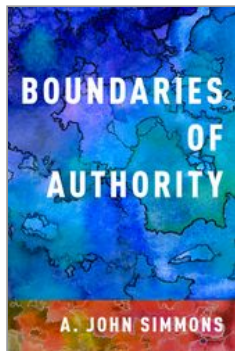


A Lockean Voluntarist Account

University Press Scholarship Online

Oxford Scholarship Online



Boundaries of Authority

A. John Simmons

Print publication date: 2016

Print ISBN-13: 9780190603489

Published to Oxford Scholarship Online: August 2016

DOI: 10.1093/acprof:oso/9780190603489.001.0001

A Lockean Voluntarist Account

A. John Simmons

DOI:10.1093/acprof:oso/9780190603489.003.0006

Abstract and Keywords

Chapter 5 defends a Lockean theory of territory, arguing that it avoids the unpalatable commitments of its rivals. The chapter first outlines Locke's own view, which derives states' territorial rights from its willing members' private rights over land and resources. It then describes the ways in which that historical position needs to be modified to make it defensible, taking the ideal it describes (rather than Locke's own applications of his theory) to be its strong point. The chapter also describes and answers the standard objections to this sort of theory. In doing so, it defends a view about the real point of philosophical theories of territory.

Keywords: Locke, voluntarism, property, jurisdiction, territory, revisionism, ideal theory

A Lockean Voluntarist Account

The Theory and Its Limits

So the standard contemporary approaches to justifying states' territorial rights all seem to share a set of apparent problems: their justifications of territorial jurisdiction for reasonably just states permit those states to trap unwilling individuals and minorities within those jurisdictions, and they appear to deny persons and groups that are plainly wronged in the process of territorial acquisition and concentration any obvious just remedy for those wrongs. This appears to be true whether the theory attempts to derive territorial rights from the value of collective free choice and self-determination (as on the plebiscitary voluntarist view) or from the value of national orientation of a people on their land (as on the nationalist view) or from the value of justice or social happiness (as on the functionalist view).

Consider now a much older view of states' justified territorial rights that is distinctive precisely in virtue of its effectively avoiding *all* of these problems that are shared by its competitors. The Lockean view—an individualist version of voluntarism—rests on three compelling claims. First, that the only persons who are legitimately subject to a state's authority are those who are willingly subject to it. Second, that the only clear cases of rightful state claims to territorial rights (over particular geographical areas) are claims to what is lived on and labored on by that state's willing subjects. And third, that the rights of those persons who are wronged in states' territorial acquisitions do not simply fade away in the interest of the more powerful or the more numerous.

Locke himself, of course, argued (as we saw in chapter 1) that only those who have consented to membership in a political society are legitimately subject to its authority and have the obligations of citizens. And those who agree to be citizens, Locke claimed, must be understood to consent as well to submitting to the state's jurisdiction any land over which they have rights of occupancy or ownership. The heart of each legitimate state's rightful territory is thus constructed piecemeal from the free choices of persons to submit both themselves (p.117) and the land on which they live and work to the state's authority. While agreements between legitimate states (and the collective or individual labors of states' subjects) may add to or subtract from states' legitimate territory, the heart and origin of that territory are its

A Lockean Voluntarist Account

patchwork composition from the individual holdings of the state's members.¹ The Lockean view thus condemns both the political subjection of the unwilling and the exercise of territorial control by states over areas not legitimately employed in their willing subjects' lives.

Locke, remember, begins by imagining groups of loosely associated persons in a state of nature, many of whom possess property (or, at least, occupancy) rights in land, and attempts to describe how such persons might create a territorial state. All legitimate political societies originate for Locke in consent (or contract). But such consent, be it tacit or express, is typically vague or inexplicit, amounting to little more than an agreement to join together into one society. And this leaves us with the question of what subjects' consent is actually consent *to*. Locke argues that we should interpret inexplicit political consent as follows:²

Whosoever therefore out of a state of nature unite into a community must be understood to give up all the power necessary to the ends for which they unite into society . . . And this is done by barely agreeing to unite into one political society, which is all the compact that is, or needs be, between the individuals that enter into or make up a commonwealth. (II, 99)

The principle of interpretation suggested here (and elsewhere) by Locke is this: consent should always be understood to be consent *to* all and only that (p.118) which is necessary to the purpose for which the consent is given, unless otherwise explicitly stated.

When people consent to make or join a political society, then, their consent should normally be understood as consent to whatever arrangements are necessary for a peaceful, stable society. This, Locke thinks, means consent to majority rule (or to some other rule for dispute resolution), to obedience to and support for law (within the limits set by natural law), to mutual defense, and so on. Most important for our purposes here, political consent is normally consent to incorporate one's rightful landholdings into that territory over which the society will have exclusive legal jurisdiction. It would, Locke thinks, be "a direct contradiction" for us to suppose that a person's "land ... should be exempt from the jurisdiction of that government to which he himself, the proprietor of the land, is a

A Lockean Voluntarist Account

subject" (II, 120). More generally, we might say, the state cannot effectively protect its subjects from domestic or alien aggression or usefully coordinate its subjects' actions if it cannot exercise certain distinctive kinds of control over (including enforcement of the law on) the territory where its subjects mostly reside and work. Importantly, though, this is no functionalist argument for political authority: it is only an argument concerning how best to understand the content of the political *consent* that grounds all such authority.

