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**JUSTICE, LEGITIMACY AND POLITICAL BOUNDARIES:**  
The  
Morality of Border Control

by

*Enrique Camacho*

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## Contents

<b>Introduction</b>	6
<b>Part I. Two Ways of Thinking About the Morality of Borders</b>	16
§1. Liberal Revisionism: The Case for Open Borders	18
§2. The Conventional View and The Standard Objection	23
§3. The Moral Character of Liberal Democracies and The Boundary Problem	28
§4. Two Ways of Understanding Borders	36
§5. An Alternative View of the Morality of Borders	43
<b>Part II. Cultural Nationalism and Legitimate Border Control</b>	49
§6. Supplementary Nationalism and Borders	49
§7. Miller's Cultural Nationalism and Closed Borders	52
§8. Redundant Nationalism	57
§9. Cultural Self-Determination and Political Self-Determination	65
§10. Illiberal Nationalism	71

<b>Part III. Freedom of Association and Legitimate Border Control</b>	79
§11. Cultural Nationalism and State's Rights of Association	79
§12. Borders and Universal Patterns of Exclusion	83
§13. Disanalogies	91
§14. Legitimacy as the Protection of Human Rights	98
§15. The Moral Stand of States	107
<b>Part IV. Legitimacy-Oriented Accounts of Borders</b>	114
§16. The Over-simplification Charge	114
§17. The Basic View and the Public Justification View	118
§18. Legitimacy-Oriented Accounts	129
§19. Legitimacy as Integrity	135
§20. Continuous Legitimacy	144
<b>Part V. Appendix: The Moral Character of Territorial Borders</b>	151
§21. The Desiderata of the Standard Objection	151
§22. Democratic Borders	153
§23. Associative Borders	161
§24. The Puzzle of Territory	168
§25. Territory as Trust	177
<b>Conclusions</b>	186
<b>Bibliography</b>	198
<b>Glossary of Terms</b>	206

**Abstract.** The general problem of the morality of borders is to determine what kind of borders liberal democracies ought to have. This in turn raises two particular problems. First to determine the nature of states entitlement to control the administration of political and territorial borders and second, to determine what constitutes to exercise this entitlement in fair terms. This thesis is devoted to the first particular problem. I distinguish two kinds of approaches to legitimate border control: justice-based accounts and legitimacy oriented accounts. I argue that justice-based accounts are inappropriate to frame and address the legitimacy problem of borders because they typically merely assume that a set of institutions apply to those over whom coercion is exercised. But these accounts never provide an explanation about why we (and not others) have legitimate rights over territorial borders. This standard objection shows that these views fail to reach the boundary problem, but it does not say why. In this thesis I advance an explanation. I say that justice-based accounts are unfit to address problems of borders. The idea is that justice-based is a simplified account tailored to the problem of public justification, but this simplification has removed the traits relevant to reach the boundary problem. In contrast I introduced legitimacy-oriented accounts of borders. When legitimacy is not about justice and the problem of public justification of coercion, it is about integrity and the assessment of political power from the point of view of distinct political virtues such as fairness, democratic participation, due process, and justice. Legitimacy as integrity performs a division of labour between distinct conceptions of legitimacy in order to justify political power as a whole including the kind of power that borders exercise. But integrity of international basic institutions like borders point out to porous borders as the appropriate case for liberal democracies.

**Introduction<sup>1</sup>.** In 2010 it was estimated that 214 million people were living outside their country of origin. Only 6 out of 10 settled in an affluent country;<sup>2</sup> many of them have settled in developing countries. Mexico is a developing country, but immigration is still scarce.<sup>3</sup> However, this may change very soon. Mexico is the crossing point of many of the so-called *trans-migrants*: meaning migrants trying to reach USA, Canada or some other final destination (Gonzalez & Pellicer 2011: 108). Some of them may decide to stay in Mexico after all, if the country becomes an attractive destination. In any case, Mexico is the source of a vast quantity of migrants; for instance, more than ten per cent of the entire population of the USA is originally from Mexico.

Mexico is in its principles and its political arrangement a liberal democracy that is under construction. As such, Mexico has established its own international agenda pursuing the active defence of basic rights of Mexican migrants. But this diplomatic lobby contrasts awkwardly with Mexico's systematic abandonment to defend the rights of immigrants within its own territory.

This institutional awkwardness has been worsened by the lack of a defined course of Mexican foreign and migratory policy. But the discussion about what immigration policy we want begins first with the prior question of what border institutions we are morally permitted to have according to the basic moral and political principles we endorse. This constitutes *the boundary problem*. The general aim of this thesis is to tackle the boundary problem by laying the initial groundwork necessary to sketch an alternative and more plausible view of the morality of borders.

Being a member of a political community is something of paramount importance because it shapes our character, goals, values, options, opinions, beliefs, and even our imagination in a pervasive, unique and very profound way. At the same time, being a member of a liberal democracy, even if it is a liberal democracy under construction, is something in great demand, because it entails, at least for some, the possibility to aspire for a larger range of valuable opportunities to shape one's life as one wishes.

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<sup>1</sup> I provide a glossary of the various philosophical terms I employ during this work. It can be found at the end of the thesis. The main views and objections can be found as well here in the introduction. The glossary orders them in alphabetical order and adds other terms I invoke.

<sup>2</sup> International Organization of Migration. <http://www.iom.int/jahia/Jahia/about-migration/facts-and-figures/lang/en>

<sup>3</sup> In Mexico less than 1% of the population is an immigrant, according to IOM.

The sustained increment of migrants trying to reach affluent western liberal democracies and developing liberal democracies has posed the following problem. Liberal democracies became a desirable destination among other things because they are characterized by their *moral character*. This means that liberal democracies, in principle and in its political arrangement, abide by certain fundamental moral principles that establish complex forms of mutual concern such as the protection of rights and dignity. These forms of mutual concern tend to allow a greater range of valuable options than other kinds of regimens.

This is problematic, because for many scholars this moral character binds liberal democracies to provide a good justification for rejecting those who seek better life chances within them (Miller 2005a). Consequently, the morality of borders is a source of deep and stark controversy, not only because borders have a pervasive effect in the lives of everyone on both sides (of the border), but also because it is not evident how liberal democracies may justify exclusion of outsiders and at the same time remain coherent with its moral character. That is why the moral character of liberal democracies is *the central organizing idea* of this thesis, because the basic moral and political principles we endorse must guide us to determine the kind of border institutions we ought to build.

In light of the moral character, the justification of exclusion is challenged by the desperate situation of many migrants. If membership of a community is so paramount, then to migrate entails great costs, because migrants leave behind almost everything. Presumably, not many are keen to spontaneously abandon their fatherland if they do not need to. Most emigrants escape the worst social evils, like famine, poverty, natural disasters, illegitimate governments, economic crashes, financial crisis, gender discrimination, xenophobia, homophobia, racism, religious persecution, etc.

Among international migration, during 2010, the amount of those escaping from a life threatening situation increased up to 15.4 million (IMO). On the face of it, considering immigration as a problem is not simply a matter of persuading majorities about one kind of border policy, it requires taking into account the despair and dire need of those who dare to migrate. This means that most migrants have a good claim for being admitted. At the same time, affluent liberal democracies have good reasons to limit the number of immigrants grounded on the protection of the basic rights of their members and on the burden to institutions that newcomers may cause to public services and welfare systems.

In the face of these challenges, it is not clear how we should proceed especially because both classical and contemporary political theory seem to overlook the problem. On

one hand, classical political theory seems to assume rather than explain the control over territorial and political borders. People have always moved across the globe for a variety of reasons. But restrictions on migration coming from the nation-state's borders are a rather recent development. Prior to the twentieth century, there are no signs of a consistent immigration policy (Alden 2012). Migration controls were sporadic and when seldom enforced they responded to specific circumstances like potential economic benefits, colonization, worker shortage, surplus of workers, etc. In any case, state dominion over borders was widely regarded as an analytic property of state's sovereignty. Classical political theory remained silent about the subject except perhaps for two notorious exemptions.

Locke, for instance, justifies the legitimacy of continuous boundaries in the joint property and consent of associated members.<sup>4</sup> Some of the dominion that individual members have over their own property is, thus, ceded to the state in order for it to implement the necessary arrangements for a peaceful and prosperous society; thus, giving raise to state rights of jurisdiction. The state then has a dominion over the territory that is greatly analogous to private ownership of the land. As such, the state wields discretion on movement across its political and territorial borders. In his *Elements of Politics* (1908: 248)<sup>5</sup>, Sidgwick states that it is essential for the modern state to exercise *supreme* dominion over a particular portion of the earth's surface (1908: 221). Thus, it is taken merely as axiomatic that states have the right to decide whether to accept any immigrants at all. In any case, the state has discretion on the conditions it wishes to impose on admission. This is what I call *the traditional view of borders*.

On the other hand, contemporary liberal theory and democratic theory both begin by presupposing the existence of the *demos*: a political community and its members. They do not provide a definitive criterion to decide who is in and who is out. The reason is that liberal and democratic theories of legitimacy and justice are addressed to the people subjected to the dominion of its institutions. For instance, classical political theory is mostly concern with justifying political power to subjects (Simmons 2001). In turn, contemporary political philosophy focuses mostly on the public justification of coercion and distributive principles to its citizens (Lægaard 2010). Neither addresses justifications or arguments to foreigners or takes the existence of borders as problematic at all. This diagnosis of classical and contemporary Anglo-American political theory I call *the underdeterminacy problem*, because liberalism and democratic theory remain undecided and underdetermined about a normative explanation of membership (Scheffler 2002; Blake 2007; Goodin 2007; Avizadeh 2008; Lægaard 2010).

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<sup>4</sup> For a discussion on Locke, see Simmons 2001: 312-17 and Blake & Risse 2007:3-10.

<sup>5</sup> As cited in Miller 2008a: 374 and Simmons 2001: 301.

In the face of this underdeterminacy, a group of liberal scholars thought that the issue wasn't as straightforward as Locke and Sidgwick thought (Walzer 1983; Carens 1987; Anderson 1991). If the underdeterminacy diagnosis is sound, liberalism would need to be supplemented with an additional piece of theoretic machinery. Some liberals think that in order to clarify membership and the provision of rights it raises, it is crucial to engage in a comprehensive methodological revision of liberalism and democratic theory as a whole (Blake 2007; Goodin 2007; Avizadeh 2008).

For some scholars, this revision will show that liberalism can only be consistent with its own moral principles of equality and freedom of movement if it pursues a regimen of relatively open borders (Carens 1987; Cole 2001; Kukathas 2010). Yet, others believe that the central locus of political justification is nationhood. Thus, what is needed in order to supplement liberalism is a theory of nationalist legitimacy that offers a nationalist principle of political self-determination that explains membership and permissible partiality in a principled fashion (Miller 1995; Tamir 1993; Gans 2003). A few think that a reinterpretation of the standard provision of liberal rights would be enough to supplement liberalism by means of a state's principle of political self-determination (Walzer 1983; Wellman 2008; Altman 2009).

Despite this stark controversy about how to proceed with the boundary and underdeterminacy problem, a broad consensus has emerged among political theorists around the idea that the traditional view was no longer acceptable for liberal democracies and that liberalism and democratic theory needed to be supplemented in certain way in order to offer a justification for border control and exclusion. For instance, as the idea of human rights became central to international discourse, it became clear that one implication of human rights would be that the interests of would-be migrants needed to be somehow taken into account. And this kind of consideration includes the requirement of addressing a principled justification for rejection.

It is true that this moral shift in the morality of borders is promising; but the current state of normative Anglo-American debate remains unsatisfactory. Consider, for instance, the role of immigration in the industrialization, growth, and development of current affluent states. Without immigration these contemporary processes wouldn't be possible.<sup>6</sup> Instead of approaching migration as a global complex phenomenon, crucial in development and growth, Anglo-American literature has largely focused on immigration and exclusion.

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<sup>6</sup> IOM: Developing Migration Policy: <http://www.iom.int/jahia/Jahia/about-migration/developing-migration-policy>.

On one side, defenders of restrictive border controls try to establish a *prima facie* case for closed borders. On the other side, defenders of open borders argue for a *prima facie* case of open borders. Scholars establishing *prima facie* models find it very difficult to debate each other simply because they begin with different antagonistic assumptions. Only a few scholars see the normative status of boundaries as a corollary of states' legitimacy (Simmons 2001; Stilz 2011; Abizadeh 2012; Ypi 2012; etc.). From this point of view, *prima facie* models are misleading, because they assume what is essential to investigate: the claim to have a right over the territory and its boundaries. Instead, *prima facie* models ignore territorial claims and focus on claims of justice. Political subjects are those defined as those with claims of justice. These are the general lines of what I call *the standard objection*.

In this thesis, I pick up the general question of what kind of border institutions liberal democracies ought have and contrast this problem with different formulations of the standard objection. I do it from an alternative point of view. Instead of assuming that membership is a commodity to be distributed, and that legitimate border control is the one that distributes membership according to principles of justice, I begin by endorsing the idea that justice and legitimacy are distinct values.

I distinguish justice-based accounts of borders from legitimacy-oriented accounts of borders. *Justice-based accounts of borders* are characterized by grounding their accounts on conceptions that take justice as the only locus of legitimacy. In contrast, *legitimacy-oriented accounts of borders* seek to ground the authority of borders on broader accounts of legitimacy defined independently from distributive justice. For justice-based accounts, outsiders are rightfully excluded because they lack distributive claims. For legitimacy oriented accounts, the answer is not straightforward because the state has basic international institutions like borders that exert political power over outsiders. This kind of political power needs to be justified to those subjected to them despite the fact that these people lack distributive claims.

Once justice and legitimacy are not taken as the same thing, two particular concerns emerge. First, what is the nature of liberal democracies' entailment over borders? Second, what kind of border control may liberal democracies permissibly exercise? In this thesis, I focus on the first question of the *legitimacy of border control*, whereas I leave the second question about the *fairness of border control* almost ignored. The reason is that in order to establish the fair terms of border policy we have to establish first what kind of control liberal democracies may permissibly exercise over borders.

The contribution of this thesis is modest. I argue that the conventional liberal view and its further developments into cultural nationalism and rights-statism fail to supplement liberalism regarding the underdeterminacy problem; failing, consequently, in addressing the boundary problem. As I am interested only in laying the initial groundwork of a more plausible view, I focus largely on explaining why and to what extent conventional liberalism fails to justify broad border controls.

In Part I, I explain that the conventional view fails to address the underdeterminacy problem because it treats membership as a commodity. This in turn presupposes a bounded community that determines patterns of distribution of membership. In parts II and III, I assess two further attempts to supplement the conventional view regarding its initial failure. The strategy of nationalism and statism try to engineer a tailored principle of political self-determination that helps to explain membership in a principled fashion. But, I show that this strategy fails to accommodate liberal principles. In IV, I try to explain that these various liberal views are grounded on an account of legitimacy rightfully customized to deal with other problems (like the problem of public justification of coercion or the problem of endorsement), but are overall inadequate to deal with the underdeterminacy and boundary problems. I end this thesis, in part V, with a partial sketch of what an account of legitimate control might look like.

For the benefit of readers each part may be read separately as each of them engages in a criticism of liberal defenders of border restrictions in a particular and delimited way. Part I deals with the conventional view, part II with nationalist defenders of exclusion, part III with statist justification of closed borders and part IV with the conception of legitimacy that seems to be grounding these different views. It is only part V that articulates a positive alternative, yet preliminary, approach to the morality of borders.

In more detail, the argument proceeds as follows. In the first part, I discuss two different approaches to the morality of borders: I argue with others that the conventional view delivers arguments to control membership, but it does not deliver arguments for the control of territorial borders. As a result, its arguments for closed borders do not apply to territorial boundaries. I explain that this is the result of a conceptual mistake: membership is not a commodity susceptible to be distributed.

The objections I present, however, do not preclude the possibility that defenders of border restrictions might develop their accounts and arguments in a more sophisticated way in order to supplement liberal underdeterminacy of borders. In fact, the conventional view was

further developed into accounts of nationalism and statism. Thus I proceed to analyze in more detail these two powerful expressions of the defence of exclusion.

In part II, I discuss cultural nationalism. Cultural nationalism argues that there is no right to immigrate and at the same time countries have a broad discretion to exclude would-be migrants grounded on the right they have to protect their national culture. I argue that nationalist legitimacy is not appropriate for liberal democracies because the nationalist principle of political self-determination seems to imply a centralized cultural management exercised by state institutions and officials. Culture, when it is understood as a broad authentic expression of the social existence of a group, must be constructed and defended organically by the free participation of each member. A liberal democracy must only provide general conditions for the development and advancement of a plurality of cultural expressions.

In part III, I discuss rights-statism. This is another development from the conventional justice-based view, which argues that states have the right to exclude all would-be migrants as they see it fit grounded on the basic political right of association, because this right entails the right to be free from unwanted associations. I argue that the statist version of political-self determination runs with a very simplistic moral framework that is not appropriate for the principles and practices of liberal democracies.

Parts I to III attempt to show that the conventional liberal view (and its further developments into nationalism and statism) fails to deal with the boundary problem. In part IV, I attempt to explain why. I argue that the conventional view rests on too simplified a moral framework in which nationalist legitimacy requires minorities to sacrifice their dignity and well-being for the sake of the cultural majority, or a state's freedom of association is a trump card even over harmful effects of vulnerable individuals and groups. The hope is to show that the moral character of liberal democracies seems to rule out the kind of exclusion that the conventional view hopes to ground, because the moral character subjects authority to further moral requirements than the mere protection of basic state political rights and the mere implementation of procedural majoritarianism in favour of national majorities. On the face of it, very porous borders seem appropriate for the case of liberal democracies.

Ultimately, I endorse the idea that legitimate borders are those that exercise border control in a way that protects the dignity of both insiders and outsiders. In order to support this, I try to show that the legitimacy of political power is not compartmentalizable. I use the central organizing idea of the moral character of liberal democracies, to explain that legitimacy must be continuous in a way that liberal democracies are not permitted to exercise political

power abroad in a way that can only be interpreted as a plain denial of the principles that ground the political arrangement inside. This is *the principle of integrity*.

Thus, I endorse an account of legitimacy as integrity. Integrity is another political virtue of institutions that poses stringent normative requirements about how our values, virtues, principles, laws, and practices fit with each other. I suggest that integrity entails the interpretative interaction of a *division of labour* between different political virtues and conceptions of legitimacy. It is this division of labour that allows legitimacy as integrity to preserve the continuity of legitimacy in order to solve the boundary problem, supplementing liberalism regarding the underdeterminacy problem.

The most obvious objection to this account is what I call the *dilemma of borders*. Borders are necessary to protect the dignity of insiders, but the erection of bounded states may threaten dignity of outsiders. So we need to know how borders can accommodate the protection of both the dignity of outsiders and insiders.

I argue that borders are a complex set of specialized institutions subject to democratic legitimacy, because that's the appropriate way to respect the dignity of insiders. I call this *the complex account of borders*. I explain that acknowledging *associative international obligations* is the appropriate way to understand what it means for a liberal democracy to respect the dignity of outsiders. States play certain roles in the international arena that may give some outsiders legitimate claims to inclusion. States that benefit the most from the international system will find that they have acquired broad duties of inclusion with citizens of many countries.

Finally, I introduce the idea of *trust territorial rights* that ground the *permission to control the exclusive administration of borders*. But, I also emphasize how this permission is conditional on considerations of the dignity of outsiders. So liberal democracies are bound to establish very porous borders that take into consideration the dignity of members who wish to associate with foreigners, and also the protection of the dignity of outsiders with legitimate claims of inclusion grounded on international associative obligations.

Given the layout of this argument, the main ground and definitions can be found mainly in §§4 and 5 where I present how I understand the central organizing idea of the moral character of liberal democracies and of the boundary problem. The main argument can be found in part IV where I reject justice-based accounts of borders and endorse legitimacy as integrity as the appropriate way to ground control over borders. So, part I explains and justifies the problem that motivates this thesis by introducing the distinction between justice-based

and legitimacy oriented accounts. And part IV endorses legitimacy as integrity as a promising legitimacy-oriented account of border control.

Part V constitutes merely a preliminary sketch of what a more plausible view of legitimate border control grounded on integrity may look like. Parts II and III only show that the tailored principles of self-determination fail to supplement liberalism regarding the underdeterminacy problem.

When I began my dissertation, like others, I had the intuition that the problem of political borders was to establish what kind of demands of justice each side may legitimately make to the other. On this account, outsiders do not have strong demands of justice because only those coerced by basic institutions have strong legitimate claims of this kind. Despite this, I thought like others that justice was the appropriate locus for making decisions about dire problems like refugees, brain drain, or economic migrants. And as a result, the task of the philosopher was only to analyze countervailing reasons in order to establish what justice requires in each case. The remaining tension between the global scope of moral values like freedom and equality; and the local scope of bounded values like justice would have to wait for a methodological revision of liberalism in order to be dealt with.

As the research developed I became convinced that this was misleading. While subjecting liberalism to a methodological revision may be a good idea anyway, I came to believe that this gigantic quest for coherence was not necessary to address the boundary problem. At least it did not seem necessary to establish an initial groundwork for a moral frame appropriate to borders. I had the intuition that what we needed was to find the appropriate standards to assess what borders do abroad against other states, organizations, people and merchandise, in order to assess the kind of political power borders exercise against outsiders. So I abandoned the initial research and started a new one on these grounds.

This thesis began with the idea that justice is a political virtue of institutions too narrowly defined for performing the job of assessing international institutions like borders in a satisfactory way. The tendency in political theory of defining standards in a circular fashion around justice may be useful as a simplification tool to deal with the complexity of problems like the public endorsement of coercive institutions, but it was doing nothing more than obscuring the task of assessing and justifying other institutions and problems. So, I looked instead to other political values like legitimacy, fairness, integrity, due process, efficiency, etc. I realized that the interpretation that defines these virtues of institutions from the point of view

of justice was not necessary. One could coherently understand these political virtues independently from justice. That is the underlining intuition behind this work.

If this is sound, the argument of this thesis supports the idea that a liberal democracy must establish porous borders, because only porous borders have the potential to respect the dignity of both, insiders and outsiders. This conclusion may seem unsatisfactory in two ways. First, it does not say anything new. Most liberal democracies and developing states have porous borders. This is obviously true, but I do not take this observation as an objection. To me this means that my account serves well to model the conditions where borders are a normative problem for liberal democracies.

In contrast, justice-based accounts of borders, particularly those that *defend prima facie* models for closed or open borders seem entirely alienated from these basic circumstances of the real world. Defenders of broad restrictions establish rather a prescription for liberal democracies, a normative ideal that may require the structural transformation of the world as we know it. For the time being, though, we must deal with the liberal democracies we know and the international arena that is familiar to us. Perhaps they are right and we may lead better lives in closed and isolated communities that become able to establish their own contained horizons of value and their own independent range of options. But in the meantime, we need to deal with the liberal democracies and international system we know. I believe that my account establishes grounds to control borders that could be reached under these conditions.

The second is that my account does not provide a response to specific demands of inclusion. I believe this objection is fair: legitimacy as integrity and territory as trust do not tell who should get in or who is rightfully excluded. But, in turn, I would say that these kinds of questions are addressed by an account of fairness of borders. Territory as trust and legitimacy as integrity helps to establish a moral framework that set important constraints over what kind of political power is permissible to exercise through border institutions. For instance, it tells us that *prima facie* cases of open or closed borders are not appropriate for the moral character of liberal democracies. For the rest of the answer, the reader will have to wait for further work.

## Part I

### Two Ways of Thinking About The Morality of Borders

A significant part of the Anglo-American literature has focused on defining a prima facie case for the morality of borders. On one side, the conventional view and defenders of immigration control sustain that there is a prima facie case for potentially closed borders (Walzer 1983; Wellman 2008; Miller 2008; Blake 2007). This means that borders should remain closed until we have sufficient reasons that outweigh a state's right to restrict entry. On the other side, proponents of a full methodological revision of liberalism argue that there is a prima facie case for potentially open borders (Carens 1987; Cole 2001; Kukathas 2010). This means that in accordance with liberal values, borders should remain relatively open until we have sufficient reasons to restrict entry. As each position establishes a countervailing prima facie case, their proponents do not really talk with each other.

But these positions just assume that states have dominion over borders. There is the prior problem of grounding state's dominion of their territory and borders (Simmons 2001: 305). Once a state's claim over territory is grounded and dominion over the borderline institutions is justified, then we can pose the question about the fairness of borders and define in specific cases, how relatively open or closed borders should be. This is the underlying assumption of this part.

This kind of considerations will allow me to introduce the following critical distinction: Anglo-American philosophy has mostly favoured accounts of borders based upon considerations of distributive justice. *Justice-based* accounts of borders assume that exclusion of would-be migrants is a consequence of the scope of justice. However, there is an alternative but not unfamiliar approach based on the legitimacy of nation-states. Instead of simply building upon assumptions of distributive justice, *legitimacy-oriented* accounts of borders focus on what borders do to people and goods, and seek a justification for its exercise of authority from a state's right of sovereignty grounded on its territorial claim.

In this section, the two ways of thinking about borders are presented as a working distinction, but I do not provide arguments to support this distinction. I merely suggest that most of Anglo-American accounts of borders have a similar structure, namely, a structure

ordered and categorized by a conception and an interpretation of the role, site, and scope of distributive justice.<sup>7</sup>

While I refrain from providing arguments for the critical distinction I discuss, however, some related matters as an illustration for the distinction. I particularly invoke Michael Walzer's account as a paradigmatic example of the conventional view about border control, and as a paradigmatic example, too, of justice-based accounts. I also suggest that justice-based accounts may be based upon a conceptual misunderstanding that began with Michael Walzer when he conflated goods with associations. Freedom of association could be something intrinsically and instrumentally good, but this does not mean that membership is a commodity to be distributed. These accounts overlook entirely putative rights over territory.

On my view, centralized governmental control over borders and restrictions on immigration consists in a state's possession of a complex set of right-incidents. I argue that conventional liberal views about closed borders and open borders remain implausible, as they do not encompass relationships with the rest of sovereignty rights. Thus, I do not refrain from showing some support for the alternative approach based on legitimacy, because it constitutes a more complete articulation of the different aspects of sovereignty. But full argumentation will be found in the last sections of this thesis.

In section §1, I outline an account of Carens's ideal of open borders. I show why his justification for open borders remains inconclusive. Then in section §2, I then propose an account of the liberal conventional view about immigration and the standard objection against it. If the standard objection is sound, the conventional view is inconclusive as well.

I introduce important conceptions in order to understand the problem of borders in §3. Particularly, I introduce *the moral character of liberal democracies*. This explains under what conditions border control and restrictions on immigration are a normative problem. Finally, in section §4, I present the distinction between justice-based accounts and legitimacy oriented accounts by explaining some important limits of the justice-based account.

The arguments found in this section, though, are general in nature. The objections against the conventional view, included in this part, do not preclude the possibility that further

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<sup>7</sup> The discussions of the role, the site, and the scope of justice have a long history. Here I am using these terms loosely. By the role of conception of justice, I am referring to what we should we expect it to tell us? For instance, whether we expect it to tell us something about what we owe to each other in general, or whether we expect it to tell us how a state must be constituted. This discussion arises when we, for instance, question what we can expect from justice in the international realm. By scope I mean the boundaries of the institutional framework of justice. This discussion arises when we ask why those institutions apply to a determined set of people and not to others. By site I mean the territory over which a conception of justice is imposed. This discussion arises when we question why the state we belong to may extract obedience from us. All these problems will be found in the discussion below. Compare Mason (2012) for an enlightening discussion about these matters.

arguments could be given in order to supplement arguments of membership, and connect membership accounts from the conventional view with the rest of sovereignty claims. Indeed, the conventional view has been further developed by cultural nationalists and rights-statists. I will discuss such arguments in parts II and III, respectively. Here I only wish to offer a contrast between the two ways of thinking about borders and show that, in general, legitimacy-based accounts are more promising, since, in principle, they do not need any supplementary arguments. From the legitimacy-oriented account, the morality of borders is worked out with familiar theories of liberal and democratic theories. A more complete account of the legitimacy of borders, however, will have to wait until part IV and part V, where I will deliver my own account of a legitimacy-oriented approach.

**§1. Liberal Revisionism: The Case for Open Borders.** According to defenders of open borders, the liberal standards of freedom and equality point towards freedom of movement across the globe and freedom of association that transcends boundaries and to equality of opportunity, unbounded by nationality. With this interpretation of liberal values, they extract the conclusion that states have a *prima facie* duty to maintain borders open or at least as open as possible. If liberalism is to be consistent with its own values, then any departure from equality and freedom, understood in the specified way above, needs to be properly addressed and justified in liberal terms.

Joseph Carens (1987, 1992) is the most prominent defender of this view. He argues that limiting political morality to the internal set of relations within the nation-state is arbitrary. If equality and freedom seriously matter to us, their scope should transcend borders and be applied globally (Carens 1987:229-54). In this sense, citizenship is as morally arbitrary as race or gender. Therefore, restrictions to immigration are at odds with core liberal values, like freedom of movement, freedom of association and equal opportunity.

Carens explains these two ideas—(1) liberal continuity of values, and (2) wrongful arbitrariness of migration control—using three main points. First, he puts forward a cosmopolitan reading of Rawls. He believes it is arbitrary to think that under the veil of ignorance people in the original position would chose to restrict basic freedoms using state boundaries. Second, even if we don't think reasoning within the original position is relevant in this case, we could invoke instead equality of opportunity in support for open borders. Again, it is certain forms of arbitrariness that seem at odds with liberal standards. Any plausible idea of equality condemns basic social goods to be distributed according to morally arbitrary features, such as gender, race, and sex. Carens insists that citizenship is arbitrary in the same

morally relevant way that gender and race are; therefore, it is inconsistent that protection over equality that justice provides is to be suddenly inapplicable (without further justification) outside the scope of borders preventing people (who for that matter are like us) from benefiting from the social goods they could willingly help produce.

Finally, the same considerations could apply to the liberal commitment to freedom of movement and association. People should be free to pursue their own endeavours. That's why liberals recognize freedom of movement as a basic right. But, it seems arbitrary to say that the reasons why freedom of movement and association are important turn out to be unimportant or trivial once one has crossed a border.

Carens concludes that there is a *prima facie* case for open borders. This means that open borders is the presumptive position that could be bent only if strong reasons are provided. Any departure from this standard should be grounded on an urgency to protect the very same values that liberalism seeks to protect in the first place. For instance, the state could limit these liberties during determined periods of time when national security and public order are threatened.

The most obvious problem with Carens's view is that Rawls himself challenged Carens's interpretation of the scope of liberal values (Rawls 1999: 39). There are also more interesting objections to Carens's idea. One in particular keeps showing up in the literature and challenges Carens's arbitrariness argument. (Blake 2007: 227-29; Scheffler 2001: Chs 3, 4 and 5; Miller 2008: 374-76; Goodin 2008: 263-67). We saw that according to Carens, citizenship is an arbitrary fact. Defenders of borders claim that Carens's argument relies on a misleading account of the role of justice in social relations. Roughly, the idea is that in all relevant cases, justice is determined in contexts of shared citizenship because of the given distributive structure of responsibility and authority. This means that for the case of the familiar theories of justice, it is impossible to determine justice without a set of relationships held together by the nation-state.

