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# No right to unilaterally claim your territory: on the consistency of Kantian statism<sup>\*</sup>

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**Abstract:** The paper examines the consistency of recent Kantian justifications of state authority through reflection on the normative implications of states' territorial nature. I claim that their conceptual structure leaves these accounts unable to close the justificatory gap that emerges at the transition from legitimate authority simpliciter, to legitimate state authority. None of the strategies Kantian statisticians have come up with in order to solve this problem – based on the *proximity*, *occupancy*, and *permissive* principles – provides the needed grounds on which to carve up the earth's surface into jurisdictional domains. Yet, I conclude that this does not require Kantians to cede statist grounds altogether but to take a distinctly 'global perspective' on states.

**Keywords:** Authority; Legitimacy; Kant; Property; Territory.

## 1. Introduction

The fact that, among the burgeoning literature on territorial rights, a distinctly Kantian position is by now well established speaks to a broader shift with regard to the way in which Kant is invoked by contemporary political philosophers:<sup>1</sup> traditionally read as a paradigm cosmopolitan whose normative agenda (laid out in essays such as *Toward Perpetual Peace*) was happily appropriated for debates from the institutional design of a global political order to migration or human rights,<sup>2</sup> recent years saw something of a 'statist backlash'. Driven by a renewed interest in the *Doctrine of Right*, Kant's main legal and political work, an increasing number of theorists discovered him as a proponent of a distinctively state-based morality (Hodgson 2010, Ripstein 2009, Stilz 2011b, Waldron 2011). In contemporary normative debates, these 'Kantian statisticians' most prominently advocate a genuinely moral obligation to leave the state of nature in order to establish and comply with legitimate states. The aim of this paper is to show that it is

precisely reflection on the *territorial* nature of modern statehood, which threatens to render this position incoherent. Ultimately, I hope to show, this leaves Kantian statism tenable only in a radically revised version.

My argument unfolds as follows: In the first section of the paper, I delineate the normative concept of territorial jurisdiction and introduce the justificatory gap that emerges at the transition from theorising legitimate authority, to theorising legitimate *state* authority. I go on, in the second section, to set out why the Kantian statist framework – deriving the need for political authority from the problematic structure of unilateral property claims – has a uniquely hard time bridging the gap. The third section scrutinizes three strategies Kantian statist have come up with in order to solve this problem – based on the *proximity*, *occupancy*, and *permissive* principles – and shows why each of them fails to license (within the parameters of Kantian statism) a particular way of carving up the earth’s surface into jurisdictional domains. In the final section, I conclude that the impossibility to close the justificatory gap does not require Kantians to cede statist grounds altogether, but incites an altered, distinctly cosmopolitan perspective on states.

## **2. Territorial jurisdiction and the justificatory gap**

One of the most momentous features of our political world is that it is made up of states. Characteristically, states are territorial entities: their claim to make and enforce law (to exercise legitimate authority) pertains to a particular bounded geographical area and the people present within it at a particular point in time. Although this fact is so deeply entrenched in modern life that it may be hard to even imagine different forms of political organisation, it is far from being an unalterable feature of the human condition, or even of organized, law-governed human associations. Human societies have in the past lived together under institutions with central authority but no fixed borders (like empires), or even within feudal

structures where political relationships collapsed into personal relationships of authority and obedience (cf. Pierson 2004). Yet, notwithstanding recent diffident developments (in global politics) towards more fragmented forms of sovereignty that may be taken to foreshadow that this connection need not be here to stay forever, for the time being our world remains one divided into institutions linked to particular pieces of the earth. Due to this territorial nature, states claim what is usually called jurisdictional rights: to make and enforce rules over continuous geographical areas.

Let us get a bit clearer on this claim to territorial jurisdiction by delineating it from two further normative concepts that are related but of different extension: legitimacy or legitimate authority, and territorial rights. Territorial rights are usually taken to have three distinct dimensions (Simmons 2001, p. 305): the state's claim to make and enforce law within its borders, to extract and use the natural resources on its territory, and to control its borders. Jurisdictional rights thus only figure as one element of a more extensive bundle of rights-claims that states make with regard to their territory, each of which requires separate justification. While modern states typically claim all three kinds of rights, in this paper I will solely focus on the claim to territorial jurisdiction. For, while we can at least hypothetically conceive of a state that lacks entitlements to exclusively control the natural resources that good fortune happens to have located in it or to exclude potential immigrants from entering it,<sup>3</sup> territorial jurisdiction instead seems to be a constitutive component of modern statehood.<sup>4</sup> If it turned out that the claim to territorial jurisdiction cannot be vindicated, what we normally think of as states would no longer exist. Hence, in what follows I will discuss the question of territorial jurisdiction without reference to (legitimate restrictions on) immigration and (legitimate distribution of) natural resources – although our answer to the former will surely have repercussions when it comes to the latter.