Further, stability in its advancement of the goals of societal security and coordination requires that the society's territories not be dismembered or perforated by the individual decisions of subjects, thus creating indefensible borders, allowing alien presences within established defenses, and so on. So a subject's consent should also be understood to be consent to the following arrangement: subjects will not bequeath, sell, or otherwise alienate land incorporated into the state's territories except on the condition that subsequent holders of that land will also be bound by the obligations of membership, including subjection of the land to state jurisdiction (II, 116–17, 120).³ Thus, Locke argues, the consent that legitimates political society will normally legitimate as well that society's claims to jurisdiction and control over a particular (more or less) fixed and stable area of the earth's surface.⁴

(p.119) Territory can be legitimately *added* to the state, of course, as new subjects or subject settlers join new land to it, or as the state otherwise makes legitimate acquisitions (through purchase, say, or through collective labor by its subjects⁵ or through seizures justified by prior alien aggression). The process that creates a state's territories thus needn't be an "all at once" contract, as Locke's remarks perhaps suggest. Neither should it be understood to (necessarily) be a "once and for all" settlement, contrary to what Locke's texts almost certainly imply. Because all plausible Lockean theories of property limit justified property rights to those that satisfy a robust Lockean proviso—requiring that we leave a fair share of the world for others to use or appropriate⁶—the extent of our justified holdings may diminish in changed circumstances, as the size of a "fair share" itself changes. (This kind of process will be examined in considerable detail in chapter 7.) But if the justified holdings of a political society's consenting members may diminish with changing circumstances, so may the justified territorial claims

A Lockean Voluntarist Account

of their polities (which are tied to the sum of their members' legitimate holdings). If, then, we suppose that an adequate theory of territorial rights must justify only states' territorial rights that are necessarily *permanent*, we must of course reject the Lockean voluntarism that I defend here. But I see no reason to insist on such a standard of adequacy for a theory of territorial rights. Indeed, in a world plagued by poverty and overpopulation, but in which some nations have far more land and resources than they need, it is hard to see an insistence on the permanence of states' territorial rights as anything but (likely) self-serving moral blindness.

Still, for a Lockean account to end up justifying anything remotely like the territorial claims of actual modern states, it needs to explain why states should end up with legitimate *continuous* boundaries, not just how they can end up with legitimate jurisdiction over various chunks of land. Locke himself tries to do this, I think, by making two assumptions. The first is that members will tend to be clustered together on land adjacent to one another, with few "interior (p.120) dissenters"—that is, few landowning persons who decline membership but whose holdings are surrounded by those of consenting members.⁷ The second is that *unowned* interior land (i.e., unowned land surrounded by the holdings of subjects) will, by international understanding, be accepted as the common property of all members of that political society within whose exterior boundaries it lies.⁸

Neither supposition, perhaps, seems very plausible on its face, but both can be made to seem more reasonable with further elaboration. States' territories can be expected to initially form by expanding outward from cores of adjacent, already associated persons with common goals. Interior dissenters are not very likely for a variety of reasons (at least where states do not illegitimately attempt, as modern states in fact routinely do, to subject all adjacent land to their jurisdictions). Dissenters who find themselves surrounded by consenters and consenters who find themselves separated by dissenters' lands from the core of members both have strong self-interested reasons to exchange land (or seek new holdings) in ways that will tend to create continuous boundaries for political societies (without any use of coercion). While being a dissenter surrounded by consenters might provide some attractive opportunities for riding free on the society's provision of public goods, the amounts of control over the lives of interior

A Lockean Voluntarist Account

dissenters that Lockean states could still legitimately exercise (e.g., by controlling their movement and opportunities for productive interaction with others, by enforcing natural law against them, etc.) would in fact provide much stronger motivations for dissenters to either consent to membership or relocate to exterior spaces (supposing such spaces exist, as Locke does suppose). Similarly, members have strong incentives to offer favorable terms for movement to any interior dissenter, given the increased costs (in monitoring and defense) imposed on them by their polity's discontinuous boundaries.

(p.121) The international "common consent" that Locke thinks creates "the commons" within states is, perhaps, an even more questionable assumption, for such consent would seem to bind neither independent persons (i.e., those who are subjects of no state) nor new states formed subsequent to such common consent, leaving both free to establish property in the allegedly common land. But the spirit of Locke's theory of property is, I think, consistent with allowing that *modest* common holdings of land can be legitimated by the exclusive use of the commons by society's members for gathering, recreation, or shared activities, *independent of* any "common consent" to this that other societies may have given. What the spirit of Locke's account *condemns*—rightly, I think—is the familiar practice of states declaring as the common property of their members (perhaps on the grounds of their "manifest destiny") vast and unused spaces, simply to facilitate defense or future settlement and expansion.