Citizenship, therefore, plays a central role in determining when a body of laws applies to a given subject and when it simply doesn't. It is true that, from the point of view of, say, Maria, her birth citizenship is an arbitrary fact. This does not mean that the social arrangements and forms of political relationships constructed on grounds of citizenship are all arbitrary. She is accidentally a citizen of her nationality<sup>8</sup> (as oppose be a citizen of any other

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<sup>8</sup> Here, nationality is used as a synonym of citizenship.

nationality), but the relationships she establishes along her life, as member of a political community, are morally meaningful.

Thus, Michael Blake distinguishes between the *morally arbitrary* and *morally irrelevant* (Blake 2007: 229). Citizenship is distributed arbitrarily because no one chose where one was born, but it is not morally irrelevant because borders mark the domain of a state's authority. This is important because it highlights a relationship that exists only among members of the same political community. Both the state and the citizens have responsibilities towards each other, according to this scheme (Blake 2007: 229).

This distinction seems plausible, and a state's sphere of authority and its social relationships are indeed morally meaningful, but the extension of this domain (where justice applies exclusively) could still be arbitrarily defined in the relevant, yet regrettable sense. Think about the history of liberalism. Many of its liberal victories have always been about extending rights; for instance, in the case of political rights for women or blacks. So, in the case of would-be immigrants (especially those who lack the protection of a just state), it is not clear why we shouldn't extend the sphere of justice in order to include them.

There are two conceptual responses to this problem. One affirms that there is something special about us that allow us to limit the extension of the state, and its sphere of influence and protection. David Miller (1994) and Samuel Scheffler (2001) argue that, as compatriots, we are engaged in a special relationship that results in special distributive claims (sharing rights and duties) that we don't share with foreigners. Scheffler insists that any plausible position about open borders has the burden of proof to show that it could devise institutions, practices and ways of life that, despite the abolition of boundaries, could take into account legitimate allegiances and loyalties of people. This project would include, "[...] developing recognizable cosmopolitan ways of living that incorporate the sort of stable infrastructure of responsibility that more traditional ways of life have always made available to their adherents" (Scheffler 2001: 130).

The other conceptual response argues that there is nothing really special about our fellow countrymen, but this does not mean that citizenship is morally irrelevant. Robert Goodin (2008: 274-75) argues that nation-states, despite the arbitrariness of their formation, are still a good device for distributing responsibilities. The fact that borders and citizenship are morally arbitrary does not entail that the relationships established within the state do not generate morally meaningful claims. We are accidentally members of this community, but

once we're members, we have assigned responsibilities for compatriots in a way that we have not assigned to foreigners.

Blake agrees with Carens that liberalism needs to be submitted to a methodological revision in order to properly assess problems of citizenship, immigration, legitimacy and coercion. Blake also acknowledges that citizenship is arbitrary in the sense that it is not under our control to choose where to be born. But notice that to immediately open borders, may threaten to break down the basic institutions we know. This could mean also the collapse of the whole responsibility-authority structure of justice, which entails an abandonment of the way we understand responsibilities and obligations, without showing an alternative on how our distributive duties could be otherwise discharged.

The objection seems to criticise Carens for overlooking the meaningfulness of our relationships; but I am not sure that this accusation against Carens's central claim is fair. Instead, I am convinced Carens's claim is not that the various relationships grounded on citizenship are morally meaningless, nor that borders should be abolished and citizenship dissolved (Carens 1987: 270). What Carens is trying to stress, I believe, is that the burden of proof is for those who favour closure, not the other way around even if in the end we find sufficient reasons to preserve restrictions.

In the end, Carens is not saying that citizenship is not a morally relevant element. What he rejects are social forms of organization that make citizenship have indefensible harmful effects upon distributive positions by protecting unjustified privileges that otherwise should be ruled out by justice, just in the same way that justice rules out social arrangements that make it possible to suffer harmful effects out of random facts like race, sexual orientation, gender and class. To put it in another way, enforcing equality of gender (because gender shouldn't be relevant, say, for getting a job) is not to say that gender is morally meaningless; defending open borders as the *prima facie* case is to say that citizenship should not affect so detrimentally in the life prospects of people, and is not to say that national borders and allegiances are worthless.

Carens does not deny the moral weight of the social relationships grounded on citizenship. What he questions is the putative entailment to restrict markets and exclude certain people from the benefits created by these markets. Chandran Kukathas (2010: 211) conveys it as follows: when we have a resource to exploit, we might be tempted to exclude others from embarking in similar ventures in order to ensure that we exclusively are the ones to benefit. Kukathas asks why locals should be the ones entitled to the benefits of the

immediate access that they have to certain markets. This is the kind of methodological criticism Carens is advancing.

Carens is a revisionist who suggests that liberalism should assess its practices and institutions in order to find better social arrangements that fully realize its values, regardless of the full moral status of the social relationships grounded on our institutional arrangements, as they are now. This is not to overlook the moral meaning of our social relationships as they are now, but to suggest that the current conditions are such that make it impossible to continue with the same social practices without incurring in inconsistency, incoherence and banality of the principles that ground our social arrangements.

On this token, Scheffler and Goodin's criticism seem to address Carens's objective more fairly by pointing out that Carens does not show other alternative social arrangements capable of realizing our possible responsibilities. Note that the mere fact that Carens refrains from delivering a full theory of justice capable of addressing alternative forms of responsibility and duties, is not enough to dismiss his remarks on *the need for consistency and continuity in liberal values*. As Kukathas remarks, "it is worth considering the case for open borders because it forces us to confront the inconsistency between moral ideals and our existing social and political arrangements" (Kukathas 2010: 219). However, without some hint about how to understand justice independently of democratic citizenship, Carens's case does not seem conclusive.

On the face of it, Carens might be pushed to consider second-best options guided by the principle of open borders (Kukathas 2005). From this pragmatic position, borders admit some restrictions. It is imperative to bear in mind that these restrictions are a remedial solution issued out of pragmatism and never justified in principle (Goodin 1992: 11; Kukathas 2005: 573). In any case, as I said, the situation may very well not change much if we find strong reasons for preserving the current practices. However, if that's the case, at least conceptually, the resulting border regime will be held for the right reasons and presumably will be more sensitive to considerations of fairness.

However, these problems need not trouble us now. Whether Carens is right or wrong about the *pro tanto* case for open borders as one of the consequences of a methodological revision of liberalism, the fact is that we cannot yet fully envision the consequences of such revisionism for our core intuitions on the questions of justice and legitimacy. This is why I will concentrate my effort on the conventional view and its developments into cultural nationalism and rights-statism. The reason for this relies on the long-term nature of a revisionist project. If

a global community is to arrive in the future, the nation state in general, and the achievements of the moral character of liberal democracies in particular, seem to be a necessary previous step for the realization of a cosmopolitan global order. Tom Christiano puts it like this:

[...] insofar as the development of global political institutions and ultimately the development of a global political community are essential to the realization of the aims of the moral cosmopolitan, the modern liberal democratic state must play a central role. And to the extent that it is necessary to this development, we must protect such states from forces that would undermine their democratic character and the normal functioning of their political systems. Immigration policy should be in part evaluated in terms of whether it undermines the existence and normal practices of liberal democratic states (Christiano 2008b: 934).

In the meantime, I won't pursue the discussion of liberal revisionism any further. Suffice to say that liberal revisionism does not modify the justice-based paradigm of political legitimacy. And for now, and at least in the medium term, open borders are not acceptable, because they will jeopardize the institutional administration and practices of liberal democracies; jeopardizing as well the possibility of other forms of governance in the near future. I however will keep the requirement Carens's requirement of consistency and continuity in liberal values, but I will realize this requirement in a different fashion in section IV.

**§2. The Conventional View and the Standard Objection.** I will provide a brief account of the conventional view on immigration before I introduce an alternative frame to the problem. In doing this, I want to discuss the standard objection against the conventional view. The conventional view defends the claim that states wield a broad right to control borders; encompassed with an also broad right to exclude whoever they see fit according with the interest of the state and its members (Wilcox 2009: 814). One of the most prominent defenders of the conventional view is Michael Walzer (1983).

According to Walzer's own theory of justice, membership is the most primary good of all, because other goods get their value assigned with reference to the possibility of belonging to a community where these goods are valued, distributed and protected. Members themselves are to establish membership patterns of distribution among individuals who belong to the community and also among those who should be admitted according to the internal character of the community.

The principle that determines the distribution of membership is political self-determination or the right that a community of character exercise over its own common

destiny.<sup>9</sup> This means that, “We who are already members do the choosing in accordance with our understanding of what membership means in our community and of what sort of community we want to have” (Walzer 1983: 31-32). The fact that a process of distribution of goods occurs, and that this process must be administered, points out to the idea that membership is the most basic good that may be distributed (Walzer 1983: 31).

Walzer supports his case for exclusive membership mostly by using analogies. The idea is to begin with cases where membership and exclusion are crucial, relevant factors, such as clubs, neighbourhoods and families, in order to transfer knowledge from these familiar cases to the controversial case of membership to nation-states. By providing uncontroversial cases about legitimate partiality and exclusion in familiar situations, the conventional view hopes to convince us that we should use the same criteria in the case of exclusion carried out by the state. He analyzes familiar models of membership in order to identify the ones that have similar traits as the state.

First, Walzer invokes the familiar model of neighbourhoods, which are understood as associations of random individuals living in a contained geographical area. But states cannot be like neighbourhoods because, while neighbourhoods are only constrained by preference and conditions of the economic market, states have further obligations to protect freedom, welfare and culture. Neighbourhoods are, in principle, open and only subjected to conditions of the market, precisely because borders are able to ensure them protection; but if countries were to remain open, then, “[...] it is likely that neighbourhoods become little states [...] neighbourhoods can be potentially open only if countries are potentially closed” (Walzer 1983: 38-39).

Clubs are associations of self-interested individuals with shared ends who chose to bind themselves together; thus becoming free to admit new members according to their common understanding of the practical ends of the association (Wellman 2008). The club analogy fails as well, because the state has meaningful moral features that clubs don't have. For instance, unlike members of a club, citizens recognize robust moral obligations towards certain groups of outsiders to whom they feel ethnically, historically or culturally close (Walzer 1983: 41). Admission may be required for groups closely related to actual members of the state in virtue, for instance, of a shared common ancestry.

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<sup>9</sup> In this context, popular sovereignty must be understood through the special conception of democratic citizenship. Roughly, a group of people acquires sovereignty over the institutions that they owe obedience to when, —in the shared interest to control their common destiny—, they constitute themselves as people by means of elaborating a constitution (Abizadeh 2008). Popular sovereignty here should not be taken as a reference to a pre-political substance. (Thanks to E. Serrano for this observation).

Current international bounds show that states are more like huge families connected with their kinship, regardless of political borders and of not having chosen to be related with any particular people. This is the case of Israel with Jews around the globe or the case of the Hungarian Diaspora.<sup>10</sup> As families do with the admission of new members, Walzer thinks decisions about borders should be in control of members of political communities.

*The standard objection against the conventional view* starts by challenging the scope of the membership arguments. According to this objection, the conventional view conflates arguments to control membership with arguments to control jurisdiction, territory and ultimately borders (Carens 1983; Simmons 2001; Fine 2010). This challenge can be summed up as Simmons says it, “Why can states be thought entitled to control territories at all, rather than, say, to just control persons?” (2001: 304). The conventional view is only providing arguments for the control of membership, but analogies about membership fail to show how jurisdictional, territorial and border control can be related with membership at all. In order to illustrate this point, compare these claims:

- i. **Self-Determination Claim.** Political communities have a right to decide who should be considered a member of the community given that exercising dominion over membership is a constitutive property of political-self determination (Walzer 1983: 32).
- ii. **Closed Borders Claim.** Boundaries should remain relatively closed in the interest of members until there are powerful moral reasons to admit someone (Walzer 1983: 44).
- iii. **State’s Sovereignty Claim.** State’s dominion over borders is so strategic for state’s sovereignty that borders should remain under state’s discretionary control (Walzer 1983: 61).

These three propositions are logically independent, yet the conventional view understands them as one integral part of the same argument as follows: Political communities wield a right to decide about their self-regarding affairs and, therefore, have a concomitant right to distribute membership (i). Because of this, the state controls inclusion discretionally (iii) in a way that tends to keep borders relatively closed in the interest of members (ii).

According to Carens, the conventional view wishes to unify these three different and logically independent propositions at the same time (Carens 2003: 96). The problem arises because, first, the conventional view just supposes that these claims are analytical components of political self-determination; and second, despite the relationship between these propositions, it is not obvious. The conventional view only delivers analogies in order to

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<sup>10</sup> Cultural nationalism takes this idea further. It is a powerful argument for border restrictions that I discuss in part II of this thesis.

support this purported analytical relation. In fact, Walzer only provides an analogy to support (i) leaving propositions (ii) and (iii) unsupported.

Analogies are indeed a valid source of knowledge. The problem is that analogies are vague and most of the time provide only very limited knowledge that could be very useful as a hint, but hardly sufficient to completely define a complex problem. Think about Niels Bohr's analogy of the solar system. Bohr's analogy was crucial to advance a new atomic model, but the properties of the solar system say practically nothing about the properties of atoms.

Using an analogy often means to find meaningful and relevant traits between a familiar and broadly known case and an unknown or strange case. The potential of learning something new from the transferred knowledge depends on how relevant the traits shared by the two cases are. Analogies are interesting precisely when one of the cases is alien or greatly unknown, so the chances that the cases share a broad set of common traits are low. That's why Bohr's analogy only tells roughly what an atomic particle looks like, but it does not really expand our knowledge of atoms at all.

I fear this is the case of analogies with the conventional view. Walzer's analogy of the family is telling us that states may act partially to its own citizens, which in turn may ground control of membership. But, it is not really expanding our knowledge about the kind of partiality states may exhibit or about the extension and limits of the right to control membership. Importantly, it does not explain to what extent control over membership should entail control of jurisdiction, territory and borders, and whether this control should be understood as a discretionary right to exclude.

To be clear and show the limits of these analogies, Carens remembers that we have familiar examples of political communities that control membership, but not its borders (Carens 1987: 267). Suppose I move from West Midlands to Warwickshire. The moment I move to a new political community, I am obliged to change my membership status. Both constituencies control membership, because I now pay taxes to a different constituency and obey a different body of rules and laws. Yet, I am not banned from crossing borderlines between the two constituencies, despite there being a defined boundary between them.

Note that the standard objection does not claim that borders should remain open or cease to exist. It merely points out that migration and borders are complex moral phenomena that entail the exercise of an intricate set of different rights. It also observes what theories of legitimacy have long noted: that a state is a *sui generis* form of association. The family analogy seems a limited resource to ground the strong territorial and boundary claims needed to

justify exclusionary rights. A family may exclude unwanted visitors, but in virtue that they own their home, and not only based on the relationship among them (Fine 2010). After all, I may bring new members to my family even against my parents and siblings' wishes, if I decide to marry someone or if I have a child (Lopez-Guerra 2012).

Before concluding with this section, I want to mention one last concern. The conventional view seems to be particularly vulnerable to collapse into the *traditional view on immigration*. As noted in the introduction, the traditional view simply takes as axiomatic that discretionary border control is an acceptable exercise of state's sovereignty, but it never provides justification for it.<sup>11</sup> Given that the conventional view seems incomplete and inconclusive as it is, I worry that its proponents could be tempted to simply invoke sovereignty as the connection between the right to control membership and the right to control borders. This concern is not trivial. Walzer himself seems to assume that controlled borders will be necessarily closed (Walzer 1983: 44). It is very important to note that the invocation of sovereignty as an ultimate ground is no longer available to the conventional view, precisely because justification would be circular. Members would not necessarily choose to close borders; as, for instance, members of the European Union did not close their borders.

Relying on sovereignty as an ultimate ground would be almost like saying that states have sovereignty over borders when they are sovereign. The connection between political self-determination and closed borders is not sufficient or necessary. Assuming that the connection is necessary would entail the collapse of the conventional view into the traditional view. It is true that in many liberal democracies, porous or open borders are not endorsed by a broad part of their citizenry. Global inequality makes the liberalization of borders practically impossible without risking the collapse of functioning institutions. However, it is not incoherent that under more favorable economical and political situation, better-informed people will favor porous or relatively open borders, or at least more porous borders than the conventional view would tolerate. Removing from people the right to prefer open or porous borders could be described as a form of statism that does not seem compatible with liberal democracies.

Note that the traditional view and statism are not acceptable because liberal democracies are different from other states. As indicated above, Walzer himself rejected the club and neighborhood analogies on the ground that states are under stringent and broader

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<sup>11</sup> This seems to be arbitrary from the liberal point of view, being that in a sovereign liberal democracy any exercise of political power is limited by law and requires public justification. Liberal revisionism and the conventional view, instead, attempt to deliver a moral justification of border control and exclusionary rights.

obligations. I suspect this means that liberal democracies are more than societies or associations; they are, rather, morally bounded communities subjected to demands of integrity and legitimacy, and not only to demands of justice and due process. It is this *moral character* that makes it inappropriate for liberal democracies to treat citizens as members of an association or a club; for instance, when members of a cultural minority are always bound to defer benefits to the majority. This special character of liberal democracy is the central organizing idea of this work, so problems of this sort will be discussed in what follows.

In sum, the standard objection provides the following lessons: First, it recommends being cautious about the risk of arbitrarily invoking sovereignty in order to avoid collapsing it with the traditional view. Second, it insists that control of borders does not entail close borders, but rather an administration of borders. Finally, it points out the need to supplement their view with further arguments.

Indeed, some very well motivated philosophers have tried to follow Walzer's lead and supplement the conventional view. Christopher Heath Wellman has picked up Walzer's rejected clubs analogy and developed an argument for exclusion based on the state's right of association. In the same token, nationalists have spotted Walzer's remark that people feel a very strong symbolic connection with their fatherland (Walzer 1983: 39). But before that, in the next section, I want to take a step back and discuss what kind of conditions, within liberal democracies, make the traditional view unacceptable. I hope this inquiry can point me in the right direction on how to deal with the morality of borders in a way that allows me to offer a sketch of an alternative moral framework.

**§3. The Boundary Problem and the Moral Character of Liberal Democracies.** The *traditional view about borders*—as stated for instance by Locke or Sidgwick—takes as axiomatic that each state has a right to admit or refuse entrance of would-be migrants on its own terms.<sup>12</sup>

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<sup>12</sup> There are stark differences between Locke and Sidgwick's account. In his *Elements of Politics* (1908: 248), Sidgwick stated that it was essential for the modern state to exercise *supreme* dominion over a particular portion of the earth's surface (1908: 221). Thus, it is taken as axiomatic that states have the right to decide whether to accept any immigrants at all. In any case, the state has discretion on the conditions it wishes to impose on admission. Locke, on the other hand, justifies the legitimacy of continuous boundaries in the joint property and consent of associated members. Some of the dominion that individual members have over their own property is, thus, ceded to the state in order for it to implement the necessary arrangements for a peaceful and prosperous society, thus, giving rise to state rights of jurisdiction. The state then has a dominion over the territory that is greatly analogous to private ownership of the land. As such, the state wields discretion over movement across its political and territorial borders. It could be said that in contrast with Sidgwick, Locke did offer a justification of exclusion grounded on property rights. I believe that's fair, but in turn I'd say that Locke assumes that individual property can be transferred to the state in such a way that it may ground state authority over borders and borders. For discussion see Simmons 2001.

According to its own interest and the interest of its members, the state has a straightforward right to decide whom, if anyone, to admit. Surprisingly, while the central concepts of political theory have endured great transformations since the time of Locke, the traditional view has entered twentieth first century international law almost unmodified. For instance, the 1933 Montevideo convention on the rights and duties of states, defines states as entities with fixed territories (and permanent populations) under governmental control (and with the capacity to enter into relations with other states). This exemplifies how for traditional international law the connection between political community and territory is so close that they almost blend (Simmons 2001: 302). Jurisdiction has been always defined in terms of the territory a state operates as the exclusive source and enforcer of the law (Simmons 2001: 305); but as indicated above, in the discussion about the conventional view (§2), it is not evident that claims over membership necessarily imply rights over jurisdiction and membership.

A partial explanation for the prevalence of this traditional assumption relies on the fact that, in general, liberal theories and democratic theories are *underdetermined* regarding a normative explanation of membership.<sup>13</sup> The importance of underdeterminacy regarding border control is straightforward. If we cannot explain membership, then it is difficult to provide normative basis for border control, as we cannot explain why those inside should be inside and why those rejected should not be inside. Miller describes the underdeterminacy problem as “[...] the problem of deciding who should be included in the *demos* or constituency when democratic decisions are taken. How, in other words, should the political units within which democracy will be practiced be constituted?” (Miller 2009b: 201).

The reason for this underdeterminacy is not clear. It could be that liberal and democratic theories of legitimacy and justice were traditionally addressed to people subjected to the dominion of its institutions. For instance, classical political theory is mostly concern with justifying political power to subjects (Simmons 2001). In turn, contemporary political philosophy focuses mostly in the *public justification of distributive principles to citizens* (Lægaard 2010). Neither address justifications or arguments to foreigners, or takes the existence of borders as problematic at all.

In any case, the fact is that liberal theory and democratic theory both begin by presupposing the existence of a system of fully functioning political communities. This means

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<sup>13</sup> Two paradigmatic examples of the underdeterminacy problem are Rawls and Dahl. Rawls famously conceived his theory of justice as principles applicable to basic structure of a closed liberal society with a fixed set of members (2001b). Dahl, on the other hand, thought that the problem could not be decided within democratic theory itself. It needs to be assumed externally (1989). However, the levels of liberalism and democratic theory are used here generically in order to identify a persistent problem of Anglo-American tradition.

that liberalism and democratic theory remain undecided on a normative explanation of who belongs and who does not (Scheffler 2002; Blake 2007; Goodin 2007; Abizadeh 2008; Miller 2009b). I call this diagnosis of classical and Anglo-American political theory *the underdeterminacy problem*. Liberal revisionism and the conventional view both try to fix this underdeterminacy; but as we saw, both fail to provide a conclusive account of the morality of borders.

Before going any further, it is worth pausing to discuss how we will understand the problem that boundaries pose for liberal democracies. As an illustration, I will consider the contrast between the traditional view and normative views. I shall offer a tentative explanation about why the traditional view of borders became unacceptable for liberal democracies. This will be helpful in order to understand the challenge that an account of the morality of borders must meet.

David Miller (2008a: 374) asks what has changed in the last one hundred years to disqualify the traditional view and turn immigration into a controversial problem. For Miller, this shift in the public and academic opinion is not just the result of the rise in the numbers of people who wish to live elsewhere, but a substantial change in the make-up of states (Miller 2008a: 374). This means a change in the inner conditions of legitimacy concerning liberal democracies. According to Miller, during the last hundred years, states acquired a *moral character*. Miller explains:

[...] our political morality has moved some distance away from the nationalist idea and towards the cosmopolitan idea of political organization [...] our political morality does not regard state sovereignty as trump card in the way it was for Sidgwick—states do not have an unconstrained right to decide whom to take in and whom to exclude. We have to justify refusing admission to those who want to come in, in the face of their sometimes urgent demands to be admitted (Miller 2008a: 376).

The question, however, remains: Why is it required to justify the exercise of the authority of borders to would-be migrants? It is clear that the moral character of the state has posed *internal* limits on the state's sovereignty. In liberal democracies, conditions of legitimacy are such that it is impermissible for the state to exercise unrestricted authority over members of the community; for instance, by arbitrarily curtailing constituents' human rights. It is not evident, though, how this moral character renders unqualified arbitrary sovereignty unacceptable when it is also issued against would-be migrants, aliens and foreigners.

It is easy to see, from what we saw in §1 and §2, that liberal revisionism and the conventional view avoid, to a certain extent, this problem by simply assuming a *prima facie* case for borders. Observe that the philosophical controversy between liberal revisionism and the conventional view of immigration restrictions is to decide which one of them is the *prima facie* case, and where the burden of proof lies. If the conventional view is correct, then any relaxation of border exclusions should be justified to the threatened population (the citizens). If the open borders position is correct, then the exercise of restrictions needs to be justified to all or at least to would-be migrants.

Note that with this manoeuvre a justification is never seriously addressed to would-be migrants, it is simply said that borders *pro tanto* are in principle closed or opened in each case. It is almost like saying, “we are sorry, we can’t admit you because borders are just like that.” In contrast, I begin with the intuition that conditions that limit external sovereignty over borders might not be entirely different from those that historically and morally have limited the exercise of power over those who are subjected to state’s authority. In this I follow Miller: for a liberal democracy, conditions are such that sovereignty over borders cannot be a trump card because liberal democracies are distinguished by its moral character.<sup>14</sup>

There are many ways to describe the moral nature of liberal democracies. Social morality and political theory are, to a great extent, devoted to the task. For the purposes of this work, I will specify the moral character in two ways: first, in terms of liberal and democratic legitimacy and, second, by invoking some common facts about the best current practices in international affairs.

*Legitimacy* is in its most general meaning a moral virtue of institutions that permissibly exercise justified political power (Peter 2009). There are of course several conceptions of legitimacy according to specific institutional arrangements and according to the kind of justification that is adequate (Christiano 2008a). This does not need to trouble us now. The important thing is to note that when states shifted to the status of liberal democracies, conditions of legitimacy became such that they began to include at least three important constraints on what can count as a legitimate states: *individual freedom*, some form of *equality of opportunity* and *democratic citizenship*. I will say more about legitimacy in parts IV and V. In the meantime, to avoid ambiguity about the moral character of liberal democracies, some brief qualifications are in order.

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<sup>14</sup> Miller defines this moral character in terms of nationalist legitimacy. I save the discussion about nationalist legitimacy for part II.

*Basic individual freedoms* are not understood as unconstrained powers. Rather they are understood as a wide provision of rights that protect human basic interests, such as choosing occupation, freedom of movement, freedom of association, property, etc. (Miller 2012). Oberman explains it like this:

People are entitled to more than just a degree of choice; they are entitled to something like the most extensive range of choice that is compatible with the rights and liberties of others. To see this note that governments can violate basic liberties by banning just one option within a wide range. A ban on Judaism (say) would violate freedom of religion even if all other religions were to go unrepressed (Oberman 2013: 444).

Rights are by their own nature limited and constrained. Each person's basic right is bounded by the rights and liberties of others (Oberman 2013: 444). Having a *right* is to be in a position of dominion over something (Wellman 1995). Rights need to be specified in their components to avoid conflict and contradiction.

Part of what it means to constitute a political community is to collectively decide through a deliberative inclusive process the limits and proper specifications of each and all rights. *Communities* are groups with political rights to self-determination that, first of all, need to specify their common set of rules in order to decide who has dominion over what and in what circumstances. They also set the appropriate ways that rights could be interpreted, discussed, questioned and changed, as a suitable way to discuss and identify the moral principles that they share. That is why communities, as opposed to societies characterized by seeking mutual benefit and associations characterized by sharing common ends, *communities bound together by their moral character*.

*Equal concern* is a form of mutual consideration established between members of a community with a moral character. It is in principle, more than political equality and equality of opportunities. For the state to treat everyone with equal concern also means that, in a liberal democracy, everyone could develop the minimum degree of capacities to take part fully in the cooperative life of society. For instance, individuals need to be able to think about themselves as a valid source of legitimate reasonable claims instead of thinking themselves as submitted to domination and fortune (Rawls 2001: 20). This means that a legitimate liberal democracy must provide the conditions for everyone to be a member without losing one's *dignity*. As a political conception, dignity means that everyone's life has objective equal importance for the institutions of the community in a way that allows for participation, social

cooperation and compliance with the rule of law without being oppressed or without losing one's self-respect (Dworkin 2011).

Finally, equal citizenship is more than just equal status of all members of a state that bans under-class stratifications (Miller 2008a: 375). Once equal citizenship becomes a central feature of states' legitimacy, it will make considerable demands to public policy. For instance, it requires that everyone is able to develop the minimum degree of capacities to take part fully in the cooperative life of society. Some public justification of distributive patterns of expenditure will be required to ensure that basic freedoms and equal concerns are in fact accessible to all groups of members.

The moral character of a liberal democracy is also constrained by *common practices and facts of international affairs*, which can be seen as an external expression of states' inner moral character. These common facts, based on sociological and international law generalities, also configure the problem of borders as we know it (Beitz 2008: 30-37).

First, we have *global interdependency*. The financial and international trade systems, and even global climate, suggest that the welfare of states depends on responsible actions and politics that every state should take. Secondly, there is the fact of *globalization*. The current technologies in transportation and electronic mass-media, as well as the increment of global population, implies that the world is much smaller than it was a century ago, in a way that a great many are now aware of the circumstances and opportunities everywhere. Finally, there is the fact of *international cooperation*. Liberal democracies have engaged willingly and knowingly in the construction of a complex and pervasive international system that encompasses financial, trade, diplomatic and mutual support activities. The establishment of this international system has taken interdependency and globalization to levels never seen before. These general facts of international relationships entail that international cooperation is both possible and necessary.

The moral character of liberal democracies, then, is both shaped by internal conditions of legitimacy and external facts of international affairs. *Inside* is the moral character that guards basic freedoms, equal opportunities and democratic citizenship, which is also associated with a set of social practices that favours the flourishing of all sorts of associations, markets, entrepreneurships, common ventures, etc. But given the facts of interdependency, globalization and international cooperation, these internal social practices are associated with some analogous external international practices. In particular, liberal democracies and their members are engaged knowingly and willingly in all sorts of transnational associations,

international markets, global corporations, and diverse ways of common ventures with members of other political associations.

It is important to note that we can assess borders from a descriptive perspective; but in the case of liberal democracies, we can also evaluate borders in a normative fashion. This means that we are not concerned about borders as they are, we instead reflect upon practices and policies from the point of view of the moral character of liberal democratic states. We don't ask in depth questions about current practices of borders. Rather, in general terms we ask what kind of entailments and jurisdiction liberal democracies ought to have over the territory and the people within it, and how these entailments should be exercised. This is what I call *the boundary problem*.

It is important to note that in what follows, we will discuss migration and borders as a problem only for nation-states that affirm, through their institutional arrangements and public policies, human rights, basic freedoms, equal concern and democratic citizenship. That is, we focus on the normative problem of borders as it emerges for liberal democracies distinguished by their moral character.

Despite the ideal character of this discussion, as in any other area of normative philosophy, *feasibility* is an important constrain. Certainly to pursue impossible ways of life that require traits of character and psychology alien to human beings is not the subject of normative theory. But that's not what, for instance, Rawls had in mind when he described this kind of intellectual enterprise as the description of a *realistic utopia*: strongly ground by current institutions and practices and informed by historical development, yet also looking to extend the limits of practicable political possibilities (Rawls 2002: 11-23).