On the other hand and more importantly, we can delineate territorial jurisdiction from the concept of legitimacy, or legitimate

authority. Legitimacy describes a moral status that we ascribe to a political institution that fulfils certain criteria, and/or the norms emanating from it. It endows this institution with a specific normative advantage to create morally binding norms for those named as its subjects, and to coercively enforce them.<sup>5</sup> Territorial jurisdiction specifies a particular form in which authority can be exercised: namely, against everyone present at a certain point in time within a certain geographically defined area. That people can have a part of their rights and obligations defined by an institution merely by being present in the territory over which this institution governs points to the remarkable fact that *membership* and *subjection* are not coextensive when it comes to modern states. That is to say, while state citizenship is sufficient for being subject to the state's authority (states typically claim authority also against non-resident citizens, for instance to pay taxes or to do their military service), it is not necessary: states also enforce their laws (and take themselves to legitimately do so) against visitors and non-citizen residents.<sup>6</sup> These are individuals who, while physically present at a certain point in time at a piece of geographical space that the community claims as subject to its control, lack the more direct ties that characterise citizens' relation to their own community. While territorial jurisdiction is thus at its core – like legitimate authority – a claim to a moral power *over persons*, it crucially adds a spatial element: it specifies that a particular institution (the modern state) claims authority over everyone within a particular bounded area. Notice that neither the traditional question 'under which conditions one agent could, from a moral point of view, have authority over another agent', nor the answers traditionally provided (in terms of consent, membership, fairness or the like) take account of this spatial dimension, as would be required in order to normatively inform the real-world practice of territorial jurisdiction.

The crucial implication for the purposes of this paper relates to the way in which claims to jurisdiction come with an expansion of argumentative burden compared to legitimate authority simpliciter. For, a claim to make and enforce law within a territory does not merely impose a

duty (to obey the law) against those who are directly addressed qua membership.<sup>7</sup>What is more, ‘institutional outsiders’ also have a duty imposed on them to respect the legitimate jurisdiction of the respective state. This duty is bipartite: on the one hand, outsiders have a duty not to interfere with or undermine the (legitimate) institution’s exercise of authority within its boundaries, or set up alternative institutions there (Stilz 2011a, p. 573, Waldron 1993, p. 17). This is a duty of unlimited range incumbent upon everyone regardless of whether they ever become subject to the first-order norms a state issues. And second, they have imposed on them a duty to submit – if and when present within the relevant territory – to the rules set by the institution that claims the territory as subject to its control. Consequently, at the extension from a specifically moral power to make laws, to an entitlement to do so within specific boundaries, emerges what I call a justificatory gap: additional reasons (for the exercise of political authority within a particular territory) need to be given to those whose normative situation is significantly changed without them being member of the institution.

To make this more vivid, imagine a hypothetical scenario where individuals A, B and C live in a world not yet territorially partitioned. Now A and B decide to enter into political relations in order to regulate their interactions. While this leaves C initially unaffected, the situation changes as soon as A and B decide to territorially materialize their political project, claiming a particular territory as subject to their jurisdiction. In so doing, they impose a bipartite duty on C: not only is the relevant land out of reach for any political project C may want to realise herself at some point. What is more, whenever C is from now on physically present within the territory – let us assume it includes an impressive mountain range that C, a passionate mountaineer, frequently visits – she will be subjected to the laws set by the institutions through which A and B cooperate politically. *Some* reason needs to be given to C for the change in her normative situation brought about by A and B’s claim to subject the territory to their control.

Some aspects of the problem I have developed in this section may reverberate with what is discussed in the territorial rights literature as the ‘particularity problem’ (e.g. Moore 2015, pp.87-100; Nine 2012, 27),<sup>8</sup> that is the question how to move from a general justification of territorial rights to justifying specific areas being under control by particular states. Indeed, the problem I focus on is not entirely unrelated in the sense that a state’s claim to exercise jurisdiction is of course always a claim to do so over a particular piece of land. However, approaching this question against the background of the justificatory gap gives us a different perspective on the kind of normative endeavour we are engaged in when attaching particular peoples to particular bits of territory: it turns our attention *away* from related questions familiar from disputes about legitimate authority – remnants of which are often still present in the territorial rights literature – ,<sup>9</sup> to the underlying accounts of what entitles agents to exercise normative control over objects. For, as we have seen, this is the added normative burden as we go from a claim over people, to a claim over people within a certain geographic area. It is this aspect that I shall turn to now.

### **3. Kantian statism and a Lockean way out**

In the last section, a brief conceptual analysis of territorial jurisdiction yielded the insight that a justificatory gap emerges at the transition from reflection upon political authority, to state authority specifically. This gap emanates from the duties imposed on outsiders when a political community (through their institutions) organises itself politically within specified territorial boundaries. I also pointed to the fact that, as a consequence, a theory’s success in dealing with this problem will prominently hang on the justificatory structure of the underlying account of rights over objects.<sup>10</sup> My aim in this section is to show why this leaves the Kantian statist account (e.g. Hodgson 2010, Ripstein 2009, Stilz 2011b, Waldron 2011) in a uniquely problematic position with regard to the

justificatory gap. Notice, to that effect, that we can distinguish two ways of conceptualising the duties imposed on outsiders when an agent claims normative control over an object (Van der Vossen 2015, pp. 68-72): in the case of *duty-creation*, a new duty is brought into being that did not exist before. According to *duty-activation*, in contrast, a unilateral claim merely enacts a pre-existing duty. For instance, when I step into your path, I do not create a de novo duty for you not to run me over, but merely activate your prior natural duty not to do me harm." I want to show that it is the fact that the Kantian statist account, unlike its Lockean competitor, rests on a construal of unilateral appropriation as *duty-creation*, which critically raises the justificatory burden with regard to claims to territorial jurisdiction.