That, then, is the substance of Locke's theory—or, at least, of the Lockean voluntarist theory that I favor—of the grounds and limits of the territorial rights of states. Its basic principles strike me as more plausible and intuitive than any of the alternative theories on offer (in ways that I will explain in the remainder of this chapter). What is *not* plausible, however, is the practical use to which Locke himself put this theory. The *conjectural* history Locke offers (to explain the grounds and limits of states' territorial rights) clearly does not match (or even approximate) the *actual* history of any modern state. No modern state governs only consenting members, nor has any modern state's claimed territory been composed solely from the holdings of its consenting members. So Lockean voluntarism's *ideal theory*—its theory of when territorial claims by states are *perfectly rightful*—does not yield

A Lockean Voluntarist Account

conclusions that straightforwardly confirm the actual territorial claims made by any modern state. Locke's conservative ambitions in *applying* his theory of territorial rights—that is, his desire to confirm the territorial claims of nontyrannical modern states, his own postrevolutionary England included⁹—were clearly unsupported by his theory, resting instead on a set of false factual assumptions. The power and plausibility of the Lockean theory lie rather in the principles of its ideal theory.¹⁰

(p.122) And the primary virtues of these voluntarist principles, so understood, are plainly these: first, they explain the particularity of states' territorial claims in a natural and intuitive way, by identifying each state's territories with the particular areas in which its willing members live and labor. Second, the Lockean theory has a simple and persuasive answer to concerns about the supersession of rights and past injustices done by states. Lockean voluntarism rejects the idea of simple supersession of rights by seizure or mere passage of time (moral rights being, on this view, "imprescriptible").¹¹ It cannot be embarrassed by theoretical insensitivity to the plights of the expelled, the annexed, and the wrongly subjected—even when those unfortunates are mere individuals or when, as groups, they have never desired, been able, or been permitted to organize politically. The Lockean view is thus not vulnerable to charges of overeagerness to simply affirm the legitimacy of the territorial status quo. The rights of those maimed in the machinery of politics do not simply fade away for the convenience of the powerful or the numerous. Those whose rights have been violated in creating or reshaping states retain the right to rectification of those wrongs. Rights supersession is, according to the Lockean voluntarist position, normally just wishful thinking, typically done by those who most stand to benefit from it.

Third, Lockean voluntarism can address the problem of trapped minorities in a direct and appealing fashion. While it is possible (though, as we have seen, unlikely) that there will be minority individuals or groups who are *physically* "trapped" within the outer boundaries of a legitimate Lockean polity, Lockean voluntarism holds that there is simply no such thing as a person who is "trapped" in a stronger, *de jure* sense, as permitted by the rival theories of territorial rights (discussed above in chapter 4). The Lockean view is committed to the position that states may do no more to coerce or restrict the

A Lockean Voluntarist Account

freedom of the unwilling located within their boundaries than private persons would be entitled to do to one another in a state of nature (since groups are entitled to politically incorporate in the first place only if in doing so they “injure not the freedom of the rest” (p.123) [II, 95]). Trapped minorities may not be subjected to political authority without their consent—though they may, of course, be watched and defended against—because they enjoy the same rights to live and choose freely¹² that each polity’s members exercised in choosing to create or join a state. Just as such minorities may not undermine the rightful political arrangements of those around them, those whose arrangements they are may not interfere with the rightful activities of the unwilling. The complaint that states cannot run smoothly without uniformly subjecting all within the states’ claimed boundaries to the same political authority is both normally factually false and, on the Lockean view, always morally beside the point.

Finally, intuition does, I think, typically identify closeness to satisfying Lockean standards for the legitimacy of states’ claims to territorial rights with closeness to the *actual* legitimacy of states’ territorial claims. Where states’ territories have histories that approximate Locke’s conjectural history—where persons have (relatively) innocently acquired or (relatively) exclusively used land that has been (relatively) freely subjected to state jurisdiction—we tend, I think, to be *least* skeptical about states’ claims to territorial sovereignty and *most* skeptical about rival, alien claims to that territory. Where territories have been forcibly subjected, where “unimproved” lands have been claimed without use, or where claimed territories have been the subject of rival (especially prior) use or ownership claims, for instance, we tend to be most skeptical about states’ claims. This suggests to me that the Lockean account of legitimate territorial rights is at the heart of our commonsense notion of rightful territorial sovereignty, with much of the remainder being mere accommodation to the (grim) realities of international political life. This should be unsurprising when we remember that the few early modern political philosophers who wrote anything at all about the state’s territorial dimension—these being the serious philosophers who had the best historical perspective on the *rise* of the modern territorial state—seem to have agreed with Locke in taking legitimate state territory to be at least largely derived from that land that was rightfully used or

A Lockean Voluntarist Account

owned by the state's willing subjects.¹³ So perhaps the greatest strength of all of the Lockean voluntarist theory is the way in which it captures deeply entrenched and rationally supportable intuitions about what counts as a rightful territorial claim by a state.