To clarify consider both radical positions: open or closed borders are equally unfeasible. Adopting any of them and pursuing sealed and isolated states or radically liberalized open states would change dramatically the world as we know it. In liberal democracies, globalized markets and interdependent economies would make it extremely difficult to return to a quasi-medieval isolationism or even to a nationalist Westphalian state driven by dynasty supremacy. In the same way, if affluent states are to liberalize immigration now, the severe inequalities extended globally and the profound cultural differences would submit their institutions to a harmful predation and exploitation of public goods, making the lifting of border controls difficult to implement as well (Heath 1997: 347).

However, some may fear that supplementing liberalism with a position that advises more porous or open borders will be unlikely to be accepted by affluent states because

international movement will increase the need for international cooperation, and their power will be limited as a result. Plus, politicians often find it very profitable to utilize xenophobia in order to manipulate the masses.

There are two reasons to resist this kind of scepticism. First, most affluent states need immigration. The demographics of most liberal democracies show that they lie somewhere below the reposition and maintenance rate. This means that immigration is an important input to maintain population at reasonable levels for economical viability and development.<sup>15</sup> Second, as Dworkin points out: “a time may come, when the need for an international law is more obvious to more politicians than it is now” (2013: 15). The world faces problems of coordination that needs a shift in public opinion and a considerable improvement in international and global governance. This certainly includes the international management of immigration according to standards of legitimacy, justice and human development.

The moral character of a liberal democracy and the normative nature of this inquiry allows me to introduce an assumption, in the hope that it is not controversial. I believe that on both sides of the border there are people with legitimate interests and powerful reasons for exclusion and inclusion. On the inside there are legitimate demands for the exclusion of unwanted new-comers, but also a legitimate interest of further inclusion of people from different political communities—with whom members wish to associate within the territorial bounds of the state. Additionally, as stated above, international practices raise a legitimate interest for members of other political communities to associate within the territorial bounds of a foreign state, and with their members.

In sum we can now characterize *the general problem of borders, or boundary problem* for short, as defining what kind of borders liberal democracies ought to have and what they owe to would-be migrants. *Immigration* is defined as the movement of persons from one state into another with the purpose of temporary or permanent settlement (Kukathas 2005: 570).

If these remarks are sound, a liberal democracy cannot use sovereignty over borders as a trump card, because the kind of political power that borders exercise must be justified as legitimate. Legitimacy is required because of the moral character and the associated internal and external practices of liberal democracies. Internal practices protected by liberal and democratic values are associated with relative external practices.

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<sup>15</sup> See “World Migration Report 2010 - The Future of Migration: Building Capacities for Change” [http://publications.iom.int/bookstore/index.php?main\\_page=product\\_info&products\\_id=653&zenid=tj57h33ekna3j5cuhfduu7n7c4](http://publications.iom.int/bookstore/index.php?main_page=product_info&products_id=653&zenid=tj57h33ekna3j5cuhfduu7n7c4)

The fact that these practices are *under-protected* by international law, does not necessarily diminish the moral engagement that members of a political community incur when their associations transcend national boundaries. Thus, members of other political communities may have legitimate claims to be admitted, grounded precisely in the internal and external practices of members and the moral principles embedded in these practices, which are protected by the moral character of a liberal democracy. The nature and extension of the duties acquired needs to be properly framed and qualified. Next, I want to contrast this conceptual framing of the problem with liberal revisionism and the conventional view.

**§4. Two ways of understanding Borders.** In the last section I defined the *general* problem of borders. I shall now specify at least two different *particular normative problems*. First, we could challenge how a putative right for controlled borders is exercised. For example, we could ask if a specific administration of borders is rightful, just, efficient, adequate, etc. But, a logically prior question is to ask whether states have an entitlement to control borders in the first place. So, we could challenge as well the claim that states in general have the right to a monopoly of unilateral control or dominion over borders. Thus, it is essential to distinguish between a state's entitlement and how a determinate state exercises that entitlement in one way or the other.<sup>16</sup>

To determine the principles and rules to assess the demands of insiders and outsiders constitutes *the problem of fairness of borders*.<sup>17</sup> To determine under what conditions the authority that borders exercise over members and non-members is morally permissible constitutes the prior *problem of legitimacy of borders*. This means that legitimacy addresses *primarily* the question of entitlement, while fairness addresses primarily the question of the exercise of that entitlement. Hope the distinction becomes clearer at the end of the section; although more argumentation for this distinction won't be found until part IV. In this section, I suggest that both the liberal revisionist account and the conventional view may be inadequate to solve the general problem of borders, because they fail to address both particular problems of borders.

I offer a partial explanation in support of this idea by arguing that *justice-based accounts* begin with a conceptual infelicity. Justice based-accounts conflate associations with

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<sup>16</sup> Thanks to Andrew Williams for this suggestion

<sup>17</sup> It is important to note that exercising the right to control borders does not mean, in principle, to have the right to keep them necessarily or mainly closed. For instance, nation-states can maintain the right to control borders even when they may not be morally justified in exercising exclusion based on considerations of race (Walzer 1983; Blake 2007; Miller 2010a).

the duties and benefits they produce, but membership itself is not a commodity to be distributed. In conventional associations, membership is explained by consent. But states elude this explanation (Walzer 1983; Miller 2010b; Wellman 2009).<sup>18</sup> Thus, the conventional and revisionists accounts are unfit to provide a normative explanation of membership to supplement liberalism with regards to the underdeterminacy problem.

Let's begin with the first challenge: the fairness problem of borders. As I have indicated in the last section, according to their moral character, liberal democracies are bound to provide justification when they define the migratory status of a would-be migrant (Miller 2008a). In other words, rejection or admittance needs to be justified in fair terms. Practices and principles that are inherent to liberal democracies imply that outsiders and insiders may have conflicting legitimate claims. The first challenge asks what kind of control is it morally permissible to exercise. But it is impossible to answer this question, if we are ignorant of what outsiders and insiders may legitimately expect of the other or what constitutes a fair balance of rights and obligations assigned by the relationship between would-be migrants and receiving states (Miller 2008a: 371).

Consider for instance admission policies. A variety of principles can be invoked to determine the selection of immigrants. Three kinds of solutions come to mind. Firstly, there are the *luck-based ones*; for instance, lottery, first-come or a waiting list. Secondly, we can select by *cultural, linguistic or ethnic affinities*. Thirdly, there is the possibility of giving priority to aspirants who possess traits currently scarce among members. For instance, states may recruit women if they face a substantive reduction in population reposition; or they may instead recruit skilled workers when needed in specific productive or service areas of the economy.

These admission policies raise many thorny difficulties (Wellman 2010). For instance, is it permissible for liberal democracies to give preference to those would-be migrants with a particular ethno-cultural background with which the state itself considers to have affinities? Can a liberal democracy grant priority to aspirants over gender condition? May a liberal democracy reject those who it considers culturally alien? Regarding this problem, the conventional view approach to the problem of fairness is as seminal as controversial.

Consider Walzer's analysis of the "White Australia" policy where the government pursued the redefinition of Australia as a white community, preventing non-white non-

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<sup>18</sup> For the view that membership to a state can be the result of consent, see Simmons (1999).

European immigration. While Walzer rejects this policy, his objection is grounded in contingent facts rather than principles.

Assuming, then that there actually is superfluous land, the claim of necessity would force a political community like the White Australia to confront a radical choice. Its members could wield land for the sake of homogeneity, or they could give up homogeneity (agree to the creation of a multiracial society) for the sake of the land. And those would be their only choices. White Australia could survive only as Little Australia (Walzer 1983: 47).

Broad consensus has been reached among liberal scholars that Walzer's analysis is misleading (Miller 2005: 204; Carens 1987: 268; Blake 2007: 233). What causes perplexity, though, is the fact that these scholars do not agree exactly why (Wellman 2010). But, everyone seems to agree that there is an obvious tension between freedom of association and equal treatment that liberals find difficult to grasp.

The conventional view does not escape this problem, and the problem seems exacerbated by the stringent moral requirements that states seem to have in contrast with other forms of association (Fine 2010). On one hand, it seems that certain ways of exclusion are simply a consequence of membership (Walzer 1983; Wellman 2008). Any association or group by definition excludes those who don't currently belong to the group. But at the same time, certain forms of exclusion, for instance those based on gender and race seem spurious even in the domain of private associations (Blake 2012).

I shall come back to this issue in part III when I discuss exclusion based on state's rights of association. Suffice to say, for now, that it seems difficult to address the problem of admission policies if we do not clarify first what kind of control the state is permitted to wield over borders. Once we know the moral requirements of the exercise of political power over borders and the justification conditions of this kind of political power, then we can assess the specific exercise of border political power, such as admission policies. This means that the legitimacy problem of borders is conceptually prior. That is why this thesis focus on it.

Another source of concern regarding fairness is the effect that emigration causes in those countries left behind by migrants fleeing to developing and developed states. Brain-drain may have disastrous effects for countries already suffering shortages of talented people, because this is likely to raise the levels of poverty and scarcity of goods and services in countries of origin. This is the case with healthcare professionals. While Europe is inhabited by 21% of the world's population, it concentrates 45% of the world's doctors and 61% of nurses; Africa, on the other hand, is able to retain only 3% of the world's doctors and 5% of nurses

(Brock 2009: 200). One obvious response to this would be to limit the exit of high-skilled professionals, but this seems to be at odds with individual liberty (Wellman 2008).

The concern for brain-drain is important because it highlights what the conventional view systematically tends to overlook: that the interest of outsiders needs to be taken into account, if we take the value of fairness as an important ideal for our political life (Oberman 2013: 430). Whatever weight one may give to nationhood or membership, it seems hard to deny that at least the interest of desperate people abroad should have some importance, if not priority. But again, any attempt to prioritize these different concerns would require more clarity regarding the legitimacy problem.

In sum, regarding the first challenge of fairness, the unsolved tension of exclusionary rights and equal concern reveals that the liberal view is largely incomplete. It seems that a fair immigration policy needs first to establish a moral frame that sets limits to the administration of the flows of unskilled and professional workers so migration inflicts less harmful effects, without curtailing the opportunities of people on both sides of the border.

I said in the last section that one of the crucial expressions of political self-determination is to specify the body of rules and laws under which the community collectively submits itself. Thus, in order to clarify the nature of state's entitlement over borders and the reasons to manage it in certain ways—which constitutes our second, yet prior challenge—we need to investigate first what is the full structure of that entitlement.

For instance, we could ask what right is at the core of the structure: whether it is a jurisdictional, territorial, associational or contractual right. We also could wonder about the content of this right; that is, the different rights and duties that make sense of it: the right to control borders, the right to limit membership, the right to close borders, the right to political self-determination, duties of non-interference, duties of charity, duties of justice, etc. We could analyse the composition of each of these rights in terms of its *incidents*: privileges, liberties, claims, powers, immunities. It is important as well to clarify who is the right holder. Is the putative right held by the state, by the citizens or by some institution, a group of state's officials or a combination of the former?

One powerful specification of the collection of rights and incidents implied in border control available to the conventional view is the *functionalist account* of borders.<sup>19</sup> The functionalist account is often invoked by defenders of the conventional view. The functionalist account of borders establishes that there are instrumental reasons to control borders, because

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<sup>19</sup> Note that a functionalist account of borders may be grounded in a functionalist account of legitimacy. See §12.

of the benefits involved in a centralized territorial control. States need territorial continuity in order to enforce justice, define property rights and provide public goods (Quong 2010; Wellman & Cole 2011; Stilz 2011: 576). Quong explains this account as follows:

Institutions which distribute resources, establish and protect property rights and capture and punish rights violators require, in order to be effective, exclusive jurisdiction over a given territory. Justice is very unlikely to be realized when there are competing institutions which issue different rules regarding property rights of criminal law within the same territory. Justice is most likely to be established if, for any given area, there is a single legitimate authority with the power to protect and enforce people's rights and ensure a just distribution of resources or advantages (Quong 2010: 130).

People have a basic interest in seeing their rights and property secured, and the jurisdiction of the state offers to provide that kind of security. Dominion over the territory is needed in order to exercise jurisdiction. Border control seems a corollary of both the jurisdictional protection of rights and the territorial continuity needed to realize this. In this case, the core right of the structure is set as the state territorial dominion held by institutions and officials of the state. As it is assumed that territorial dominion is jurisdictional in nature, it implies a broad provision of claims, powers and immunities over land, its resources and constituents. Thus, the functionalist account encompasses rights to control territory, membership, jurisdiction and borders. The functionalist account seems very attractive, because it orders and connects different rights associated with border control indicating at the same time compelling instrumental reasons to hold control of borders.

The main problem with this account is its vulnerability to *the particularity problem* and the *specificity objection*, which render this account unfit to supplement liberalism (Wellman & Simmons 2005, Quong 2010). The particularity problem arises because the functionalist account only establishes the importance for a state's institutions to have a determined territorial site, but fails to deliver further criteria to determine *where* precisely the limits of this site should be (Quong 2010: 129).

This raises important complications. For instance, suppose you have a group of equally beneficial states that similarly guarantee sufficiently efficient enforcement of justice, protection of property and adequate provision of public goods. In these circumstances, it is difficult to find any deontic or principled reasons to establish what state should control what territory, because any of these states can perform relatively well such a function. If Germany and France perform similarly in the requisite functions of the state, then why should Germany control this territory and not France?

In the same manner, the *specificity objection* (Quong 2010: 111) may challenge the depth of the functionalist account. I may be morally required to obey the law and submit myself to just institutions, but why should I owe obedience to this state instead to this other? Why should I owe obedience to the state I was accidentally born into, instead of voluntarily submitting myself to a state that does a better job protecting rights, securing property and ensuring public goods? In this case, it would be perfectly just for migrants to fly from their countries of origin and seek to discharge their duties of justice to a state with better institutional arrangements.

A merely functionalist account cannot answer these questions. It merely points out the complexity of the provision of rights related to border control and also the convenience to pursue a justification for it, but it never seriously engages with that justification. That is why liberalism needs a supplement in order to provide a solution to the boundary problem. Instead of providing that supplement the conventional view invokes a *prima facie* case of borders that tend to assume precisely what is being questioned.

Additionally, note that using a *prima facie* model to understand immigration problems is controversial, especially if the question is framed in the discourse of rights. Some right theorists, like Wellman (Wellman 1995; Waldron 1981), argue that *prima facie* models are vulnerable to the *contradiction of right's objection*. The conflict arises because rights are commonly considered as general and absolute, but if they are general and absolute, they shouldn't conflict with each other. By definition, *prima facie* rights conflict with rights associated with countervailing reasons. If rights conflict then rights cannot be absolute.

*Prima facie* models find it difficult to explain what is the overall force and advantage of having a right at all if countervailing reasons can always arise. Importantly, *prima facie* models of borders simply assume that states have a legitimate claim over territory and its borders, while at the same time one of the seminal assumption of political theory states just the opposite: that there is a strong presumption against state's authority that presumably includes the authority that they exercise over borders. There is a certain circularity in assuming that borders should be, in principle, open or closed, but never clarifying why states have, in principle, such a claim to control borders in the first place.

In sum, the status of the normative debate seems unsatisfactory, because the challenge of fairness is insufficiently discussed by the conventional view, at least in Walzer's version, and the second and prior challenge of legitimacy is simply ignored. I believe I can suggest a partial explanation of this deficiency with the following distinction. I believe there

are at least two approaches to the morality of borders: The justice-based account and the legitimacy-oriented account.

Justice-based accounts of borders begin with the idea that justice and legitimacy are not distinct political virtues (Valentini 2012). Hence, a justice based account of borders is grounded in a justice-based account of legitimacy. Once a justice-based account of legitimacy is established, then the right to exclude immigrants is simply *assumed* to be a direct consequence of the scope of basic institutions, because members are defined as those who have legitimate distributive demands against a particular state.<sup>20</sup> But this assumption cannot address the specificity objection and the particularity problem.

Recall the second challenge is about determining the conditions of permissibility of the political power that borders exercise. This includes dealing with specificity and particularity. Within justice-based accounts, exclusionary rights are seen simply as a result of claims of distributive justice (Lægaard 2010: 248). The assimilation of the problem of legitimacy to the familiar problem of justice entails that the underdeterminacy problem remain unsolved. Instead of justifying claims over the territory and jurisdiction over its borders, justice-based accounts simply begin telling us that membership of a political community is a matter of justice.

I suspect they begin with that assumption because they conflate associations with their fruits and costs. That is why they believe that membership is a commodity. Certainly membership is a condition for the existence of any group, but it is not itself one of the commodities that a group produces and distributes. Membership is rather a condition of the possibility of distribution patterns.

The standard objection argues that claims over borders are rather complex. If exclusionary rights were about membership only, then states will claim to control people only, instead of claiming control over territory and its boundaries (Simmons 2001). Claims of jurisdiction and control over territory not only play a role in justification, but they seem prior to the problem of defining any distributive pattern. Thus justice-based accounts might be inappropriate to elaborate a normative explanation of membership and exclusionary rights.

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<sup>20</sup> Note that justice-based accounts include both the conventional view and liberal revisionists because both begin by asking who may have a legitimate demand of justice to make against whichever institutions. The difference between them relies on the scope of justice. For defenders of the conventional view, justice only makes sense between members of the same political society. The scope of principles of justice coincides with the limits of the institutions of the state. States distribute membership to newcomers when they see it fit, for instance, when one is born within the territorial boundaries of the state, whether one is genetically related with members, when one is culturally affined to the state, etc. But for revisionists, the scope of justice is global. Distributive demands should be extended globally. As indicated before, in this work I focus on the conventional view to further develop it and its further developments into nationalism and rights-statism.

Legitimacy-oriented accounts, on the other hand, start with a strong presumption against state's authority, including state's authority over borders. It does not argue for *pro tanto* open borders, it merely requires moral justifications for all the rights and incidents related with border control. In what follows, I won't defend at length this distinction. A more complete account will be found in part IV. In the meantime, I will mention just a few attractive points of legitimacy-oriented accounts.

**§5. An alternative view of the Morality of Borders.** In this part, I present some intuitive advantages of legitimacy-oriented accounts. Discussion about this account would have to wait until part IV. Here I only attempt to present the distinction. Legitimacy-oriented accounts distinguish justice and legitimacy as different political virtues of institutions. Unlike the justice-based accounts, legitimacy oriented accounts do not make assumptions regarding whether borders should be in principle open or closed. Instead, legitimacy oriented accounts begin with the second challenge as they acknowledge a *prima facie* case against political power. As borders exercise political power, there is a *prima facie* case against the political power that borders exercise. Thus, the control of borders needs to be properly justified before the question of fairness of administration of borders is even addressed.

Instead of assessing the complexity of claims over borders, justice-based approaches tend to reduce the problem to Manichean face-offs between open and close borders. When in fact, for the case of liberal democracies the problem is rather about the limits and dimension of this putative permission for exclusion and the levels of *porosity* it generates in terms of relative openness or closeness of borders (Lægaard 2010: 248).

One example of the limited explanatory scope of justice-based accounts is the tension between the right to leave and the rejection of a putative complex right, encompassing both the right to leave and the right to enter other state. In this section, I will use this tension as a strategy to illustrate the advantages and nature of legitimacy-oriented accounts. A more complete account of this distinction will be found in part IV.

The right to leave one's country of origin (along with the right to return) is broadly accepted among liberal democracies as part of the provision of basic freedoms that limit states sovereignty on the understanding that states should protect citizen's basic interests. A state that denies emigration treats its citizens as political property insofar as it forces them to remain, regardless of their preferences (Altman & Wellman 2011: 180).

In general the individual right to exit safeguards legitimacy by providing an option for protect oneself in the event that a group abuses its power. According to Miller, "The right to

exit is a right held against a person's current state of residence not to prevent her from leaving the state (and perhaps aiding her in the endeavor by, say, providing a passport). But it does not entail an obligation on any other state to let that person in" (Miller 2010: 197).

In order to support the rejection of a putative right for being taken in, Wellman mentions two reasons (Altman & Wellman 2011: 178). First, freedom of association entails the freedom not to associate: "one may unilaterally emigrate because one is never forced to associate with others, but one may not unilaterally immigrate because neither are others required to associate with any given potential immigrant" (Altman & Wellman 2011: 179-80). Second, immigration involves costs to the community as a whole. Granting a right to enter will give immigrants permission to deplete other countries' resources and for the exploitation of members of other political communities.

This, however, seems a rash judgment. Many economists agree that under favorable circumstances, immigration is overall beneficial (Weissbrodt 2008). Additionally, as we indicated above, states are a *sui generis* form of association subjected to further moral requirements (Goodin 1985; Rawls 2001a; Fine 2010; Blake 2012). Miller, for instance, takes a more subtle position. He concedes that would-be migrants may have claims to enter. But, these claims are so weak that they do not entail any specific obligations of any particular state to take someone in. Miller observes that in this case, it is sufficient that most people get offers from at least one state: "then the position as far as the right of exit goes is pretty much the same as with the right to marry, where by no means everyone is able to wed the partner they would ideally like to have, but must have the opportunity to marry someone" (Miller 2010: 197).

Yet, this seems to be unsatisfactory from the point of view of the basic interest that the right to leave itself attempts to protect. For instance, Cole says, "One cannot consistently assert that there is a fundamental right to emigration but no such a right to immigration; the liberal asymmetry position is not merely ethically, but also conceptually incoherent." (Cole 2001: 46). It seems difficult that the right to leave serves its purpose without the concurrence of other rights that make that protection possible.

Indeed, the conventional view is right to point out that *logically* the right to leave does not entail a right to be taken in. These two rights are indeed logically independent in the sense that they are clearly distinct rights. But this approach completely overlooks the ground of a right to exit and the overall nature and purpose of basic rights. We must look at rights rather

interpretatively in order to grasp the complex structures they form and the interests they protect (Dworkin 1986, 2011).

Recall, human rights are defined as protections to basic interests and needs necessary to lead a decent human life (Altman & Wellman 2009:2). Recall as well that what we call rights often denote a bundle of different specific rights or *incidents* that define what a right does in different circumstances (Wellman 1995). For instance, what we call the right to own the computer I have purchased, denotes a bundle or set of related complementary incidents that specify my property right as a privilege to use it, which is a claim against others from using my computer, a power to transfer my rights over the compute and an immunity against others to alter my other incidents over my computer. We cannot make sense of my right over my computer without reference to these other specific incidents that integrate the set of what we normally call “my right over my computer”. Yet, each incident within the set is logically independent from the other.

So despite the logical independence of some rights or incidents, we must find out in which structure rights and incidents fit in the light of the interest they protect, in order to make sense of a complex structure of rights. Similarly, I believe we can look into an isolated right to exit merely as a logically-independent right, but this would completely miss the point of what explains this right. This overlooks the fact that within liberal theory, the right to exit is an important protection against harmful forms of membership, exploitation and domination. Instead we need to see how this right fits in a more complex structure of rights that serves one single purpose.

Groups have a great potential to illegitimately restrict the autonomy of their members. The familiar liberal answer against this threat is to permit group self-determination and rights of exclusion as long as members enjoy sufficient right to exit (Mill, *On Liberty* 1998: 91-92). In the standard case of groups, the interest is fulfilled by a right to exit, because individuals may find other associations to join or they can undertake to create themselves new associations. This means that the right to exit is part of a more complex structure that protects also the right to form new associations or join other associations. But, states are a *sui generis* form of association with extraordinary potential of harm, which does not admit these possibilities. So the complex structure that encompasses the right to exit states is also different. This complex structure is human rights.

The right to exit states must be understood in this complex manner. If the right to exit states has the purpose of protecting people from states that cause harm, then in order to

make sense of this right, it needs of a similar complex molecule of related specific rights that make that protection possible in the same way that my right to the computer only makes sense when it is specified by those other related incidents. Presumably, a qualified right to be taken in would be part of such a structure, because protection from an evil state will not succeed if I do not have a related right to be taken in.

It seems to me that in the case of exiting states, the right to leave needs to be specified with a set of several detailed rights that guarantee the protection of the basic interest that motivates the right in the first place; that is, the protection against abusive authority and the assessment and maintenance of the state's legitimacy. I do not attempt that analysis here. The important point for now is that the possibility to analyze the complexity of a set of rights, transcending the basic structure of the society, simply eludes justice-based accounts that, by definition, are exhausted by the scope of the basic structure and the fulfillment of Samaritan duties. For justice-based accounts, one simply lacks a right to immigrate to a country when one lacks claims of distributive justice to that country in particular.

Most of the normative debate has been focussed on reasons to limit immigration (Barry & Goodin, 1992; Cristiano 2008) or in avoiding border controls (Carens 1987; Steiner 1992), and very little to ground the entitlement itself (Simmons 2001; Scheffler 2002; Lægaard 2010;). The reason is because contemporary political philosophers have almost always begun with the idea of states as units with legitimate territorial dimensions, only concerned with the justice question (Simmons 2001: 302). As Simmons notes, this might be because political theory is still based on 16<sup>th</sup> and 17<sup>th</sup> century discussions about internal sovereignty, where political virtues focused on who has *de jure* authority over whom within a political society and the limits of political authority are recent discussions (Simmons 2001: 300n4).

In contrast, a legitimacy-oriented account is not focused on immigration controls, but it sees *migration* integrally without an arbitrary disproportionate interest on exclusion. Legitimacy-oriented views assess what borders do to people and things on both sides of the borders. This means that it assess the exercise of political power that borders wield over insiders and outsiders, hence looking for an integral justification for border authority.

This orientation towards the assessment of legitimacy enables legitimacy-oriented views to deal with the complex set of rights, interests and reasons implied in state's exercise of this entitlement in a variety of circumstances. The basis of a state's claims over those territories and populations within them is a logically prior question. It is not enough for a state

to have established just institutions to justifiably exercise dominion over any territory it chooses if it does not have valid claims over that particular territory in the first place.

This account transcends the old 17<sup>th</sup> century frame limited by internal sovereignty; and assesses political power in both its external and internal constraints; for instance, regarding problems like defining when and why political communities have a right to self-determination, when international intervention is justified, and crucially, the question of under what conditions exclusion may be permissible (Simmons 2001: 301n4).

I anticipate a lot of resistance against the distinction, because of the influence of justice-based accounts in political theory is pervasive. The distinction between justice-based and legitimacy-oriented accounts still needs further clarification. The difference between the two accounts is still unclear. It may seem that the only difference between the two is that justice-based accounts presuppose territorial control, while legitimacy-oriented accounts do not. If this was the case, then in principle, the two accounts could coincide to the extent that justice-based accounts are silent regarding the challenge of legitimate border control. However, I believe that the distinction is deeper than that. I suspect justice-based accounts are different insofar as they tend to collapse the distinction between different political virtues. Particularly, the distinction between justice and legitimacy is crucial for addressing the underdeterminacy problem, although I won't argue for this here.

What I have done in this part is a preliminary suggestion. I have put forward a distinction, to work with it in what follows. I will discuss the distinction in more detail in part IV. In the meantime I just want to insist that these considerations do not support an unrestricted, unlimited right to immigrate. My interest in the asymmetry between the right to leave and the putative right to emigrate was motivated by the need to show the explanatory limits of justice-based accounts. However, I do endorse the idea that the right to leave needs to be encompassed by a provision of rights that permits would-be migrants to open their legal migratory options in a way that limits harmful effects and boosts development worldwide. But, I do not offer support here for these ideas.

Just as no liberal state restricts internal mobility, and those states that do are criticized for denying basic human rights, the right to leave constitutes the seminal (sometimes symbolic) protection against governmental action in the face of possible excessive demands of allegiance (Whelan 1981:637). But this raises the following perplexity: If freedom of movement is so basic that it overrides the claims of local political communities, at least inside boundaries, wouldn't it be consistent to encompass the right to leave with an associated (yet constrained

and properly qualified) right to be taken in? I hope I have shown that legitimacy-based accounts are better endowed to deal with this kind of question.

In this part I have discussed Anglo-American gravitation towards and its focus around immigration and exclusionary rights. I hope I have shown that these approaches, although diverse and pluralistic in their motivations and solutions, share two main traits. First, they try to establish a *prima facie* case for borders. For instance, liberal revisionists argue for *pro tanto* relatively open borders according to the continuity of liberal moral and political values of equality and freedom. Conventional liberals argue for *pro tanto* relatively closed borders based on the partiality and exclusionary rights of associations. Second, these accounts share a justice-oriented argumentative structure. Roughly, one has claims to be admitted when one has distributive claims against institutions. Conventional liberals restrict distributive claims to members under the dominion of the basic structure of society, and liberal revisionists expand the scope of these distributive institutions.

Two main problems arise with justice-based accounts. First, its functionalist account does not overcome the particularity problem and the specificity objection. Second, it does not explain why states have a claim for the monopoly of the control over borders in the first place. This potentially renders justice-based accounts unfit to supplement liberalism with a normative explanation of membership that could solve the boundary problem of determining what kind of border-line institutions liberal democracies ought to have.

In contrast, legitimacy-based accounts start at a better place with a strong presumption against the authority of the state and ground the authority of borders in state legitimacy. Because these accounts start with a basis of sovereignty rights, they potentially may show the relationship between the complex set of rights and incidents related to border control. The main advantage of these accounts is that a broader knowledge of the kind of entitlement that states have over borders may contribute more elements to the problem of fairness of borders, than what the justice-based account may provide. However, I won't address the problem of fairness in this dissertation. This however won't be clear until I provide a more complete explanation of the difference between these accounts in part IV.

It should be noted that nothing in these considerations entail that the conventional view is necessarily wrong or that borders should remain relatively opened. I have merely shown that the conventional view is inconclusive. The conventional view, however, has been developed in two main branches: cultural nationalism and rights statism. As nothing in these considerations presented in this part entail that the conventional view is self-defeating or

incongruent, I must analyze next these further developments (parts II and III) before I develop support for a legitimacy-oriented account (part IV).

The hope is that the distinction invoked in this part could be of some use when we discuss nationalism and rights-statism. In this part, I have merely shown that justice based accounts are at a serious disadvantage to address problems of borders and any problem that transcends the scope of distributive institutions for that matter. Hopefully, this suggestion becomes clearer when we discuss nationalism and rights-statism in their own terms.

## **Part II**

### **Cultural Nationalism and Legitimate Border Control**

**§6. Supplementary Nationalism and Borders.** In the last part, I outlined the general problem of borders in order to find out what kind of borders liberal democracies ought to have. Liberalism and democratic theory find it difficult to address this problem, because the problem itself is never properly framed in these theories. Rather, both liberalism and democratic theory begin with the idea of states as units of justice with a fixed set of members and a defined territorial dimension (Simmons 201: 302).

I described that situation as the *underdetermination thesis*, because from this perspective borders can be considered as an underdetermined normative issue for political theory. Note however that this line of criticism does not prevent the conventional view from articulating the required arguments. In principle, the conventional view could be restated and elaborated further in order to fill in the gaps. Indeed some enthusiasts (Gellner 1983; Miller 1994; Tamir 1993; Ignatieff 1994; Gams 1998) decided to take care of this gap and attempted to supplement liberalism with a theory of nationalist legitimacy, which explains membership in terms of nationhood or national identity.