*Kantian Statism and Duty-Creation.* In order to understand the predicament of the Kantian framework, we need to highlight the way in which it grounds a rationale for political authority in specific considerations about the possibility of property rights. The starting premise of the Kantian statist account is that all individuals have an equal basic right to set and pursue their purposes independently of the wills of others, i.e. to autonomously make the decisions that govern their own life, together with an obligation to respect others' equal right to do so (Ripstein 2009, pp. 30-56). Now, people do not pursue their ends in empty space, but tend to do so by taking up means: they claim as theirs objects outside of them. Effective self-determination without being subject to the choices of others, the argument goes, requires the possibility of excluding them from the use of certain objects, and hence the possibility of having full-fledged property rights (Stilz 2011b, pp. 39/40). For, any remotely complex project that individuals set out to pursue will require them to appropriate external objects. The problem is that, in unilaterally appropriating objects of their choice, individuals *create* new obligations for others. In doing so, they take themselves to possess natural authority over them, i.e. to partly determine (as well as interpret and ultimately enforce) their rights and obligations. For the Kantian, such an assertion of natural moral powers is a non-starter among moral equals, since no person is any more entitled than any other to



determine the terms of their interactions. The solution consists in joint entrance into the 'civil condition': only a collective or 'general' will, embodied in the state, is entitled to make public coercive law that puts everyone under the pertinent obligations. In providing a public interpretation of these rights and obligations and imposing it on everyone, the state coordinates interpersonal interactions such that nobody is subject to another's arbitrary choice.

Notice an important implication of this argument: particular holdings can only exist within a distributive scheme publicly defined and enforced by a third party. While the Kantian statist account provides a general rationale for the existence of a system of property rights as a whole – it enables individuals to pursue their projects consistently with each their equal right to freedom – what we do not get is an account of *individuation* that would allow us to tell a story how people can come to have particular holdings (outside the civil condition). Notice that we face a structurally analogous problem when it comes to rights over territory. The Kantian argument gives us a general rationale for territorial states as we know them, grounded in a moral requirement to live under authorities that make and enforce law valid for everyone present within a certain geographical area. What remains a conceptual blind spot, however, are the possible grounds upon which a particular state could legitimately claim to do so within a particular territory – a story that needs to be told in order to bridge the justificatory gap. For, to unilaterally claim a territory as subject to one's control is to (problematically) create a new duty on outsiders to respect this claim.

*Lockean Statism and Duty-Activation.* Now compare the Kantian framework to an alternative Lockean story (e.g. Schmidtz 1990, Simmons 1994, Van der Vossen 2009). What justifies property rights on this account is not the particular kind of moral relation they make possible, but their contribution to the fulfilment of human basic interests.<sup>12</sup> People's fundamental, e.g. autonomy-related, interest in having secure access to and exclusive control over what is theirs is taken to ground a general right to

own property within certain limits. In a second step, this general right is individuated: people can acquire entitlements over previously unowned objects by performing specified acts on them, e.g. mixing their labour or making efficient use of them. The boundaries of this share are set by certain provisos that ensure others' equal fulfilment of the relevant interests. Within these constraints, I can unilaterally impose on others obligations to respect my rights in what I acquire. For, crucially these duties are not newly *created*, but merely *activate* a prior duty to respect my right to what I successfully acquire in accordance with and within the limits of a prior moral right to own property in general. Such acts of duty-activation are thus taken to be a "common and unproblematic feature of moral life" (Van der Vossen 2015, p. 71) that involve no special moral legislative authority.

Once we think about rights in territorial jurisdiction within this conceptual structure, the justificatory burden is of course much lower: all that needs to be shown is how an important interest justifies a general right to territory, which the relevant agent (e.g. a people, nation, or state) can then unilaterally individuate by relating to the land in a particular way. The duty imposed on outsiders is not created anew, but specifies a prior duty to respect rights in territory thus acquired (given the relevant provisos hold). We can see this most clearly in accounts of rights over territory that take direct inspiration from Locke (Simmons 2001, Steiner 2005). On this view, individuals can generate a natural entitlement to a piece of land in virtue of performing certain acts, like labouring or occupying it. They then each decide to transfer elements of their property rights over their particular area to the state, whose right to territorial jurisdiction emerges by aggregation. The duties imposed on others through controlling a piece of land are contingent on their conformity with the pertinent provisos: claims to territory are legitimate under the condition that what remains for other communities either constitutes a 'fair' or 'equal' share of the common stock (Simmons 2001, Steiner 2005) or at least does not prevent them from meeting their own basic needs (Nine 2012, p. 27).<sup>13</sup>

The Lockean story thus lends itself to a significant shift in

argumentative burden: as long as territorial boundaries have emerged in accordance with the specified provisos,<sup>14</sup> states have a prima facie right to a claimed territory. Thomas Christiano (2006, p. 82) calls this the *conservation principle*: unless there are cases of severe injustice towards insiders or outsiders, there is a strong moral presumption in favour of existing boundaries, regardless of how 'arbitrary' their histories are. As long as the relevant provisos have been and continue to be met, existing territories can be justified with regard to genealogies of their emergence. The Kantian statist instead does not have this strategy at her avail, as the justificatory burden is significantly higher: she cannot just stipulate that any existing state is justified in making law within its particular territory, as long as it has come to hold this power in the appropriate way and continues to exercise it legitimately. Even the introduction of additional 'external' legitimacy requirements specifying how institutions ought to relate to outsiders when it comes to both the establishment and exercise of its territorial jurisdiction, for instance with respect to the human rights of outside individuals and the territorial sovereignty of other states (Buchanan 2004, p. 266 ff., Stiliz 2011a, p. 590 ff.), does little in attenuating this conclusion. These criteria may help specify the conditions under which existing boundaries could be rightfully protected and preserved, but do not bring us any closer to establishing territorial boundaries and respective subject populations in the first place. What Kantian statisticians need to do in order to maintain the consistency of their framework is provide, from within its internal logic, a positive criterion for connecting particular territories with particular states – a criterion that cannot merely have recourse to the institution's internal structure, or the represented collective's relation (e.g. attachment) to the land. In the next section, I will examine three criteria – based on the *proximity*, *occupancy* and *permissive* principles respectively – that Kantian statisticians have come up with in response to this problem.