(p.124) It may seem to some that I have condemned (in part I) the purely structural, antihistorical Kantian functionalist approach to territorial authority only to now embrace an equally one-sided, purely historical Lockean approach. The attractions of a seriously pluralistic approach to these questions, noted and praised in chapter 3, may appear now to have been forgotten. Such a reaction, though, would be an overreaction. In the first place, the Lockean theory of territorial rights is *itself* a pluralistic theory, limiting legitimate (historical) acquisitions and transfers of property and territory by their conformity with an egalitarian proviso, one that entitles all to access to a fair share of the earth and its resources. And in the second place, defense of a Lockean account of legitimate political authority over persons and land is perfectly consistent with defense of a non-Lockean theory of domestic justice. A state's legitimacy, I have argued at length elsewhere¹⁴ (and noted above), is only one dimension in which a state may be morally evaluated. It may also be evaluated in terms of its possession of other virtues, such as justice (whether conceived in Rawlsian terms or others). A legitimate Lockean polity has the right to order its institutions as it chooses (provided that it violates no rights in doing so); but those societal choices are still subject to independent moral evaluation and criticism (in terms of their justice, say, or their efficiency or generosity). One of the central flaws of Kantian functionalism, in my view, is that it attempts to accomplish both of these kinds of moral evaluations of states with a theory that is in fact oriented toward only one of them.

A Lockean Voluntarist Account

The Standard Objections (and the Correct Responses to Them)

With all of these noteworthy virtues, why have political philosophers and political theorists not jumped at the opportunity to embrace the Lockean voluntarist theory? The answer is not, I think, that proponents of non-Lockean views simply reject the powerful intuitions on which the Lockean theory is built. For (as we will see in chapter 6) it is at precisely the point where concerns about historical wrongs are brought clearly into focus that rival theories are often motivated to take hybrid form, introducing historical principles in order to avoid the strongly counterintuitive implications of their core theories. I take, instead, the most persistent and fundamental objections to Lockean voluntarism to be three.¹⁵ (p.125) The least troubling of these, despite its surprising resilience, is the common claim that the Lockean account confuses the idea of property with the quite different idea of jurisdiction or territory, in consequence of which the Lockean account of states' territorial rights must be equally confused.¹⁶

To identify the two would, of course, be confused. But state jurisdiction is plainly not, according to either Locke or Lockean voluntarism, *identical* to private property—since, among many other things, on the Lockean model individuals can still privately own land over which their state has legitimate jurisdiction. Rather, state jurisdiction is composed of some of the “incidents” (or component rights) of the fuller ownership of land that individuals can enjoy in the state of nature, along with some of the rights that individuals there possess over themselves. When persons subject themselves and their land to the state, they transfer to the state some of their rights over each. They then enjoy a less full property in their land (e.g., they can no longer accomplish unencumbered transfer of their land to others) and a less full freedom in their persons (e.g., they are now obligated to comply with valid law even on their own land).

State jurisdiction differs from individual property by including only some of the component rights of natural property in land (e.g., the rights to control borders and regulate uses) and by including some rights over persons which are *not* components of natural property in land (e.g., the right to make and coercively enforce law within the area). But the two are closely

A Lockean Voluntarist Account

related, since property ownership clearly has a jurisdictional aspect, just as territorial jurisdiction has a property-like aspect (making it not at all confused to suppose that one might derive from the other).¹⁷ Landowners have (“jurisdictional”) rights to make certain kinds of rules to govern their lands, thus unilaterally restricting the liberty (p.126) of those who choose to (and are permitted to) enter on their land. Landowners who choose to submit their land to a state’s authority give the state’s rules priority on their lands, thus accounting for the state’s consequent jurisdictional rights over those lands. They also agree to allow the state to regulate their land in other ways (which they were originally entitled to do themselves), including controlling those boundaries of it that will constitute parts of the state’s territorial boundaries. The result is a kind of sharing between state and subject of the various incidents that comprise the fullest possible rights in land, and a concentration of some of those incidents (received from all subjects) in the hands of the state.¹⁸ This latter concentration, I think, is an accurate representation of our normal conception of states’ rights over their territories, not any kind of confusion of territorial jurisdiction with property. There is, then, nothing particularly mysterious about our ordinary conception of states’ rights over territory that cannot in this way be accounted for “by subtraction” from individual natural rights over land and over their persons.

Often this first objection to Lockean accounts of territorial rights is combined with a second, in whose light the first becomes more intelligible. If rights in land are necessarily created through legal or institutional rule, then it plainly makes no sense to claim that individual rights in land serve as the justifying foundation for these institutions (i.e., the institutions that are responsible for creating rights in land in the first place). The first objection thus really appears often to rest on the second: that it is not possible to make sense of rights in land outside of a state whose laws establish them; so we naturally can make no sense either (p.127) of grounding a state’s territorial rights in the subjection (by willing members) of private rights in land to that state’s jurisdiction.¹⁹

This objection can have a stronger or weaker form, depending on whether it denies all extralegal property rights or only extralegal property in land.²⁰ Notice, however, that the required skepticism about prelegal rights in land must extend further than mere skepticism about Lockean “natural”

A Lockean Voluntarist Account

property rights. It must extend as well to all conventionalist theories of rights in land (such as Hume's), according to which pre- or extralegal moral rights in land and chattels are possible given the establishment of appropriate interpersonal conventions to define and regulate them.²¹ If extralegal property in land is possible—be it naturally or conventionally grounded—then owners' willing subjection of such land to a state can be intelligibly identified as a necessary condition for legitimate state jurisdiction over the land, as the Lockean model requires for justified state territorial rights. Further, the property rights at issue need not be absolutely clear in their precise boundaries, provided that their "cores" are well justified. Even Locke allowed that an important part of each state's job is to "settle" the likely controversial "edges" of natural property claims, just as states collectively settle by treaty the precise boundaries of their territories.²² So this style of objection to the Lockean position must claim quite a lot about the impossibility of private rights in land outside the state, requiring somewhat more philosophical nerve than at first might seem to be the case.