Nationalist ideologies have been invoked from both ends of the political spectrum. It is known that colonialism, imperialism and racism have given nationalism a bad reputation. That's why these enthusiasts needed to restate nationalism with a civic defence, distinguishing

it from ethnic-nationalism. *Ethnic-nationalism* characterizes membership with a myth of common descent.<sup>21</sup>

In order to deliver a theory of legitimacy suitable for supplementing political liberalism, these enthusiastic nationalists that are engaged in the revitalization and domestication of nationalism, have to change their ideal or belief of supremacy of race and kin with the socially acquired traits of culture. If they succeed, nationalist legitimacy would state that members are involved in a special relationship with each other through their own national culture, which is worth being protected by national boundaries. Common membership is therefore formulated in terms of belonging to a group that shares national culture. Common history and language are promoted as a way of defending and unifying the nation, which embodies a national culture. For this reason, outsiders are legitimately excluded as a result of the obligation the state has to protect the national culture. This claim is sometimes referred to as *cultural nationalism* (Tamir 1993, Miller 1995, Kymlicka 2003).

Cultural nationalism is very attractive because it begins with two facts familiar to everyone. First, there is the anthropological fact of in-group allegiance. All human beings distinguish between in-group and out-group people (Pinker 2002:65; Brown, 1991). Nationalism takes advantage of this automatic human response and builds a political frame upon it. Second, the relatively shared interest that most human beings have in preserving and reproducing their own set of values, beliefs, stereotypes, role models and ways of life; and the interest they have in seeking that the social world reflects to some extent their cultural traits.

However, the main problem of cultural liberalism is its incompatibility with liberal values. On the one side, all liberals are, to a certain extent, nationalist simply because liberal democracies for the last two hundred years have been intimately linked to the nation-state model. But one important task of liberalism has been to acknowledge the fact that its dependence on the nationhood of the majority has a clear potential to be unjust, especially to different kinds of minorities (Kymlicka 2003). So the process of empowerment and inclusion of minorities has entailed an associated process of denationalization of the state. On the other side, cultural-nationalists want to go further and increase the dependence of the state to the institutions, ideologies and morals of nationhood, arguing that the possibility of liberal values to take root in society depend upon the morally meaningful bounds established within a nationalist community.

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<sup>21</sup> Here I am not supporting a skeptical claim against ethnic-nationalism. Basic demographics and population genetics show that in modern nation states common descent cannot be more than a myth (Abizadeh 2012:873).

It is important to insist that cultural nationalists may have agreed that only a *civic* formulation of nationalism (as opposed to an ethnic formulation) is compatible with democracy, liberalism and peace; but, at least conceptually, civic-nationalism may still be compatible with injustices like expansionism, forced annexation and colonization. Therefore, cultural-nationalism still needs to work out how to differentiate itself from these illiberal forms of nationalism.

Cultural-nationalism, then, faces two important challenges. (1) It needs to supplement liberalism regarding the underdeterminacy problem in order to determine membership and borders. But at the same time (2) it needs to remain liberal. Historically, nationalism has been very successful in defining membership, but mostly at the cost of aggressive and militant ideologies. Clearly not all forms of nationalism are liberal and because of this, many believe there is a *pro tanto* liberal case against nationalism (Freeman 1994). Cultural nationalism needs to appeal to liberal concerns and principles in order to justify border restrictions. In what follows I focus on David Miller's version of cultural nationalism, because I consider it the most systematic and complete defence of that view.

In §7 I develop a brief account of Miller's view in order to show that it rests on two controversial premises that potentially weaken its case. In §8 I gather some objections posed by scholars pointing out that nationalism may be redundant regarding the underdeterminacy problem, because on closer examination, the reasons it gives for the case of exclusion are not really different from those provided by liberalism which are vulnerable to the standard objection. But again, this objection does not entail that nationalism, as an account of legitimacy, has failed. In order to face the objection it may be possible to come up with a tailored nationalist public culture. That's why in §9 I argue that the cultural nationalist case for culture protection seems to require that the state engages in nation building projects, and cultural management that seem unacceptable on liberal grounds. Finally, in §10 I conclude that exclusionary rights cannot be grounded in nationalist legitimacy, because the nationalist principle of political self-determination is not appropriate for liberal democracies as long as it fails to comply with liberal standards.

Nationalism may be either redundant or illiberal, but it is correct in highlighting the importance of community with regards to the problem of understanding the relationship between legitimacy, justice and borders. The moral dimension of community certainly matters to us in the sense that it establishes the normative ground of our claim about legitimacy and justice. But there is nothing that entails that a self-determining community that exercises

legitimate control over the territory it occupies needs to be a nationalist community. Yet a morally-bound community will remain the centre of argumentation in the following sections.

**§7. Miller's Cultural Nationalism and Closed Borders.** David Miller is considered a liberal thinker, because he endorses a normative ideal of social justice; that is, individuals have a claim to justice against the state, which in turn is required to establish and sustain distributive institutions (Miller 1995: 90-96; 2009a: 292). What makes Miller a nationalist thinker is the fact that he also endorses the view that nation and state should coincide as much as possible because of the paramount importance of national culture (Miller 1995: 81, 88, 90). Nations are better protected by states of their own, and states work better when they embrace one single nation, thus the state should adopt policies designed to protect and nurture national identity (Miller 1995: 72). Accordingly, a legitimate state is the one that embodies and protects national culture (Miller 2008a: 375). A state is thus morally justified to close its borders, if that's what is needed to protect shared identity. In this section I outline Miller's argument for nationalism as a supplementary account of legitimacy to show how he reaches the conclusion that nations have the right to control and restrict immigration. However, I will point out that Miller's defence of nationalist justified exclusion rests in two debatable claims that weaken his case for exclusion.

To support the prescription of *one state one nation* Miller defends what he calls *the principle of nationality* (Miller 1995: 40). The principle of nationality advances three central theses<sup>22</sup>: (i) national culture is a genuine contribution to the individual identity formation process. (ii) This identity formation process establishes a special relationship between fellow-nationals that give rise to special duties of partiality among members. (iii) Because of this, nations have a good claim to political self-determination.

It is important to note three salient features of Miller's defence of the principle of nationality. First, a link between national culture, national self-determination and democracy is established. According to Miller, cultural nations are ethical communities brought together by means of a pervasive shared public culture and solidarity grounded in a strong emotional mutual commitment (Miller 1995: 29). As a result, national communities have a good claim to self-determination because a community of this type needs to decide collectively in order to preserve its existence (Miller 1995: 81). Miller believes that only democratic states can ensure the kind of political self-determination that is genuinely national, because democratic

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<sup>22</sup> Cf. Miller: 1995: Introduction.

citizenship constitutes the only way members of the same nation can participate in the shaping process of their nation's policies and culture (Miller 1995:89).

The second main feature of Miller's view is the paramount importance it gives to vernacular culture. According to Miller, the relevance of national culture is explained in terms of a *contextualist* approach to justice. Roughly, contextualism sustains that within different contexts, different principles of justice should apply because relationships with people are in principle established in community-relative terms (Miller 1995: 57, 59, 64, 109).<sup>23</sup> What matters is who distributes what to whom, and in what circumstances (Miller 2002a: 7).

The third main feature of Miller's defence of the principle of nationality is that the case for group-partiality within a nation is based upon the idea that nationality is a special relationship because it is both instrumentally and intrinsically valuable (Miller 1995:163). Miller, thus, has instrumental and intrinsic value arguments to support the kind of partiality that explains his case for exclusionary rights.<sup>24</sup>

The *instrumental-value argument* states that national culture has a value as means to some specified ends for instance, the social goods and practices that it brings about (Miller 1995: 92). The idea is that states need to subsist in a public environment of social trust and solidarity in order to perform adequately its distributive functions. This kind of social environment can only be found in nations whose members all share the same national identity. Note that instrumental-value arguments are conditional to the actual accomplishment of the goods that the argument established as an objective. If in reality the nationalist protection of culture is not necessarily connected with the production of such goods, the argument fails in its own terms.

*Intrinsic value of national culture* arises when we do not consider its value as means to achieve specified ends. Intrinsic-value argument states that national culture is valuable in itself because it provides us with a morally meaningful community within which we ourselves identify. This process of self-identification, in turn, is decisive for the development of our very own identities (Miller 1995: 40). The idea is that there is something about shared national culture that, without it, our lives as members will be seriously damaged or at least significantly impoverished. The intrinsic value may be assessed taking into account the role of national

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<sup>23</sup> Miller's contextualism is contrasted with ethical universalism, which is criticized for abstracting the individual from her social meaningful realm, obtaining an implausible account of human morality and motivations.

<sup>24</sup> Miller does not explicitly separate his arguments like this. He argues either from an instrumental or intrinsic ground as he sees fits. Instead of following Miller's formulation by heart, I draw upon Shaffer's distinction of these two different ways of approaching partiality (Cf. Scheffler: 2002: 100-102).

culture in the formation process of our individual identities; that is, the contribution of national culture in socialization and acculturation of members.

Given this moral framework, established by the paramount importance of national culture, borders, as any other policy, should be determined according to the principle of nationality (Miller 2007: 223). Nationalist legitimacy is defined by the requisite function of protecting national culture. Alien cultures threaten to change the continuity of national culture (Miller 1995:88). Thus, immigration policy should be worked out with the purpose of establishing the conditions and means necessary to secure the continuity and authenticity of national culture (Miller 2007:221).

As a result there is no such thing as a right to immigrate because freedom of movement, the right to exit and any other right or liberty are not absolute. They are limited by the moral framework that makes them possible. They only make sense as a provision of rights that members of a political community are able to provide to themselves (Miller 2005b: 194-99).

It is widely believed that liberal societies offer sufficient freedom of movement to protect the basic interest of members.<sup>25</sup> To protect freedom of movement and also to provide an adequate range of valuable options is in part what it means for a state to be legitimate. Everybody should be entitled to the same kind of treatment from their fellow citizen, and every country should be entitled to decide their immigration policy. But, freedom of movement or the lack of an adequate range of valuable options does not, *per se*, grant a right to immigrate.

In extreme circumstances, permission to enter a state could be granted, but not as a right to immigrate, but rather as an obligation of the state to aid. Miller acknowledges that affluent countries have heavy duties to aid; but before a state's right of exclusion can be waived by these circumstances, countries may try to ensure that basic rights for people are sufficiently protected in the places where they live. For instance, by aid or intervention (Miller 2005b:198).

In the case of refugees, a basic need to move to a different country can only be defended contingently by extraordinary circumstances. Even in this case, the person does not have an unlimited right to move, but only a contingent right to find protection in some other state. In the same vein, the right to exit does not entail an unlimited right to enter any country

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<sup>25</sup> "So long as they comply with the standards of decency [...] all contemporary states are able to provide such an adequate range [of options] internally" (Miller: 2007: 213).

(Miller 2005b: 196). The right can be satisfied provided that one or more countries are willing to take her in, as one's right to marry is contingent to find at least a willing partner (see §5).

Miller concludes that nations have a right to control and restrict immigration based on national self-determination (Miller 1995: 63). Given the intrinsic and instrumental value of culture, citizens have a legitimate right to control as much as possible the continuity and authenticity of their public shared culture. It seems very difficult that people could control the development of their culture without the right to restrict immigration (Miller 2005b: 200). If immigrants have no right to be admitted and states have a right to restrict immigration, it seems that nationalism may ground a strong case for closed borders that allow states to be communities of character (Walzer 1983: 62). Note that Miller's supplement to liberalism, regarding the problem of membership, if successful, entails that duties of distributive justice are not available as ground for a right to immigrate. Because the principle of nationality limits the scope of distributive duties to the institutions that apply only to members of the same nation (Miller 2005b: 198).

However, Miller's defence of the right to exclude rests on two debatable claims. The first is that national culture is intrinsically and instrumentally valuable; and second, the idea that the value of national culture morally permits the exclusion of would-be migrants. As indicated above, national culture is valuable because of its role in the production of goods and its role in the process of formation of our identities. The problem is that the normative ideal that makes culture valuable in this way is taken for granted or at least yet to be empirically supported (Abizadeh 2002; Laegaard 2006: 401; Wellman & Cole 2011: 52).

The idea that nationalism is necessarily connected with the kind of solidarity, transparency and social unity needed to support the endorsement, stability, participation and social justice is yet to be proven. In the same manner, Miller is just supporting the idea that nationalism could act as a facilitator for this kind of goods (Abizadeh 2002). This does not mean that nationalism would be advisable or preferable to other means to achieve these goods. The acceptability of the conclusion is conditioned on accepting the normative ideal. Yet the argument is not meant to provide this kind of evidence.

As indicated in §6, much of the twentieth century history of the nation-state has to do with a process of *de-nationalization* and multiculturalization of public policies in order to ban exclusionist ideologies and accommodate the pluralist, multicultural and multinational nature of modern liberal democracies. The idea that nationalism is the best social structure for public morality and individual socialization depend suspiciously on an empirical thesis and

sociological conjecture about the contemporary world; that on closer inspection may be very controversial, if not out of date.

Each of Miller's claims about the positive contribution of nationalist morality to well-being and identity is likely to be challenged by evidence in the opposite direction, showing that multicultural, pluralist, multinational liberal democracies perform better in many ways and tend to be more peaceful, competitive and productive. High living standards of liberal democracies, such as Canada and Switzerland, are paradigmatic.

The second controversial claim is that sharing a common national identity is a necessary condition for distributive justice, and that those who lack claims of distributive justice may be permissibly excluded. As we saw, Miller maintains that nationalism may supplement liberalism, because it determines membership. By extension, this also provides a justification for exclusion.

This move entails that the problem of immigration may be reducible to the more familiar problem of distributive justice. Then, an argument needs to be provided to show that distributive claims are a constitutive trait of members from the same nation. Miller himself abdicates this premise (Miller 2009a: 303). Miller realized that distributive justice could apply to people engaged in many types of relationships, and not only to relationships established by means of shared culture. In the same way, there can be several motivations to enthusiastically comply with the demands of distributive justice; nationalist solidarity is not the sole source of normative motivation. For instance, we can think of an association brought together by an enthusiasm for producing goods on fair terms. They may agree about production plans, terms for distributing the burdens, and profits without being bonded by a nationalist culture. Additionally, it seems that shared identity and solidarity are not sufficient conditions; because when there are high levels of both, communities are tempted to transcend justice and allocate resources in alternative magnanimous and noble ways (Miller 2009a: 304).

Nationalists may be guilty of a flaw that Andrew Mason (1999: 263) identifies: they sometimes confuse the issue of what it is for a group to constitute a nation with the reasons why nations have emerged in the first place. Perhaps nations emerged as a result of strong national bonds; similar to those described by Miller, but these conditions are not the same as those involved in the stability and unity of large liberal democracies of our times. This forces Miller to recognize that demands made by immigrants and claims made by national citizens may be equally reasonable in a way that there is no simple rule for solving immigration conflicts (Miller 2008a: 389).

Even if we do not challenge these two fundamental views of Miller, the cultural nationalist argument for broad exclusionary rights, still fails in its own terms. In the next section, I raise three objections pointing out that nationalism fails to supplement liberalism. Additionally, I argue in the last section that the nationalist conception of legitimacy is not compatible with the kind of legitimacy appropriate for a liberal democracy. This makes the nationalist case for exclusion inapt for liberal democracies too.

**§8. Redundant Nationalism.** The first central problem arises when we closely examine the instrumental-value argument. As indicated in last section, Miller claims that national culture is fundamental for the production of certain socially valuable goods and virtues. Sune Lægaard (2007) acknowledges that cultural nationalism may deliver instrumental reasons to determine the scope of institutions and to limit immigration, but he argues that the kind of reasons cultural nationalism provides are overall redundant in the sphere of liberal argumentation, since they are not substantially different from those already provided by liberalism itself. If that's the case, then the nationalist case for exclusion is also inconclusive as it is, because it is vulnerable to the underdeterminacy problem (Lægaard 2007: 291-94).

Lægaard first draws a distinction between different ways to value public culture: First, the character of public culture; second, its role in acculturation, socialization and integration; and third, its effectiveness and pervasiveness at fulfilling that role. According to him, a public political culture can be pervasive and effective in the process of acculturation and integration of both aliens and citizens, and yet it can lack a nationalist character.

Consider Miller's conception of national culture. The role of public culture in the stability of institutions is characterized mainly by how it delivers a sufficient sense of common identity and common purpose to citizens, which in turn provides them with emotional incentives necessary for complying with the demanding requirements of deliberative democracy and social justice. But note that this role of public culture depends on the pervasiveness and content of the public culture and not specifically in its character as a nationalist culture. As Andrew Mason points out (1997: 442), there is no reason to believe that national culture would contribute to the compliance of our distributive obligations, unless of course that kind of compliance is part of our shared culture, but that is not always the case.

This is not to claim that culture has no role in socialization and in grounding liberal democracies. Quite the opposite, Rawls famously worked out liberal principles of distributive justice for a liberal democracy in the fundamental ideas of public political culture (Rawls

2001b). For Rawls, principles of justice are acceptable partly because they are worked out from basic ideas present in a shared public culture. Conversely, a nation-state is not stable without a public political culture compatible with a conception of justice (Rawls 2001b: 5). Rawlsian public political culture is a construction worked out to exclude comprehensive and perfectionist elements in order to ground a conception of justice acceptable to all. The question is whether nationalism is one of these elements that needs to be stripped out from culture in order to make it suitable for public endorsement.

In any case, I think it is safe to say that Miller is not arguing that the only possible public culture is nationalist in its essential character. This allows us to make the following distinction.<sup>26</sup> We can talk about culture in at least four different senses relevant to legitimacy. The first is *culture in the broad sense*, which is a social technology that transmits knowledge from one generation to another within, more or less, a territorially-gathered group (Pinker 2002). The meaning of emotions, kinship, gender and conceptions about illness, pleasure, free time, relaxation, death, life, nature, rewards, punishments, etc., are culturally transmitted.

This characterization of culture provides a way of life across a full spectrum of human activities, organizational habits, institutionally integrated societies, cultural context, etc. Without membership to a culture, it would be very difficult to make sense of a wide range of duties, rights, allegiances and benefits inherent to our social life. Presumably much of the content of this broad conception of culture may be characterized as what Rawls calls comprehensive conceptions.

That's why Rawls distinguishes *public political culture* from broad culture. So the second conception of culture is a philosophical construction made by philosophers from the broad culture, and contains the relevant political ideas suitable for justifying principles of justice that everyone can accept (Rawls 2001b: 5). Culture in the broadest sense, is stripped from its folk and vernacular comprehensive traits, in a way that only the cultural ideas that can be shared by everyone, as free and equal citizens, are the ones relevant for justifying principles of justice.

I don't think Miller is invoking specifically any of these meanings when he invokes 'culture'. On one hand, invoking public political culture would make nationalism indistinguishable from liberalism. On the other hand, invoking a broad conception of culture would be odd, because not every cultural group sees itself as a nation. Consider instead the following two distinctions: the concept of *national culture* as a broad conception of culture of a

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<sup>26</sup> Although I am not following her, I draw on Lægaard's distinction of public culture and national culture (2009).

group that is characterized by identifying itself as a nation, and a *nationalist culture* as a political construction, parallel to Rawls' public political culture, but characterized by carrying out *the values of nationalist public morality*, such as the priority of national self-determination and the principle of nationality (see §7).

The point I am trying to make is that it does not seem necessary that a valuable culture needs to be nationalist in character in order to perform the valuable traits that Miller attributes to national culture. There is nothing incongruent about the idea that a public political culture can be engineered in such a way that it is able to foster stability and unity by playing a meaningful role in the formation of individual identity, as it indeed occurs in the education systems of Canada and Sweden.

Mason, for instance, argues that the benefits that Miller identifies, as a result of sharing a common nationalist culture, may be secured by a sense of belonging to a polity that does a really good job in advancing fairness and justice to all members of society (Mason 1999). A nationalist culture runs the risk of being comprehensive if constructed under the idea that belonging to a nationalist community constitutes a fundamentally superior form of good. I will discuss this further in the next section.

In response, Miller might want to refocus on the intrinsic value of public culture, and its role in forming our very own individual identities. As indicated in the last section, Miller believes that there's something about shared public culture that has intrinsic value, without which our lives would be seriously damaged or at least significantly impoverished.

Here Miller's account of culture seems difficult to grasp. For instance he fails to specify clearly what exactly is under threat in a nationalist culture when exposed to aliens. He also fails to identify what has intrinsic value. It is also unclear what differentiates his conception of nationalist culture from the liberal public political conception of culture from which liberalism itself is worked out.

Consider my distinction of the different layers or senses of culture. For a culture to be considered a precondition of acculturation, where it gives structure to all our choices, it must encompass all the elements of a broad conception of culture (Lægaard 2009:293). But it seems that this conception of culture ceases to be public and politic. Recall that the main challenge of cultural liberalism is to be compatible with liberal standards and yet appeal to liberal concerns in order to justify the nationalist explanation of membership (Holtug, Niels. Lippert-Rasmussen, K. Lægaard, S. 2009: 10-12). If nationalism appeals to a broad conception of national culture in order to ground intrinsic value, then compatibility with liberal standards

becomes increasingly problematic, since a broad conception of culture, while it is able to provide grounds for intrinsic value, it has by its own nature many comprehensive elements.

Such a comprehensive or perfectionist nationalism is not likely to be shared by most citizens of a liberal democracy. As Scheffler remarks, one explanation to this conundrum is that Miller is really conflating *shared identity* with *shared culture* (Scheffler 2007: 102). It seems plausible to expect that under certain circumstances a group of people share the same identity, but it seems illiberal to require citizens, of a pluralistic liberal democracy, to all identify with the same culture; unless, of course, we work out and specify a civic kind of public political culture to act as a conventional abstraction from the broad conception of culture.

One possible response available to Miller is to relate a connection between individual identity and territorial rights. Miller could perhaps claim that territory itself is a central part of citizens' identity as a symbolic dimension of culture (Gans 2003: 100). Indeed, many events occur on a territory: the history, tales, traditions, cuisine, architecture, sculpture and other forms of cultural expression are materially and symbolically associated with a particular soil and landscape (Miller 2007: 218).

Indeed Miller argues, on Lockean grounds, that settlers have an ownership claim to territories where they add surplus value with their labour and culture (Miller 2012b: 266). It seems that this view could be presented independently from Miller's controversial assumptions about culture: namely, the identity of a group is simply imprinted in the landscape in a way that it is not detachable, and the public space reflects a meaningful part of the identity of the group (Miller 2007: 218). This answer is also attractive because it is able to bypass the standard objection (see §2). Recall the standard objection to Walzer's account, which pointed out that arguments restricting membership do not necessarily entail territorial and border control. By connecting cultural rights with territory, Miller offers a more direct way to ground immigration restrictions, since control over territory may entail exclusionary rights.

This answer takes us to the second problem that arises with instrumental-value arguments. The second problem arises because, on closer inspection, this kind of symbolic connection with territory raises more difficulties than those apparently solved by it. Anna Stilz (2011) pointed out an important conceptual problem that Miller's view leaves unelaborated. Namely, it is not clear that a mix of labor and culture with a landscape is a necessary or sufficient condition to establish a group's right and authority over a territory. (Stilz 2011: 577).

For instance, why should it be the "nation" and not individuals or a "movement of artists" that gain territorial claims? The participation of the nation is metaphorical compared

with the actual involvement of say modernist architects and craftsmen in the Bauhaus movement in Germany. Furthermore, the Bauhaus movement influenced architecture globally and it seems farfetched to think that Germans or German Modernists gained territorial claims in Tel Aviv as a result of the blend of their cultural movement with the soil and landscape. In the same vein, big construction conglomerates such as ICA, build gigantic infrastructure projects and monuments across borders. Despite the technical input of Mexican engineering, Mexicans do not claim the territory of a stadium in Brazil or a motorway in Panama.

It seems that the addition of culturally constructed parcels of land within a territory does not explain the jurisdiction of the territory as a whole; for example, the architectural and overall cultural influence of Cubans in Miami does not transfer jurisdictional rights to La Habana. Culture and its influence on a landscape seem to explain why a group can be legitimately interested in holding dominion over it, but this does not explain what the conditions are for a group to permissibly exercise dominion over a territory. Furthermore, any historical participation in landscape acculturation may be outweighed by past injustices.

Miller is clear about stating that current states are the result of a long historical process that almost always involves injustice. While injustice remains morally meaningful, Miller contends that future generations may acquire claims over the territory, despite the wrongdoings of their ancestors, given that they manage to imprint their culture on the territory (Miller 2007). However, it seems, to a certain extent, odd that Miller grants current occupants territorial rights provided only that they have remained within the territory enough time, and have changed the territory as they see fit.

Past injustices not only cast doubts over putative exclusionary rights, but also appear to set perverse incentives for future injustices. This contention however does not revoke the legitimacy of a state as a whole, but objections like these give rise to scepticism about the possibility of a necessary connection between cultural rights and exclusionary rights. Again, cultural rights may explain the interest of insiders, but do not lay necessary conditions for exclusion.

Miller could of course deflate his conception of culture and retreat back to Walzer's original claim, which he seems to endorse (Miller 2009: 292). Recall Walzer's idea of socially embedded duties of justice, "The idea of justice presupposes a bounded world within which distributions take place: a group of people committed to dividing, exchanging and sharing goods first of all among themselves" (Walzer 1983: 31). In this narrower view, boundaries are

important because goods and resources are inseparable from the shared social meanings attached to them, and distributions presuppose the community that embrace these meanings.

Note that Walzer's view does not make controversial sociological assumptions about the relationship between individual identities, distinct "slices" of culture and national allegiances. Nor does he make compromises with the past generation's wrongdoings. It merely states the obvious: resources matter to the people that own them or participate in the process to produce them.

The problem arises when states are different from nations (Miller 1995: 18), and nations are rarely found in territorial isolation (Blake 2007: 22). Any nation justifying its distributive patterns must acknowledge the existence of distinct cultural minorities, and therefore face the challenge of justifying its distributive patterns to them (Blake 2007: 22). Additionally, Walzer's view is vulnerable to the standard objection (§2).

The third problem with cultural nationalism is how it deals with the competing nationalist claim made by minority nationalisms. Recall Miller's cultural nationalism is based on a contextualist account of justice. Roughly, contextualism states that what matters for defining patterns of distribution is what is distributed to whom, and in what circumstances. This account emphasises Walzer's concern about the social meaning of goods in a given community as opposed to the generality of universal patterns of distribution applicable to all. The tension arises because if cultural nationalism is arbitrarily overlooking minority nationalisms within a nation-state, then it can be accused of enforcing unauthentic identities that are the product of political manipulation that attempt to impose an artificial homogeneity by means of enforcing a fixed identity of the dominant group (Young 2000). If nationalism is biased towards the identity of the dominant group, then it fails in its own contextualist standards, as contexts of cultural minorities are not necessarily readily assimilated to the dominant culture. Miller's answer to this challenge is, however, intriguing. He says:

In multinational states the conflicting features of culture should be de-emphasized in them to stress instead as a basis of unity, those cultural traits that we already share with the minority so we can form a territorial community in whose self-determination we all can share (Miller 1995: 92).

This of course is a very sensible answer. "Where communal divisions are sharp, policy has to be made in such a way that each community feels that it's getting a fair deal." (Miller 1995:95). It seems that in such circumstances the principles that regulate the social cooperation must be worked out from common grounds, say by a process of philosophical enquiry about the

fundamental ideas of public political culture. But this prescription seems to take us back to the first problem; being that Miller acknowledges that “whether they admitted or not, all modern states are multicultural” (Miller 1995: 376). If in these circumstances the prescription is not different from a liberal attitude towards pluralism and multiculturalism, then cultural-nationalism either is redundant (and thus, not supplementary) or only applicable to a kind of homogeneous states that no longer exists (if it ever did).

Miller could interject by stating that not all cultural-groups want or are entitled to national self-determination. “The grounds of self-determination apply equally to all peoples who met the criteria of nationality.” (Miller 1995: 99). Notice that nations are defined as groups encompassing a shared culture; and national self-determination is defined as analytical property of nations (Miller 1995: 90). It seems to me that what counts for the purpose of national identity in each case is what the group in question takes to be essential to their identity. The distinction between nations and cultural groups is arbitrary or circular to the extent that any cultural group, who sees itself as a nation, simply has a claim to national self-determination.

O’Neill (1994) poses this kind of challenge to Miller arguing that nations, at least as we know them, are in no sense real communities. Nations are rather *ex professo* built communities whose political purpose is to suppress real communities in order to advance the interest of certain classes (O’Neill 1994: 136). O’Neill’s description matches the historical evolution of the European nation-state. The national allegiances that we currently know are a recent historical development. And from many points of view, the process of nation building that ended up with the states that we now know remains morally questionable.

Nation-states have typically sought to build a common nationhood by destroying any pre-existing sense of a distinct nationhood composed of national minorities. Examples of this are the massive coercion used by the French government in the XIX century against Breton and Basques, and also in the policies adopted by the former Slovak government against ethnic Hungarians. In both cases nation-building policies were pursued in a coercive way, violating people’s civil and political rights (e.g. the right of free association, of expression, right to run for office, etc).

Now, it is true that most cultural groups are not in fact actively seeking national self-determination, at least not as Miller characterizes it; specially when they exist in accommodating liberal societies. But in hostile environments like those provided by nationalist republics, most cultural groups, once they become organized, exercise forms of self-

determination that could reach significant political expression, depending on the resistance or even rejection showed by mainstream society.

In a way, a nationalist state may be the source of a problem rather than the source of a solution, because any group, sharing a societal culture, that is sufficiently organized may potentially begin to see itself as a nation, provided that the political environment proves to be sufficiently impermeable to their legitimate demands. Within a nationalist state any group that sees itself as a source of legitimate claims will start to see itself as a nation too, when that's the only way that a nationalist state will hear their demands if the language of the nation is the only one that nationalist institutions of the state value. The problem is that nationalism tends to foster this kind of environment that is adverse to assimilation and solidarity between different cultural groups. Thus, nationalism will be creating the very same problem it pretends to solve.

In the face of this challenge, Miller insists that what is required is not complete homogeneity but enough communality (Miller 1997b: 77). This kind of communality is what we indeed find when we look at actual cases. The minimum communality needed is described by Miller as an interest in national self-determination, that is, the interest of being governed by those with whom one shares communalities. This interest for sharing the political space must be stronger than the particular interest that divides different cultural groups.

Again this seems plausible; the problem is that this defence is not specific to the principle of nationalist political self-determination. Miller seems to be paraphrasing the standard liberal case of multicultural pluralism, grounded in the importance of the cultural basis of justice. He seems to abandon the specific defence of national self-determination by refraining from explaining why in multinational democracies state nationalism has sovereignty over minority nationalism, if the reasons for national self-determination apply to both.

