case, the shareholders may have none of the core rights associated with ownership in the item of corporate property, as these are vested in a chief executive or managing director, although they might have other, more peripheral rights, such as an entitlement to a share of capital gains. For example, although a shareholder might technically stand in indirect proprietary relations with respect to a particular car owned by the company, it is not the case that she necessarily has the right to use it, or to prevent others from using it.

Which of these must the form of group ownership Pevnick invokes most closely resemble? (1) can be ruled out straight away. It cannot be that we as citizens hold state institutions in common for our use and consumption, just as peasants had the right to gather firewood on manorial land under the system of commoners' rights. It is unlikely Pevnick would wish to claim that we have the right to privatise bits of state institutions as we see fit. (2) is equally unlikely: we do not each privately own discrete parts of state institutions, like owning a particular room in some Whitehall department – if we did, we should know about it. Thus, of the options under consideration (which admittedly, for all I have said, may not be exhaustive), it looks like (3) and (4) are the only viable candidates.

Both joint ownership and corporate ownership can be described as 'collective ownership', yet both involve different rights, which are usually clearly set down by law. Yet Pevnick's argument necessarily relies upon a Lockean, "state of nature" story about how we can come justifiably to own property, as if he is to establish a justified collective ownership claim in state institutions, he must do it through appeal to form of property that is *explanatorily prior* to those institutions. Citing a legal convention as the justification for an ownership claim cannot provide a reason to respect that claim to someone who is not a participant in that convention. Lockean arguments do, in theory at least, establish a claim that is not dependent on a particular system of law. However, they are not adequate to establish *every* right in the bundle we now associate with

ownership in modern legal systems, what Honoré called "full liberal ownership". As Alan Carter observed, Lockeans are liable to commit an error of reasoning analogous to the one made by proponents of the design argument for the existence of God, scathingly attacked by Hume. Even if we can prove the existence of a designer, Hume noted, it does not follow that the designer is the god described by Christianity. Similarly, even if we can justify some core property right, it does not follow that we get "full liberal ownership" as part of the package (Carter 1989 132). In what follows, it will be argued that Pevnick does indeed make this mistake: the method of property acquisition described is not adequate, even in theory, to justify the *state's* purported right to positive self-determination, because, as with autonomy-based defences of the right to self-determination, it attributes to the *state* rights which may only justifiably be attributed to individuals.

Joint ownership versus corporate ownership

Pevnick presents several cases which are supposed to serve as analogies for the proprietary relationship between citizens and state institutions, and to respond to predicted challenges. One such case, *Kidnapped Lecturers,* is supposed to provide a response to the criticism that taxation cannot ground our collective ownership of institutions, since we pay taxes by force. In this analogy, some academics are captured and forced cooperatively to produce a series of lectures. '[O]ne cannot reasonably doubt', Pevnick observes, that 'that their labor gives them a right to the profits that result from the sale of the lectures' (Pevnick 2011 37). We are not primarily interested in this challenge, however, but the question of whether the case elucidates the *kind* of collective property we are supposed to have. Unhelpfully, Pevnick chooses as his analogy a piece of *intellectual property.* As the lectures are infinitely reproducible, all that seems to matter in this case is how the profits should be distributed. Questions of how *authority* over the property is distributed are thus made to appear less significant, making it difficult to say whether the lectures own their work jointly, or as a corporate entity. This thus requires further investigation.

Pevnick presumably wants to avoid certain conclusions that would appear to follow from *Kidnapped Lecturers*. It may easily be argued, for example, that the lecturer who spent long nights preparing well-researched prose should receive a *larger* share of the royalties than the lecturer who merely proof-read the draft. Yet, with the exception of some hard-nosed libertarians, we do not think that that the benefits we receive from the state should

be in proportion to the amount of tax we pay. Pevnick apparently does not see the monetary value of tax contributions as a reflection of labour value, but, along with voting, as a mark of participation in a collective labour activity, something that is not quantified. But Pevnick cannot have it both ways. If paying taxes is a mere *qualifying mark* of membership, then he is saying no more than "those who qualify as members of the group ought to be able to determine its direction". This would be a simple restatement of the principle of self-determination rather than a defence of it. It would remain open to the following challenge: why shouldn't current non-members have the right to pay taxes, to vote, and thus to gain membership? The effectiveness of the Locke-Becker property argument lies in the idea that labour *adds value*. Yet if – as seems likely - Pevnick wishes to say something like, "group A has *in fact* contributed labour, while group B has not, and thus group A has the right to prevent group B from accessing the product of their labour, because they created this value" - then he must concede his argument rests on a comparison between the *amount* of labour performed by the two groups (some versus none). This is true even if, as Pevnick instructs us, we measure labour by its 'creative and directive' (Pevnick 2011 35) qualities rather than by how difficult it is. If one's having laboured to produce something provides a reason why one should have it and not some other, then having laboured *more* than some other surely must provide a reason why one should have *more of it* than that other[13]. One would be responsible for creating *a greater portion* of its value. In other words, it is difficult to start from an *individualistic* account of property acquisition and finish up with a form of collective property other than *joint property*, which admits of shares of different sizes.

[13] This point is raised by Marx in the *Critique of the Gotha Programme*. Marx observed that under 'bourgeois right' is necessary that labour be repaid in proportion to its duration and intensity. Thus, in the transitory stages of socialism, workers would be given certificates which had an exchange value proportionate to the number of hours worked. It was only at a later stage of development, when labour ceased to be a traded good and instead was recognised as 'the foremost need in life', that the maxim 'from each according to his abilities, to each according to his needs' (Marx 1996 214-5), could be realised. In other words, Marx's claim is that so long as there is a convention of liberal property, it must be regarded as related to how long and how hard the individual works. Could Pevnick claim that he is positing a form of communal property that transcends the liberal paradigm of reward for input? He does make some remarks that suggest this: 'although we cannot rightly understand the state's jurisdiction as a kind of private property [it] is a form of collective property...[in which] the community as a whole determines how important resources are to be used' (Pevnick 2011 44, quoting Waldron 2004). Yet if this is understood as such communal property, he would not be able to ground exclusionary self-determination claims, as these are derived from the convention of 'bourgeois property'. Within some ideal communist paradigm, there is no reason why mere *willingness* to work should not count as sufficient for membership, given desert is no longer proportional to input.

Pevnick presumably believes that by stating we labour *as a group*, we gain rights over the product as a group, and thus the problem of just deserts does not arise. Yet it remains obscure what it is to labour as a group, and why property gained in this way should override individual claims to a greater share in state institutions. Imagine a clear case of cooperative labour: a collective farm. As members of a workers' cooperative, the labourers are entitled to an equal share in the organisation's profits, and they are entitled to it *because* they contribute their labour. Yet the mere fact that someone contributed labour would not entitle her to an equal share automatically. If for example, a stranger secretly laboured on the cooperative farm at night, this would not give her an instant claim to a share. This is because the cooperative is a kind of corporate entity with prior criteria for membership and implicit or explicit rules for the distribution of rights and responsibilities. On Pevnick's account, that which provides a normative justification for property acquisition – labour through taxation and democratic participation - is also the criterion for membership: ownership and membership are the same thing. Thus it looks like we cannot be *corporate owners,* because in theory, at the point of property acquisition, we were not a corporate entity, but a set of individuals. Unless Pevnick is willing to lay down some prior criterion for membership, it seems that if we take the Locke-Becker reasoning to its proper conclusion, we ought to own a stake in state institutions proportionate to the amount of value we each added to them.