The third and most fundamental obstacle to the acceptance of Lockean voluntarism, however, is that (as we have seen) the theory offers an account of states' legitimate territorial rights that does not match up very well with the real-world claims made by actual modern states. States are not voluntary associations, nor have the territories states' claim been constructed from the submission of land by willing subjects to state jurisdiction. Lockean theory thus seems to describe (p.128) an extremely demanding ideal that is simply too distant from the hard reality of the world to permit its application to real-world territorial claims and disputes.²³ The plebiscitary voluntarist, functionalist, and nationalist accounts may appear to do better on this score, since they are focused more on states' present characters and capacities and less on the historical processes that produced the present distribution of states' claimed territories. These views thus seem more immediately applicable to real-world territorial claims and disputes, despite their shared theoretical defects (described above), and less likely to require dramatic revisions in our views about the actual territorial rights of real-world states.

A Lockean Voluntarist Account

To this concern—which is foremost in the minds of many who quickly dismiss any Lockean approach to states' territorial rights—a variety of responses seems appropriate. The first is simply to question such critics' wariness about revisionism. The kind of revisionism being urged here (by Lockean voluntarism) is really no more substantial than would be defending a theory of social or distributive justice that implies that all existing states are unjust, or defending an account of the ideal international order that condemns existing arrangements as unjust or illegitimate. But, at least since Rawls began shaping the political philosophy of his generation, both of these positions have become perfectly familiar. And it is perhaps worth adding that forty years ago philosophers similarly summarily rejected philosophical skepticism concerning states' authority over their claimed subjects. In the intervening years, however, such skepticism about political authority and obligation has acquired a reasonably substantial following.

For those whose concerns about extensive revisionism persist, it should be emphasized again that states can be morally evaluated in many different ways other than by the legitimacy or illegitimacy of their claims to territorial jurisdiction or possession. The possession of the rights in which a state's legitimacy consists is not the only positive moral quality a state can possess. States can be more or less well justified in terms of their justice, their efficiency, the extent to which they help to meet their subjects' needs and those of others in the world, and so on.²⁴ And even if all actual states fail to live up to Lockean standards of legitimacy, they do not all fail in equal measure. Just as states can more or less closely approximate Locke's ideal of the voluntary political association, so can states more or less closely approximate the Lockean ideal of justified claims to territorial rights. Further, we can surely identify *portions* of existing states' claimed territories that more or less closely satisfy Lockean standards. The failure of some aspects of a state's claim to territorial rights in no way implies the failure of all. The revisionism required by Lockean voluntarism, then, is no more (p.129) a uniform, condemnatory black brush than is the revisionism required by a reasonable skepticism about the *justice* of modern states, the world economy, or the international order of states.

A Lockean Voluntarist Account

Finally, we need to keep firmly in mind the theoretical *point* of defending an account of states' territorial rights. Yes, because Lockean voluntarism takes very seriously historical wrongs and the rights of the unwillingly subjected, the theory's practical implications will inevitably be more revisionist than will be those of the alternative theories I've criticized here. But all of the theories we've examined are (or include) *ideal* theories; all describe ideals to which real states' territorial claims will conform only very imperfectly. Many real states' territorial claims will not qualify as legitimate on the terms of plebiscitary voluntarism, functionalism, or nationalism, nor will these theories obviously yield clear solutions to the most pressing of the world's actual territorial disputes. These are, after all, *philosophical* theories.

The job of (ideal) philosophical theories of this sort, in my view, is to identify our moral target, to describe how states' territorial claims could be fully rightful and legitimate. There will then be separate and difficult questions about how, in a distinctly nonideal world, we can approach that moral target in an efficient and fair fashion. That will involve, first, determining to what extent territorial claims made by real-world states count as legitimate according to the ideal theory; and, second, using the ideal to identify the most serious wrongs done by states (and their subjects) in establishing their acknowledged territorial boundaries. Only then can we meaningfully proceed with the business of recommending practical policies that best correct these wrongs, beginning (*ceteris paribus*) with the most serious, and always focused as well on practical and moral limitations on required reforms. (I describe below in part III my view of the actual content of the various aspects of Lockean voluntarism's nonideal theory.)

The true test for an ideal philosophical theory, in my view, is not how closely and comfortably its prescriptions match the ways in which we actually live our political lives, but rather how plausibly it identifies the most grievous kinds of wrongs that we do to each other in the course of those lives. And Lockean voluntarism, I submit, identifies the wrongs that need righting in a clear and compelling way, putting us in position to attempt to redress them and to gradually achieve a more rightful condition. For the Lockean, our political ideal must be

A Lockean Voluntarist Account

a world in which each person is, as fully as possible, treated as a self-governing equal.