This demonstrates that Miller's contextualist account of justice lacks a full account of partiality that could categorize different special relationships in a way that allows lexical differences between different principles of self-determination. Without such an account, Miller has to recognize that state's nationalism is not the only legitimate source of political partiality. If these considerations are sound, a liberal interpretation of nationalism collapses into liberalism itself. However, this does not necessarily entail that a different account of nationalist partiality cannot be developed; nor that the vernacular culture of a nation cannot, under certain conditions, ground rights of exclusion. Miller could revisit his conception of

culture and find a way to build a case for cultural rights that could ground exclusion. I will address this possibility in the next section.

**§9. Cultural Self-Determination and Political Self-Determination.** In the last section I gathered some objections from scholars interested in showing that cultural-nationalism is at best redundant about supplementing liberalism on the problem of underdeterminacy. In this section I want to discuss if cultural nationalism is able to deliver a strong case for political self-determination in order to ground exclusionary rights. Hopefully, I can show that cultural nationalism does not explain why the interest to control culture adds to the right to political self-determination.

Nationalism indeed provides good arguments for cultural self-determination; but this case for cultural rights may not transcend the liberal case for political self-determination, leaving again the underdeterminacy problem unaddressed. It seems to me that either nationalism commits itself to controversial nation building projects of culture management or it ends up adding the same arguments from multiculturalism about the importance of culture that liberalism has already assimilated.

I start with two assumptions about the moral character of legitimate liberal democracies (§3). The first is that democracy is more than majority rule. For instance, majority rule is limited by minority's rights; minorities have certain rights that must be protected, such as freedom of speech and freedom of worship. The second assumption is that equal concern (which is among these essential rights) is in principle more than political equality and equality of opportunities. In a liberal democracy to treat everyone with equal concern means that everyone could develop the minimum degree of capacities to take full part in the cooperative life of society. For instance, citizens need to be able to think about themselves as a valid source of legitimately reasonable claims, instead of thinking themselves as being submitted to will and fortune (Rawls 2001: 20). That means that a legitimate liberal democracy must provide the conditions for everyone to be a member without losing one's dignity. Participation, social cooperation and compliance with the rule of law should not be seen as something that implies losing one's dignity.

Bearing this in mind, recall the central claim of any form of nationalism. The doctrine of *one nation one state* makes no sense if the nation in question has no good claims for *political self-determination*. If a nation cannot legitimately wield the authority over its institutions and members, it cannot become a state. The legitimate interest and the practical

need they have on deciding their faith as a community, grounds what we consider good claims for political self-determination.

As indicated in the last section, nationalists argue that a community of this kind is valuable instrumentally and intrinsically, because it plays a crucial role in the identity formation process and because it facilitates trust, which, in turn, facilitates the development of the welfare state and of deliberative democracy. However, I think this justification of nationalist self-determination is misleading because it confuses the dominion that a state legitimately exercises over citizens from those who it extracts allegiance and from those whose will it seeks to represent; with the mechanisms by which the culture of a nation is shaped.

Sharing a pervasive rich culture may be enough to consider that a group constitutes a nation, but this does not necessarily mean that it could become a legitimate state. Sharing a culture is a sufficient and not a necessary condition (Mason 1999:263). I suspect that what is required is the capacity of the group to *socialize* its members. Recall that culture, as a broad conception, is a social technology that transmits knowledge from one generation to another within, more or less, a territorially-gathered group (Pinker 2002). Without membership to a culture, it would be very difficult to make sense of a wide range of duties, rights, allegiances and benefits inherent in our social life.

Socialization is the capacity to pass on a shared culture in such a way that it allows mutual recognition and self-identification of every member (Margalit & Raz: 1994). Socialization means to make this social technology open to every member of the community, so they can interact with others in a way that everyone expects them to. But then, in order to consider that a group is performing well in this requisite function, as a socializing agent, the fact that a community is nationalist in its sensibility and in its culture is not necessarily relevant. What matters, it seems to me, is the fact that a group has the authoritative social structure needed in order to make the relevant features of the broad culture accessible to people in order to be socialized (as members of that particular group). Societal cultures are not necessarily nationalist.

In order to capture this difference, Lægaard proposes to distinguish between *political self-determination* and *cultural self-determination* (Lægaard 2007: 293). This distinction reveals that a nation is not the only case for political self-determination, as we know as a fact, because there are many more national groups than nation-states. A nation is indeed a specific case of cultural self-determination that aims to collectively determine the shape and the content of culture in an exclusionist way. But groups with a nationalist culture are not the only ones

entitled to political self-determination. For what we know, nationalism may not even be the most convincing case of political self-determination. So the connection between cultural self-determination and political self-determination is not obvious.

For the nationalist it seems obvious that the two kinds of self-determination are connected. But consider an alternative story about the relationship between culture and institutions. If being a member of a cultural group facilitates welfare state and deliberative democracy, it may not be in virtue of how familiarized each of us is with the mainstream culture; but rather it may be in virtue of how open the cultural dialogue for everyone of us is in the polity. It may be that the broad conditions of open participation are what deliver the kind of trust and mutual engagement that social justice and deliberative democracy demand (Abizadeh 2002). The problem is that by favouring, if not imposing the culture of the majority, nationalists are not making it particularly easy for many people to incorporate themselves to the cultural dialogue of the polity.

If the majority protects its culture by isolating itself from alien influences, then the mainstream culture may be seen as an instrument of domination where some people cannot participate without losing their dignity. In this case, culture is no longer seen as a common ground where everyone can participate in a cultural dialogue. The fact that a majority shares the same culture does not seem to justify the transformation of a liberal democracy into a nationalist nation-state, in virtue that cultural self-determination and political self-determination are not necessarily linked.

Members of the majority are entitled to be collectively in charge of their own culture, but that does not necessarily entitle them to wield rights of political self-determination. This is because unity, endorsement and stability may not be necessarily a result of how successful the majority is in offering or imposing their culture to the rest of the members, particularly in pluralist, multicultural, multinational liberal democracies. Instead, they may be a result of how successful we are all in guaranteeing that everyone with interest and talent could participate as equals in the everyday construction of our common culture. It may very well be true that nationalism is one of the many obstacles that liberal democracies may face in order to boost inclusion.

However, I fear that this won't convince everyone and that there will be people who will still find persuasive or attractive the idea that nationalism facilitates or at least smoothes in some way that I failed to describe the appropriate function of the state. So suppose that I am wrong, and let's assume that a nationalist state has by its own cultural uniqueness a good

case of political self-determination. I will question, then, whether a legitimate liberal democratic state should or should not exercise its dominion in a way that affects how culture should be protected and nourished so it could socialize the members of the state. Is liberal democracy compatible with a nationalist state that takes part in cultural management? Why should government require people to share a single language, memorize the past and cherish its heroes? If we should separate church and state, why not separate state and nation?

The problem is that it is not clear how an institution devoted to cultural protection could be legitimate. In a liberal democracy, the authority of the state needs to be publicly justifiable (Rawls 2000: 12). So given the conditions of pluralism, it seems odd that an institution could exercise dominion over people's culture and yet remain justifiable to everyone. Note one important thing, if the state or any other centralized governmental institution takes seriously the protection of national culture, then it must be expected that the government and its officials have a respectable opinion about what exactly should be protected or what needs to be prioritized. Preservation of the culture of the majority cannot work without finding some way to identify or at least make reasonable judgments about what people want to preserve or what is worth preserving. It will be necessary for the state to know what is under threat or what is worth protecting in order to focus institutional efforts. Call this the *selected national culture*.

It will be necessary also to decide what means are suitable for exercising this protective enterprise. Furthermore, assessing culture might be difficult, because cultural elements are often a matter of degree, and these things are normally difficult to translate into policy (Dworkin 2001: 228). Therefore, to take these decisions of degree and character, the state will need to appoint experts to discreetly interpret culture, value it and decide what traits need to be fostered. Would citizens, even the nationalist ones, endorse government's *selective interpretation*?

In order to assess whether citizens (even those members of the majority) would endorse or not the selective interpretation and management of culture; it seems that we are in a position to add yet another distinction or slice of culture to the several ones considered before. When political power is exercised in order to establish a determined set of core cultural features, with the purpose of establishing a socio-political and educational artefact, with cultural management purposes as those described before, then it is not working out a public nationalist culture; it is rather tailoring an *official nationalist culture*. This seems to be

controversial because it entails that the culture of one group is coercively transformed into the culture of the nationalist state.

The main problem is that official culture is unable to supplement liberalism regarding the underdeterminacy problem. When nationalism ceases to invoke a pre-political culture as a way to identify members, and starts to see nationalist culture as a long term nation-building project, then it is abandoning his attempt to offer an account of legitimacy that could supplement liberalism and instead it is only targeting current members with the desired tailored cultural background (Abizadeh 2012: 872).

For an illustration of this, consider a case from Mexico. When modernity rendered the accomplishments of the Mexican revolution out of date, instead of moving on to the next century, Mexican president López-Mateos instructed education officials to refurbish the country's history in order to indoctrinate children into a nationalist official culture that sought to legitimize his regime. Historic facts were forged with a political purpose (Ávila & Guedea 2010). The newborn official history of the country took the form of a nationalist myth of origin, devoted to the creation of an official nationalist culture.

The official history took the form of an anti-liberal myth that fostered violence over political dialogue, radicalism over negotiation, and rebellion over peace (Aguilar 2000; Schettino 2008). The victimization and bitterness against foreign peoples infused into the official nationalist culture originated in Mexicans an adverse attitude against political institutions, markets and foreign countries. In fact, the free textbook distributed by the government to all basic school levels was so successful that Mexicans are among the polities more adverse to markets, even above most former socialist republics.<sup>27</sup> As a result, Mexicans today suffer a sort of schizophrenia of values, promoting liberal rights on one side and exhibiting deep-rooted discriminatory attitudes on the other.<sup>28</sup>

Of course it could be said that not all cases of nationalist-revolutionary projects of official acculturation and nation-building need to be so disastrous. But I believe that if the state exercises selective interpretation of cultures, then any attempt from the state to preserve the integrity and authenticity of a culture will paradoxically lead to adopt an inauthentic way of life (Waldron 1995: 101; Scheffler 2007). But even if we overlook the charges about authenticity, the problem is that centralized cultural management seems to accomplish the opposite of what the nationalist expect. It curtails the putative role of national culture in identifying who is

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<sup>27</sup> See Pew Hispanic Center report "Mexico by the Numbers: Attitudes about the economy": 2012

<sup>28</sup> See CIDE. 2010. "Mexico the Americas and The World. Survey on attitudes and values of Mexicans." <http://mexicoyelmundo.cide.edu/>

a member of the nationalist community. This was the central supplementary contribution of nationalist legitimacy to democratic legitimacy: to solve the underdeterminacy problem and explain who is a member of the constituency (Miller 2009b). An official culture does not identify members of a pre-political national *demos*, it merely acculturates the existing members of the society.

I hope that with the objections I have suggested that, even if majorities have a legitimate interest in controlling their culture, this interest is not equivalent to a right, because cultural self-determination is not necessarily connected with political self determination. So when we say that a majority should elevate their culture to the nation-state level because it is good for them, more justification is needed. The imposition of an official nationalist culture is problematic, because centralized cultural management seems to take away members' control over their culture, which is at odds with the main motivation of cultural-nationalist of preserving member's control over their culture.

Before closing, let me insist on a reason that makes nationalist legitimacy incompatible with liberal-democracy. I believe that certain decisions must not be taken collectively, but instead should be made individually. A culture, broad or nationalist, can be formed, sustained, and protected not collectively but organically as the result of free people making free choices. But the broad culture, even if it is nationalist in character, has no political role to play, at least in a liberal democracy.

In contrast, a public political culture (as opposed to broad, comprehensive or official culture) of a legitimate liberal democratic state is an artificial structure engendered with the purpose of showing what values and virtues we share as members of the political community in a way that could appeal to all. Public political culture must be civic in nature, and not nationalist, perfectionist or morally comprehensive, particularly if the citizenry is composed by many cultural groups. Does this mean that a liberal democracy has no role to play in culture? On the contrary state has stringent obligations regarding culture. A legitimate state must provide the conditions that will make different cultural expressions thrive and prosper (Dworkin 2001: 229-233).

If liberalism has failed in delivering its own support and unity, or if it is underdetermined regarding the scope and the site of its institutions, that does not mean that the best available solution is to engage in romantic projects of nation-building. The objective should never be, I hope, to eliminate the plurality produced by liberal democracies by substituting it with purported tailored nationalist cultures.

**§10. Illiberal Nationalism.** In response, Miller might wish to work out a nationalist public political culture conceptually thin enough to bypass liberal restrictions regarding pluralism, but thick enough to introduce nationalist morality into the public to justify of policies and institutions. If such a design were possible, it remains to be discussed whether it would be appropriate for liberal democracies. In this section I want to address this issue and ask what kind of relationship a liberal democracy ought to have with cultural-nationalism. I want to suggest that nationalist legitimacy may not be appropriate for liberal democracies.

I will argue that the idea that a state's authority is only justifiable when it is addressed to the protection of national culture is at odds with basic ideas, like equal concern, which are central to the liberal democratic conception of legitimacy. Further, I believe that cultural nationalism fails in its own terms to be nationalist enough, and therefore, the only defensible cultural-nationalism is a multicultural one. However, multiculturalism is a precept, not an account of legitimacy. Multiculturalism advises liberalism about the best way to interpret its ideals in the conditions pervasive in modern societies; it does not provide an account of what is the appropriate justification of the exercise of political power over defined sets of members and bounded jurisdictions. Liberalism has assimilated a multicultural precept about the importance and role of culture. This makes cultural-nationalism trivial again.<sup>29</sup>

In principle, it seems that there are at least two ways in which a liberal democracy could be nationalist. First, there is *familiar nationalism*. As indicated before, all liberal democracies are nationalist to the extent they are organized as nation-states. As we saw, for the last 200 years, liberal democracies have been intimately linked to the institutions and ideology of the nation-state. Liberalism, coercion theory, legitimacy and democracy theory among other elements of European political thought, have been all articulated and defended in a way dependent on nationhood.

This form of familiar nationalism is civic as opposed to ethnic or cultural; it is not explained in terms of common genetic descent, or common broad culture; but merely based in a public culture open, in principle, to all citizens, and ideally acceptable from their own pluralist point of view (Kymlicka 2001: 243). This is possible because, as indicated in the last section, public political culture is not a comprehensive form of culture. It is rather an

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<sup>29</sup> It could be questioned whether liberalism has assimilated a multicultural precept in a satisfactory way. I would not decide this matter here. It suffices to say that potentially liberalism could assimilate multicultural recommendations without any supplementary help from nationalism. I suspect that, despite the fact, some multicultural policies might fail in specific circumstances, but multiculturalism as a supplementary precept to liberalism remains valid.

abstraction or selection of culture worked out from other cultural expressions with the purpose of describing how a specific community understands itself as a fair system of social cooperation (Rawls 2001: 5).

But in a *substantially nationalist state*, which is the second way a liberal democracy could be nationalist, the comprehensive culture of a dominant group is to be expanded to everyone within the state. The link between nationalist culture and the institutions of the state creates an environment where we all live and breed the same cultural aims, values, and the characteristics of this environment makes a difference to all citizens. It is easier for a member of the majority to live within a nation-state when his practice, values, and beliefs as a member of that majority are elevated to the status of national by institutions of his state.

This distinction draws upon the different segments or *slices* of culture that I differentiated in the former sections. Very briefly, we can distinguish the political conceptions of culture worked out by philosophers or political theorists from broad culture spontaneously arising. There is a kind of broad culture characterized by being the culture of a group that sees itself as a nation. The broad culture of a nation may or may not be nationalist in character, as a nation can have a cosmopolitan broad culture, such as Florence in the Renaissance. Opposed to broad culture, there is a kind of public culture worked out with the purpose of introducing nationalist morality into the public arena. While principles of a familiar national-state may be justified by the basic ideas of a public political culture, the principles and policies of a substantially nationalist state are justified either by a broad national culture (nationalist in character) or by a worked out nationalist political culture.

Let's stop for a second in the motivational basis of a substantially nationalist state. Some people would argue that in a democracy often the advantages for the majority might result in disadvantages for others. If the majority wants a certain kind of social environment and culture, then fairness may require the minority to defer their desired social environment. The institutions, basic law, and social arrangements of a nationalist state are designed to suit the particular cultural needs of the majority, and are therefore acceptable only from the point of view of its members and sympathizers.

We can now spell out the question in this way: must a liberal democracy be a mere civic nation-state or can it be a nationalist nation-state? Can a liberal democracy become a substantially nationalist state without losing its legitimacy? There are familiar examples of both kinds of states. Canada and the United States are civic nation-states established over the basis of familiar nationalism. Canada contains a variety of ethnic groups, and it is in fact

formed by two linguistic nations. The Québécoise enjoy a great deal of independence and self-determination. Along with the Anglo-Canadian majority and the French-Canadian minority, there are several minority cultural-groups. France and Israel are examples of the other extreme, they are substantially nationalist nation-states. Israel accepts Jewish coming from all cultural backgrounds but identifies itself in its basic laws as a Jewish state.

The United Kingdom and Mexico, for example, fall somewhere in between, as most of liberal democracies do. The United Kingdom contains several nations, but these nations in practice share a common language. Its basic law is civic in form, but the society is still traditionally ruled following pervasive cultural values and discretionary unwritten rules. These cultural values are often identified with the English majority.

Within México, more than 35 different tongues coming from at least 6 different families are still spoken.<sup>30</sup> Contextualist morality could easily take this as evidence that there are more than a few national cultures that are hidden or rarely acknowledged. Meanwhile, its system of political parties is composed by two left-winged parties characterized as revolutionary nationalists and a right-winged party identified with Christian democracy. The country has been ruled in the last twelve years by the Christian democrat party, which despite its conservative tendencies, points out to liberal and democratic values. One of the leftist parties is in office now, and this could easily turn politics back to nationalism. On my view, these kinds of cases, such as Britain and Mexico, are worth serious attention because conditions are such that they could easily turn to the side of nationalist-states, instead to the side of merely civic nation-states. But this needs to be argued.

Now recall that nationalism attempts to supplement liberalism regarding the underdeterminacy problem, and the problem liberalism has in generating its own support. On this scheme, a strong yet inclusive national identity should ensure integration, participation, assimilation and security by actively providing an accessible comprehensive national identity, and stopping citizens of different cultural background that do not comply with the liberal democratic values. But it is not evident that nationalism is our only or even our second best option to face these familiar problems.

So, I think it is worth asking, and leaving the regrettable history of nationalism behind: can we reconcile the legitimacy of a liberal democracy with the idea that a state that exercises domain over people from many different cultural and even national backgrounds, can officially

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<sup>30</sup> National Institute of Indigenous Languages: <http://www.inali.gob.mx/>

commit itself, through its constitutional arrangements and its public speech, to one of the cultures present in the state, provided that it is the culture of the majority?

As we saw, a cultural-nationalist says a big yes to this question by providing two kinds of reasons: instrumental reasons and intrinsic reasons. Instrumental reasons are provided to argue that in a liberal democracy conditions are such that the requirements of social justice and deliberative democracy make cooperation and compliance very demanding. Therefore, for a liberal democracy to generate its own support, a continuous labour of nation-building is needed in order to generate the levels of allegiance and bonding necessary to build up the basis of trust, solidarity, and transparency for strangers to support and cooperate with each other. The conviction is that it is very difficult for liberal and democratic values to take root in society without the pervasive effect of the institutions of nationhood and their constant nation-building activities (Gellner: 1983, Miller, 1994, Tamir 1993, Gams: 1998).

Intrinsic reasons are provided to argue that personal identity has a structure such that it will be seriously harmed if it is deprived of the kind of identity that nationhood provides. It is argued, for instance, that individual freedom needs cultural membership because people are only able to make choices if they assess the different alternatives from the perspective of the fixed set of valuable options offered by their culture. This self-identification and identity formation process also promotes mutual re-cognition of everyone's needs in the form of reciprocity and responsibility. As indicated in the last section, the problem arises when we realize that nationalist culture is not the only social matrix capable of supporting acculturation. Any community organized enough is in principle capable of socializing individuals into members of the community, provided that its content is endowed with this kind of social virtues and values.

Abizadeh (2012) has strongly rejected intrinsic-value arguments. According to him, intrinsic-value formulations of nationalism collapse into ethnic nationalism. Abizadeh believes that nationalist legitimacy entails the necessary condition of identifying culture as a determinant trait for a sort of pre-political membership. Legitimacy is, thus, grounded in the cultural bound of a pre-political group, because culture explains the kind of law and institutions that those who share the same culture, are able to provide for themselves (Abizadeh 2012: 869). But this solution fails, because it seems impossible to identify a set of properties uniquely shared by nationals. For instance, Miller assumes that individuals subjected to the determinate set of formative conditions of socialization and acculturation will share the same culture. For him socialization and acculturation is a black box. It is by no means

clear how what he calls culture, turns blank slates into members of only one political community.

The nationalist idea of acculturation seems to rest in controversial sociological assumptions (Abizadeh 2012: 870-71). First, as we saw, cultures are not homogenous, unambiguous and distinctly defined; rather, they tend to overlap. Even if they were unambiguous and homogeneous, individuals are subject to a variety of formation conditions and processes of socialization coming from different directions that establish a variety of identifications, loyalties and allegiances.

Secondly, formative processes of socialization just don't uniformly infuse individual minds with the identity of members. Given the variety and clashing of various inputs, there will be a great margin of internal variation. The internal variation of an individual's identity and the external overlap of formative conditions will make it implausible to determine a set of defined cultural properties to identify members of a nation. Every time you specify a set of properties, it will be either over-inclusive or under-inclusive, because of all the possible and cross-cutting variations. So, cultural-nationalism itself needs to find a supplement that pinpoints who are members of the nation and who are not. According to Abizadeh, on this point, cultural-nationalists might need to find an ethnic supplement as a pre-political determiner that genetically defines membership.

On the other hand, we have instrumental arguments. I'm under the impression that given the conditions of liberal democracies, it seems difficult to accommodate nationalist legitimacy with liberal-democratic legitimacy. We can't reconcile the doctrine of one state one nation with liberal democracies because there is, it seems to me, a *prima facie* conviction that democracy is more than majority rule and that members of a community need to be able to accept the dominion of the state over them without losing their dignity. It is not possible for each citizen to see the government as her government, unless the government shows each citizen an equal concern and equal respect (Dworkin:2001: 205)

In this vein, multiculturalism tried to supplement liberalism, among other things, on the problem of generating support and stability. In contrast with nationalism, which is a theory of legitimacy, multiculturalism is a *normative precept* motivated by the concern for the dignity and well-being of all human beings. A liberal multicultural society (as opposed to a nationalist community) is one consisting not of a majority and minorities, but constituted by a plurality of cultural groups. The central idea is that universal values are realized in a variety of different ways in different cultures, and that they are all worth of respect (Raz 1998: 193, 204, 200).

Multiculturalism helped liberalism to realize that to the extent that the state can't be absolutely neutral, institutions of the state can become a system of preferment to the majority and this can lead to potential injustices to minorities, and to unfair advantages to the majority. At least for multicultural liberals, it is very difficult to see how in a nationalist society liberal values will take root if minorities feel mistreated (Kymlicka 2001: 50-54). As we saw, mainstream liberalism, such as Rawls', has to a certain extent assimilated a multicultural precept. Whether or not liberalist revision has been satisfactory is not now the question. As indicated in §7, the point is rather that nationalism is not delivering the supplement required for liberalism.

It seems we are left with two possibilities. Either nationalism supplements liberalism in the form of a precept, requiring equal standing from all cultural groups, including those nationalist in character. Or nationalism is supplementing liberalism with a hidden premise of the common ancestry, as Abizadeh suggests. The last option is *prima facie* illiberal on different grounds and seems overall implausible given the historic movement of populations over the globe, and the changing nature of cultures. The first option suggests that nationalism collapses into familiar nationalism, taking us back to the triviality charge. Liberal democracies are already as nationalists as they can get under the conditions of pluralism; and concerns about national minorities are assimilated in the form of multicultural and pluralist precepts of liberalism.

Summarizing, cultural-nationalism argues for border restrictions based on nationalist self-determination. It provides instrumental and intrinsic reasons to value national culture in order to support that exclusion is morally permissible when necessary to protect national culture. The connection between cultural rights and exclusionary rights is based on two doubtful premises. On closer examination, the purported value of national culture is never demonstrated but only assumed. In the same vein, the connection between national culture and the scope of distributive justice is merely assumed. National culture is neither a sufficient nor necessary condition to give rise to distributive obligations.

Even if we do not challenge these premises, cultural-nationalism fails in its own terms, jeopardizing, thus, its case for exclusion. First, cultural nationalism seems redundant, because it fails to provide different reasons for exclusion that are different from liberalism. Reasons for closing borders are somehow grounded in political self-determination, but national self-determination cannot plausibly be the only or the better case of collective self-determination. Not only are nationalist communities enabled to provide the goods necessary to sustain liberal

democracies. Furthermore, we can distinguish between political self-determination from cultural self-determination.

Cultural self-determination does not seem necessarily connected with claims to exercise dominion over jurisdiction or territorial rights. Further argumentation is needed to show why our interest to control our culture may ground rights of political self-determination, or show how cultural self-determination may be connected to rights for exclusion as it is not evident how the right to participate in the protection of the culture I identify with, makes exclusion of alien people to this culture permissible. Apart from these assumptions about the importance of culture, cultural nationalism does not provide any different grounds for political self-determination different from those familiar to liberalism. Additionally, our identities can be shaped in different ways. National culture is not the only or the best input of acculturation and socialization.

However, when nationalism finally provides different reasons for exclusion, and tries to engineer a suitable conception of culture that overcomes the objections, it does it at the cost of collapsing into cultural preservationism and conservatism. Closing the scope of liberal institutions and justifying the site of their domain seems to demand that membership coincide with national culture, but national culture seems itself underdetermined. In order to determine national culture, cultural nationalism seems to be reduced to engage in nation-building practices that imply the establishment of an official nationalist culture. This takes away control from members of the nation, which is at odds with the principle of national self-determination. At the same time, it does not seem legitimate to use political power to construct an official culture for indoctrination. Additionally, it seems difficult that such official culture could be accepted by members of a pluralist liberal democracy.

Cultural nationalism, then, fails both to accommodate liberal demands because the principle of nationality seems unacceptable from the point of view of a plural citizenry; but also because it fails to comply with its own contextualist standards as it renders a form of nationalism (the one of the majority) as arbitrarily prior to other vernacular (yet *minoritarian*) forms of culture. Nationalist legitimacy seems overall inapt to supplement the legitimacy of a liberal democracy, because *minoritarian* members would not be able to see themselves as valuable members of the society, if the culture of the majority is artificially elevated as official culture and later managed by the state. State official culture may even become unauthentic, yet be practiced by the members of the majority.

Cultural nationalism claimed that exclusion of would-be migrants is justified by the need to protect national culture. But specific migration policy is worked out from a deliberative democratic process, which has national culture at its heart. It is not very clear if this line of argumentation leads necessarily to closed borders. In the end, national culture could be cosmopolitan in character. But in any case, if only some of the indicated objections are sound, nationalist legitimacy cannot be the ground of legitimate exclusion, because national culture does not provide supplementary reasons to determine the scope and site of institutions, leaving the problem of membership and borders underdetermined.

Before closing this section, there are three lessons, I think, we can learn from the hope of nationalists. First, any of the objections discussed here do not deny the need of political borders. They only deny that national culture counts as a necessary condition for grounding broad exclusionary rights. The fact that nationalism fails to be supplementary encloses one important fact: nationalism is redundant because precisely during the last decades, liberalism has been systematically amended by multiculturalists and other critics to admit that community and culture matter to us in such a paramount way that community and culture need to play a role in legitimacy and justification of the exercise of political power, and of the justification of border's authority. Individuals crave self-identification with groups, and nation-state communities remain as the locus of self-determination and legitimacy.

Second, even if the triviality charge is sound, it does not entail giving up on the nationalist concerns regarding the enormous value of belonging to a community. Communitarianism is, for instance, another critical branch of liberalism that has produced its own precept promoting awareness among liberals regarding the importance of membership and community (Sandel 1998). Membership to a community is not only intrinsic and instrumentally valuable, but also crucial for explaining political obligation and legitimacy. The upshot, however, is that membership and community needn't be explained in nationalist terms. As Mason insists, there is a distinction between belonging together and belonging to the polity (Mason 1999:165).

Finally, the moral character of a liberal democracy, along with the social virtues of a public political culture, may be able to secure forms of civic patriotism needed to sustain deliberative democracy, stability, and endorsement. This will be compatible with the possibility of leaving citizens to define on their own "belonging together". Note however that this conclusion relies on the assumptions about the moral character I began with. Liberal democracies have a moral character precisely because of the enormous intrinsic and

instrumental value that belongs to them. This moral value entails many advantages, but also entails stringent requirements. If a liberal democracy were merely an association ruled strictly by majority rule, political equality and equality of opportunities, then fairness may require minorities to defer for the sake of the majority. But liberal democracies do possess a moral character, and a great deal of the moral progress they represent in the history of human kind relies on this moral character. However, it seems to me that this moral character rules out cultural-nationalism as a candidate to supplement liberalism regarding any aspect to the morality of borders.

### **Part III**

## **Freedom of Association and Legitimate Border Control**

**§11. Cultural Nationalism and State's Rights of Association.** We saw that liberalism and democratic theory are both underdetermined regarding how to make sense of borders and citizenship<sup>31</sup>. This makes it unclear what freedom and equality require from borders. On the face of it, many liberals rush to conclude that equality demands open borders, because the place of birth is as arbitrary as race or gender, but it can, however, change dramatically the prospects of wealth and opportunities. These are the kind of arbitrary outcomes of luck that egalitarians typically tackle (Carens 1987; Cole 2001; Kukathas 2010). But Christopher Heath Wellman thinks that the best way to understand freedom and equality entails that closed borders are not necessarily unjust. This, though, does not necessarily defend the status quo. The point instead is that, under certain conditions, having an international arrangement of legitimate closed states might be compatible with understanding people as free and equal.

Wellman hopes to reach the conclusion that states may have a right to *universal patterns of exclusion*; that is, to exclude everyone from their territory if they wish. He advocates the right of a legitimate state to reject anyone based upon a state's right of political self-determination and political association. He believes this right of association entails the right to be free from unwanted associations, such as those with would-be migrants. From this point of view, Wellman rejects cultural nationalism.

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<sup>31</sup> Liberalism assumes for instance, already existing, closed societies, and democratic theory just presupposes an existing *demos* (Blake 2007)

We saw that cultural nationalism attempts to supplement liberalism by determining who and why someone is considered a citizen (Holtug, Lipert-Rasmussen, Lægaard 2009). Cultural nationalism is part of a stream of arguments that defend border restrictions. We saw that these arguments normally have the form “In order to protect or preserve X we may justifiably limit immigration. X typically represents economy, markets, productivity, security, trust, solidarity, political will, and/or cultural distinctiveness. As Walzer puts it, “Admissions and exclusions are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them there could not be *communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.” (Walzer 1983: 61)

According to Wellman, liberal nationalism raises two kinds of concerns (Wellman & Cole 2011:50). First, we need to know if their contentions are empirically correct. We may ask: is limiting immigration really necessary and/or sufficient to secure X? That is, we need to verify for instance if cultural homogeneity is necessary to sustain a deliberative democracy, especially because multicultural countries like Canada, United States and UK seem to do just fine.