Collective property and collective action

Pevnick therefore fails to give an adequate account of how we come to own state institutions *collectively* when we labour as *individuals*. Yet a plausible answer is perhaps available: we may theorise that group property is acquired when it is created through labour in the framework of coordinated, collective action. For example, if we build a house together, according to a division of labour that capitalised on our particular skills, giving due attention to the goals and ideas of the other builders as well as our own, plausibly, we might say that it is irreducibly the group that has built the house. On Michael Bratman's account, collective action occurs (paraphrasing heavily) when some individuals intend that "*we*" do some action, and 'mesh sub-plans' to make sure their individual roles in the action coordinate with one another (see for example Bratman 2014). As described by Pevnick, voting and paying taxes look like remarkably atomised forms of individual action, which do not conform to Bratman's conception of collective action, or any other conception. Anna Stilz, however, has argued that democracy and

paying taxes *can* be viewed as a form of collective action along similar lines as Bratman's, if viewed more broadly as the activity of perpetuating a system of state coercion upholding a particular set of rights and duties, and continuing to shape that system of rights into the future (see Stilz 2009 173-208). Stilz does not invoke this view in the context of a property-based defence of a right to self-determination, but in defence of the view that we have special duties to our fellow citizens, which form the basis of political obligation. Here, however, we must limit ourselves to considering whether it can do the job of fleshing out Pevnick's claim that we gain *property* in state institutions *as a group*.

On Stilz's Bratman-influenced account, what is essential for collective action is that it follow from shared intention. Thus, Stilz anticipates the objection that we seem to have no clear shared goal when we pay taxes and vote. Her response is that in democracy, our intention is that *we* formulate law *together*. We can recognise this as collective activity because of our meshing sub-plans. Following Rousseau, Stilz sees our intention as participants in a democracy not as attempting to assert our own desires and interests, but as adopting a stance which aims to promote the good of society as a whole. That stance requires me to consider your interests in formulating my opinion, and to intend that your interests be taken into account by society at large. In other words, it is precisely Rousseau's General Will that takes on the role of shared intention, and thus we are entitled in her view to regard ourselves as makers or authors of the product of the democratic process - legislation and institutions. In more recent work, Stilz has developed this view into a defence of the value of collective self-determination in the context of decolonisation (Stilz 2015).

It should be noted that there would be a large leap between the claim that we are entitled to *regard* ourselves as authors of state institutions, and the claim that we, as a group, are *objectively* the creators of the value these institutions contain, and thus we have a property right over them which includes the right to prevent non-members from accessing them. It seems clear that in long-established states such as the UK, the greater part of the value of institutions of state is not the result of the creative activity of its extant citizens. Much of the legislation that protects our rights, defines our duties, and establishes the framework in which our institutions operate is hundreds of years old, and it is not the case that anyone today, through democracy, exerted much creative influence over it. While it is probably true that taxpayers are collectively responsible for

sustaining the state's institutions and its ability to defend their rights, this taxpaying activity alone is not sufficiently coordinated to be regarded as collective action. Most of us to not intend, in paying taxes, to play a part in the action of maintaining a system of coercively enforced rights. Many simply wish to avoid punishment, and perhaps judge that paying taxes is probably worthwhile considering the benefits we as individuals receive, as well as those received by others. Stilz writes that, in paying taxes and obeying the law, 'we can say that residents are in fact contributing to the public coercion of one another even though they do not intend the entire joint project' (Stilz 2009 193). In democracy however, we are 'party to a shared intention' in a 'more robust way' (Stilz 2009 194). Thus it seems Stilz concedes that without the activity involved in democratic participation, the case for regarding ourselves as authors of institutions would be weak.

The challenge for Pevnick would therefore be to show that we are responsible, as a *democratic* public, for creating the *value* contained in our institutions. And given we played no part at all in creating the fundamental elements of these institutions, as this took place at an earlier historical period, this may be a difficult thing to do. As a generation of voters, we have been confronted with something that is already valuable - the state - and, through our democratic activity, have perhaps increased its value by some very small fraction of the total. Could Pevnick, through Becker's reasoning, claim this was enough to gain property? It seems evident that we could not claim that others lost nothing through being excluded from the state, as they have lost the chance to access the value that we, the present-day electorate, cannot claim to have created.

Pevnick's answer is to argue that the state is a 'society as a fair system of cooperation over time, from one generation to the next' (Rawls 1991 15, quoted in Pevnick 2011 39), a claim he illustrates through an analogy he calls *Family Farm*. A child is born to parents who own a farm, and '[a]t his birth, his family makes him a full and equal member of the business' (Pevnick 2011 37). Pevnick observes that this child is clearly more entitled to determine how the farm should be run than someone from outside the family. Similarly, the analogy goes, it would be wrong for foreigners to protest that citizens of a state had no particular right to determine how it was run on the grounds that their citizenship was simply an accident of birth. Yet this this argument comes up against Carter's problem: it assumes, illicitly, that our property right contains a right of *bequest*. There is no reason to suppose this right should follow from Locke-Becker arguments about creation through labour. The *Family Farm* analogy thus does not

present good reason for *outsiders* to respect citizens' rights to pass their citizenship on to the next generation. It is clear from the fact different jurisdictions have different conventions for the granting of citizenship at birth – *jus sanguinis* versus *jus soli* – that such rights are constructed *within* a particular legal system; it is quite wrong to suppose that those *outside* of that system have reason to respect them.

But perhaps *Family Farm* is a red herring. On Stilz's reasoning, we arguably already have an explanation for the 'generational' character of collective property: the collective activity that gives rise to collective property is ongoing, it is a process which new generations join piecemeal as they are born and older generations die. The group is thus a temporally extended entity; it is "we" who made our institutions, because "we", in Britain for example, are the British, which includes the Elizabethans and Stuarts as much as the Britons of the present day. But even formulating this position brings out its complications: "the British", in the time of Elizabeth I, did not exist: there were simply the English, the Scots and the Welsh. The United Kingdom of Great Britain was created, in the most direct sense, with the act of union in 1706-7, but it really took shape when Britain began to expand its territory overseas; "Britain" came to represent the imperial metropole in a way that "England" could not. "We" cannot be identified with a process, a collective activity, because parts of that process have broken away and formed new polities, other parts have fused and formed a single polity. If the collective owner of state institutions is identified with a historically extended process, then there is no reason why this process should be identified with the current state. Much of the value of UK institutions was created through the collective activity of groups now regarded as the people of independent states, including the Republic of Ireland, India, the United States of America and many other groups. Thus it is difficult to see why a particular organisation, the state of the contemporary UK, should have the right to claim that it acts on behalf of a historically extended cooperative group of individuals[14].

Thus Pevnick faces a dilemma. If we own state institutions jointly, which would seem to be the default way of understanding how individuals could come to own something *together* from a Lockean individualistic perspective, we face a number of problems. If we each own a part share in state institutions proportional to the amount of value we have created, then it would seem our claims may compete with one another. A change

[14] Fine also notes the difficulties arising from 'ownership-membership claims of former imperial and colonial powers' (Fine 2010 264)

in state policy would amount to a modification of state institutions, which, prima facie, would be a violation of some individual's property right in her share of the state, unless that individual had authorised it. Thus Pevnick would need to provide a mechanism through which it was possible to claim that individuals had authorised the state to manage their property. If we own state institutions as a collective corporate entity, we face a similar problem: what entitles the state to claim it acts on behalf of this body of people, and has not effectively been stolen from the taxpaying and voting masses by a small cadre of politicians?