## 4. Three Kantian strategies

In the last section, I have laid out why the gap that emerges at the transition from justifying political authority to justifying *state* authority looms particularly large for Kantian statist. Prima facie, the rationale provided for territorial jurisdiction – in contrast to a broadly Lockean alternative – lacks a criterion upon which specific pieces of land could be identified (or unilaterally claimed) as subject to the authority of specific institutions. Aware of this problem, Kantian statist have developed a number of argumentative twists that would allow for such an individuation while staying within the conceptual purview of their preferred narrative. I will argue that none of the three strategies scrutinized in this section succeeds in this endeavour.

### *The proximity principle*

The first strategy, which has been put forward by Jeremy Waldron (1993, 2011), offers an empiricised version of the Kantian statist account laid out in the last section. Recall that the argument in its general form derived the need for political authority from a conceptual puzzle pertaining to rights over objects: in unilaterally claiming and enforcing what I take to be my property, I illegitimately arrogate to myself a moral authority I do not have. Only a public authority, in making coercive law valid for everyone, prevents people from mutually imposing on each other their unilateral interpretations of what is theirs. Waldron's empiricised version of what up to this point takes the form of a purely moral problem focuses on how individuals' wills concretely instantiate, and clash, in empirical reality: namely, within quarrels about concrete objects, land, and resources. Under the assumption that it is among those living 'unavoidably side by side' that these conflicts are most frequent and endemic,<sup>15</sup> we can 'localise' what started as a general moral duty to enter into the civil condition: following

Waldron's 'proximity principle' (1993, p. 14), it is those immediately adjacent to me with whom I ought to establish a political institution so that our disputes can be resolved consistently within a single coherent framework of laws.<sup>16</sup> While he concedes that the scope of the state-centred legal framework might have to be extended with an expanding sphere of human interactions, on his view there is something about the very frequency and intensity of the disputes among those in physical proximity that uniquely indicates the need for a standing arrangement like the modern state as opposed to piecemeal conflict-solution. In order to account for the presence of particular states in particular areas, however, an additional assumption is required: that 'humans are not spread out evenly across the face of the earth, but clustered together in a plurality of distinct localities' (Waldron 2011, p. 10). The idea is that geographical factors like the unequal distribution of resources on earth attract people unevenly to different locations. While we may have occasional interactions with people elsewhere, our most 'frequent repeat players' (Waldron 2011, p. 11) will be those we share a 'cluster' with.

Now, it is not entirely clear what job Waldron actually wants the proximity principle to do. Sometimes, he presents the argument as allowing us both to 'explain the emergence of particular states in particular areas' (Waldron 2011, p. 14), and offering a normative criterion for drawing the boundaries in the rare cases where this is within our control. But of course, he is aware both that people nowadays just do not live in clustered groups (but are virtually dispersed continuously over the earth) and that the current allocation of peoples and territories into separate states is the result mostly of violent histories rather than organically growing communities gradually approaching one another. Given that I find myself in one polity with some people that I live side by side with, but not with others (who are just on the other side of the border), the proximity principle will not do the desired work in carving up the earth in a non-arbitrary way.

Waldron thus shifts the focus of his argument: away from actual physical to a kind of 'legal proximity' that arises among co-citizens once

borders have been (arbitrarily) drawn and respective addressees of the laws 'cleared up'. The thought is that the incipient arbitrariness sets off a normatively relevant path dependency: once people share political institutions, 'the comparatively higher frequency, density and entanglement of interaction will survive the approach of the populations towards one another' (Waldron 2011, p. 15). The entire argumentative burden now rests on the institutional ties that bind together citizens once they are subject to a common institution. This, however, puts the cart before the horse. Of course an agglomeration of individuals will, once they are institutionally constituted as a 'people', have a higher density of interactions and share bonds they did not share before. Yet, we want to know what entitles a state in materialising its authority here and now, not how it got to acquire and consolidate it. Does this mean that my criticism is only valid under the specific current circumstances of worldwide contiguous human settlement?<sup>17</sup> In a way it does. But this just results from the way in which the justificatory gap presents itself to the Kantian framework. We saw in the last section that the Kantian cannot help herself to a genealogy of boundaries, but needs to provide criteria for claims to territory as they stand. It is this task that the proximity principle falls short of. For, understood as physical proximity, it fails to justify the boundaries of precisely those existing polities that currently claim our allegiance, or indeed any alternative set of concrete boundaries. Understood as legal proximity, instead, it collapses into the *conservation principle*.

### ***The occupation principle***

Anna Stilz (2009, 2011a, 2013) has recently suggested an alternative way of particularizing claims in territorial jurisdiction, drawing on what we can call the *occupation principle*.<sup>18</sup> While Stilz (2011a, p. 579) agrees with the Kantian institutionalism about property rights, she worries that an orthodox version of this view is unable to account for a strongly held

intuition: if rights to objects do only exist under institutionalised schemes of property, it is difficult to explain what is wrong about the forceful removal of non-state (e.g. nomadic) groups of people from their homeland. She thus introduces the concept of occupancy rights as pre-institutional (and thus limited) claims to land, which are weaker than full-blown property rights but ought to be respected by any institutional scheme potentially established on the pertinent land. While it is still the state that holds the territorial right (not a cultural nation, or individual property holders), the right is derived from a prior and more fundamental occupancy right – a right to reside on the land in question – held by the people on whose behalf the state is operating. Hence, all that must be shown is that the people whom the state represents have rights of occupancy – given that these pre-institutional rights to land are by definition particularized claims to a specific area (Stilz, 2013, p. 334), they are supposed to provide the desired move that allows us to subsequently justify the state’s jurisdiction over a bounded territory.