The alternative theories I've criticized are theoretically insensitive to too many of the clear wrongs that states do in our names. When states insist on exercising jurisdictional authority over unoccupied land or over land occupied by unwilling subjects, or when they expel or destroy the innocent in their quests for territorial control, they wrong persons in ways that require rectification, either through the adjustment of territorial boundaries or through genuine reparations

(p.130) of some other sort. Indeed (as I suggested above), I think that modern states also frequently do wrong simply in their efforts to control the sites of a wide range of the world's natural resources (through their more property-like territorial claims).

In real-world disputes about territorial boundaries or about rights to natural resources, facts will inevitably be contested, claims will inevitably conflict, and disagreement will inevitably persist. A sound philosophical theory of territorial rights can at best only identify the salient moral vectors in play in such disputes and lay out the general guidelines for pursuing the best resolutions of them. And that, I contend, Lockean voluntarism does admirably. Ease of application and simplicity of resolution are far from the only (or even the chief) virtues a theory of territory (or any theory in moral or political philosophy) should possess. After all, quite silly or clearly defective views can be wonderfully easy to apply to real-world cases and yield stunningly clear conclusions about them. Only some feature that made a theory utterly inapplicable to the real world would appear to constitute a fatal defect, at least in a theory that purports to be action guiding.

And on those grounds, some will no doubt insist that the Lockean voluntarism whose ideal theory I have endorsed must be rejected—precisely because it simply *cannot* be applied in practice and thus cannot hope to yield any even partial or approximate resolutions of territorial disputes (unlike the other theories we've considered). Given the long human history of injustice with respect to land, both by individuals and by states, along with the controversial nature of even many respectable claims to property, we simply cannot expect to be able to untangle the various strands of entitlement to lands in a way that can illuminate any actual territorial

A Lockean Voluntarist Account

controversies. Establishing “innocent possession” of land in the first place, with which the Lockean theory *begins* its explanation of moral right, seems hopeless. This problem appears to be (at least part of) what made Brian Barry call the Lockean account “absurd.”²⁵

While I do not pretend, of course, that a Lockean account can with no difficulty neatly determine the proper distribution of territorial rights over, say, Palestine, neither, I think, can any of the contending philosophical theories of states’ territorial rights. Some of the problems in such real-life cases, of course, are *evidentiary*, which is not a problem with the *theory* at issue. Still, one might reasonably think that these evidentiary problems are far more dire—perhaps (p.131) disqualifyingly so—for a theory that relies in its justificatory principles, as Lockean voluntarism does, not only on the routinely obscure actual history of acquisitions and transfers of individuals’ property rights and state’s territorial rights, but on the shaky counterfactual judgments that seem required in order to determine the proper rectifications of injustices that occurred in that history.

I argue below (in chapter 7) against these charges, in part by showing that in fact many compelling and perfectly valid Lockean claims to land have only vague or “limiting” contents, rather than precisely delineable contents. Even, then, on a perfectly articulated and well-justified Lockean theory, we should *expect* many property claims (hence territorial claims) to be controversial and to require the use of judgment, not merely calculation or principled syllogisms, for their satisfactory resolution. For instance, the compelling historical claims to control over territory made by the descendants of some aboriginal peoples, though perfectly legitimate in Lockean terms, may not be precisely delineable due to the requirement that claims to huge amounts of land (such as those necessary to a large hunter-gatherer economy) may have to be “downsized” in the face of the needs of other potential users (in order to leave “enough and as good for others”). But regardless of how one evaluates those arguments in chapter 7, surely at least this much must still be conceded here: that any theory of territorial rights that *does* purport to offer perfectly simple applications of its ideal principles to—and hence simple resolutions of—the real world’s deeply complex and bitter

A Lockean Voluntarist Account

territorial conflicts is for that very reason one about which we should be immediately suspicious.

Notes:

(1) An interesting alternative reading of Locke's views on territorial rights is defended in Van der Vossen (2014). While I (obviously) disagree with much of the textual analysis in Van der Vossen's interpretation of Locke (especially regarding the implications of the *First Treatise*), I agree with his insistence that "property is not necessary for territory" in Locke (4). States' authority over their coastal waters, like their authority over common land within their boundaries, is supposed by Locke to be a product not of (their members') prior property in them ("submitted" to the jurisdiction of the state by their consents), but rather a product of international consent (explicit or implied) (e.g., II, 45). Indeed, Locke's remarks on the origins of political society strongly suggest the possibility of states (communities, societies) acquiring jurisdiction ("political power") over *persons* independent of those states acquiring any *territorial* jurisdiction at all (a possibility that I noted earlier in the introduction). I will not argue here against Van der Vossen's alternative reading, observing only that it does Locke no favors, in my view; for it renders Locke's view an essentially functionalist one (with all of functionalism's problems): the right to govern a territory, according to this reading of Locke, is acquired "by governing effectively and justly within an area" (9).

(2) The discussion immediately below draws on my more detailed defense of this reading of Locke in Simmons (1998), esp. 168–70.