But there is an even more fundamental problem with the corporate property approach. If the institutions of the UK state are owned by a historically extended corporate entity called "the British", why should we *care* when this entity's rights are violated by incursions from foreigners? When an individual creates some item, we care if others steal that item because a person expended creative energy for no reward, and that strikes us as unfair. When a voluntary association creates something of value cooperatively, we respect its right to it for the same reason: the particular individuals in the association have expended creative energy. But when a corporate entity creates something, it is not clear which *individuals* have been treated unjustly if its rights are violated. Because we cannot say that one generation has the right to bequeath the state to the next, we must draw a strong distinction between the corporate entity and those individuals that currently make it up. Certainly, the current set of people which constitute the corporate entity may be negatively affected by violations of the group right, but those individuals have no *right* not to be so affected. And if we are individualists, we simply do not care about corporations in the same way that we care about people. Corporations are usually entities established through legal convention, whose rights are backed by law. There may be sound utilitarian reasons for upholding a convention that grants corporations moral personality within a particular legal system. But when we have to assume a "state of nature" scenario, and begin from Lockean, individualist assumptions, as in the present case, it is difficult to see how a corporation could be sustained over several generations in a way that outsiders are compelled to respect simply because of supposed property rights.

4. Self-Determination and Democracy

The ideas of democracy and of self-determination are traditionally thought to be closely related. The American Revolution, the historic locus of some of the earliest references to a principle of self-determination in international morality, combined both these imperatives almost without distinction: the idea that individuals should not be bound by any law to which they had not assented was of a piece with the desire to throw off the British yoke. In international legal theory, T.M Franck put forward the influential argument that an emerging norm granting a right to democratic governance had developed and 'self-determination is the historic root from which the democratic entitlement grew' (Franck 1992 52).

In the foregoing sections we have seen three approaches to the justification of a right to self-determination which have come up against a similar problem. Autonomy-based approaches argued that the value of collective self-determination derived from the value of individual autonomy, and that democracy secured the connection between the two, because democracy was the expression of autonomy 'in the political realm'. Yet they could not explain why majority rule should be considered an exercise of individual autonomy when the majority so often overrules the individual's choices. Thus it could not be shown that the importance of individual autonomy gave us strong reason to respect the state's autonomy, or regional autonomy. Wellman and Pevnick faced a similar problem. Instead of autonomy, they attempted to derive the right to self-determination from other, typically individualistic values: freedom of association and property. Had they argued that it was precisely *individual* property, or *individual* freedom to associate from which the group right was derived, they would immediately have faced the same problem as individual autonomy theorists. As states are not voluntary associations, the individual right would be in conflict with the group right: for the property approach, this would mean that the state's disposing of our individual property in certain ways would lack our consent and would therefore be a rights violation; for the freedom of association approach, it would be impossible to say in what way the state's exclusionary policies could be an viewed as an exercise of *individual* freedom of association. Thus both authors attempted to circumvent such difficulties by arguing that these rights were irreducibly collective.

Yet this tactic also met grave difficulties. In the case of Wellman, it meant arguing that states enjoyed freedom of association on the basis of an intuitive argument about our judgements regarding international morality. But even if Wellman's judgements about "freedom of association" in relations between states are correct, it is a step too far to derive an argument for "freedom of association" in the relations between *states and individuals* from such judgements, as the same intuitions may simply not apply. In the case of collective property, this could only be achieved by asserting that property was acquired through the collective action of a corporate entity. Yet there would be no reason to respect the rights of this corporation other than as a means of securing the rights of those individuals that make it up, and as it is historically extended entity, there is no reason to respect its property claims from generation to generation, as it exists outside of any framework of positive law. Thus much of the value contained in state institutions ought to be considered "up for grabs", as it would have existed without the labour of extant individuals, and outsiders would be made worse off if the current individual owners excluded them from it. The authors simply cannot circumnavigate the individualist intuitions implicit in their approaches.

What is manifest in their arguments is a desire to seek a compromise between the individualist approach and the attempted group approach. For Pevnick, to say that we have collective property is to say that 'the community as a whole determines how important resources are to be used. These determinations are made on the basis of the social interest through mechanisms of collective decision-making' (Pevnick 2011 44, quoting Waldron 2004). For Wellman, the state is akin to club in which 'caring about our experience as a club member gives one reason for caring about the rules for admitting new members' (Wellman 2016 83). 'Social interest' and 'caring about our experience' thus replace the more demanding idea of *basic rights* to free association and property (it appears the authors retreat to an interest theory of the functioning of rights). No one would doubt that we have various social interests in state institutions, nor would anyone deny that we care about what it is like to live in our state. They may, however, deny that these interests are capable of grounding a group right to exclude.

Wellman and Altman claim that democracy is an exercise in collective autonomy. 'In a legitimate democratic state' the authors claims, 'the group collectively rules itself through institutions of representative government' (Altman & Wellman 2009 17). Pevnick similarly remarks that 'only democratic institutions respect citizens as part-owners of

those institutions' (Pevnick 2011 31). Yet they do not give a clear indication of what it is for a group collectively to rule itself, or what features of democracy are required properly to respect the state's collective owners. Apparently they have in mind something similar to contemporary democracies. Yet contemporary democracies only partially instantiate the ideal of majority rule. In jurisdictions that are divided into districts which each elect a single representative on the basis of a plurality vote, and in which the legislature is controlled by the party with the most representatives, such a legislature can in many cases only claim to have received the votes of a minority of the population. In the United States, it is arguable that the electoral system is specifically designed *not* to maximise the responsiveness of the state to the wishes of the public. James Madison, a principal architect of American democracy, argued it was necessary to *control the effects* of democratic popular influence – such as 'a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project' - by 'passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country' (Hamilton, Madison & Jay 2003 44) – in other words, it was necessary to create an elected aristocracy in order to secure the interests of landowners, 'to protect the minority of the opulent against the majority'[15], as he phrased it in a more private context. Given the explicitly anti-populist construction of many extant democratic institutions, we may question whether it is enough for the authors simply to talk of "democracy" as an instrument of collective control, without specifying some ideal conception of democracy they favour.

There are potentially two ways in which the idea of democracy could forge the missing link between individual rights and group rights. The first I will refer to in general terms as 'control', the other as 'authorisation'. As discussed briefly in an earlier section, one can be said to have control over a particular domain, in the sense I intend, when one's personal preference tracks outcomes in that domain over a wide range of policy questions. An absolute monarch has absolute control over public policy, as his will directly determines the policy to be adopted. To say that one has control in a certain domain is also to say that one is autonomous within that domain. Authorisation, meanwhile, is the granting of authority to the state to manage one's affairs as a proxy. When an individual grants a legal power of attorney to another, in respect of her

[15] *Notes of the Secret Debates of the Federal Convention of 1787, Taken by the Late Hon Robert Yates*, The Avalon Project, Yale School of Law Lilian Goldman Law Library, available at: http://avalon.law.yale.edu/18th_century/yates.asp, retrieved 20 August 2016.

financial affairs for example, she is granting that other the authority to manage her property in a way that preserves her individual autonomy. Authorisation is thus passing one's control to another. The idea that governments rule by 'the consent of the governed' of course has its most famous articulation in the American Declaration of Independence. In this context, consent is another word for authorisation: the principle asserts that the authority to govern comes from the people, and they retain the power to withdraw it. Yet 'consent' can also characterise a relationship of control: if consent is required not just for one big activity – government – but a wide variety of policy questions, then policy can be said to be under the control of the agent. In what follows I will address each of these concepts in turn, in order to discover whether there is a workable conception of democracy that instantiates either to the extent that would be required to join the dots between individual and group rights, and vindicate the authors' defence of the right to exclude.

Control

Niko Kolodny (2014) has argued that majoritarian systems of democracy are incapable of fulfilling an individual interest in control. He distinguishes 3 ways in which one's interest in *influence* can be satisfied, each of which comes in one of two forms, absolute and relative:

	Relative	Absolute
Contributory Influence	One's action (eg. voting), pushes the outcome in a certain direction, although it might not change the overall outcome, and has no more chance of affecting the outcome than anyone else's.	+ the outcome has far-reaching effects
Decisive	One's action is such that had it been different, the outcome would have been different.	See above
Control	One's action would have been decisive over a wide range of relevant conditions (eg. when others vote differently).	See above

The three forms of influence thus constitute a hierarchy, where our interest in influence is satisfied to the greatest extent when we have control, and to the least extent when we

have mere contributory influence. One's interest in *absolute* influence can be satisfied to a greater extent when one becomes more powerful. A dictator who enlarged his empire would advance his interest in absolute control. As Kolodny forcefully argues, however, it does not seem that voting can advance our interest in decisive influence or control.