So what precisely is an occupancy right? Stilz defines it as ‘the right to reside permanently in a place, to participate in the practices that are ongoing there, and to be immune from expropriation or removal’ (Stilz 2013, p. 327). It contains two instances: a liberty to reside permanently in a particular space and to make use of it, together with a claim right against others not to be removed from that area. According to Stilz’s ‘plan-based account’, these rights are grounded in people’s autonomy-related interests in stable residence at a particular place. Many of our life-plans and projects are ‘located’ (Stilz 2013, p. 338), that is they unfold and hence require residence at a certain place – from our engagement in social relationships and economic practices to membership in religious, social, and cultural organizations. The ensuing interest to stay in our communities and amongst people with whom we have these relationships is sufficiently weighty to hold others under a prima face duty to respect this occupancy.<sup>19</sup> Three conditions need to be fulfilled in order acquire an occupancy right: a person needs to reside at a particular place now or has done so previously;

residence within that territory needs to be fundamental to the integrity of her structure of personal relationships, goals, and pursuits; and finally, the connection to the particular territory was formed through no fault of her own (Stilz 2011a, p. 585).

We can grant to Stilz the plausible idea that individuals can have some kind of entitlement to be where they are, regardless of whether they live under state institutions or not.<sup>20</sup> Much less clear is how we can derive rights to territorial jurisdiction from these occupancy rights, for two reasons: first, occupancy rights are relatively weak use-rights that can overlap (several people who live in proximity can have occupancy rights over the same place grounded in various located projects and practices), while rights in jurisdiction are much stronger rights to exclusively control an environment (Stilz 2013, p. 350). The justificatory gap, which we are concerned with, only emanates from this stronger claim. Second, occupancy rights are explicitly individual rights for Stilz. While she concedes that there may be derivative group rights to occupancy, these are nothing more than an ‘aggregated bundle of individual occupancy rights’ (Stilz 2011a, p. 579). That is to say, from an individual right that enables autonomous agents to pursue their projects at a particular place we need to get to a collective right that enables them to control collectively, through institutions, their geographical environment.

In her attempt to conceptualise a group with a strong, shared interest in jointly and exclusively controlling the territory they occupy, Stilz is of course constrained by the parameters of the Kantian statist framework she is committed to. We have seen that, on this account, states are not mere vehicles for the self-determination of pre-politically defined groups, but are tasked with solving distinctive moral coordination problems. In order to avoid a cultural nationalist narrative, Stilz thus argues that a ‘people’ in the relevant sense need not pre-exist a state, but can in fact be brought into being by it. The idea is that, merely in virtue of sharing and cooperating together in state institutions, an unconnected group of individual persons may over time be made into a people with the kind of moral bonds that



support their state's claim to the territory comprised by aggregated occupancy rights. A 'people' is thus defined by Stilz as a group that a) has established a history of political cooperation together by sharing a state in the recent past, and b) possesses the ability to reconstitute and sustain a legitimate state on their territory today (Stilz 2011a, p. 591). That is to say that only where a number of individuals already share state institutions, or have recently done so,<sup>21</sup> do their combined occupancy rights translate into territorial rights. Unfortunately, again this leaves us without a non-circular criterion for connecting a particular group of individuals to a particular territory: the moral boundaries of legitimate jurisdiction collapse into the de facto boundaries of existing states. To be fair, the state-modelled notion of peoplehood is only supposed to deliver a *necessary*, not a *sufficient* criterion for legitimate claims to territory. Stilz puts great emphasis on the additional claim that the state also needs to exercise its authority in a way representative of the people it governs. So if, for instance, Russia was to re-appropriate one of its former territories such as Estonia, and then govern it effectively, Stilz would deny that the new enlarged state possesses territorial rights on the grounds that it contains a group with occupancy rights for whom 'Greater Russia' is not a legitimate state.<sup>22</sup> Yet, note that in order to be thus representable in the first place, a 'people' already needs to cooperate politically (or have recently done so) within state-based institutions. Just like Waldron and his *proximity principle*, Stilz's account thus falls back onto the *conservation principle*.

### ***The permissive principle***

The third Kantian solution to the problem of territorial statehood, suggested by Lea Ypi (2013a, 2014), starts from an explicit recognition of (a version of) the justificatory gap: given that initial acquisition as well as continued control over territory affects all those permanently excluded from the territory, she argues, it needs to be justified universally. The only way to overcome this gap is dynamically in historical time. That is to say,

‘the citizens of each state are entitled to the particular territory they collectively occupy if and only if they are also politically committed to the establishment of a global political authority realising just reciprocal relations’ (Ypi 2014, p. 288). We are required to rise above the initial injustice of unilateral occupation by ‘invest[ing] political efforts in creating a kind of political association in which territorial claims can be subject to global, public arbitration’ (Ypi 2014, p. 288). Instead of looking backwards at how states have come to hold their current territory, or how in the present they actually achieve what they are morally tasked with, Ypi thus proposes a turn to the future: given the unavailability of principles on the basis of which we could legitimately draw boundaries, we should focus on ‘how states now act politically to overcome the unilaterality of that initial acquisition’ (Ypi 2014, p. 303). Once the required global political association is in place, states are required to submit to the rules of jointly framed political institutions that rightfully regulate the claims of all.