(3) Nine criticizes the "individualistic Lockean" view of territory by mistakenly associating it (and mistakenly associating my own view) with Hillel Steiner's "Lockean" theory, according to which property owners permanently retain the "meta-jurisdictional" authority to unilaterally secede from their societies with their property (Nine [2008a] and [2008b]). Locke's actual position (and mine) holds that consent to membership in a legitimate society should normally be understood to include surrendering unilateral rights of secession, such rights being inconsistent with the point of creating a society that is intended to be stable, defensible, and

A Lockean Voluntarist Account

enduring. As I detail below, the various incidents of natural property rights are distributed by political consent between citizen and state.

(4) Beitz summarizes Locke's argument as follows: "The founders restricted both the uses to which they (and their heirs and assigns) could put their land and created a limited power in the government to regulate its use. Since the territory of the commonwealth is like a quilt patched together from individual holdings in land, the system of covenants envisaged results in a uniform diminution of the ownership rights of the original owners and in the creation of a uniform set of rights in the government in respect of all the land in the commonwealth" (Beitz [1980], 493).

(5) Labor mixing can thus generate territory "indirectly"—through creating individual property that is later consensually incorporated into state territory—or "directly," through collective labor by consenting members. One need not choose between these two sources of territory, as Nine appears to suggest that we must (Nine [2012], 72). As Nine correctly observes (but without drawing the correct conclusion from it), "more than one set of entitlements ... can be justified from Lockean property arguments" (83).

(6) Some, of course, are skeptical about the intelligibility of such provisos, due to the (alleged) unavailability of any uniquely best way of understanding the idea of a "fair" or "equal" share. See, e.g., Risse (2012), 122–3. While I believe we can do much better on this front than Risse suggests—and that Risse himself in fact needs to do better, especially in his account of intergenerational justice (184)—I will not pursue the matter further here.

(7) Jean Hampton objected to Locke's account precisely because the possibility (likelihood?) of such interior dissenters leaves as the only legitimate state "a patchwork state, which is so impractical as to be impossible" (Hampton [1997], 62). But Hampton did not consider the points noted below in the text concerning the unlikelihood of interior dissent. She also mistakenly supposed that *tacit* consenters in Locke would not count as having joined their land to the state, making discontinuous boundaries for the state seem virtually inevitable. This supposition is perhaps not unreasonable in light of the fact that Locke's principal example of tacit consent

A Lockean Voluntarist Account

is that of enjoying land *already* under a state's jurisdiction (II, 119). But Locke plainly allows that tacit consent can be given in other ways; and tacit consent to join a political society given by those holding *unsubjected* land is clearly intended by Locke to involve incorporation of that land into the society's territories. See my defense of this reading of Locke in Simmons (1998), esp. 164–6, 168–70, 176.

(8) “And though it be common in respect of some men, it is not so to all mankind, but is the joint property of this country or this parish” (II, 35). The “several states and kingdoms” have “by common consent given up their pretenses to their natural common right, which originally they had to those countries” (II, 45). “By consent they came in time to set out the bounds of their distinct territories, and agree on limits between them and their neighbors” (II, 38).

(9) Locke's avowed purpose in the *Treatises* was “to make good [King William's] title, in the consent of the people” (*Two Treatises*, Preface).

(10) As we saw in chapter 2, ideal theory will in fact have three parts, dealing respectively with the moral principles for individuals, for domestic political societies, and for the world order. The Lockean moral principles for individuals require that we respect others' natural rights, that we honor and respect voluntary agreements between persons, that we do our fair share of helping those in dire need, that we appropriate no more than a fair share of the earth and its resources, and so on. I have already discussed in some detail, both in this chapter and elsewhere in this book, the Lockean domestic ideal of the legitimate state (as a voluntary association of a distinctive sort, typically with territorial rights of the sort described above). The global ideal of Lockean theory is simply that of a world of legitimate states, so described and limited, along with any individuals and groups that opt instead for nonpolitical conditions—all (including states, as corporate actors) obeying the rules of natural morality (as defined in the ideal principles for individuals) and respecting any (permissible) changes to their natural condition to which they have voluntarily agreed.

(11) Though, as we will see in chapter 7, this does not mean that the contents of those rights may not change as circumstances change (due to the operation of “the Lockean

A Lockean Voluntarist Account

proviso")—nor does it mean either that rights may not sometimes simply “dissolve,” or that they are absolute or indefeasible. Despite his reputation as a rights absolutist, Locke in fact allowed for the defeasibility of moral rights. Locke maintains that the legitimate claims to land (and other property) of a just conqueror may have to “give way to the pressing and preferable title of those who are in danger to perish without it” (II, 183). See also I, 42–3.

(12) My Lockean theory’s position on “freedom of movement” for nonmembers is discussed in chapter 9.

(13) As Baldwin ([1992], 213) correctly notes. For example, while neither Grotius nor Pufendorf had much to say on the subject, what they did say strongly suggests that both took the heart of each state’s legitimate territory to be established in some way by adding together the original members’ legitimate holdings. See, e.g., Pufendorf (1934), 958 (7, 1, 5), 994 (7, 2, 20), 1274–6 (8, 5, 1–2); Grotius (2005), 563, 669 ([bk.] 2, [chap.] 5, [sec.] 31; 2, 9, 4).

(14) Simmons (2001a).