To illustrate, imagine a case where there are three voters and two options for them to choose from:

α	1	2	**β**	1	2	**γ**	1	2	**δ**	1	2
A	x		A	x		A	x		A		x
B	x		B	x		B		x	B		x
C	x		C		x	C		x	C		x
ε	1	2	**ζ**	1	2	**η**	1	2	**θ**	1	2
A		x	A		x	A		x	A	x	
B		x	B	x		B	x		B		x
C	x		C	x		C		x	C	x	

Assume in this scheme that a majority vote is needed for either 2 or 1 to be adopted, everyone must vote for one option, and that the *ex ante* probability that a given individual will vote for a given option is at chance. In order for a voter to be decisive, it must be the case that had she voted differently, the outcome would have been different. In other words, a voter is decisive when, without her vote, the result would be tied. On this schema, this occurs in 4/8 cases for each voter: it is as likely as not that a given voter will be decisive. If more voters were introduced, that probability would sharply decrease, as more voters make a precise tie less probable. Having control is out of the question: if A chooses 1, there are as many alternate possibilities on which A choses 1 and 1 does not win, as there are possibilities in which A choses 1 and 1 does win, as we have stipulated there are an even number of voters equally likely to vote for one of two options. In a less artificial example, the numbers would differ, but it would clearly remain the case that the choices of many or most individuals would not track outcomes across possible scenarios in which the rest of the electorate voted differently.

Wellman stipulates that democracy serves the value of *collective control*, rather than individual control. Similarly, Pevnick refers to institutions for 'collective decision-making'. These concepts stands in need of clarification. Wellman apparently wants this notion to be understood in a very loose way; he does not believe democratic institutions

to be *required* for a group to be self-determining[16] (Altman & Wellman 2009 25-31). Yet the very fact they argue that collective control can serve the values of freedom of association and collective property goes some way towards determining requirements for collective control. In the previous chapter it was concluded that since the state's right to freedom of association was said to be justified through the idea that we 'care about our experience' as group members, the state's right to exclude must be dependent on its capacity to achieve a favourable outcome in terms of this experience. Pevnick's suggestive remark that collective control of property means the state manages our property according to 'social interest' presumably has similar implications.

These values of 'experience' and 'interest' are individual values, not a group values. Wellman does not argue that it is an intrinsic good that the group have a good experience, in the same way that Walzer claims (although not in these terms) that it is an intrinsic good that communities preserve a certain character. On an anti-individualist account, we might think, for example, that the *state's* interests were explanatorily prior, that it was important to us that our state had control because our respect for it was such that we cared about its ability to advance its interests, even if they ran counter to our own immediate interests. Neither author, however, would want to go that far; it is clear that each thinks the value of having a good experience as members, or achieving various social interests, is valuable *to each individual member*. Thus the extent to which we value the state's right to exclude is proportional to the extent to which the state is able to ensure each member achieves this positive value. As intimated in the foregoing chapter, it would seem mere 'correspondence' would not be enough for such a justification of the right to exclude to be characterised as an exercise of self-determination, unless the state was *responsive* to the interests of individuals. If this responsiveness requires *individual* control, then as Kolodny demonstrates, this would be impossible under a majoritarian voting procedure.

---

[16] The authors argue that people can exercise their self-determination in choosing non-democratic arrangements, by electing a monarch, for example, so long as there is a constitutional provision to reverse such arrangements by referendum, so that the choice would not involuntarily bind future citizens who did not participate in the original choice. Yet how would the people indicate its desire for a referendum? Presumably, the constitution would have to provide for referenda to be held on a regular basis – say, every 5 years – in order to ensure that the "non-democratic" arrangement still had popular consent. In other words, the ruler would effectively be an elected president, given that he was obliged to renew his mandate to govern at regular intervals. Thus the claim appears to be self-defeating.

Yet it is possible that control is too demanding conception of the degree of responsiveness that would be required. Arguably, all that is required is that institutions are so set up that state policy tracks the "pro" or "anti" attitudes of individuals in a reliable way, without requiring that any particular policy outcome is preferred by any particular individual. If, however, this notion is given a more formal definition, difficulties again emerge. Kenneth Arrow (1951) proved that a set of axioms defining necessary conditions for a preference aggregation function to instantiate collective positive influence could not be satisfied simultaneously. While I will not innumerate Arrow's axioms here, if we accept the premise that a preference aggregation function cannot fail to instantiate one of these conditions and its output count as the group preference ordering ('the social interest') – and this does seem plausible - then no voting procedure can provide "collective control".

Perhaps however, responsiveness can be achieved in ways other than the formal properties of voting systems. Perhaps *representation* can serve as the means for the transmission of influence (despite Madison's efforts to ensure it did not). Philip Pettit (2012) distinguishes two forms of representative democracy, indicative representation, and responsive representation. The first functions by selecting proxies, in such a way that they serve as a model for the whole society; the second functions by selecting 'deputies' that are supposed to relay the preferences of the people they represent, or aim at acting in their interest (acting as 'trustees'). Pettit contends that despite formal problems associated with direct democracy, including the kind highlighted by Arrow, at least one of these forms of representative democracy can provide citizens with 'an equally accessible form of unconditioned and efficacious influence that imposes an equally acceptable direction on the state' (Pettit 2012 187). Pettit notes that it looks like there is only one way in which democracy can circumvent Arrow's impossibility result and his own related 'deliberative dilemma': some form of deliberative democracy, in which the participants do not merely provide inputs in the form of preference orderings, but are able to reflect on their preferences in light of the stated preferences and intentions of others, and in the wake of feedback from votes that have been carried out and have led to irrational results (see also Pettit & List 2011). He further argues that in contemporary democratic states, a plenary assembly of all citizens would simply be too large for voters to engage in effective reflection and deliberation. Representation is therefore a necessary device to reduce the size of the deliberative assembly.

For the purposes of the present discussion, it looks like an indicative assembly cannot serve the function of fulfilling society's interest in group freedom of association and collective property. For, as Pettit remarks, the relationship between the preferences of the group at large, and the result of the assembly's deliberation is not a causal one, but an evidential one. The outcome is authoritative (if it is authoritative), because it provides evidence that it is likely the outcome would be preferred by the group as a whole. Yet because there is no causal link, it cannot be said that the outcome is a result of *positive influence*. The indicative assembly is just one possible means for technocrats to garner evidence about what the people want – a glorified focus group. A benevolent despot who was especially good at assessing the needs of his people would, we may stipulate, be able to achieve just as much 'correspondence' without consulting such an assembly. Yet no-one could claim citizens had positive influence in this case, as the decision is still ultimately the prerogative of the despot. The same could be said of the proxy representatives.

The responsive assembly therefore offers our best chance for genuine positive influence. But here, problems of the kind Kolodny raised resurface. For in the election of deputies, those who vote for another candidate, and find themselves in the minority, have had no positive influence. Pettit wishes to claim that causal influence lies in the fact deputies are beholden to the electorate for their re-election, and must therefore attempt to respond to their concerns. But arguably, as far as someone in the minority concerned, the deputy is here again no different from a benevolent despot: the deputy's will is the only thing that counts in the final analysis, and the electorate's preferences have no direct power to influence it. Thus it is a contingent matter whether granting a representative democracy the right to exclude will lead individuals' 'experience as citizens' to be conformable to their preferences, or whether they achieve their particular social interests. This provides a very weak argument for exclusion, which in essence can be summarised as claiming that the state has the right to exclude because state officials have good reason to believe their citizens will prefer a certain exclusionary policy. Without introducing some "realist" claim, that states only have duties to serve the interests of their citizens, the value of preference satisfaction served by exclusion cannot be deemed sufficiently important to ground the state's right to exclude.