The role particular states play with a view to such a global authority is purely instrumental: they are a ‘first approximation’ (Ypi 2014, p. 301) to the realization of the required all-inclusive polity, a first step beyond the stage of moral anarchy. Hence, states’ claims to territory can at most be ‘permitted’ – that is to say, they are justified *provisionally* and *conditionally* upon their contribution to a state of affairs that rectifies the injustice that they themselves constitute. Ypi thus draws a direct analogy to Kant’s property argument, the rough structure of which should be familiar at this point. We have seen how it arises from a fundamental tension: while purposive agents need to claim external objects as theirs, unilateral acquisition is at the same time deeply problematic. What we have not attended to so far is the ‘permissive principle’ (*lex permissiva*, in Kant-speak) that Kant employs in order to overcome this impasse. Generally speaking, a permissive principle is an authorization to make an exception to a general prohibition in order to realize an obligatory end. In the case of the property argument, a permissive principle provisionally allows unilateral appropriation *under the condition* of joint entrance into the civil condition

where property rights can be enjoyed through collective rules of arbitration and enforcement. The duty of state entrance mitigates the arbitrariness of exclusion manifest in the unilaterality of initial acquisition. Now, by analogy Ypi wants to argue that territorial states can be ‘permitted’ if, and in so far as, they contribute to the establishment of a global authority realising all-inclusive principles of right. Just as property claims remain provisional until their vindication by public authority, claims to territory remain provisional until carried over into a global authority.<sup>23</sup> Ypi’s willingness to bite the bullet promisingly turns a theoretical outlook that threatens to become a conceptual stasis – the insight that unilateral acts of settlement and the ensuing sets of boundaries are always necessarily arbitrary – into a progressive political project. Nevertheless, the notion of a provisional right (that permissive principles are said to give rise to), which is at the heart of this transitional logic, remains mysterious and ultimately allows for two very contrasting evaluations of the status of existing states and their claims to territory.<sup>24</sup>

On a more moderate reading, the permissibility framework is supposed to enable us to actually theorise existing states’ claim to territory. Indeed, many of Ypi’s remarks may be taken to indicate that the requirement to leave statehood behind is not that categorical after all. For instance, she repeatedly emphasises that states can at most be ‘*invited* but not *coerced* to enter in rightful political relations with other states’ (Ypi 2014, p. 306). The borders of recalcitrant states cannot be arbitrarily dissolved or redrawn on the grounds that they refuse to make their territorial claims ‘conclusive’ by joining a wider political association. Yet, unfortunately she neither explicates what the conditions of permissibility are – what exactly it means to ‘invest political efforts’ (Ypi 2014, p. 309) – nor does it become clear what it would actually mean for a state and its claim over territory to be merely provisionally ‘permitted’, as opposed to conclusively justified. Clearly, the former claim is normatively weaker than the latter, but neither are we told in which way precisely this is the case, nor whether and how this curtails any of the claims states make against both

insiders and outsiders. The suspicion is hence that once again what we end up with is a version of the *conservation principle*, invoking a strong presumption for existing territories and boundaries. At the end of the day, Ypi claims, ‘even though acquisition of a particular territory is a result of historical and political contingencies that can only be retroactively justified, this contingency does not authorize us to modify the present partition of boundaries’ (Ypi 2014, p. 309).

On an alternative and more radical reading of Ypi’s argument, states represent really nothing more than a transitory stage on an unstoppable path to an all-inclusive political community. Their transient purpose is to work towards their own dissolution in favour of a – supremely coercive – global institutional scheme that liberates us from the arbitrariness of existing boundaries. Embracing the Kantian framework would then essentially rule out a form of *statism* as understood so far. Is this the conclusion we are ultimately left with?

## 5. Theorising states from a global standpoint

None of the three strategies scrutinized in the last section succeeded in providing Kantian statists with the argumentative resources to make good – within the confines of their preferred framework – on modern states’ claim to exercise legal supremacy over a bounded geographic area. Its very conceptual structure, it seems, makes it impossible for the account to license a particular way of carving up the earth’s surface. According to a radical reading of Lea Ypi’s *permissive* strategy, recognising the arbitrariness of jurisdictional domains ultimately requires us to overcome a state-based international order. I do agree with her claim that, within Kantian parameters, there is no way of closing the justificatory gap. Yet, in this section I want to challenge her conclusion that the normative pressure that stems from this insight necessarily entails the need to ‘liberate’ us from it by rectifying it historically. Rather than *overcoming* statehood, it should urge

us to explore ways and means of *transforming* the way we conceive of it. For, I think there are good reasons, both external and immanent to the Kantian framework, for safeguarding the statist model. Let me briefly point to each in turn.

First, it seems to me that we are in general well-advised to be rather cautious about vindicating state dissolution in favour of a single unified world community. I do not just want to dismiss the idea of a world state, as is often done, with a brief reference to Kant's famous 'soulless despotism' concern (Kant 1996, p. 356). I acknowledge that recent work has gone some way in conceiving of institutional models beyond a global leviathan (e.g. Scheuerman 2014, Ulas 2015). However, I do share the scepticism of many theorists as to our capacity to (both intellectually and practically) transfer, and implement globally, ideas and ideals that have been very much developed from within and for the nation-state framework – from centralised political control to democratic authorship and political participation – onto the global stage.<sup>25</sup> It is considerations like these that suggest that something akin to a world of plural sovereign states with the capacity for dealing with justice locally ultimately remains favourable to a world state.

More importantly, however, I would like to direct your attention to a consideration grounded within the logic of the Kantian account itself. The idea is that established states, in enabling at least some people to interact on rightful terms by having their rights and obligations publicly defined, constitute a moral achievement of a particular kind. Kant claims that, in doing so, they acquire a moral personality of their own which that would be annihilated were they incorporated into a larger coercive unit (Kant 1996, p. 318; see also Flikschuh 2010). In other words, there is a morally significant disanalogy between sovereign entities – which are already omnilateral wills of sorts, even if bounded – acting in the international sphere, and individuals acting unilaterally in a state of nature.