Second, even if the empirical survey vindicates the nationalist case and limiting immigration is both necessary and sufficient to protect X, we have to know if liberal democracies have the moral right to the exclusive protection afforded by their enviable political regimes. We need to ask as well: do those who seek to restrict immigration have a moral right to X?

Wellman thinks there is a liberal argument, better than cultural nationalism that can answer successfully the challenge to supplement liberalism. According to him, his account is not vulnerable to these queries above because his account of the morality of borders focuses on a *country's legitimacy* (Wellman & Cole 2011: 52) rather than a distinctive cultural shared feature. On Wellman's view, the cultural diversity is not particularly relevant to the problem of moral justification of a regimen's border (Wellman & Cole 2011: 52). Wellman's account is undecided regarding the issue of cultural composition, because it does not depend on descriptive claims about what sort of things are possible only in culturally homogeneous conditions.

Consider for instance an all-male Golf club. It seems implausible to argue that their rights of exclusion stem from the fact that its members are all male. Wellman says: “If anything, perhaps the opposite is true; one might think that these two groups would have had

even stronger presumptive rights to exclusive control over membership if their admission policies had not discriminated against women” (Wellman & Cole 2011:53). What matters is if a country is entitled to political self-determination; that is, if they are collectively able and willing to perform the requisite political function of adequately protecting and respecting human rights. Citizens may very well be interested in the effects of immigration in their country, but according to Wellman that only explains why they value their common political association, but it does not ground their right to the things they prefer to protect (Wellman & Cole 2011: 52).

Now, in order to explain how closed borders may be compatible with equality, Wellman first rejects luck egalitarianism (Cohen, G. 1989; Arneson 1999; Dworkin 2000). Luck egalitarianism is roughly the view that we should care about equality in order to eliminate all the influence of luck with regards to opportunities. Instead, he believes the reason we care about equality is that those who have less are predictably vulnerable to oppression and exploitation (Altman & Wellman 2009, Ch6). It is not clear how the mere fact that someone may be worse-off than others just because she was unlucky enough to be born in a different country is necessarily unjust and how this difference necessarily entails open borders.

In order to support this idea, Wellman offers a thought experiment (Wellman 2008: 122). He compares inequalities of two different kinds. First, there are two societies isolated from each other. One of them is significantly better off than the other. Inequalities of the second kind occur within the same society. Members of this society are aware that some of them are doing considerably better than the rest. According to Wellman, inequalities of the second kind are much more important, because they arise as a result of oppression over vulnerable groups, while inequalities of the first kind are a matter of luck.

But even if we think that as a matter of justice we should care about the dramatic difference in life prospects between, say Norwegians and Chadians, it is not obvious that the appropriate response to this kind of difference is to leave borders wide open, especially given the fact that there are some other options available to correct that inequality (Wellman 2008: 129). For instance, you could also transfer some of the Norwegians’ wealth and redistribute it to the Chadians. Then it may not be necessarily unjust that some country closes its borders if at the same time it finds a way to take the legitimate interest and needs of foreigners into account.

Once we move towards this alternative account of equality, it is easier for Wellman to introduce his morality of borders. What equality and freedom really require from borders is for

them to protect the value of certain forms of membership, which are necessary to protect our most basic rights. In turn, everyone needs to be free to pursue this kind of membership without interference from outsiders. This is the view I challenge.

In this part, I will agree with Wellman that the state's freedom of association plays a role in the justification of controlled borders and even that certain kinds of states interacting in a determined global structure may be morally authorized to keep their borders closed. I will argue that this is not the case of liberal democracies. I hope to show that among liberal democracies, freedom and equality ban universal patterns of exclusion in a way that seem to require porous borders.

First, in §12 I outline key points of Wellman's argument and I will discuss if it is able to overcome the standard objection. In §13 I invoke some other critics in order to show that Wellman's case, as it is, may be inconclusive. Yet, critics are unable to show that freedom of association is not the locus of justification of the authority of borders. They fail also to show whether or not it is, all things considered, permissible to reject everyone. In §14 I present another objection. I argue that Wellman's case is better understood as a normative prescription: a normative ideal like cosmopolitan case that allows us to confront the coherence of our values, virtues, principles and conceptions. But just as with the cosmopolitan case, it doesn't tell us much about the kind of borders that liberal democracies ought to implement. Finally in §15, I doubt that even as a normative ideal, Wellman's case could be desirable and appropriate for the future of liberal democracies. I follow Blake (2011), noting that Wellman's case is sound only in a limited moral framework.

Ultimately I want to show that Wellman frames his case in a rather anaemic conception of legitimacy that does not seem appropriate for liberal democracies. Once an appropriate account of legitimacy is introduced, it becomes clear that political freedom of association does not have absolute dominion over individual freedom of association or at least not the kind of dominion that permits universal patterns of exclusion. That is why I think Wellman's view is a form of statism grounded in a collectivist interpretation of basic rights: the putative priority of state's right of association over individual rights of association is never grounded. Instead the moral character of liberal democracies seems to make universal patterns of exclusion illegitimate, thus refuting Wellman's case.

I have used the term "rights-statism" to describe Wellman's position and this requires some clarification. As indicated above, he advocates the right that a legitimate country has to universal patterns of exclusion based upon a state's right of political self-determination and

political association. Statism is a term used when the rights of the state have prior status over the rights of individuals (Walzer 1980: 209). I suspect that Wellman gives an arbitrary priority to the rights of state over the associational rights of individuals.

When I say that Wellman's statism is rights-based, what I mean is that rights-statism is not a form of patrimonialism. Patrimonialist statism is a form of governance where all political power flows from government agencies in a way that institutions and policies are explained by the interest of officials who control government agencies. I take this as non compatible with legitimacy constrains that Wellman establishes, yet Wellman assumes a sort of fitness between members, state and government that justifies the priority of state's rights over the rights of individuals. This, I believe, could be read as a form of statism grounded on an interpretation of group-rights; an interpretation that seems difficult to accommodate with the moral character of liberal democracies. I hope these claims become clearer as the discussion moves forward.

**§12. Universal Patterns of Exclusion and Political Borders.** For Wellman, states are political associations that are enabled to pursue the protection of basic rights. The legitimate exercise of state freedom of association is what permits states to set limits to our responsibilities of justice towards people abroad and also to limit our individual basic rights (of property, movement and association). To illustrate how this is compatible with individual freedom and equality, Wellman often uses analogies. Consider for instance a very wealthy person, like Bill Gates. We do not think that because of his wealth, equality requires Gates to marry a poor lady. Normally we think that whereas Gates remains free to choose whom to marry, he is required to transfer some of his wealth to the poor.

In the same token, some countries may be burdened with heavy and stringent duties of assistance toward foreign countries, but that does not necessarily make it unjust for these same countries to keep their borders closed and exclude all foreigners. About this kind of universal patterns of exclusion, Wellman concludes: "Just as an individual has a right to determine whom (if anyone) he or she would like to marry, a group of fellow citizens has a right to determine whom (if anyone) it would like to invite into its political community. And just as an individual's freedom of association entitles one to remain single, a state's freedom of association entitles it to exclude all foreigners from its political community" (Wellman 2008: 110-11).

As indicated in §2, analogies are a powerful resource of illustration, but we still need to ask, in light of freedom and equality, how should we understand and justify the moral

permissibility Wellman claims states have to exclude all would-be migrants? Particularly it is not clear why, if the protection of rights is what matters, people are not entitled to join the association that better protects their rights. Why are people not allowed to responsibly associate with foreigners if that means bring them into the territory? Or why a country or a federation, like the European Union, cannot permissibly intervene and annex a country that does a poor job protecting the rights of its constituents.

Wellman believes that we can find the answer for these kinds of questions in liberal, basic political rights, particularly in political self-determination (Wellman & Cole 2011: 13). The idea is that individuals and groups, like legitimate states, are entitled to political self-determination. This means that they occupy a morally privileged position of dominion over their self-regarding affairs. This dominion can be outweighed by sufficiently powerful reasons, but in general, states, as well as individuals, enjoy a right to administrate their own affairs as they please (Altman & Wellman 2009: 162). One component of political self-determination is freedom of association because, unless a political community is free to associate as it sees fit, it is not entirely self-determined. The state's right of association also entitles its freedom from unwanted associations. Therefore, if it sees it fits, a state has a presumptive right to close its borders to everyone, executing universal patterns of exclusion.

There are several qualifications to be made here. Importantly, I must flesh out why Wellman believes that legitimate states are entitled to political self-determination and what is the relationship between self-determination and legitimacy. I shall begin with the last one. For Wellman, states are non-consensual forms of politically organized associations with governing institutions, population and sovereignty over its territory (Altman & Wellman 2009:3).

States are justified to exist because their existence makes it possible for us to discharge our natural duties (Wellman & Simmons: 2005). For example we all have a duty to rescue someone in peril. Given that fair institutions rescue us from the perils of anarchy, we all have a natural duty to do our fair share to rescue ourselves and those who we share a faith with by obeying the law.

Wellman endorses then a formulation of a *functionalist account of legitimacy* (Altman & Wellman 2009, Ch. 2). We have discussed in §4 a general formulation of a functionalist account of border controls. This kind of account is often grounded on a functionalist account of legitimacy, such as Wellman's. Under this account, there are certain functions that can only be performed by states. One of those functions is providing justice. Justice has many currencies,

but the most general of these is captured by the conception of *human rights*. Therefore, a state is legitimate just in case it performs certain political functions.

These functions are defined as doing a good job protecting the human rights of its constituents. In other words, the function of protecting human rights is so paramount and essential that it justifies the state's exercise of coercion over its constituents. Human rights are a subset of moral rights that act as protections or trumps that place constraints on permissible exercise of power by states, guaranteeing the access to basic human interests and needs in order to live decent human lives. In sum, states are legitimate because they protect human rights. In turn, constituents find themselves under the political obligation to comply, because they all have Samaritan duties to obey the law.

Wellman's functionalist account of legitimacy has two salient traits. First, this account of legitimacy is justice-based. A good performance in the protection of justice is what grounds legitimacy. Thus, legitimacy and justice are not understood as different political virtues. Second, among all the currencies of justice that could be invoked, Wellman chooses the most general and less stringent. The protection of human rights is understood as a constraint on what can count as a legitimate state. So, legitimacy and justice only coincide when justice is defined in the most basic of its demands.

Now recall that a functionalist account faces a major problem: it fails to supplement liberalism regarding the underdeterminacy problem, because it merely points out the importance of having just institutions and borders, but it does not provide any principle to face the specificity objection and the particularity problem.<sup>32</sup> Roughly, the functionalist account says why we need just institutions to exercise effective jurisdiction over a bounded territory, but it does not define, in a principled way for a defined set of people, a set of institutions and a bounded piece of land, nor who the authority is and why the particular state that we belong to may demand obedience from us (Quong 2010: 110,129).

Wellman acknowledges that a mere functionalist account finds it difficult to explain these problems on its own. That's why he introduces a principle grounded on the intrinsic value of self-determination. The right of political self-determination delivers principled content to a mere functionalist account, because collective competence and achievements command respect (Wellman & Cole 2011: 24-25).

According to Wellman, it is very odd to explain certain facts of our political world without granting the existence of political self-determination and the freedom of association it

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<sup>32</sup> See §4.

should entail. Importantly, it seems somehow difficult to explain, for instance, why a country that does an excellent job performing its requisite functions, cannot forcibly annex another country that does a poor job protecting basic rights (provided that this annexation happened in a pacific way with full respect to human rights).

For illustration consider Wellman's example (Wellman & Cole 2011: 17). Norway is a legitimate state, but has particularly lax and permissible traffic laws about speed limits. As a consequence, Norway fails to prevent some violations to human rights. Concerned Swedish citizens urge their government to pick up the slack and prosecute reckless Norwegian drivers.

Explaining why this would be impermissible seems difficult when only appealing to the functionalist account, if we do not assume also that Norwegians have a political dominion over their own self-regarding affairs. Indeed, Norwegians would find themselves under a duty to comply with Swedish institutions that do a better job guaranteeing their rights. Except that by submitting them to their punitive system, Sweden is in fact, *as a matter of principle*, wronging Norwegians badly. No matter how much better off Norwegian drivers would be under the Swedish traffic system, it would be *disrespectful* to unilaterally submit Norwegians to Swedish law.

As long as Norway does a decent or even a sufficient job protecting constituent's basic rights, Norway has a political right of self-determination that is violated if Sweden dares to unilaterally assign itself the responsibility of submitting Norwegians. If we otherwise assume that political self-determination is unimportant, then we have to face specificity, particularity and unpalatable consequence that groups cannot be wronged (Wellman & Cole 2011:20).

The upshot is that interfering with a legitimate state's dominion over its self-regarding affairs is impermissible and morally wrong because it disrespects members of the state (Wellman & Cole 2011:22). Putting it in another way: to have institutions enabled to protect our rights is a public and collective achievement that belongs to the members of political associations. Interfering with this group dominion over its own affairs fails to honour the importance of their collective mission (Wellman & Cole 2011:25).

On the same token, individual freedom of association is a crucial element of self-determination. Individual self-determination is a crucial part of autonomy as it makes available ways to exercise liberties, the possibility of pursuing one's conception of the good, and the possibility to develop meaningful relationships. These expressive and intimate purposes of individual self-determination and individual freedom of association are impossible if freedom of association does not entail exclusion rules that protect associations from unwanted

relations. Wellman, thus, concludes that we shall always begin with a strong presumption in favour of freedom of association, because limiting freedom of association equals limiting self-determination. (Wellman & Cole 2011:31-4).

Members are legitimately concerned to preserve their freedom of association because the size and composition of a group can dramatically change its character and the overall experience of membership in that group. Furthermore, new members will typically have a say in determining the future direction of a group that current members may not like. Wellman stresses: "one's fellow citizens all play roles in charting the course that one's country takes. And since a country's immigration policy determines who has the opportunity to join the current citizens in shaping the country's future, this policy will matter enormously to any citizen who cares what course her political community will take (Wellman & Cole 2011:240).

To sum up, Wellman's account of the morality of borders is characterized by identifying a presumptive position of dominion over border policy, even if this means to close borders to all potential immigrants including refugees. This presumptive case focuses on the state's legitimacy rather than whether its constituents share a common culture or origin (Wellman & Cole 2011:52). But state's legitimacy is based on an account of justice defined by the protection of human rights. When a country is forced to take in a would-be migrant, their members are wronged because each member is part of the collective endeavour of sustaining and shaping the institutions that protect their rights.

Now recall the standard objection. As indicated in §2, this objection is first found in Carens's criticism to Walzer (Carens 1987; Walzer 1983). According to Carens (2003: 96), Walzer provides arguments only to justify control of membership, but does not provide arguments to show how justifying control over membership can be extended as a justification to control territory, jurisdiction or borders. Walzer takes for granted that sovereignty entails jurisdictional power and control over territory and its boundaries. It is important to see whether Wellman's development of the conventional view is able to face the standard objection because, as suggested in part I (§§4&5), the standard objection helps to disclose a systematic problem with justice-based accounts of borders.

The suspicion was that conflating justice and legitimacy leads to conflating associations with the goods that associations produce. This, in turn, makes it easy to think that membership is a commodity to be distributed. Once membership is understood as a commodity, the boundary problem is easily reduced to the more familiar problem of the scope of justice: members are thus defined as those bearers of claims of justice against state's basic

institutions. But, this begs the question invoked by the underdeterminacy problem of how to explain membership in the first place. Instead, certain kinds of membership are the ones that may raise distributive claims, not the other way around.

Sarah Fine (2010: 242-43), among others (Avizadeh 2008: 38; Pevnick 2009: 147-69), claim that Wellman's reformulation of exclusion based on membership, on closer examination, does not really overcome Carens's standard objection of the liberal conventional view. She insists that putative state's rights seem underdetermined in contrast with the complexity and relevance of border control and membership.

Wellman seems to be assuming what he hopes to conclude: the idea that rights of association entail a right to exclude all. This assumption is not valid, because we can distinguish rights to control membership from other sovereign powers: jurisdictional rights, territorial rights and rights to control borders. Fine highlights the fact that control over civic boundaries of membership does not necessarily include the kind of control over territorial boundaries that permits universal patterns of exclusion (Fine 2010: 343).

Of course Wellman invokes several analogies to support the idea that civic boundaries entail territorial boundaries. But Wellman's analogies might be superficial, because on closer examination, the state's and individuals' rights are different and entail non-analogous immunities, privileges and liberties. Interesting enough, this worry seems to be a consequence of Wellman's own account of rights called *specificationism*.<sup>33</sup>

According to Wellman, what comes out in common language as a right is really a shorthand marker that indicates a complex right structure, which in strict sense is a set of different relationships or *incidents* indicating when a right actually exists and when it simply does not (Wellman 1995: 278). A right shows when someone has a position of dominion over someone else or something. Wellman's account of rights is based on the classic Hofeldian idea that rights do not conflict with each other (Hofeld 1919; Wellman 1995, 1999).<sup>34</sup>

The main idea of the specificationism is this: in order to avoid contradiction, a right needs further specification to make it clear who has right of what, against whom and under what circumstances. Because of this, the specificationist view avoids considering rights as

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<sup>33</sup> Roughly, there are two accounts of rights that deal with the problem of conflicting rights. *Prima facie* models avoid considering rights as absolute and instead say that rights are a result of balanced reasons. You hold a right until there is a sufficiently strong reason to override it. Using *prima facie* models of rights mean that Wellman aims to set a standard departure case, a presumptive case. In general, this kind of case does not conclusively show that an action is morally permissible, since the non-absoluteness of presumptions allows it to be overridden by other moral reasons (Wellman 1995: 283). Wellman rejects *prima facie* models because this account finds it difficult to explain what the overall advantage of having a right is, if rights can always systematically be overridden by countervailing reasons.

<sup>34</sup> See discussion in §4.

general, but rights remain absolute if we are able to specify when one has the position of dominion and when one simply does not. The upshot is this: under this account, it seems odd to give so much argumentative attention to a putative analogy between individual and state's rights, because once rights get properly specified the analogy proves to be superficial.

Consider the apparent conflict between states' right of association and individuals' right of association. According to Wellman's specificationism, the illusion of conflict must disappear if we answer *who has the right of what under what conditions*. Answering these questions with sufficient detail allows specifying rights in a way that avoids rights conflicting with each other. In the case of the rights of association (individual and state), Wellman avoids such analysis. In any case specificationism is likely to show that the state's right is limited, as it is implausible to suggest that state has a right to curtail individual associations with outsiders in all cases.

For instance it seems unpalatable to think that the state can have the dominion over our personal privilege to establish associations, like marriage even when marriage occurs with an outsider. This is not to say that an individual's right of association, even in the case of marriage, is unlimited or unqualified. For instance, I typically lack the power to marry twice, unless I dissolve my previous marriage first. The state has the power to waive my right to marry when the state protects a willing minor, for instance.

The point is that we have the right to leave our country and establish any associations we wish with willing would-be partners or spouses (Whelan 1981) as long as another state does not come along and interfere with that privilege, claiming territorial rights that excludes us from consummating our associations in that particular territory. If this description of this case is sound, we are back to the standard objection: it is the case of territorial rights that seems to be doing the justificatory work, not the case of membership and associational rights.

For illustration, consider Wellman's own analogy. He claims that we as a country are allowed to reject foreigners, just as we as a family are entitled to close the doors of our home to strangers. Sarah Fine (Fine 2010: 343) observes that ultimately what grants that right is the fact that we *own* the house, not the fact that we are associated as a family.

An available option for Wellman is to argue for a putative individual right of occupation. Then just as individuals have a right of occupation, certain political associations may hold a political territorial right on their behalf.<sup>35</sup> But in that case, again it is not clear that freedom of association and not territorial rights would be performing the main justificatory

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<sup>35</sup> See Wellman's PPEL Conference in Washington University at St. Louis: "Political Legitimacy & Territorial Rights," January 2012. <http://www.youtube.com/watch?v=tMQRSL3HEQc> I will discuss a similar account in the appendix.

work. In any case, the picture is much more complex for states than it seems for individuals. And further argumentation is needed to supplement freedom of association as the ground for exclusionary right or to show how freedom of association shares the justificatory division of labour with other sovereignty rights.

To be clear, consider specificationism again. Note that state's rights of association are typically only exercised against other states and associations, not against individuals. A state has a privilege to associate with other states and immunity against other states who claim to interfere with those associations. Sometimes states have a power to waive secessionist's claims. From the right that a country has to avoid merging with another willing country it does not follow that a country has the right to reject any would-be migrant. It is unclear how patterns of exclusion could be directly inferred from the rights dictating the relationships between states.

From this structure it is not evident that states do in fact have a privilege to associate with individuals or have the corresponding immunity to avoid unwanted associations with them. Nor is it clear if states can have dominion over constituents' privilege to associate with foreigners or a power to waive individual's rights of association. It is coherent to accept that states have rights regarding the relationships with other states and at the same time condemn universal patterns of exclusion (Hidalgo 2012).

I fear Wellman's account of rights rather than helping out his own case for permissibility of closed borders makes clear the point that the standard objection was trying to make: freedom of association is not doing the justificatory work in a case for closed borders. Recall Sarah Fine, among others, who argues that control over civic boundaries of membership does not necessarily include control over territorial boundaries (Fine 2010: 343). Wellman's argument is addressing control of membership, but he would need a complementary justification to connect state's rights of association with territorial rights.

Despite this objection, Wellman refuses to analyze and specify sovereignty rights in order to respond to the standard objection. Instead, he merely insists that denying freedom of association to states would have unpalatable consequences (Wellman 2008: 112). Of course, denying state freedom of association as a whole is likely to have odd implications, as Wellman remarks. Particularly, without a good provision of group rights it is difficult to explain how a group can be wronged and in what way a group can be held responsible for some collective actions.

But the standard objection is not denying group rights or freedom of association as a whole. At least Carens and Fine seem to accept that groups and states have a right of self-determination and consequently a right of association. The standard objection is merely emphasizing the complexity of what borders do in terms of the different sovereignty rights involved, and the need for a complex moral frame to take into account complexity of borders.

Critics can remain sceptical about how the different rights implied by immigration controls fit with each other and what right or molecule of rights is doing the justificatory work of what borders may permissibly do to would-be migrants. In the face of this, it seems that Wellman's view might be underdeveloped or inconclusive as it is, but that does not necessarily mean that freedom of association is not the adequate locus of the justification of putative general exclusionary rights.<sup>36</sup> The view could perhaps be supplemented or developed in a more complete fashion. I should explore this possibility by taking into account different objections.

**13. Disanalogies.** Most of Wellman's persuasive power lies in his analogies. States have a right to exclude everyone just as an individual has a right not to marry anybody if so she wishes. Or states may exclude everybody just as a family may close their doors to unwanted visitors. Analogies aim to transfer knowledge from a familiar case to a less familiar or unknown case, provided that there are relevant similarities among both cases. But if the similarity is not relevant, then the analogy fails as trivial or superficial (§2).

I shall devote this section to the disanalogies identified by critics. Superficiality is the main charge against Wellman's analogies. As Bohr's analogy only tells that electrons rotate around the nucleus and not much more than that, I fear Wellman's analogies say what we already know: members are under special obligations that justify a certain kind of partiality among them. But just as Bohr's analogy does not tell anything about quantum physics, Wellman's analogies do not provide a theory of special obligations, legitimacy of borders and partiality that could supplement liberalism regarding the underdeterminacy problem.

Obviously, there is a stark disanalogy between groups and individuals.<sup>37</sup> Wellman is not oblivious to this, yet he insist that the right each group has to determine their own

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<sup>36</sup> I shall explore this venue at the end when I deploy my criticism to the conventional view and justice-based accounts.

<sup>37</sup> For instance, states are mighty corporations that coerce their members, exercising their sovereignty over many aspects of their constituents' lives. Citizens rarely consent to submit themselves to coercion; instead they are defenceless in front of the state, except for the fact that they hold some rights that allegedly offer a small immunity in certain spheres from state's dominion. Individual self-determination may reflect the autonomous ends of the individual, but states' policies often may not even reflect the will of the majority. Individuals may decide to a certain

membership is “common and uncontroversial” (Altman & Wellman 2009: 160). But among all the possible disanalogies, critics have singled out at least two important concerns (Carens 1987; Carens 2002; Fine 2010; Lister 2010; Blake 2012). First, the disanalogies may entail that only individuals enjoy the kind of freedom of association that allows universal patterns of exclusion, such as those Wellman claims permissible. Second, even if states may permissibly hold such exclusionary rights, presumably individual right of association applied to certain important forms of association, like marriage, may trump state’s presumptive right to exclude (Altman & Wellman 2009: 160).

While critics admit that the importance and role of freedom of association are analogous between individual and state, in general, critics resist that in a state’s case the analogy supports the same implications than in an individual’s case. Particularly, critics resist the idea that states’ provision of rights (self-determination and freedom of association) entails the right to exclude everyone.

Concerns of the first kind contend that not all associations are morally equivalent (Blake 2012: 754 N 10). Depending on the level of intimacy, the relationship grounds different exclusionary rights. Wellman’s favorite example of marriage entails a great deal of intimacy, whereas it is safe to say that the non-voluntary, non-intimate nature of political states may at least cast doubt on a state’s moral right to unqualified exclusion. For instance, in the case of marriage, my right of association indeed grounds rights that function as trump cards: I have the right not to be married with you, no matter how willing you’ll be to marry me (Lister 2010: 724). But, whereas individual freedom of association is a human right that can be understood as a trump right, at least in the case of marriage (in the limited sense above), the same cannot be said in the case of a state.

The problem becomes clearer when we consider the possible conflict between rights of association of both kinds; for instance, when a state limits members from associating with foreigners. The standard answer to this (White 1997: 381; Lister 2010: 727; Fine 2010: 349) is the general rule stated by White, “As a general rule the more intimate and closely-knit an association is, the fewer restrictions the state may put on the association” (1997: 724). State’s legitimacy relies on its capacity to establish an appropriate institutional framework that allows associations of many kinds to flourish. If a state does not have the moral features of marriage or religion that enables these association with trump-like rights, then a state’s claim of exclusion must be weaker (Fine 2010: 350).

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extent with whom they wish to marry or befriend, but most relationships among states are left to the discretion of foreign affairs bureaus that seldom express the mandate of citizens.

According to Lister, freedom of association requires states to allow their citizens to bring in their close family members (Lister 2010: 731-2) on two grounds. First, intimate associations trump larger and anonymous associations. Second, states are not like other anonymous associations, so the limits in the way states set rules of membership apply. Intimate associations deserve more deference than less intimate ones, because intimate associations, like family, cannot perform their functions unless its structure is not left to a great extent to the parties (Lister 2010: 733n.53). “The more intimate an organization, the more important it is that members be able to determine the content of the group” (Lister 2010:732).

The nuclear family is the most intimate form of association, whereas even a small homogeneous state can only count as an association in the broad *sui generis* political way. Therefore, in a conflict between the largely impersonal and anonymous state and the closely intimate family, it is the last one that deserves the presumptive protection. That is not to say, though, that a state has no right to limit immigration. Nor does it mean that we need to deny the state’s freedom of association as a whole. Limits in individual freedom of association are in order.

Wellman accepts that freedom of association is much more important in cases like marriage, but he retorts that his argument does not really rely upon these two kinds of cases to be equally important (Altman & Wellman 2009: 162). According to Wellman, dismissing state’s freedom of association only because of the lack of intimacy among citizens is to overlook the great importance that typically membership has for citizens.

It is not good to simply tell citizens that they need not personally associate (let alone associate intimately) with any fellow citizen whom they dislike; the point is that rightly people care very deeply about their countries and, as a consequence, they rightly care very deeply about those policies which will affect how their communities evolve. And since a country’s immigration policy affects who will share in controlling the country’s future, it is a matter of considerable importance (Altman&Wellman 2009:163).

Wellman may be right about acknowledging constituents’ legitimate interest in their shared faith in the sense that they may like to limit the amount of people with whom they have to share a special bond (Altman & Wellman 2009: 164). But Lister is not objecting to this interest and the relative right that protects it. What Lister is claiming is instead the idea that universal patterns of exclusion may be appropriated only to highly intimate forms of associations, but

not necessarily to states. It might be permissible that states exclude some; but not potentially everyone, as in the case of marriage.

However, Wellman can still argue that a state-citizen relationship is still far more important than any other relationship among citizens with foreigners. But then, this begs the question of whether the nature of the state's right indeed has these same morally relevant features that authorizes freedom of association as a trump card in the case of marriage.

So we can now invoke concerns of the second kind: Even if states may permissibly hold such universal exclusionary rights as Wellman hopes, presumably those presumptive rights are easily overcome by countervailing conditions. So we may ask: what conditions are sufficient to suspend Wellman's case? One obvious answer to this is the disproportionate potential of harm that states have in contrast with individuals and other corporations.

Sarah Fine pursues this line of criticism (Fine 2010: 339). According to her, the possibility to harm others sets limits to Wellman's *prima facie* case in a way that blocks universal patterns of exclusion. Remember, Wellman starts with an analogy about individual self-determination and how freedom of association is an analytic element of that right (2008: 110). Each enjoys a position of dominion over her self-regarding affairs that entitles her to freedom of association. However, elsewhere (2003: 265-85; 2005: 11, n.7) Wellman recognizes that it's not always clear when an action is self-regarding. According to Wellman, in general people should be left alone when her behavior is not harmful. Fine notices that this harm clause is absent from group self-determination, which seems problematic given the large potential of harm that groups have over members and non-members (348).

Wellman, himself, elsewhere (1999: 13-40) conceives liberal principles as grounding a presumptive case against group rights. A state's potential of harm is so great compared to individuals and other groups, and the interests it may threaten are so substantial that the presumption for self-determination and freedom of association is called into question. Wellman, however, retorts that the state has other means to discharge this and other kinds of responsibilities, for instance by international aid or justice exportation. But it is not clear how international assistance can make up for certain harms as in the case of desperate refugees seeking asylum or the case of preventing someone from pursuing a life plan that can only flourish in certain political communities (Carens 1987), or simply by arbitrarily holding the monopoly of certain job markets (Kukathas 2010).

Wellman believes that analogies are appropriate answers to these thorny difficulties. In the case of marriage, he claims, freedom of association functions as a trump card that gives

someone the right to be free from unwanted marriages, no matter how much harm this does to a willing proponent. But as we saw above, not all forms of association are morally equivalent and not all elicit the same rights. This raises the question of whether the nature of state's right indeed has these same morally relevant features that authorizes freedom of association as a trump card, as in the case of marriage. The fact is that states are neither like marriages nor like clubs, especially because no one can found a state of their own. Furthermore, exclusion from a state (which bares an enormous range of resources and options) has a devastating impact (Carens 1987: 267-68).