It should be noted I do not wish to claim *Pettit's* argument fails. Pettit's aim is to describe a form of democracy capable of rendering the acts of the state *non-dominating* with

respect to its citizens. This is a much less demanding aim than finding a conception of democracy capable of instantiating some *positive popular will*, of the kind implicit in the idea of positive self-determination. Pettit was indeed concerned expressly to deny that any search for this latter vision of democracy could bear fruit. Yet it looks like it is precisely this conception of democracy that would be required to render the justification of the right to exclude by means of the right to collective self-determination comprehensible.

In recent work, Sarah Song (forthcoming) argues definitively that it is self-determination's status as a principle of *democratic control* that generates a right to exclude. She sets out the argument as follows:

1. A people/demos has a right to self-determination.

2. The right to self-determination includes the right to control admission and membership.

3. The demos should be bounded by the territorial boundaries of the state.

4. Citizens of a territorial state, in virtue of their role as members of the (territorially defined) demos, have the right to control admission and membership.

For Song, the right to self-determination *just is* a right to a minimal form of democratic governance, and it is justified for the same reason that democracy has widely been said to be justified: because it is the best way of showing equal respect for individuals (see Kolodny 2014**b**, Christiano 2008). She then treats the question of the right to exclude as an extension of the "boundary problem" in democratic theory: she argues, for various instrumental reasons, that the actual boundary of the state is the best way of determining who should belong to the demos. Her reasons include the idea that states define the rights that create the background conditions of democracy, and unless we all belong to one state, we are likely to disagree about how our democracy should be run. She argues further that the state is the main site of solidarity, meaning one has a greater stake in the successful running of the institutions of one's own state, and that it is expedient that political representatives are accountable to a particularly pre-determined group of individuals. The argument scores over Pevnick and Wellman's accounts in an important respect – it provides an account of why the individuals who live within a state should

have the right to control a particular state boundary rather than just membership of their group.

Yet it also shares with them, I believe, a significant oversight. It is *states* that enact exclusionary policies, while it is the *demos* that has the right to *control* who should become part of the democratic community. If a demos has an interest in controlling its membership, it must surely be because of the effect this will have on the wellbeing of its individual members. If, however, the value of democracy is simply that it represents our moral equality, as Song maintains, then institutions can be "democratic" without affording us "control" over policy – this is precisely Kolodny's point. One problem, then, is it is unclear why "self-determination" as she understands it - the right to live under institutions that show due respect for our moral equality - should give rise to a right to control membership, as there is no *a priori* connection between who is allowed to be a member of the group, and whether institutions will be capable of representing them as equals. More importantly, however, as with Wellman and Pevnick, Song does not explain why whatever she understands by "democratic control" can be expected to generate outcomes which will advance our *particular interests*.

Authorisation

Perhaps however the relationship between the individual and the state, capable of conferring the rights of the individual upon the state, is one of authorisation. Various authors have in the past argued that democracy can serve this function. The Enlightenment theorists Locke, Hobbes, and Rousseau all produced arguments to the effect that majority rule is the natural decision procedure in any political unit, membership of a political unit implies acceptance of majority rule, and thus acceptance of its outcomes. Hobbes argued that 'if the lesser number pronounce (for example) in the Affirmative, and the greater in the Negative, there will be Negatives more than enough to destroy the Affirmatives' (Hobbes 1996 114) and thus the negative will win out, like a resultant force. Locke argued that when a group of people have 'made a community', since 'it being necessary for that which is one body to move one way', it ought necessarily to move 'whither the greater force carries it'. (Locke 1988 331). Rousseau claimed that in voting, citizens were being asked to give their opinion on the content of the general will, thus 'the tally of votes yields the declaration of the general will' (Rousseau 1997 124). Yet all these theorists argue that the very joining of a political community, or being part of a political community, constitutes the act which authorises

the *majority* to act on one's behalf. Thus for all three, majority rule must be founded on initial *unanimity*. For Hobbes, individuals become '*authors'* of the state, meaning everything the state does becomes an act they must avow as their own. Rousseau similarly claims that the general will *is* the will of each individual, and that, paradoxically, if the state followed my private will as opposed to the general will, I would not be free.

If such claims can be justified, this would clearly do the job of connecting individual rights to the group right. Hobbes' assertion that the state acts 'by Commission, or Licence from him whose right it is' (Hobbes 1996 122), is precisely the claim that the state's rights are derived from a *transference* of individual rights. An act of exclusion on the part of the state could thus count as an exercise of my individual freedom of association, or as a justified defence of my property rights. These ideas have, however, somewhat fallen out of favour since being formulated by Enlightenment political philosophers. As already discussed, if the state is a voluntary association, then we can certainly give sense to the idea that its acts are acts of its individual members. A useful analogy is the convention of cabinet collective responsibility in the Westminster system of government: a cabinet member may not disavow any determination of the cabinet, because she has the right to resign from any cabinet with whose policy positions she cannot agree. Yet the idea that we tacitly consent to the authority of the state is widely considered problematic, precisely because we have nothing analogous to this right to resign: we can tear up our identity documents and live as a stateless person in another country, but the associated costs are so high that not doing so cannot be considered a voluntary position.

It seems, however, that Pevnick in particular *does* consider voluntaristic relationships to be central to his argument. He claims that irregular immigration can be condemned because 'illegal immigrants…took their place in the community without the consent of the citizenry' (Pevnick 2011 164). Given that he acknowledges states are not voluntary associations, why should we think that particular pieces of immigration policy express popular consent? Some have argued that democratic participation *itself* can count as an act of authorisation. On this type of view, merely taking part in a democratic procedure can serve to express one's consent for the outcome, even if one ends up on the losing side. This seems prima facie implausible, as it appears one can vote without intending

any such consent, and one cannot consent unintentionally[17]. Yet perhaps something like Stilz's claim, discussed in the previous chapter, can furnish the relevant intention. We intend to *legislate together*, she claims, and thus it would be implicit that we intend the outcome of the collective action even if it goes against our preferences.

But this argument requires us to have a particular complex attitude towards the state: it requires us to view elections as a cooperative activity aimed at producing legislation together. I would argue that this is psychologically unrealistic. Elections are typically characterised by bitter factional disputes, and are better understood through the rubric of *conflict*, rather than cooperation. Just as war can be regarded as the continuation of politics by other means, politics is war with its teeth removed. Note that given it is *actual psychological attitudes* that are key here, it is not enough to argue that on some ideal conception of democracy, for example some version of deliberative democracy, this combative aspect would disappear. As an ideal conception of deliberative democracy has never been instantiated, we can present no evidence for the claim.

The ideal of deliberative democracy may be characterised (among other ways) as reaching a decision through 'an open and uncoerced discussion of the issue at stake with the aim of arriving at an agreed judgement ... a process whereby initial preferences are transformed to take account of the views of others' (Miller 2000 9). This characterisation really does make democracy sound like a cooperative activity. But if we consider how extant deliberative assemblies operate, the story is quite different: agreement is typically reached through horse-trading among the pet policies of various factions, rather than rational reflection on the content of the 'general will'. The distribution of interests creates arbitrary bargaining advantages, and in practice each faction is likely to be focused on achieving its own preferred outcome, which it may seek to accomplish through deception, intimidation or institutional manipulation. As Miller writes, 'for deliberative democracy to work well', even in theory, 'people must think it more important that the decision reached be a genuinely democratic one than that it be one they themselves favour' (Miller 2000 22). It may be that people would adopt such attitudes if a democratic system that better instantiated the deliberative ideal were introduced, but it seems more likely that the psychological attitudes expressed in contemporary democratic processes would persist.