If we stay with this very idea for a moment, we can see why the Kantian framework does not only provide good reasons to consider ways of

transforming the state rather than overcoming it, but also conceptual resources to do so. To this effect, I need to say a word about Kant's philosophical method more general. At the centre of Kant's philosophy lies what is often referred to as the 'Copernican Turn': simply speaking, the idea that philosophy needs to attend to the structure of human cognition and volition rather than the structure of the world. This change amounts to a radical shift in perspective from the (third-personal) observer's point of view, to the (first-personal) perspective of the agent. Rather than making deductive inferences from first principles, Kant asks us to draw out the (epistemological or moral) conditions of possibility of a given experiential or practical context that we find ourselves in. My aim here is not to go into any detail about this wider philosophical method, or assess its merits. I just want to point out that it quite fundamentally changes the way in which Kant approaches the question of the justificatory gap. For, he is just not interested in (providing criteria for) dividing up the earth into territories from something like an Archimedean 'view from nowhere'. Rather, Kant holds us to reflect on the moral implications of the fact that the boundaries of territorial states, as we find them, are necessarily arbitrary.

This provides us with an alternative way of spelling out the cosmopolitan implications that are, undoubtedly, inherent to the Kantian justification of political authority. To acknowledge that states always normatively point beyond themselves does not entail the need to overcome them, but to look at them from a different, genuinely global perspective. On the methodological level, this changes the way in which we theorise states from the outset: reflection upon states and what justifies them in exercising the right to rule within their territory cannot proceed regardless of the wider normative relations they are embedded in. For Kantians, that is to say, global political theorising cannot be a mere afterthought – they cannot turn their attention to global normative thinking only *after* having settled the matter of legitimate authority domestically. Hence, the *de facto* separation between what is until today theorised as two distinct theoretical discourses – legitimate state authority on the one hand, global political

morality on the other – cannot be consistently upheld. Debates on the justification of political authority (and, very much in line with this stance, recent disputes about territorial rights) still very much continue to start from the assumption that states can be theorised ‘one at a time’ and largely independently of global concerns. This does not entail that Kantians need to entirely collapse the two theoretical projects of state and global theorising into one other. What it does entail is that they cannot just proceed with the state-centred business as usual, given that – from their perspective – the intelligibility of whatever first-order normative question depends on a prior, or higher-order claim to territorial jurisdiction that cannot be conclusively justified.

My primary aim here is to point out that there is a conceptual space for such a fundamentally revised form of Kantian statism. While I do not have the space to fill it out in any detail, let me end with two suggestions that anticipate what this could look like. The first idea just follows Kant in the conclusion that, I take it, he draws himself from the remaining justificatory gap: the need to complement the domestic arena with international (between states) and cosmopolitan (between citizens and states other than their own) realms, constituting a tripartite ‘system’ of right with three functionally differentiated yet conceptually interdependent domains of institutionalisation. Following the argument indicated in the last paragraph, the thought is that while states (qua existence) have a moral personality of sorts, this very status comes with wider, more encompassing obligations towards other states and outside individuals. Kant is quite adamant that if any of the three levels is lost sight of, ‘the framework of all the others is unavoidably undermined and must finally collapse’ (Kant 1996, p. 455). Domestic and global spheres are so intimately tied to one another that ‘the problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states, and cannot be solved unless the latter is also solved’ (Kant 1991, p. 47). As basic as this insight seems for readers of Kant’s political philosophy, it has been quite woefully neglected in the recent statist wave.

A second suggestion goes beyond Kant's own focus on questions of transnational order and explores a changed perspective on the internal structure of states themselves. Peter Niesen (2012) and David Owen (2014), for instance, argue that the current intellectual climate with its heavy focus on overarching supranational collectivities, constitutions, and governments and thus on ways of transcending the modern state, has (lamentably) directed our attention away from proposals that emphasise transformative potentials that *inhere* it. Only once we stop restricting our theoretical horizon exclusively to models of a post-national order will we be able to envision ways of transforming our world of states (and the pertinent ideals of membership and belonging) in a cosmopolitan direction. Under the label of a 'cosmopolitanism in one country', they thus conceptualise ways of transforming statehood through 'cosmopolitan political activity' from within. Niesen and Owen set out a number of concrete institutional implications this may yield, from ways of extending membership and participatory rights to foreigners, to far-reaching rights of migration and movement. For now, I want to abstain from assessing the respective merits of these proposals. What matters to me is the way in which they come out of an acknowledgement that the non-vindicability of territorial borders can leave a mark on the way in which we think about state practices and institutions themselves. We may not be able to *overcome* the (unavoidable) arbitrariness of the political world as we find it, but can at least go some way in accounting for, and attenuating, the normative pressure that stems from this insight.

## **Conclusion**

The aim of this paper was to point out a problem for Kantian statism: the very way it justifies political authority, I argued, threatens to make the account inconsistent. For, the problematic structure of unilateral property claims from which Kantian statists deduce the need for public arbitration resurfaces analogously when it comes to states' claim to make and enforce



law within a bounded geographical area. The argumentative moves proponents have worked out in order to overcome this problem boil down to two, equally unsatisfying, strategies: either they fall back on the *conservation principle*, putting up with the status quo of existing territories and boundaries, or they give up the possibility of bounded statehood altogether. My own proposal sought to point out that reflections on the fact that subjects just find themselves, for good or worse, thrown into an institutional landscape that is the result of mostly contingent and violent histories of drawing boundaries might actually yield progressive political implications. Awareness of the justificatory gap, I argued, should incite Kantians to take up a genuinely global perspective on states. My hope is that the gist of this conclusion – that theorising states in the face of rapidly changing global conditions requires thinking outside the box and daring a glance beyond our own nose instead of turning inwards and settle with accustomed ideas and convictions – has repercussions well beyond those who subscribe to the Kantian outlook that has been at the centre of my attention here.