Fine notes that it is precisely when associations grow in such a way that they start to vaguely resemble states, when their claim to exclusion seems to weaken, like in the case of the Jaycees. Jaycees stand for the United States Junior Chamber, a non-for-profit organization established to provide opportunities for young men to develop personal and leadership skills through service to others. The Jaycees later expanded to include women after the United States Supreme Court ruled in the 1984 case *Roberts v. United States Jaycees* that Minnesota could prohibit sex discrimination in private organizations. The court argued that the Jaycees were a non-intimate non-expressive organization that arbitrarily excluded women from a pool of opportunities and advantages.

Blake also thinks that Wellman is best read as conceiving a state's freedom of association as a *trump right* in very much the same way we usually understand human rights (Blake 2012: 749).<sup>38</sup> In this vein, those who interfere with our right to associate or those who force us into unwanted associations definitely wrong us (Blake 2012: 750). In contrast with individuals who can choose their ends freely, states, in particular liberal democracies, serve specific purposes that entail certain moral constrains.

As indicated before, when we discussed the right to exit associations (§5), there is a simplistic way to understand rights that must be avoided, because it disconnects rights from the interests they protect. In this same vein, Blake suggests that the best way to make sense of our fundamental principles, rights and legal practices is to explain why we value them in the first place. So we need to find out why we value freedom of association, in light of fundamental principles, and how our legal practices fit in this picture.

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<sup>38</sup> Human rights are conceived as trump cards deployed to protect individuals against an impermissible act from government. For instance, we have principled deontic reasons to be free from torture. This right stands above any telic reasons about beneficial outcomes that might arise as a result of torture. This kind of simple deontic trump right can be suspended only under extreme, strange or desperate circumstances where the moral framework of human interactions has ceased to apply (Blake 2012: 750-51).

In order to illustrate this interpretative process, Blake begins with the allegedly uncontroversial assumption of equal concern as a fundamental core moral value. According to Blake, we need to find out how different and sometimes countervailing claims of rights of association serve equal concern. In order to see how this works, consider the contrast between the Jaycees case with Boy Scouts of America (BSA). The court recognized BSA's right to exclude openly homosexual troop leaders. According to Blake, despite the different outcomes, what these cases have in common is the interpretative process that the courts analyzed, judged and interpreted the relevant laws.

BSA is an organization mostly devoted to the expression of a particular ideal of ethical conduct, which considers homosexual acts as wrong. Forcing the BAS to include homosexuals would curtail BAS from realizing this ideal. Whereas the inclusion of female members did change the nature of Jaycees, its expressive ideal remained the same and the burden of change was justified because of the serious problem of female discrimination. Either way, our practices, rights and principles show that group freedom of association in the case of private groups is not understood as a trump right, but as a right that must fit in a much more complex moral picture.

In any case, it seems safe to say that the state's freedom of association is not a trump card or at least it is not in the same extension and sense as it is in intimate associations, like marriage. Wellman is aware of this and Fine rightly points out that Wellman himself recognizes limits onto control of membership (Fine 2010: 353). For instance, Wellman presumably accepts, along with Walzer, that the state should not control membership by coercively regulating birthrates or selectively awarding the right to birth. Fine continues, "therefore since denying a group a full control over membership rules is not an automatic denial of their self-regarding affairs; the citizens are not forced to sacrifice all control over their common life in order to prevent significant harm to others" (Fine 2010:353). A group can still be self-determining as long as it continues to set its own internal and external policy and agenda.

Summarizing, we saw that critics have raised at least two main concerns. First, the disanalogies may entail that only individuals under certain circumstances, like those provided by extremely intimate relationships, may enjoy the kind of freedom of association that allows universal patterns of exclusion, such as those Wellman claims permissible for the state. Second, even if states may permissibly hold such exclusionary rights, presumably individual rights of association applied to certain important forms of association, like marriage, may trump the state's presumptive right to exclude, at least when this exclusion right is solely

grounded on state's right of association. This would explain the broad rights to family reunions invoked by Lister (2010) and often endorsed by liberal democracies.

We saw, as well, that Wellman seems to be aware of the various disanalogies, but he insists that the right each group has to determine their own membership is "common and uncontroversial" (Altman & Wellman 2009: 160). He is happy to answer critics with analogies of intimate associations and highlighting the unpalatable consequences of denying the existence of state's right of association as a whole, or arguing that competing individual rights cannot be absolute. Yet, he fails to realize that critics are not questioning state's right of association as a whole or arguing for unlimited or unqualified individual basic rights; quite the opposite, they require Wellman to accept that state's freedom of association may face at least similar (if not stringent) limits and qualifications that individual rights do.

From these objections it is safe to conclude that Wellman's case is not as straightforward and neat as he claims: (i) the provision of the state's sovereignty group rights is complex and it is not clear that freedom of association can do the justificatory work by itself; (ii) this leaves Wellman's *prima facie* case vulnerable to further limits, given the greater potential of harm that a state is capable of infringe.

I fear, however, that Wellman would insist that there are certain decisions that individuals may need to do as a group, in a corporate sense. Wellman could insist that the individual alone has no unilateral dominion over association with foreigners because the group should decide with whom the benefits of membership are to be shared. Yet, it would be difficult for Wellman to dismiss the oversimplification charge.

I agree with Blake that Wellman is forced either to claim that the USA's legal practice is misleading or that the structure of rights is much more complicated than he first thought (Blake 2012: 757). If he accepts the former, he loses some of the elegance and appeal of his argument. State's freedom of association is not as neat and intuitive as he announced, and it seems to be at odds with our most basic intuitions about the principles and history of the fight against discrimination. If on the other hand Wellman accepts complexity of rights, then he must renounce general universal patterns of exclusion; since particular conclusions must be derived from the analysis of how institutions, rights and practices should reflect our most fundamental principles.

Blake concludes that Wellman's universal pattern of exclusion could only be permissible if we assume a *simplistic deontic picture of rights*, because only under those conditions can states have a sort of veto power over any other claims. However, in liberal

democracies, according to their moral character, the structure of rights is complex in such a way that we need standards to decide between competing claims, leaving a veto-like trump rights structure only for basic human rights. Particularly we need to address the interests and claims of those who do want to associate with foreigners and the importance of equal concern and anti-discrimination rules. The state's freedom of association does not preclude unwanted association; it rather serves as a common ground for the beginning of the process of interpretation, judgment and argumentation about the different associative rights and obligations.

In what follows, I will expand on Blake's oversimplification charge. While Blake objects that universal exclusionary rights are at odds with equality, I will contend that Wellman's case is not appropriate for liberal democracies as a whole. Liberal democracies have a moral character that demands thicker conceptions of legitimacy that may outweigh universal patterns of exclusion.

**14. Legitimacy as the Protection of Human Rights.** The above scholars have shown that Wellman's view may be underdeveloped or inconclusive. As it is, Wellman's case might be sound only in an oversimplified moral framework. But for the case of liberal democracies with a complex moral character, Wellman's view does not seem to overcome the standard objection and fails to connect membership rights with claims over borders. However, this does not necessarily mean that freedom of association is not the adequate locus for the justification of putative general exclusionary rights. The view could perhaps be supplemented or developed in a more complete fashion. But, I want to dismiss that possibility at least for liberal democracies.

In these two remaining sections, I want to show that Wellman argues for a prescription applicable to an ideal case. But that ideal case is not compatible with the ideal case of liberal democracies. Either way, Wellman's case is overall unappealing, because it remains silent on what to do regarding rights of exclusion in our current conditions.

I shall begin with three main assumptions in the hope that these are not too controversial. I start with the *pro hominem* principle (Condé 2004: 108). This principle states that all law (including international treaties and human rights, but also the rules that ground our institutions) is created for the benefit of human beings. So, all law must be interpreted and applied in a way that best serves and protects human beings, not in the manner that best serves the interests of the state.

This principle adds to our previous discussions about how to understand rights. Previously, in §5 and §13, I invoked specificationism as the appropriate way to make sense of apparent contradictions between general rights. Bundles or sets of rights and incidents make sense once we think about the particular interests they protect. A familiar right, like the right to own my computer, is explained by a set of incidents related to each other by the interest they protect. On the face of it, the analogy between the state's rights of association and individual rights of association is misleading because it distorts the main purpose of rights expressed in the *pro hominem* principle. Groups or states have rights, not because of the *personality* we may attribute to corporations or political societies, but because there is some interests that are better protected collectively than individually. But ultimately, the best interest of individuals is what explains group-rights.

Secondly, I believe that there is a fundamental distinction between the rights of individuals, of groups and of states. Private associations and states are created with different purposes and as a result they have also different properties. The difference is starker in the case of liberal democracies, due to its moral character (§3). Liberal democracies are pluralist, so they ought not to promote the realization of any particular comprehensive view by means of the exercise of political power. As a result, they cannot protect intimate or expressive interests as private associations and societies often do. What makes the case of state's rights absolutely different from the case of groups and individuals is that states are not voluntary societies or associations (Hidalgo 2012: 17). As a result, there is a strong presumption against political states, because states exercise political power over people whom, most of the time, have not agreed voluntarily in being subjected to the dominion of the state. Typically it is not permissible for individuals and groups to subject others to their dominion without their consent.

Accounts of legitimacy typically begin with the idea that there is a *prima facie* case against the authority of the state (Simmons 1999; Christiano 2004; Wellman 2011; Dworkin 2011). According to the majority of these accounts, this presumption can be defeated because the coercion is needed to secure some form of freedom and equality, yet the presumption must be defeated in order to take authority and coercion as morally justified.

Third, I believe the state and its institutions exercise political power (Raz 1998; Christiano 2004). As indicated before (§3), borders as any other governmental institution exercise political power too. As a way of simplification, it can be said that borders exercise power at least in two forms. They allow things and people out and they allow things and

people in. Borders coerce constituents particularly when they limit constituent's freedom to associate with foreigners and aliens. Borders exercise some kind of political power over outsiders when they prevent them from carrying out their expectative plans and conceptions of the good within the territory they encompass. I will discuss this account of borders in §22.

These assumptions are, to a certain extent, compatible with Wellman's account. For instance, Wellman agrees that there is a presumptive case against group rights, because within liberalism individual's interest has a priority (1999: 13-40). Consequently, he also believes there is a strong presumption against the authority of the state (Wellman & Cole 2011: 16). He acknowledges the exercise of political power over would-be migrants when he says, "[...] unless a state is able to exercise authority over the individuals who might migrate, it is in no position to control its future self-determination" (Wellman & Cole 2011: 44). The problem relies on the consequences that Wellman extrapolates from these assumptions.

To me, these assumptions suggest that the morality of borders is deeply related to the problem of legitimacy<sup>39</sup> and, thus, strongly limited by typical sovereignty constrains. In the case of liberal democracies, according to their moral character, legitimacy entails restrictions such as democratic citizenship and individual rights, particularly individual rights of association, which include the right to associate with foreign and aliens. To my understanding, this means that the political freedom of associations do not have always priority over individual freedom of association, including the exercise of associational rights with non-nationals. However, from these assumptions Wellman makes a move that I resist: he conflates right of political self-determination with the putative right to close borders and exclude all.

I hope I can show that for liberal democracies Wellman's manoeuvre is inadequate in two main ways. First, it raises the standard too high. The concept of legitimacy loses normative appeal if only a few countries in the globe manage to get close to it. Second, even if we stick to an ideal, the full compliance case, liberal democracies have additional normative requirements that are not exhausted by Wellman's account of legitimacy as protection of human rights.

In contrast with Wellman's manoeuvre provided my assumptions about the nature of rights, states and borders are in anyway sound, I hope I can raise at least two main objections to Wellman's exclusionary pattern. First, it seems inappropriate for Wellman to begin with a *prima facie* case of state's freedom of association if the exercise of any form of state's political power must first defeat the strong presumption against it. Second, even if the presumption

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<sup>39</sup> On the difference of his account with Miller's liberal nationalism, Wellman adds: "[...] my account focuses on a country's legitimacy rather than whether its constituents share a common culture. (Wellman & Cole 2011: 52)".

against political power is rebutted and states gain legitimacy, I hope I can argue that the moral character of liberal democracies makes universal patterns of exclusion impermissible. There might be a *prima facie* case for control borders, but this control is constrained by requirements of legitimacy and fairness in such a way that there is no *prima facie* case for universal patterns of exclusion and closed borders.

It is important to note two main traits of Wellman's case. First, it is a *prima facie* case that can be overridden by countervailing reasons (Wellman & Cole 2011: 34). Wellman himself emphasises that he's not arguing for an absolute right for all groups to refuse associations; so all we need is to do, in order to challenge Wellman's case, is to ask what kind of reasons are sufficient to suspend Wellman's case, and try to establish under what conditions we may find those reasons.

Second, Wellman is arguing for a deontological right to limit immigration. This means that his case is independent from teleological recommendations about how borders are better organized (Wellman & Cole 2011:46). It is also important to remember two things about the criticisms invoked so far. As we saw, none of them is denying that states have either a political right of self-determination, freedom of association or even the right to control and limit immigration. They simply resist either that freedom of association makes the whole justificatory work or that it entails the kind of right Wellman is grounding.

I have begun with the assumption that borders, as any other institution of the state, exercises political power over insiders and outsiders. Wellman does not say it, but it is natural to assume that borders, as any other institution, are subject to legitimacy constraints. I suspect conditions of legitimacy (even in Wellman's formulation) may provide the appropriate reasons to suspend Wellman's case, insofar as individual rights of association are considered human basic rights. It is possible to believe that states have sovereignty, including rights of political self-determination and political rights of association, and still object that those rights have an unrestricted dominion over individual rights of association when exercised with foreigners.

Now recall Wellman's account of legitimacy. A state is legitimate when it does a good job in protecting and respecting human rights.<sup>40</sup> From this, I believe, it is safe to further infer two things. First, it seems the exercise of political power wielded by borders is legitimate if borders respect human rights of would-be migrants (in the same way that the state and

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<sup>40</sup> Legitimacy is a virtue of institutions that issue morally justified authority and coercion; while political obligation, on the other hand, aims to establish when one has a moral duty to obey those institutions. Wellman elsewhere argues that we all have a natural duty to rescue someone in peril, given that fair institutions rescue us from the perils of anarchy, we all have a natural duty to do our fair share to rescue others by means of obeying the law. Wellman then grounds political obligation on a Samaritan duty to obey the law.

borders are required to respect human rights of members in order to be legitimate). But more importantly, if the permissibility of the exercise of the putative right is grounded on the legitimacy of political power, then it follows that it is not morally permissible for an illegitimate state to control borders and exclude potential immigrants. In short, an illegitimate state is not permitted to exercise border control.

Now recall my formulation of the problem of borders (§3). The general problem of borders is to determine what kind of borders liberal democracies ought to have. This raises two particular problems; first, to justify the exclusive control over the administration of borders (problem of legitimacy of borders), and second, to specify how this control ought to be exercised (the problem of fairness of borders). This means that we can distinguish between the entitlement to exercise dominion over borders from the way this entitlement is exercised. While an illegitimate state is not entitled to exercise any border control, a legitimate state may exercise impermissible border control. I fear Wellman is explaining why legitimate states are entitled to some border control, but his case for patterns of exclusion may be suspended by conditions of legitimacy.

Now observe what happens when we confront Wellman's account with the distinction between entitlements and how entitlements are exercised. Wellman believes that states have political rights of self-determination provided that they are legitimate. Political association is an analytical condition of rights of self-determination (Wellman 2008). A right to be free from unwanted associations is a corollary from associational rights. One could have the liberty, then, to be free of any association at all, so universal patterns of exclusion are permissible if a state is legitimate and has a right to political self-determination. Wellman says that his case for universal patterns of exclusion is straightforward. On closer examination this seems doubtful as legitimacy may pose stringent requirements on state's rights and even outweighs them. Typically, basic individual rights are understood as limits to state's sovereignty, and state's right of association is part of the bundle of sovereignty rights (Simmons 2001: 302).

Of course Wellman does not argue for absolute sovereignty rights, including rights of association. He acknowledges that states may be under heavy duties with people and other nation-states. But, he insists that states can perfectly fulfil these duties without opening their borders by allocating material aid or exporting justice elsewhere (Wellman 2008: 124-130). Presumably, on Wellman's view, once these duties are adequately addressed, the state strengthens its case for exclusionary rights.

Given the general facts of globalization, interdependence, and lack of justice and legitimacy in the world, it seems rather doubtful that all international duties can in fact be sufficiently addressed without opening borders at some point, as some scholars have challenged (Willcox 2012, Caballero 2013). But I will put this aside, as there is a more basic concern. The problem is that, on closer examination, rights of exclusion, let alone rights of universal exclusion, are not a corollary from political rights of self-determination for two reasons. First, as Javier Hidalgo notes (2012: 16), political self-determination does not entail permissibility of any policy, including border policy. A state may have a right to determine its political structure, constitution, laws and immigration policy, but this does not entail that the result would be permissible. In other words, some exercises of political power by the state may be illegitimate. Similarly, the right of association entitles one to be free from unwanted associations, but this does not preclude the possibility that rights of association and rights for exclusion may be exercised in harmful illegitimate ways.

So, whether or not immigration controls are morally permissible is independent from the right that states may have to exercise them. Note, however, that the exercise of impermissible policies weakens state's legitimacy; so if the state enacts an impermissible border policy, it weakens its claim to legitimately enacting that policy in the first place. Political rights of self-determination and association only point out who may permissibly exercise border control, but they do not explain how this entitlement ought to be exercised.

Of course Wellman can stipulate, as he does, that he is referring only to the ideal case of legitimate states. Presumably a legitimate state will engage in a legitimate exercise of political power through its law and policy, including border control. So, insofar as borders respect human rights, universal patterns of exclusion will be permitted. This begs the question whether it is all things considered permissible to exclude everyone, provided that the permissibility of border policy needs to invoke other moral considerations apart from the fact that a country has the right to decide about its border control. As with any other policy, permissibility is assessed invoking political values such as equal concern and freedom, or by invoking political virtues such as fairness, justice, or utility. Wellman avoids that problem by merely stipulating that policies of exclusion, and specifically universal patterns of exclusion, are a corollary of political self-determination. But this is false.

Wellman may insist that precisely these political virtues and values are the ones that ground a *prima facie* case for exclusion. That's why he invoked freedom of association between members in the first place. The second reason to deny that exclusionary rights are a

corollary from political rights of self-determination tackles this view. Wellman acknowledges that in virtue of the potential of harm they have, in general there is a *prima facie* case against group rights (Wellman 1999: 13-40) and in particular there is a *prima facie* case against political power. Wellman says, "Notice that there is a moral presumption against political states because they are by nature coercive institutions. This presumption can be defeated because this coercion is necessary to perform the requisite political functions of protecting basic moral rights" (Wellman & Cole 2011: 316). I believe that a *prima facie* case against political states counts as a *prima facie* case against border controls, because as indicated before, borders are basic institutions that exercise political power (§3).

So on closer examination, it seems odd that Wellman begins with a *prima facie* case of exclusion when there is a prior and more primitive *prima facie* case against border control, insofar as borders are part of the political power that states wield. At this point Wellman can say, as indicated above, that the prior case against political power may be defeated by legitimate states. Only then a *prima facie* case of exclusion takes precedence. The problem is that according to him the prior presumption against political states and borders is almost never (if ever) defeated.

Whether or not any of the states that we know of are legitimate is a matter of philosophical controversy (Simmons 1999). On Wellman's view, there are just a few legitimate states, which may include Sweden, Denmark, Norway, Germany, Canada and New Zealand. Thus, the list of illegitimate or at least non-legitimate states includes the majority of *de facto* states in the globe (Altman & Wellman 2009: 3N8). Thus, just those few legitimate states above are permitted to exercise Wellman's universal patterns of exclusion. It follows that almost no country is permitted in fact to exercise border control. Since the presumption against political power and border control is almost never defeated, then the *prima facie* case of exclusion almost never (if ever) arises.

Consider the unpalatable consequences of understanding borders under Wellman's view. If most of states in the world are *de facto* states and not entitled to border control, it's difficult to explain how they can be wronged when borders are trespassed (Wellman & Cole 2011: 28). For instance, if Mexican drivers are better off under the dominion of Alabama's regulation, maybe the state of Alabama can rightfully claim a right to licence all Mexican drivers. If Spain has too many troubles managing its debts, maybe the UK should claim authority over the Spanish treasury, provided that Spaniards would be better off. It is difficult to explain why all these things are wrong if we have to rely on an elevated conception of

legitimacy. Most of Wellman's argumentative work goes to show that his case is not as easily overridden by egalitarian and libertarian arguments. But Wellman overlooks the fact that his case never really takes over as the primitive presumption against political states, and is almost never defeated.

There is the available option of describing Wellman's case as an ideal case appropriate for normative theory. Recall that the general problem of borders is not oriented to discuss how borders are, but only how borders ought to be for liberal democracies. So at this point, it is worth asking what may be the philosophical appeal of a stringent account of borders that almost no state is permitted to exercise. There are at least two options here. First, Wellman's case may be read as normative principle. Typically, accounts of justice and legitimacy are of this kind. Feasibility is an important constraint here. To pursue ways of life that require material, social and political conditions, traits of character and psychology alien to human beings are not subject of normative theory. Normative principles establish the conditions of a *realistic utopia*: strongly grounded by current institutions and practices, and informed by its historical development, yet also looking to extend the limits of practicable political possibilities (Rawls 2002: 11-23).

I believe, in this vein, Wellman argues for a partial compliance account when he claims that even "a nonstate group that aspires to become a state has a right to political self-determination if and only if it is willing to become a state that adequately protects and respects human rights (Altman & Wellman 2009: 13). So, it seems that some kinds of aspirations are enough to ground *partial* rights of self-determination and also conditional rights of exclusion. This particular move restores self-determination to many otherwise *de facto* states.

I must confess that I find this sort of aspiration-rights puzzling. I am not sure that a collective aspiration, even if genuine and well intentioned, has sufficient normative weight to grant at least provisional or conditional rights of universal rights for exclusion. Being that partial-compliance may grant conditional rights to exercise border controls. States may permissibly control the administration of their borders provided that they do a decent job protecting human rights. This again begs the question of how legitimate and fair are universal patterns for exclusion.<sup>41</sup>

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<sup>41</sup> I want to make clear that I am not in any way denying that legitimate countries should protect human rights and under certain circumstances, for certain groups, a state would become illegitimate if it stops protecting human rights. I am not denying either that states have rights. I am merely pointing out some odd consequences of Wellman's view.

But I believe Wellman's case is best read as a normative ideal in the same way that I understand the liberal revisionist case for open borders (§1). I left the cosmopolitan case aside, because I understand it as a revisionist project. It attempts a methodological revision of liberalism in the quest of coherence and integrity between its various values, virtues, principles and conceptions. It is a normative ideal because it sets a desirable state of affairs that allows a systematic evaluation of what we want from our liberal democracies, according to an interpretation of the values and principles that ground them. However, any chance to advance this project necessitates the improvement of the conditions of legitimacy and justice in the global system of liberal democracies from how we know them now.

I see Wellman's case as a reaction to this project. Wellman's case may be also a revisionist project, but instead of been motivated by the value of equality, as cosmopolitanism is, it is motivated by the value of collective rights as they take form in the modern state. He may be suggesting a methodological revision of liberalism and democratic theory from the point of view of a form of state-collectivism. Understood in this way, Wellman's case is of inestimable value because, along with the cosmopolitan case, it allows us to confront the integrity and consistency between moral ideals, moral values, political virtues, political principles and our current existing arrangements.<sup>42</sup> But just as indicated in the cosmopolitan case, Wellman's seems to point also to alternative global political arrangements too different from the system of states that we know; and he does this without a complementary theory that tells us how these alternative political arrangements might look like and why they will be plausible and appealing.

Notice for instance that even if Sweden, Denmark, Norway, Germany and Canada could permissibly close their borders as Wellman claims, we must remember these nations are mostly uninterested in a putative right to reject all because they are involved in certain international practices of trade and diplomacy that would make it impractical and even morally inconsistent to close their borders and reject everyone.

As indicated before (§3), liberal democracies are largely defined by common facts and practices in the international realm. Interdependency, globalization and international cooperation contribute to define the moral character of liberal democracies. According to this, borders of liberal democracies are porous because citizens are greatly interested in associations with outsiders. In contrast, Wellman may be suggesting that liberalism should assess its current practices and institutions to find better social arrangements that realize its

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<sup>42</sup> Compare Kukathas 2010: 219.

values in a more complete fashion. But just as with the cosmopolitan case, Wellman's does not offer us a view of alternative available global arrangements capable of sustaining liberal democracies with the right to close their borders and exercise universal patterns of exclusion.

If Wellman's case is best read as a normative prescription comparable to a cosmopolitan revisionist project, we need not worry about it now, as I am concerned with the normative problem of borders and the prior project of justice and legitimacy of the institutions we know. Whether or not Wellman's case or the cosmopolitan case will be the appropriate development for the future of liberal democracies is a problem I shall not address here. But before closing this part, in the last section I will just mention some reasons that cast doubt on whether Wellman's case is a desirable and appropriate option for the future of liberal democracies.

#### **§15. The Moral Standing of States and the Moral Character of Liberal Democracies.**

Wellman's argument begins by telling us that the right that grounds his argument is more or less uncontested as it is part of the traditional liberal stock of basic liberties. But, Blake is right to point out that Wellman's characterization of freedom of association is in that way clear, neat and uncontroversial only if we assume an oversimplified and underdetermined moral framework. In this section, I hope I can add to that criticism and shown that Wellman's universal patterns of exclusion may be only legitimate under a conception of legitimacy that may not be appropriate for many circumstances, at least not for the typical circumstances of liberal democracies.

Legitimacy and human rights seem, to me, independent standards with different structures and purposes.<sup>43</sup> Legitimacy and political obligation explain under what conditions authority and coercion are morally justified to certain individuals (Christiano 2004). On the other hand, human rights limit state's potential of harm by establishing limits to its sovereignty (Cohen, J. 2004). To the extent that a state that systematically violates human rights is illegitimate, both accounts coincide, but legitimacy is not only about human rights, especially in the case of liberal democracies, because the moral character of liberal democracies establishes further normative requirements (§3). I suspect that conflating both standards only

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<sup>43</sup> Legitimacy is not necessarily only about human rights, it is rather about how under certain circumstances an authority, a command or any form of coercion can be morally justified. It seems implausible to think that there can be a one-for-all recipe for legitimacy. The same command may be justifiable in one circumstance to a certain group, but not to another group in different circumstances. By using human rights as a conception of legitimacy, Wellman is making legitimacy a prescription rather than a political conception of moral justification. But I won't argue for that here. For political conceptions of legitimacy see, Raz 1988 and Christiano 2008.

says the obvious: that a legitimate state must have a limited sovereignty; but this does not explain under what conditions a state with limited sovereignty may be legitimate.

In order to see how legitimacy as human rights fail to take into account other normative requirements of legitimate liberal democracies, consider the following three examples. The first one considers how for a simple account of legitimacy it is difficult to single out typically illegitimate exercises of political power for liberal democracies. The other two show how liberal democracies acquire obligations that may entail porous borders, rendering universal patterns of exclusion inappropriate for their moral character.

First, think about a very well-governed island that gets smashed by a natural disaster. Under the desperate circumstances, congress is dissolved and the army takes over in order to keep order and protect human rights. Under such circumstances, the army has legitimate authority. The people may comply for their own good. However, the character of this kind of legitimacy makes it rather controversial to think that people will have a duty of obedience or even a duty of non-interference.

One reason for this is that the army's authority is not legitimate in a general and universal moral sense, but only in a *limited contingent sense* conditional to the circumstances. In contrast, Wellman's simple account of legitimacy establishes a universal requirement that can be fulfilled by many kinds of regimes, but it cannot distinguish among them. A military regime and a liberal democracy both will be legitimate as long as both protect human rights.

So, consider that later, with time, people will start to organize themselves, consequently changing their own circumstances by means of their own moral engagement with each other. By building other forms of mutual concern, they may even get to the point when in fact their own engagement transforms their circumstances so much that they produce a *moral shift* in the normative requirements that once made military ruling legitimate. Military ruling, then, won't be legitimate anymore if it does not call for elections and helps the people to form government. Political obligation seems to arise from the fulfilment of further normative requirements that engages people in a *morally appealing way*, meaningful enough to ground duties of non-interference and perhaps to obedience. Wellman won't accept this view because his account of legitimacy does not allow diachronic change of legitimacy conditions. It will be wrong to challenge the legitimacy of the military ruling as it already fulfils the condition.

This is all very controversial. The conditions of legitimacy appropriated for liberal democracies are a matter of stark debate. This is exactly my point. Wellman's account does

not allow the controversy to arise because for a merely functionalist account of legitimacy both regimens, from the example, are the same as long as they protect human rights. Supplementary accounts of legitimacy will need to be invoked in order to take into account the difference. Crucially democratic legitimacy, for instance, will explain why, once people become organized in a way that they can vote and express their preferences, the military ruling will not be legitimate anymore, even if its job of protecting human rights is exemplary. But Wellman's simple view of legitimacy excludes democratic legitimacy.

In a liberal democracy, we need standards to decide between competing claims of freedom of association. In a private association, the majority could, under limited circumstances and compatible with antidiscrimination liberal rights, rule out some associations and even cancel the inclusion of any new members. But liberal democracies must provide conditions for everyone to feel included without losing her dignity or without being submitted to forms of domination. For an association, equal concern is exhausted by majority rule; but for a liberal democracy, equal concern means much more. For a liberal democracy, to treat everyone with equal concern means that everyone could participate in the shaping process of the shared life of the community. This sometimes requires protecting the rights of minorities. So if in a liberal democracy a majority wishes to reject every would-be migrant, equal concern may require to defend the associative rights of those interested in bringing outsiders in; at least those interested in intimate forms of association, as Lister remarked (§13).

Excluding democratic legitimacy from the conditions appropriated for liberal democracies seems at odds with the principle of political self-determination that is central to Wellman's account. Wellman claims that one of the main reasons members legitimately care about restricting membership is that new members will subsequently have a say in how the group will be organized (Wellman & Cole 2011: 39). Political self-determination requires people to act collectively, expressing their will about how to determine their community. It seems analytic that political self-determination requires members to preserve at all times some kind of joint control over main aspects of character of the group; otherwise the group would stop to be determined by its members. Yet, Wellman excludes democracy from his account of legitimacy. If a state chooses a nondemocratic form of governance that respects human rights, then it remains legitimate.

Wellman argues rightfully that democracy is merely a form of legitimate government, but it is not the only form of legitimate government. But he overlooks the fact that democracy is the only form of legitimate government that can preserve self-determination for large and

pluralistic groups, such as liberal democracies. If members are excluded from the operation to determine the group, then the group is not self-determined by its members. Perhaps in the island example at the moment of the crisis, democratic order is not a required function given the emergency of the case. But for the case of liberal democracies, conditions of legitimacy seem to require some form of equal concern that gives democratic citizenship to members as a way to make them part of the collective exercise to the right of self-determination.