---

[17] At least, plausibly, one cannot consent unintentionally. Both A.John Simmons (1986 81), and Joel Feinberg (1994 167), have termed the idea an 'absurdity'.

We should note that this idea of authorisation as a transmission of rights is problematic even if an appropriate mechanism could be found. Rights are not things we own, they are relationships between individuals. Simply because I have a right to freedom of association, it does not follow that I have a right to pass the right to choose with whom I associate to another. Property rights typically *can* be transferred to another, but as we saw in the previous chapter, it is not necessarily the case that the minimal form of property that could perhaps be acquired in a "state of nature" can be transferred. It would have to be the case that the reasons that justify my having some right still apply if I transfer my right to another. If we suppose that my right to freedom of association is grounded not simply in the value the associations of which I am a member being favourable for me, but in the value of being able actively to direct my own life, then on "transferring" my right to the state, I would lose this value. There would thus be no reason to grant that I possess the power to transfer my right at all. That said, the same does not appear to be true for the property conception: if we jointly own some piece of property, it could be expedient for us to appoint a manager for that property, so long as we retain most of the benefits of ownership.

It appears then that neither the ideal of control, nor of authorisation, can explain why democracy should be capable of conferring the rights of individuals upon states. It is important here to draw a distinction between democracy as a set of institutions, and democracy as a regulative ideal. Similarly, it is important to draw a distinction between the state's *right* to exclude, on the basis of a right to self-determination which may involve some ideal conception of democracy, and the exclusionary *policies* of extant states. Although an ideal conception of deliberative democracy could go some way towards painting a picture on which the state's right to exclude could be regarded as an exercise of individual rights, we must bear in mind what these theorists are trying to *do* with their justificatory arguments. They are trying to argue that *actual states* possess the right to exclude, admittedly with some limitations in comparison to their current powers. Thus although certain groups may possess the *right* to self-determination, and although the right to exclude might come as part of a package with a particular conception of democratic self-determination, it is a mistake immediately to leap towards attributing a right to exclude to contemporary states, as that right could only legitimately be realised through realising the proper conception of democratic self-determination.

5. Conclusion

J.S Mill argued that the 'sole evidence it is possible to produce that anything is desirable, is that people do actually desire it' (Mill 1998 81). If the UK's vote to leave the European Union, and the tenor of the political debate in the USA at time of writing show us anything, it is that 'control' over borders and immigration policy is considered to be an extremely important value in contemporary public life. Thus we should be careful not entirely to disparage the value of collective control through liberal democratic institutions. That said, we should also be careful to assess whether the value people seek is accurately characterised in public discourse.

It can be of value to me, as a subject of a dictatorship, for that dictator to have control. So long as I identify with the dictator to a sufficient extent, or hold him in sufficiently high regard, I will believe it is valuable that his decision is decisive over a wide variety of policy questions. Moreover, it may be that the dictator's having control is *intrinsically* valuable to me: I may not value it simply because I trust the him to act in my best interest, but because I hold him in such *high esteem* that I believe he ought to have control even if he is likely to make mistakes. Thus it is quite possible for individuals to value state institutions advancing their interest in control, without that implying the individual is a member of a collective which exercises control through state institutions.

Simply from the fact we tend to place a great deal of value in the institutions of our liberal democratic state being able to exercise control over who may enter the state's territory, therefore, it does not follow that it is valuable as an exercise of our collective control, even if we believe this is the reason we value it. As nationalist and communitarian authors stress, members of particular states typically have a deep sense of affinity with the institutions of their state, and, on a sociological level, it is probable that it is this trust that explains why we value the state's ability to exclude, rather than any *objective* link between our individual rights and those of the state. Yet the idea that it is intrinsically valuable to citizens that their states be able to exercise control over borders threatens to justify *too much* from a liberal individualist perspective: it would mean that individual rights not easily be weighed in the balance in the face of intrinsically collective values. Thus liberal individualist authors who assert the value of *collective control* in order to justify exclusion need to show that this value consists in something more than mere *subjective affinity*.

This is the position Pevnick and Wellman find themselves. Both offer defences of self-determination on the basis of an intrinsically collective value, yet this position is in tension with their background moral approach. Both believe that morality is fundamentally rights-based, and both think that rights are explained by the respect owed to individual persons. Wellman is well aware that there is a gap to be closed between his attribution of a group right, and the individual rights on which it must ultimately be based. But, I have argued, he is unable to close that gap. Pevnick, meanwhile asserts that the same reasons that justify an *individual's* acquisition of property rights should also apply to a *collective* acquisition of property. He is, however, unable to force individualistic intuitions about property acquisition to fit the group case.

Throughout this thesis I have referred to the target of my critique as "liberal individualists", and I do believe the failure of the arguments with which I have chiefly been concerned represents a general problem for authors with certain common commitments. I view my critique of Pevnick and Wellman as "case studies", which can be seen as implying a critique of a certain "liberal individualist" approach. I concede, however, that I may only have provided *evidence* for a more general claim rather than having demonstrated anything definitively. "Liberal individualism" has served as a placeholder term for subject of my criticism, and it falls to me now to make this notion more precise. In the second chapter I referred to Raz's definition of "moral individualism" as the view that there were no intrinsic collective goods. Theorist who attribute *irreducible* rights to groups cannot be moral individualists, by definition. Thus Pevnick and Wellman would not claim to be moral individualists in Raz's sense. Yet I contend that in essence, they do have this commitment, and it is this which leads their accounts to imply a right to positive self-determination, conceived in a way that would require the group to have a particularly demanding form of "collective control" – an institutional structure that makes state policy positively sensitive to individual preferences.

Wellman specifically repudiates "associativism" in political theory, the name he gives to the tendency of liberal nationalists and communitarians to derive rights and duties from 'mere' social relations, such as common nationality. The particular objection is that social relations *as bare facts* cannot be morally salient, but must rather be analysed either in terms of voluntary commitments or 'more fundamental moral principle[s]' (Wellman 2013 31) – which is to say individual *claims,* such the claim to have one's autonomy

respected or individual basic rights. Pevnick also expresses antipathy for this tendency, opposing cultural nationalist arguments on the grounds that 'it is not obvious that the mere existence of cultural similarity' could justify a right to exclude, but rather 'any persuasive explanation is going to hinge on the historical role members of the culture in question have had in constructing the institutions to which access is at stake' (Pevnick 2011 135). Again, he denies the *mere existence* of social relations can generate rights, and stresses the *entitlements* of individual members of the culture.

What precisely is the problem with the idea that social relations can generate rights? Views that Wellman would call "associative" function through the observation that finding ourselves in particular social relations creates special *interests*. As members of a family, we are interested in the wellbeing of our relatives just as we are interested in our own wellbeing. If we are fans of a football team, it becomes important to us that the team does well. If we believe, with Raz, that such powerful interests are all that rights ultimately consist in, then it is completely unmysterious why associative relations should generate rights. What Wellman (and apparently Pevnick) deny when they reject 'associativism', is just the interest theory of rights. Wellman explicitly rejects the interest theory; on his preferred 'dominion theory', rights essentially give their bearers *control* over others with respect to their relations with the right-bearer (Wellman 1999). It is reasonable to conclude Pevnick takes a similar view.