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<sup>1</sup> Kantian accounts of territorial rights are most explicitly defended by Stilz (2009, 2011a) and Ypi (2014). A good overview of positions defended in the wider debate is provided by Ypi (2013a).

<sup>2</sup> See for instance Bohman and Lutz-Bachmann (1997), Follesdal and Maliks (2013).

<sup>3</sup> The former position has been advocated e.g. by Thomas Pogge (2011), the latter by Joseph Carens (2013, pp. 270-72) and recently Clara Sandelind (2015).

<sup>4</sup> An anonymous reviewer has suggested to me that if a state *involuntarily* lost control over its resources or borders, e.g. through an external imposition of forces it cannot resist, it would also have lost central elements

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of its sovereignty such that we might want to question its ongoing statehood. I take it, however, that in the depicted case, the loss of control over resources and borders only expresses (or is indicative of) a prior independent loss of sovereignty that makes the former possible in the first place.

<sup>5</sup> While some authors (e.g. Ladenson 1980) want to separate the notions of legitimacy and authority (reducing legitimacy to a mere permission to coerce), I stipulate an understanding of the term as containing an explicitly moral power to change the normative situation of those subject to it (for instance by imposing obligations or conferring rights on them).

<sup>6</sup> There is certainly a difference in degree of subjection between citizen and non-citizen residents, as there are a number of ('civic') rights and obligations that only accrue to the former.

<sup>7</sup> Throughout this paper, I will be using 'duty' and 'obligation' interchangeably.

<sup>8</sup> I am grateful to an anonymous reviewer for urging me to clarify this. The 'particularity problem' is also discussed by various authors in a symposium on territorial rights in *International Theory* 1(6), 2014.

<sup>9</sup> A. John Simmons (2013), for instance, has recently reframed his 'particularity problem' known from earlier work on political authority as a 'boundary problem' concerned with territorial jurisdiction.

<sup>10</sup> In order to draw this analogy, I do not intend to deny the important difference between first-order rights over objects (including entitlements to use, transfer, and exclude others) and second-order powers to make the rules that define these rights (and to interpret and enforce those rules over the territory in which the object is contained), which is well-rehearsed in the literature (Miller 2011; Stilz 2009, pp. 194-198). I am just capitalising on a specific similarity between two kinds of rights over objects that each unilaterally impose duties on third parties.

<sup>11</sup> Thanks to Anna Stilz for this example.

<sup>12</sup> I am not claiming to provide an accurate reconstruction of Locke's own account here. Locke himself famously stipulated a right to own property grounded in God's command to make use of the earth in order to preserve mankind (Locke 1988, II, Ch.5).

<sup>13</sup> A similar story could be told about nationalist accounts of territory (Meisels 2005; Miller 2012): they focus on the ways in which a nation can particularise, through entanglement with a specific piece of land, what they take to be a general right of nations to self-determine (through a territorial political entity).

<sup>14</sup> As one reviewer helpfully points out, the Lockean strategy may thus provide the 'easier way out' only in ideal theory; in the real world it will be very hard to actually identify existing holdings as complying with the rules of original appropriation and legitimate transfer.

<sup>15</sup> Waldron attaches much importance to Kant's remark that 'when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition' (Kant 1996, pp. 451/2).

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<sup>16</sup> The assumption that it is those in my immediate vicinity with whom moral arbitration is particularly urgent might itself be questioned. For, in today's world who is a threat to whom depends more and more on structural power relations mediated by markets and institutions that are largely independent of spatio-temporal proximity. However, for the sake of the argument I shall run with it here.

<sup>17</sup> I am grateful to an anonymous reviewer for pressing this line of argument.

<sup>18</sup> Margaret Moore (2015) has offered a very similar, though not primarily Kant-inspired account that centres around occupancy rights.

<sup>19</sup> This is merely a *prima facie* right as there are distributive constraints as well as other potentially outweighing considerations.

<sup>20</sup> Indeed Kant himself grants all individuals a 'right to be wherever nature or chance (apart from their will) has placed them' (Kant 1996, p. 414).

<sup>21</sup> Stilz (2011a, p. 575) does consider something like (temporally limited) 'residual' peoplehood in cases where people who used to have a state do not have it anymore.

<sup>22</sup> I am grateful to David Miller for this example.

<sup>23</sup> Interpreters are in dispute how precisely to understand the idea of 'provisional' property rights that could be acquired pre-politically under the permissive principle. While some argue that provisional rights are merely an inconclusive form of property rights that are subsequently rubber-stamped by the state (e.g. Hruschka and Byrd, 2010), I side with those who point out that according to the very structure of Kant's argument property rights are only possible under public authority (e.g. Flikschuh 2000). This is what causes the problematic lack of a criterion upon which to determine the particular shares that can be carried over into the 'public condition'.

<sup>24</sup> I take it that the specific ambiguity I point out here is reflected in a wider tension in Ypi's work as a whole, between statist commitments (e.g. Ypi 2008) and the endorsement of more radical types of institutional change (e.g. Ypi 2013b).

<sup>25</sup> Some of these arguments are nicely summarised in Miller (2010).

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