(15) I leave to one side an equally common basis for objection—namely, the defects in the arguments advanced by Locke himself. Stilz, for instance, appears to (mistakenly) reject the Lockean approach to territorial rights almost entirely because she (correctly) takes Locke’s own arguments to be defective. As we have seen, Locke’s conservative ambitions—to justify continuous, enduring rights over their full claimed territories for nontyrannical states—led him to undermine his own foundational principles by making false factual assumptions, and thus to make some of the errors Stilz identifies (Stilz [2009b], 192–4). But a more genuinely voluntaristic (and less conservative, more revisionist) Lockean position than Locke’s own, one that takes seriously each person’s equal right to a fair share of the earth and its resources, is surely a better test of the Lockean approach to these issues—just as Kantians (like Stilz) often find their own positions more defensible when they depart from the letter of Kant’s texts (198n8, 203). Similarly, many of the criticisms of Lockean theories of territorial rights noted by Meisels ([2009], esp. 24–6) appear to rest primarily on Locke’s false empirical claims (e.g., about the actual histories of consent and incorporation).

A Lockean Voluntarist Account

(16) See, e.g., Buchanan (1991), 108–9, and (2003), 232–4; Brilmayer, (1989), 15–16; Morris (1998), 262–5; Nine (2012), 73–6.

(17) Indeed, even some of the great historical thinkers (like Grotius and Sidgwick) who strongly emphasized the differences between jurisdiction and property had to allow that state territorial jurisdiction (what Sidgwick misleadingly called “dominion”) is strongly “analogous to private ownership from an international point of view” (Sidgwick [1897], 252 [15, 4]). See also Grotius (2005), 455–8 (2, 3, 4), who *identifies* territory and property, distinguishing both from jurisdiction. It is worth remembering in this context that the word “territory” derives from Latin roots that mean (roughly) “land that belongs to one”—covering *both* individual property *and* state territory.

A Lockean Voluntarist Account

(18) See Stilz's clear characterization of this version of the Lockean view (Stilz [2009b], 190–91). This version of the view is plainly not vulnerable to the “dilemma” that Nine identifies as her reason for rejecting the individualist Lockean view (Nine [2008b], 957–63; [2012], 74–81; Ypi repeats Nine's argument [Ypi {2013}, 244], and Moore accepts it as well [Moore {2015}, 31n14]). The “meta-jurisdictional authority” to secede one's property from one's state's territory is (on this view, as we have seen) one part of that property which is typically given up in the original landowner's consent to be a member of the society. Nine devotes most of her attention to refuting Hillel Steiner's version of the Lockean view (in Steiner [1996]), on which all members instead *retain* the right to unilaterally secede with their land. I agree with some of Nine's complaints about that (in my view, weaker) brand of individualist voluntarism, while acknowledging that members of a society *could* in principle retain such rights for themselves. But her very quick dismissal of the “second horn” of her dilemma—the one actually grasped by Locke (and me)—just seems confused. Those (who desire to own land) who come in the second (or subsequent) generation of members of a legitimate society must typically either acquire (e.g., purchase or inherit) rights to land under the attached (“entailed”) requirement that they consent to state jurisdiction over it, or they must find land elsewhere that has not been thus permanently bound to the state's legitimate territories. To this we must add: while, as we have seen, the operation of the Lockean proviso over possessions in land means that such moral “entailments” on particular land do not necessarily result in *permanent* territorial rights for states, they are in no way morally suspicious across generations, *provided* that the proviso's conditions continue to be satisfied transgenerationally.

(19) Moore (2015), 16.

(20) On the stronger view, of course, one is committed to affirming that no moral wrong is done to a person (who is outside a state's jurisdiction) even by taking or destroying what that person has crafted or cultivated and harvested.

A Lockean Voluntarist Account

(21) Moore, oddly, seems to reject this possibility, asserting that “conventions are set by political authorities” (Moore [2015], 19, 153). Such a factual claim seems to ignore the existence of the myriad statutes (both within and without property law) that have been based on preexisting social conventions—useful conventions that were not “set” by any authority, but that simply arose in the ordinary course of social interaction.

(22) “And then, by consent, they came in time to set out the bounds of their distinct territories and agree on limits between them and their neighbors, and by laws within themselves settled the properties of those of the same society” (II, 38). Locke expands on the international version of this “settling” process in II, 45. Moore rejects the Lockean position partly because she (mistakenly) assumes that a defensible natural rights theory of property must have as a direct implication the substance of all familiar aspects of contemporary property law, such as “zoning laws” (Moore [2015], 20, 154).

(23) Miller, for instance, rejects such views as “impossibly demanding ... putting virtually all borders into question” (Miller [2007], 220). See also Moore (2015), 21.

(24) Again, see my discussion of the relevant distinctions at issue here in Simmons (2001a).

(25) Barry (1999a), 252. Exactly what makes Locke’s account “absurd” is unclear from this article. But elsewhere Barry writes that, because of their enormous complexity and controversial nature, adjudicating historical claims to territory is “like asking philosophers and lawyers to rule on the question of whether the number seven is orange” (Barry [1999b], 41). This also, of course, leaves the precise nature of the alleged problem unclear. But it can certainly fairly be said that Barry’s language in both articles is far stronger than any arguments he actually advances.

A Lockean Voluntarist Account