Herein lies the source of the problem. For if we believe that rights are interests, then the question of which *agency* has the authority to uphold our rights is essentially irrelevant. If, for example, the interest individuals have in their community preserving its unique character is of sufficient importance that they have a claim-right that this character be preserved, then it is obvious that the state may act to preserve that right, because *any agency* that was suitably positioned to uphold the right would have not just a permission, but a duty, to do so. Yet if we believe that all rights are essentially individual *powers over claims* – forms of control – then the exercise of rights must be the exercise of individual *agency.* This feature of Wellman and Pevnick's view is what gives rise to a *discretionary* right to exclude. On Wellman's account, we have a claim not to associate with people, and a power to waive that claim. On Pevnick's, we have a claim of exclusive access to our property, and a power to consent to others accessing it if we so choose. Deciding whom to allow into our rightful domain is thus entirely up to us. The problem, as we have seen, is that if the power to waive our claims is ultimately vested in individuals, we

need to provide a story about why the state is the agency which is allowed to exercise the right to exclude. This is why their accounts seemed to require democracy to act as a kind of conduit of individual agency. But, as I have argued, democracy is not capable of fulfilling that role.

From this it follows that if one accepts 'humanism', one cannot consistently assert that collectives have irreducible rights while denying 'associativism'. When, for example, Wellman claims that the state has a right to freedom of association, what he is saying is that the state has the power to waive its claim over a domain of free association. But the state is not a person, so this claim cannot rest on anything like the ultimate value of its autonomy. Thus the right must be derivable from the rights of individuals. The claim that a group right is *irreducible*, however, is precisely the claim that it cannot be analysed in terms of individual rights. If, on the other hand, we accept an interest theory of the functioning of rights, we can easily accept the idea of irreducible group rights. We may argue, to use Raz and Margalit's example, that it is in the interest of individuals that a group have the right to enjoy an irreducibly collective value, such as the value of group dignity. Our associative relations – the particular way in which we have been socialised – are that which make it intrinsically valuable to us that the group enjoy dignity.

We can finally conclude, then that if there is to be a successful defence of a right to collective self-determination that could justify a discretionary right to exclude, it must involve the *wholesale* rejection of moral individualism (or the abandonment of 'humanism', although I take it this is an even more costly way out). Our 'liberal individualist' target can thus be characterised as those theorists who endorse moral individualism, or, like Pevnick and Wellman, deny moral individualism although they are theoretically prohibited from doing so. Without rejecting moral individualism, one would not be able to assert an intrinsically (rather than an instrumentally) justified right to self-determination, and thus one would not be able to assert a *discretionary* right to exclude. If one offered an instrumental justification for the right to self-determination, then one would have to show that immigration was a threat not just to self-determination, but to the underlying values that self-determination serves. And if one is not willing to accept the existence of irreducibly collective values, then it can always be the case that the value of entry to the individual migrant could outweigh the value of self-determination to the individual SD-group member.

As we have seen, the individualist theorists' arguments have been liable to collapse into something similar to either communitarianism or liberal nationalism. This precarity provides evidence for the thesis that moral individualism is incompatible with a defence of a right to collective self-determination that includes the right to exclude. If Wellman can demonstrate no objective link between the individual's freedom of association and the state's, then he would have to make do with a *subjective link*. This would essentially be a communitarian position: it would be to say that citizens have been socialised to feel as if the state acts for them, and thus they regard the state's rights as important in the same way as their own. Pevnick, meanwhile, required an "associative" explanation for the group right to property in state institutions. Asserting that we acquired property as a corporate entity, involves asserting first that we *are* a corporate entity, in a way that is explanatorily prior to the act of acquisition itself. Thus we would need a prior reason to regard the group as constituting such an entity, which would most easily be achieved through an ascriptive definition of the group, through certain criteria for nationhood, for example. Ernest Renan famously argued the nation was a 'daily referendum'[18] – this idea is precisely what Pevnick would need as a substitute for the voluntaristic element in his story.

Why then do Pevnick and Wellman fail to recognise that the denial of associativism, the assertion of irreducible collective rights, and 'humanism' (in Raz's sense) form an inconsistent set of propositions? One explanation might be an equivocatory understanding of the term 'irreducible'. If a group of friends each contribute £100,000 to purchase a house, they have an "irreducible" collective right to it, insofar as there are several of them and only one house, so they must decide as a group how authority over it is to be distributed. Yet if those friends each contribute £3 to purchase a pizza, their right is collective to the same extent, but they quickly divide the pizza up and privately consume their own slice. In other words, being *practically unable* to reduce a collective property claim to individual claims, is not the same as there being no principled sense in which the group right can be regarded as an amalgamation of individual rights. Pevnick's position implies regarding our property right in state institutions in this first sense. Wellman's stance, similarly, it not so much that the state's right to freedom of association is irreducible, but that he is *unable* to find a suitable reductive explanation. He simply proceeds as though there is one, although no satisfactory story is given. Even

[18] '*un plébiscite de tous les jours*', Renan 1882 27

if it is true that we owe respect to the individuals who are 'able and willing to perform the requite political functions' of maintaining a state that adequately protects rights, and thus we must forbear from interfering with the state in certain ways, to grant the state a right *to freedom of association* is to do something much more than merely show respect for individuals. It is completely obscure why one should entail the other. Indeed, it is not clear this respect can ground *any* of the group rights commonly associated with collective self-determination or sovereignty. Yet the fact Wellman even attempts to make such a link demonstrates the extent to which he is constrained by his individualist stance.

Where does this leave theorists who wish to justify a right to exclude by means of a right to collective self-determination? If they embrace a communitarian solution, they must also embrace a strong form of moral particularism. For most liberal theorists, the abandonment of moral universalism would be too great a cost. "Liberal nationalism" can be viewed as a less radical form of particularism, more acceptable to the contemporary mainstream. Yet in watering down the "particularity" of the value of exclusion, one also dilutes the strength of the group's claim to control borders. On Walzer's account, communities of character are an intrinsically valuable collective good, thus the weight of reasons on the side of the group's claim is essentially immeasurable from the perspective of an outsider. On David Miller's account, meanwhile, culture is an *instrumental* collective value: it is valuable because it is a source of identity, because it creates the conditions for stable political relations, and so on. That is not to say that any culture will do just as well – the value of culture certainly has a particularistic component – but Miller accepts it does need to be weighed against the interests of immigrants on a case by case basis to determine whether exclusion is justified. Because I have said nothing to detract from such arguments, it remains an open question whether states ought to pursue the policy of open borders. Yet I hope I have cast doubt on the idea that actual contemporary states ought to be able to pick and choose whether and which migrants they admit, on the basis of a conception of "collective autonomy" that is compatible with a liberal individualist perspective.

Bibliography

Alexander Hamilton, James Madison and John Jay. 2003. *The Federalist, with Letters of Brutus.* Cambridge: CUP.

Altman, Andrew, and Christopher Heath Wellman. 2009. *A Liberal Theory of International Justice.* New York: OUP.

Arrow, Kenneth. 1951. *Social Choice and Individual Values.* New York: Wiley.

Becker, Lawrence. 1977. *Property Rights.* Routledge & Kegan Paul.

Berlin, Isiah. 2002. "Two Concepts of Liberty." In *Liberty: Incorporating 'Four Essays on Liberty'*, by Isiah Berlin and Henry Hardy. Oxford: OUP.

Blake, Michael. 2013. "Immigration, Jurisdiction, and Exclusion." *Philosophy & Public Affairs* 41 (2): 103-30.

—. 2014. "The Right to Exclude." *Critical Review of International Social and Political Philosophy* 17 (5): 521-537.

Bratman, Michael. 2014. *Shared Agency: A Planning Theory of Acting Together.* New York: OUP.

Buchanan, Allen. 1998. "Democracy and Secession." In *National Self-Determination and Secession*, by Margaret Moore, 14-30. Oxford: OUP.

—. 2015. "Self-Determination, Revolution and Intervention." *Ethics* 126 (2): 447-73.

—. 1997. "Theories of Secession." *Philosophy and Public Affairs* 26 (1): 31-61.

Buchanan, Allen, and Robert O. Keohane. 2011. "Precommitment Regimes for Intervention: Supplementing the Security Council." *Ethics & International Affairs* 25 (1): 41-63.

Carens, Joseph. 1987. "Aliens and Citizens: The Case for Open Borders." *The Review of Politics* 49 (2): 251-73.

—. 2013. *The Ethics of Immigration.* New York: OUP.

Carter, Alan. 1989. *The Philosophical Foundations of Property Rights.* Hemel Hempstead: Harvester Wheatsheaf.

Cassese, Antonio. 1995. *Self-Determination of Peoples: A Legal Reappraisal.* Cambridge: CUP.

Christiano, Thomas. 2008. *The Constitution of Equality.* New York: OUP.

Crawford, James R. 2007. *The Creation of the State in International Law.* Oxford: OUP.

Dahl, Robert. 1989. *Democracy and its Critics.* New Haven, CT: Yale University Press.

Feinberg, Joel. 1994. *Freedom and Fulfillment: Philosophical Essays.* Princeton: Princeton University Press.

Fine, Sarah. 2013. "The Ethics of Immigration: Self-Determination and the Right to Exclude." *Philosophy Compass* 8 (3): 254–268.

Franck, Thomas M. 1992. "The Emerging Right to Democratic Governance." *The American Journal of International Law Vol. 86, No. 1* 46-91.

Grimm, Dieter. 2015. *Sovereignty: The Origin and Future of a Political and Legal Concept.* Translated by Belinda Cooper. New York: Columbia University Press.

Hannum, Hurst. 1996. *Autonomy, Sovereignty and Self-Determination.* Philadelphia: Pennsylvania University Press.

Hobbes, Thomas. 1996. *Hobbes: Leviathan: Revised Student Edition.* Edited by Richard Tuck. Cambridge: CUP.

Honoré, A.M. 1961. "Ownership." In *Oxford Essays in Jurisprudence*, edited by A.G. Guest. Oxford: OUP.

Jackson, Robert. 1990. *Quasi-States: Sovereignty, International Realations, and the Third World.* New York: CUP.

Kant, Immanuel. 1991. *Kant: Political Writings.* Edited by H.S. Reiss. Cambridge: CUP.

Kates, Michael, and Ryan Pevnick. 2014. "Immigration, Jurisdiction and History." *Philosophy and Public Affairs* 42 (2): 179-194.

Kolodny, Niko. 2014. "Rule Over None I: What Justifies Democracy?" *Philosophy and Public Affairs* 42 (3): 195-229.

—. 2014b. "Rule Over None II: Social Equality and the Justification of Democracy." *Philosophy and Public Affairs* 42 (4): 287–336.

List, Christian, and Philip Pettit. 2011. *Group Agency: The Possibility, Design, and Status of Corporate Agents.* New York: OUP.

Margalit, Avishai, and Joseph Raz. 1990. "National Self-Determination." *The Journal of Philosophy* 87 (9): 439-61.

Marx, Karl. 1996. *Marx: Later Political Writings.* Edited by T. Carver. Cambridge: CUP.

Mearsheimer, John J. 2001. *The Tragedy of Great Power Politics.* New York: W.W. Norton & Company.

Mill, J.S. 2001. *On Liberty.* Kitchener, Ontario: Batoche Books: Batoche Books.

—. 1998. *Utilitarianism.* Oxford Philosophical Texts. Edited by Roger Crisp. Oxford: OUP.

Miller, David. 2000. *Citizenship and National Identity.* Cambridge: Polity Press.

—. 1997. *On Nationality.* Oxford: OUP.

—. 2016. *Strangers in Our Midst.* Cambridge, Mass.: Harvard University Press.

Pettit, Philip. 2012. *On the People's Terms: A Republican Theory and Model of Democracy.* New York: CUP.

Pevnick, Ryan. 2011. *Immigration and the Constraints of Justice: Between Open Borders and Absolute Sovereignty.* New York: CUP.

Philpott, Daniel. 1995. "In Defense of Self-Determination." *Ethics* 105 (2): 352-85.

Quong, Jonathan. 2010. *Liberalism without Perfection.* Oxford: OUP.

Rawls, John. 1991. *Political Liberalism.* New York: Columbia University Press.

Raz, Joseph. 1984. "On the Nature of Rights." *Mind* 93 (370): 194-214.

—. 1988. *The Morality of Freedom.* Oxford: OUP.

Renan, Ernest. 1882. *Qu'est-ce qu'une Nation?* Edited by Calmann Levy. Paris: Ancienne Maison Michel Levy Freres.

Risse, Matthias. 2012. *On Global Justice.* Princeton: Princeton University Press.

Rousseau, Jean-Jacques. 1997. *The Social Contract and other later political writings.* Edited by V.Gourevitch. Cambridge: CUP.

Senese, Salvatore. 1989. "External and Internal Self-Determination." *Social Justice* 16 (1): 19-25.

Shiffrin, Seana Valentine. 2000. "Paternalism, Unconscionability Doctrine, and Accommodation." *Philosophy and Public Affairs* 29 (3): 205-50.

Simmons, A. John. 1976. "Tacit Consent and Political Obligation." *Philosophy and Public Affairs vol. 5 no.3* 274-291.

Song, Sarah. Forthcoming. "Why do states have the right to control immigration?" In *NOMOS LVII: Immigration, Emigration, and Migration*, by Jack Knight.

Stilz, Anna. 2015. "Decolonisation and Self-Determination." *Social Philosophy and Policy* 32 (1): 1-24.

—. 2009. *Liberal Loyalty: Freedom, Obligation & the State.* Princeton: Princeton University Press.

Tamir, Yael. 1995. *Liberal Nationalism.* Princeton: Princeton University Press.

Tsai, George. 2014. "Rational Persuasion as Paternalism." *Philosophy and Public Affairs* 42 (1): 78-112.

Waldron, Jeremy. "Property".*Stanford Encyclopedia of Philsoohy (online),* 2004. Available at: http://plato.stanford.edu/archives/fall2004/entries/property/ accessed August 26, 2016

Washington, George. 1800. *George Washington to the people of the United States, announcing his intention of retiring from public life.* Philadelphia: A. Dickens and H.Maxwell.

Wellman, Carl. 1985. *A Theory of Rights.* Totowa, NJ: Rowman & Allanheld.

Wellman, Christopher Heath. 2005. *A Theory of Secession.* New York: CUP.

—. 2016. "Freedom of Movement and the Right to Enter and Exit." In *Migration in Political Theory: The Ethics of Movement and Membership*, by Sarah Fine and Lea Ypi, 80-100. Oxford: OUP.

—. 2013. *Liberal Rights and Responsibilities: Essays on Citizenship and Sovereignty.* New York: OUP.

—. 1999. "Liberalism, Communitarianism, and Group Rights." *Law and Philosophy* 18 (1): 13-40.

Wellman, Christopher Heath, and Phillip Cole. 2011. *Debating the Ethics of Immigration: Is There a Right to Exclude?* New York: OUP.

Welsh, Jennifer, and Maria Banda. 2010. "International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?" *Global Responsibility to Protect* 2 (3): 213-231.

Williams, Bernard. 2006. *Ethics and the Limits of Philosophy.* Abingdon: Routledge.

—. 2007. *In the Beginning was the Deed: Realism and Moralism in Political Argument.* Edited by Geoffrey Hawthorn. Princeton: Princeton University Press.

Young, Iris Marion. 2001. "Two Concepts of Self-Determination." In *Human Rights: Concepts, Contests, Contingencies*, edited by A. Sarat and T.R. Kearns. Ann Arbour: University of Michigan Press.