Wellman's conception of legitimacy may not be adequate to all cases; especially I doubt that it would be appropriate for liberal democracies. Particularly, it seems difficult to argue for a *prima facie* case for universal patterns of exclusion, if all things considered, some members of a liberal democracy are legitimately interested in sustaining associations, particularly of the intimate kind, with outsiders.

The last worry about how Wellman's account of legitimacy fails to take into account the moral character of liberal democracies relies on the obligations that states may acquire abroad. Recall that for Wellman's argument, two things are crucial: that states have a moral standing, and that the moral stand of states implies political freedom of association. But Wellman simplifies the moral stand of states to the protection of human rights and political self-determination. This is why Wellman has the option to argue that international obligations could be address with closed borders as long as aid is allocated where it is needed.<sup>44</sup> No matter how harmful or exploitative certain forms of political states are in the international realm, obligations and responsibilities may be discharged by sending aid, exporting justice or improving the international system while borders could remain closed. But I suspect that the moral character of liberal democracies is not exhausted by human rights and political self-determination.

To see this, consider the second example. Suppose you tell someone: "Look mate, its right that we hang out very often. We have our children in the same schools. We play golf together, and afterwards we buy rounds at the pub, we have family holidays together. But never mind! Despite all of that, we won't ever be friends". And then you tell someone else, "Look sweetheart it's true that we only see each other occasionally on the bus on our way home, and for that I will always consider you my friend." There is something odd about this. It seems that certain relationships may raise legitimate expectations that ground determined moral requirements. In the first part of the example, the other person may legitimately expect to be treated like a friend; while in the second part, it will be odd to receive that treatment.

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<sup>44</sup> Compare Wilcox 2012.

When I treat my mate in a way that does not coincide with the reasonable expectations of how friends treat each other, I mistreat her and wrong her.

Now consider a parallel example: the USA has a strong relationship with México. Mexico and the USA have deep and very sophisticated diplomatic, trade and cultural ties. USA citizens have a legitimate interest in associating with Mexicans in many ways. Given labor shortages, they are interested in hiring Mexicans. They are also greatly interested in making business with them, as Mexico is USA's 3th largest business partner. Some of them are interested in marrying them and befriending them, given population shortages. Because of this, the USA government has a strategic interest in associating with México; and Mexico and USA are both liberal democracies with shared principles (thus they share a strong diplomatic relationship).

Despite the fact that the USA merely takes an occasional cup of tea with this gal Canada, he refuses to treat these two partners in the same way, treating Canada as a friend and México no so much. What I intend to show with this analogy is that liability for harms and Samaritan duties of aid are not the only ways that a liberal democracy may acquire duties abroad. The orientation for global free markets, regional economies and globalization makes it very easy for liberal democracies to acquire *associative duties* with other countries abroad.

I will discuss associative duties in the next part (§23.), but for now it suffices to say that they are duties that we acquire in virtue of certain roles we play, for instance as friends. Liberal democracies play certain roles in the international stage that gives rise to certain duties. These, I believe, are the kind of duties that cannot be discharged with the door closed, in the same way that it would be difficult to befriend or marry someone without having them around.

The last example is compatible with Wellman's account to defend an all-Mexicans *prima facie* pattern of unilateral exclusion. Indeed, under the simple view of legitimacy, this could be permissible. If the USA were an intimate association sustained by a thin functionalist conception of legitimacy, then it certainly will be entitled to exclude all Mexicans and everyone else if it so wishes. But the USA is not an association; it hopes to be a liberal democracy interested in global trade, regional economy, transnational financial markets and international cooperation. The point is that the kind of relationships that a liberal democracy establishes abroad with other states and associations raise legitimate expectations that, I believe, render a universal pattern of exclusion illegitimate.

Of course, Wellman may be tempted to say that it is permissible for a liberal democracy to withdraw from that kind of international relationships. But the moral character of a liberal democracy is greatly defined by its international moral standing. It is exactly this moral standing that made Wellman invoke state's right of association in order to explain why things like forcible annexation wrong states. But at the same time, that's why, all things considered, liberal democracies tend to have porous borders, because it seems extremely difficult to participate in global markets and local economies without letting some associates to come around and settle in. Liberal democracies can withdraw from these international practices, but then as with the cosmopolitan case, Wellman will need to provide an explanation of how liberal democracies will look and how the alternative ways of life that will arise as a result of the transformation of the international system will be appealing and desirable for human beings.

Wellman acknowledges that current globalism establishes deep moral connections internationally. "Because of the history of colonialism as well as the current levels of international trade (among other things), it is simply not the case that the world's wealthy and the poor are unconnected and unaware of each other [...]. On the contrary one consequence of the emerging global basic structure is that virtually all of the world's people now share some type of relationship, so presumably even relational egalitarianism cannot dismiss the global significance of global inequality" (Altman & Wellman 2009:169-70).

Wellman accepts that (i) citizenship is not the only morally relevant relationship and that (ii) citizens of separate states can stand in relationships that matter from the perspective of equality (Altman & Wellman 2009: 170-1). But he insists that this doesn't undermine his case, because the state-citizen relationship is far more important than other morally important egalitarian-relevant relationships (Altman & Wellman 2009: 171). He retorts that these international duties, "even if stringent and demanding, can be fully satisfied without necessarily allowing those to whom we are duty bound entry into our country" (Altman & Wellman 2009: 171).

However, this is misleading because the discussion here is much more fundamental than duties of equality. I am not arguing that equality requires open or porous borders. I am arguing that legitimacy of a liberal democracy prohibits universal patterns of exclusion. To make universal patterns of exclusion legitimate, a state would need to give away many of the characteristic features that make it a liberal democracy. A different global system would be needed that allows these isolated and closed states to remain closed yet peaceful, provided

that global trade and interdependence has contributed largely to the peace, at least between liberal democracies.

Perhaps now it becomes clearer why I began by referring to Wellman's view as a form of rights-statism. I believe Wellman's case for the right to exercise universal patterns of exclusion is better understood as a normative ideal that articulates a prescription to borders. This prescription establishes a form of collectivism that instantiates the priority of state's rights of political association over individual rights of association, but this priority is never supported. The standard objection shows that rights of association are not connected with territorial rights to control the administration of borders. Also, states' rights of political association are disanalogous from individual rights. Particularly states' rights can only be understood as trump rights in an oversimplified moral frame, incompatible with liberal democracies.

I agree with Wellman that states have moral standing. I also accept that this moral standing implies that states have rights of self-determination and rights of political association. I accept the importance of border policy remaining in control of members of society. I resist, however, Wellman's statist prescription arbitrarily postulating the dominion of state's rights over individual rights of association.

A simple minimalistic view of legitimacy could perhaps make permissible that minorities renounce to their right to associate with outsiders and defer to the states the control over their own right to be free from any association with outsiders. But this view of legitimacy seems inappropriate for liberal democracies. On the face of it, we may ask, do those who seek to restrict immigration have a moral right to do so? In a liberal democracy, the moral standing of states is interpreted by their moral character. This rules out freedom of association as the only adequate locus for the justification of exclusionary rights. Political rights of self-determination and association certainly participate in the justification of claims over the administration of civic borders. Much more is needed in order to explain territorial boundaries and the permissibility of specific border policies.

I suspect that Wellman's basic view of legitimacy is flawed because it conflates legitimacy with justice. The stringent moral requirements for legitimacy that liberal democracies impose get obscured when legitimacy is said only to require justice. I will discuss this idea in what follows.

## Part IV

### Legitimacy-Oriented Accounts of Borders

**§16. The Oversimplification Charge.** In a recent paper, Laura Valentini (2012) claims that justice and legitimacy are not distinct values; rather, they indicate the different requirements of equal concern according to distinct circumstances. I call this the *basic view of legitimacy*. In this part I argue that the conventional view about borders, including its further developments into nationalism and statism, are structurally unfit to supplement liberalism because they are grounded on a justice-based account of legitimacy similar to the basic view. As a consequence, they are structurally impaired to address the boundary problem.

In contrast, I suggest that accounts grounded in thicker conceptions of legitimacy are better endowed to address the underdeterminacy problem, supplement liberalism and face the boundary problem. I call them legitimacy-oriented accounts, because they avoid determining their account of legitimacy by invoking solely a conception of justice. Ultimately, my objective is to show the main traits that an account of legitimacy needs to possess in order to address underdeterminacy and boundary problems. I attempt to offer the initial groundwork for an alternative moral framework for the kind of border institutions that liberal democracies ought to have according to their own principles, international practices and international law.

This objection begins with the general suspicion that the kind of border restrictions that the conventional view and its further developments defend can only be justified within an anaemic oversimplified moral framework as the one that the basic view seems to represent. Recall that the liberal conventional view conceives borders as jurisdictional devices justified to exercise discretionary rejection powers against potential immigrants grounded on a plausible interpretation of state's right of political self-determination. This, results in a defence of *broad* if not radical restrictions to immigration grounded on political self-determination. In this view, states have a *prima facie* right to reject would-be migrants grounded on the right that members have to control their self-regarding affairs.

In parts II and III we saw that cultural nationalism and rights-statism do not really add much to this view. Nationalists may have identified reasons to grant control over membership, but they fail to explain how membership to the nation is connected to territorial control. It is not clear how membership of a cultural group gives additional weight to claims over a piece of land (Stilz 2011: 577). Rights-statists, on the other hand, may have proven that rights of

association sometimes entail a right to be free from unwanted associations. But in the end, what allows a family to exclude unwanted visitor is the fact that they own their home, and not only the fact that they may conceive themselves as a closed association (Fine 2010: 343).

These objections entail that nationalism and statism have an inconclusive case of borders, failing consequently to deal with the boundary problem. Furthermore, nationalism and statism not only fail to supplement liberalism but they even may be incompatible with core liberal claims. The nationalist principle of political self-determination seems difficult to accommodate with pluralist multinational liberal democracies. Similarly, the statist principle of political self-determination may jeopardize the scope of basic human rights, like individual rights of association.

Note as well that none of the further developments had successfully faced the conventional view and the task to supplement liberalism regarding the underdeterminacy and boundary problems. Nationalism delivers a nationalist account of nationalist legitimacy that defines members as those who share the same culture. This seems to tackle the underdeterminacy problem, but on closer examination, to determine the relevant traits of culture and who shares them proves to be equally elusive. Statism delivers a powerful and appealing account of membership and state's rights. But the argumentative connection between associational rights and territorial rights remains to be provided.

The standard objection shows that the conventional view and its further developments fail to address the territorial component of the boundary problem, but it does not explain why. In this part I will give an explanation of this. Even if we grant a conceptual connection between membership and territory, on closer examination, the conventional view, even in its further developments into nationalism or rights-statism, seems to run only on an oversimplified conception of legitimacy, which does not seem particularly adequate to liberal democracies. This seems particularly clear in the case of rights-statism.

A broad interpretation of the right to be free from unwanted associations is only possible if we believe that a legitimate state must only protect basic rights and nothing more. Similarly, the nationalist central management of culture seems permissible if we believe that a state must only take decisions according to majority rule. In conditions where requirements of legitimacy are lax, nationalist legitimacy may require minorities to sacrifice their dignity and well-being for the sake of the cultural majority (Dworkin 2001: 229-233).

In similar conditions, freedom of association can be a trump card even over harmful effects over vulnerable individuals and groups (Blake 2012: 750). But liberal democracies are

more than mere associations protecting basic rights and they are more than societies organized by majority rule. I call this *the oversimplification charge*.

Liberal democracies, though, seem to be required to do more than protect rights and implement majority rule. They are required, for instance, to secure actual access of all groups to basic liberties and they need to protect the political rights of minorities. In order to explain these further requirements we need to flush out a different account of legitimacy. As discussed in §4, Liberal democracies have a moral character that furnishes their appropriate account of legitimacy. The moral character of liberal democracies is the central organizing idea of this thesis.

About this moral character, for the purposes of this part, recall at least three main traits. First, I believe that on both sides of the borderline there are people with legitimate interests and claims. *Here* on this side of the border, there are people very interested to undertake many forms of associations with foreigners. Some of these associations, by their own nature need to take place inside the boundaries of our state. Here as well there are people with legitimate interest and claims to exclude immigrants based on the costs and burdens that new comers generate. *There* on the other side of the border, there are people with legitimate claims and interest to associate with willing people here, but there, there are people whose basic interests are affected by people leaving their countries of origin, for instance when emigration of skilled and talented people levels down the well-being of the ones left behind.

Second, I suppose that a liberal democracy is more than a typical association or a state organized by majority rule and protection of basic rights. A liberal democracy is characterized, I believe, for endorsing certain fundamental moral values, such as the equal concern for the life of everyone that, in principle, is more than political equality and equality of opportunities (Dworkin 2011: 30). For instance, members of a political community, even when they belong to minority groups, ought to think about themselves potentially as a source of reasonable legitimate demands, instead of thinking themselves as subjected to luck or other people's will (Rawls 2001: 20). This means that a political community must provide the necessary conditions for every member to comply with shared rules and subject himself to the dominion of the state without compromising his dignity (Dworkin 2011).

Third, I suppose that a moral community characterized in this way is associated with a set of social practices that favour the flourishing of all sorts of associations, shared endeavours, enterprises and common ventures. These domestic practices, which are familiar

expressions of the freedom and equality that these communities stand for, are associated in turn with a similar set of international and transnational practices, particularly with diplomacy, international aid, regional cooperation, international law enforcement, global copyright, global trade and the thriving of all sorts on international associations, endeavours or common ventures that transcend national boundaries.

The moral character of liberal democracies point towards two important lessons we can learn from the conventional view. Despite nationalist illiberal claims of cultural management, nationalists taught us the enormous value of being a member of a political community. Despite rights-statists' illiberal exclusionary claims, rights-statists taught us that states are associations with moral standing that have rights. It would be odd to explain these two features without arguing that liberal-democracies are both morally bound communities and associations with moral standing entitled to have rights. In other words, it seems odd to admit these central ideas of the conventional view without granting that liberal democracies are different from other regimens in that they have a constitutive moral character. The moral character of liberal democracies defines what is distinctive of these regimens. That is why it is the central organizing idea of this work (§3).

As I already pointed out, the standard objection fleshed out the complexity of the problem, but it didn't explain why these accounts fail to achieve the justification of the exclusionary rights they seek. Crucially, the standard objection does not cancel the possibility that these accounts get supplemented with other arguments that connect membership with the rest of normative elements of the boundary problem. Nationalism and statism may be dismissed in benefit of some other formulation of the conventional view.

There is nothing in the standard objection that entails that necessarily exclusionary rights are inappropriate for liberal democracies or that the conventional view is necessarily bounded to find out of its reach the boundary problem. I suspect that broad exclusionary rights are inappropriate for liberal democracies in many ways, but it is rather the second option I want to explore in the next section.

In §17, I make a brief account of the basic view and show how it is inadequate for addressing the underdeterminacy problem. I argue that the conventional view shares with the basic view a common moral frame established in its core account of legitimacy that makes it unfit to address the boundary problem. I call them justice-based accounts because of their focus in on justice and coercion. In contrast, in §18, I lay a general definition of legitimacy-oriented accounts and reject two familiar examples of this account for their focus on coercion.

In §19, I use the central organizing idea of the moral character of liberal democracies, understood as dignity, to explain what a suitable account of legitimacy may look like. I argue that when legitimacy is not about justice it is about integrity. Integrity is another political virtue of institutions that poses stringent normative requirements about how our values, virtues, principles, laws, and practices fit with each other. I also introduce the idea of the division of labour of the distinct conceptions of legitimacy as a way to understand integrity. Finally, in §20, I pose the problem of how legitimacy as integrity may be able to accommodate the dignity of outsiders with the protection of the dignity of insiders.

I believe that the conventional view is bound to find out of its scope the normative structure of territories and borders, because of the account of legitimacy that lies at its core; that is, because of its focus on coercion and justice, the conventional view cannot approach the boundary problem. The hope is to show that the moral character of liberal democracies seems to rule out the kind of exclusion that the conventional view hopes to ground, because the moral character subjects authority to further moral requirements than the mere protection of basic state political rights and the mere implementation of procedural majoritarianism in favour of national majorities.

**§17. The Basic View.** Nationalism and rights-statism both fail to supplement liberalism regarding the underdeterminacy problem. I fear that this is not only the result of a lack of an argument that establishes a principled link between membership and control of jurisdiction and borders. Rather, I suspect that the inability of the conventional view to encompass territory and its borders is the result of a structural flaw in its moral framework. Particularly, I suspect that its focus on justice prevents its legitimacy accounts to frame other kinds of political power, such as the one exercised by borders. In this section, I expand the general characterization of justice-based accounts discussed in §4.

I argue that justice-based accounts are unfit to ground exclusionary rights, because the problem of jurisdiction and territory lies out of their reach. I explain this shortcoming showing that justice-based accounts tend to smudge the distinction between justice and legitimacy. When legitimacy is compounded into justice, legitimacy gets encapsulated in a principle of limited range vulnerable to the standard objection. In order to see this, I reject the basic view of legitimacy.

To see how the control of jurisdiction, territory and borders could escape from the scope of legitimacy, suppose that we make legitimacy and justice equivalent. On this view, political power is legitimate when it is just. Quong calls this formula *the basic view of*

*legitimacy* (Quong 2010: 131). Laura Valentini (2012) holds this view in a recent paper. She claims that justice and legitimacy are not distinct values because the underlining concerns of both are the same and because they serve the same purpose.

According to Valentini, legitimacy and justice both indicate the different requirements of equal concern according to distinct circumstances (Valentini 2012: 593). They serve the same purpose of justifying coercion (Valentini 2012: 597). Legitimacy dictates when institutions may permissibly coerce us. Justice tells what institutions owe to those subjected to them, and what is owed is permissibly enforceable (Valentini 2002: 597).

Note that under the basic view, obedience of members is treated merely as a commodity to be distributed in accordance with principles of distributive justice. The permission to coerce as the relevant kind of political power is allocated between distinct institutions. According to Valentini, the kind of justice applicable to states is not eminently distributive in a material sense, distributing the fruits of cooperation, but it is distributive first in a political sense as distributing rights and political power that later allow material distributions (Valentini 2012: 594)

This kind of political justice is interpreted as democratic deliberation. “[I]f norms of justice indicate when an institution gives its citizens what they are owed qua moral equals, and justice is always constrained by the limits of human nature, under circumstances of reasonable disagreement about justice, institutions are politically just when they implement basic substantive guarantees and democratic rights. The values of justice and legitimacy are brought together under the (more coherent) master-value of political justice” (Valentini 2012: 601).

The difference between justice and legitimacy, on this view, lies only in a division of the same labour: while a conception of (material) justice distributes the burdens and the benefits of social cooperation, a conception of legitimacy allocates the kind of coercive power necessary to enforce and ensure distributive (political) justice. Valentini explains that the difference between legitimacy and justice relies on the way each concept conceive the value of substantive demands of specifying what institutions owe to citizens (Valentini 2012: 596). Justice corresponds to substantive equality, while legitimacy corresponds to procedural equality. So, for justice the value of substantive demands is conceived as independently valuable, whereas for legitimacy, substantive demands are valuable as means for achieving procedural ones.

Note that once the basic view formulates legitimacy in distributive terms, the rest of political conceptions may start to overlap on each other in a similar way that justice and

legitimacy overlap. This results in a simplification of the moral framework. For instance, we may very well say that institutions are just if they are democratic. Then we may say that settling disagreements in a democratic procedural way adds to legitimacy, because that is what justice requires in a pluralist society of free and equal members.

The simplification of political virtues and conceptions has unpalatable consequences. Crucially, it makes it really hard to explain why some unjust exercises of political power are legitimate; whereas other just exercises of political power are illegitimate (Quong 2010: 132). Take, for instance, the ideas that Valentini offers to support the identity between legitimacy and justice, and see how important it is to preserve the distinction. Recall Valentini infers the identity to a certain extent, because according to her both conceptions perform the same function. Provided that both concepts serve the purpose of justifying coercion, she finds it puzzling to choose between them as competing value. The problem is that she assumes that they have to be competing values: “Either a set of institutions instantiates equal respect because its rule meets independent distributive standards (justice); or it instantiates equal respect because its rule is democratically validated (legitimacy)” (Valentini 2012: 597).

This is misguided. First of all, to serve the same purpose is not a sufficient condition to be the same thing. But even if it were, Valentini is overlooking the different kind of relationship that the two conceptions have with coercion in her own statements. Being that, in the case of legitimacy the relationship is direct: when a coercive institution is legitimate it is permitted to exercise coercion. While a just institution may be permitted to enforce a just policy only if it is legitimate.

Suppose that the best lawyers of the world arrive to the uncontroverted conclusion that the Swedish system of law and political arrangement is the most perfect in the globe. This means, to a certain extent, that it is just. To prove it they convince the president of Nicaragua to implement the Swedish legal and political system. In this case the law will be just, but it will not be legitimately exercised over the Nicaraguan people, because the implementation is the result of an imposition that failed to abide to any procedural requirements of democratic legitimacy.

The problem is that Valentini just assumes that justice and legitimacy are competing values.<sup>45</sup> The conceptions of justice and legitimacy are not necessarily conceivable as competing virtues. For instance, in certain cases prudence and bravery can be competing virtues to the extent that prudence may rule out certain exercises of bravery, but the same

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<sup>45</sup> She seems to conflate as well virtues with values. Political legitimacy and distributive justice are virtues of political institutions. Not values.

cannot be said of intelligence and prudence. This is not the place to reproduce Plato's classic discussion in the *Republic*. Suffice to say, it is coherent to believe both that institutions are just because they meet principles of justice and at the same time believe that institutions are legitimate because the way that institutions meet their standards of justice has been reached through democratic deliberation. Further, it is coherent to think that democratic deliberation has been undertaken and at the same time believe that the outcome is unjust, because it fails to meet substantive standards.

Similarly, as indicated in §17, it is also coherent that one policy is just, even though a dominant group has imposed it without taking the views of other members into account; in a way, this seems illegitimate. In all these cases, regardless of how institutions or outcomes are assessed, we do not have to choose between using standards of justice or standards of legitimacy. Quite the opposite, they simply are distinct political virtues, despite that they are both virtues of institutions and despite that they are both interpretations of the political value of equal concern and the moral virtues of freedom and equality.

There is a further concern apart from the fact that it is really hard to explain why some unjust exercises of political power are legitimate, whereas other unjust exercises of political power are illegitimate. The basic view oversees that not all forms of institutional authority are accountable in a democratic way, and not all sources of political power are subjects of justice. Neither all forms of political power are coercive in the relevant sense that triggers demands of democratic participation and coercion (Blake 2008, Miller 2010b).<sup>46</sup>

By the same token, after claiming that the *concepts* of legitimacy and justice are the same, and before offering arguments for it, Valentini arbitrarily, but conveniently, narrows the scope of her interest to conceptions of justice for the case of coercive institutions (Valentini 2012: 595). According to her, justice corresponds to substantive equality, while legitimacy to procedural equality. Substantive demands are those that specify what each person is owed qua moral agents by institutions of the state (Valentini 2012: 598). Although legitimacy also demands the satisfaction of substantive rights, it does it only conditionally to the extent that the satisfaction on substantive demands makes possible the exercise of procedural rights (Valentini 2012: 596). Thus, legitimacy is different from justice only in the way it conceives the role of substantive demands: for justice they are conceived as independently valuable, for legitimacy they are valuable as means for achieving procedural ones.

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<sup>46</sup> I suspect this overlap of conception is what causes the oversimplification I identified in the last section. But I leave this discussion for §18, where I explain how the moral character may furnish a conception of legitimacy complex enough for liberal democracies.

I trust that no one believes that legitimacy and justice are things that never coincide. Most people believe that there are political virtues that converge. But, typically the scope of legitimacy is taken to be broader than the scope of justice (Quong 2010). Not all forms of political power require democratic justification, and not all institutions of the state are coercive. To see this, take the institution of marriage as an example. It is clearly a non-coercive basic institution, yet it shapes pervasively our public and private life. When, for instance, the state establishes that only certain kinds of unions and no others count as marriage, a tremendous act of political power has been exercised, one that governs the architecture of permissible choices and open options that shapes our social world, yet it has been instilled in a non-coercive manner, insofar as no one is threatened to get married. Basic education is another similar example of this.

Liberal democracies are much more complex entities than Valentini gives credit to, and demands of justification and justice are not exhausted by democratic deliberation and coercive institutions. Not all forms of justice are distributive in character, not all forms of justice apply to coercive institutions, and state's legitimacy is not exhausted by legitimacy of coercive institutions or by democratic legitimacy. Importantly, justice is a division of labour between distinct conceptions of justice and there are many exercises of political power that are not coercive, but need justification. And presumably, as I will argue later, legitimacy is also a division of labour between different conceptions.

This leaves us with two possibilities. Either the basic view is an ill-formed account of legitimacy appropriated only for simplified social structures different from liberal democracies, or its claim that justice and legitimacy are the same is true only for two specific conceptions of legitimacy and justice, remaining silent about the rest of the division of labour of both conceptions.

I believe Valentini is rightfully identifying an important convergence between justice and legitimacy, but she is misleading believing that the centrality of this convergence entails that justice and legitimacy are the same. Saying that legitimacy and justice are the same is an appropriate description only when we talk about distributive justice for the case of the basic structure and democratic legitimacy of coercive institutions. But this specific case does not exhaust the division of labour between the distinct conceptions of justice and legitimacy. Narrowing down justice and legitimacy only to this case, despite its centrality to political theory, is arbitrary. In any case, this indicates that legitimacy must be broader than justice in some way.

Now that we know that legitimacy must be broader than justice and that the basic view is misleading, the problem is that the appropriate scope of these political conceptions is not obvious. This is of course a matter of debate that we can leave aside, because the worry now is that even if we accept that legitimacy is in fact broader than justice, we are not sure that a way to address the underdeterminacy problem could be found inside its so defined scope. The conventional view may still be using a conception of legitimacy that leaves the kind of political power that borders exercise out of its scope rendering the underdeterminacy problem as intractable.

Consider for instance Rawls's conception of liberal legitimacy: "political power, as the power of free and equal citizens, is to be exercised in ways that all citizens as reasonable and rational might endorse in the light of their common human reason" (Rawls 2001b: 84). This formulation has two salient features. First, it is ordered by an emphasis on public justification of coercion in contrast with other kinds of justification of other kinds of political power. Public justification of coercion is addressed to a set of citizens with reasons that they could recognize as their own. As Rawls explains, in a democratic regime the permissible exercise of political power is regarded as the power of free and equal citizens (Rawls 2001b: 41). In a way Rawls's view is restating the problem of legitimacy as a problem of public justification and endorsement.

Second, it begins with an account of natural duty. We are all under an obligation to help another and to bring about justice and support just institutions (Rawls 2001b: 98-99). The familiar account of natural duty states that we all are under a duty to comply with the existent just institutions that apply to us (Rawls 2001: 99).

Public justification imposes the condition that those subjected to coercion should have sufficient reasons to endorse the exercise of that coercion imposed upon them. Coercion is taken as the main object of public justification, because political power is conceived as always coercive (Rawls 2000:12). Thus, this view holds that a state is legitimate insofar as coercive power is justified to all members of the public on the basis of good reasons or reasons that apply to them. This view has characterized the entire project of Rawlsian and post-Rawlsian liberal political theorists (Horton 2012: 134). Let us call this the *public justification view of legitimacy*.

Within the public justification view, legitimacy is broader than justice; but still they are very closely bound up with one another, as justice becomes in essence the most important condition of legitimacy, setting the parameters of legitimate coercion (Horton 2012: 135). This

minimal distinction allows us, however, to deal with the objection to the basic view. For even a legitimate just state cannot reasonably be expected to be free from unjust laws that nonetheless citizens will be under obligation to obey. The fear is that the distinction is too minimal to reach the underdeterminacy problem.

If it is true that the public justification view characterizes the post-Rawlsian liberal project with a disproportionate focus on endorsement, distributive justice and coercion, then presumably all conventional accounts of borders may perhaps share an ill-formed structure that renders the underdeterminacy problem and the boundary problem as intractable for them. I believe this focus is what renders the boundary problem out of reach.

I believe Rawls had something similar in mind with the distinction between concepts and conceptions. Rawls understood that the *Concept of Justice* may be satisfied only through a division of labour between many *conceptions* of justice.<sup>47</sup> The case of distributive justice is merely one of them (Rawls 2001b: 10-11). And public justification is only one kind of justificatory process focused in the justification—in terms only of distributive justice—of the coercion specifically exercised by the basic structure *only*. To be clear: I do not deny that the public justification view begins asking for the justification of political power. What I contend is that these accounts are better understood as arguing for the legitimacy of only one kind of political power, and this kind of political power does not include the power that borders exercise.

The claim is this: insofar as legitimacy and justice could be conceived as independent political values, we are left with the problem of defining the appropriate scope of each of them. Anglo-American political theory is largely concerned with the problem of endorsement and stability in pluralist societies where high standards of publicity and consensus need to be achieved. It is this problem that shapes legitimacy as a problem of public justification with a focus on distributive justice. I do not question the importance of public justification for the specified case. But I doubt that public justification exhausts the conception of legitimacy. It is misleading to think that public justification and legitimacy are equivalent.

The suspicion is that the conventional view shares the public justification view and its incapacity to address the boundary problem when it frames the underdeterminacy problem as a problem of membership of those who have distributive or nationalist claims. While this approach may be appropriate for problems of public reason and endorsement, it has the often

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<sup>47</sup> Fort the distinction between political concepts and conceptions, see Rawls 2001a: 5.

unnoticed unfavourable effect of leaving the underdeterminacy and boundary problems out of reach.

Borders exercise the kind of political power that is not distributive in character, but at the same time needs to be subject to public morality, including the test of legitimacy. As a result, public justification view is not endowed to fully address the boundary problem, because they seem bounded by their own structure to presuppose precisely what is being questioned: the jurisdictional control over territory and borders.

To be clear, let's consider another more complex account of the public justification view of legitimacy. Jonathan Quong (2010) is said to articulate the most sophisticated version of political liberalism. Observe how Quong tightens justice and legitimacy. According to Quong, legitimacy is only the normative framework where reasonable disagreement about justice takes place. The conception of justice that prevails after the deliberative process acquires as a result the power to extract duties from the people who, by virtue of being reasonable, find themselves under the scope of legitimacy and, thus, are obligated because of their own reasonableness and natural duties. Legitimacy as public justification is broader than justice only in the sense that reasonable people disagree about what solution for a given problem is the most just, from a set of reasonable just proposals (Quong 2010: 137).

The mere fact that the public justification view closely bounds justice and legitimacy does not amount to saying that the underdeterminacy problem is intractable. But as discussed in part I, one way to be sure whether underdeterminacy is or not in the orbit of the public justification view is to invoke what Quong calls the specificity objection and the particularity problem. As indicated in §§ 4 and 14, the specificity objection claims that accounts of legitimacy may fail to establish *who* the legitimate authority is (Quong 2010: 110). By invoking reasonableness and general natural rights, the public justification view has only established the importance for a state to bring about justice. But this fails to deliver further criteria to single out one state from a set of equally just states.

The particularity problem claims that accounts of legitimacy may lack any sound way to establish *why* the particular state that we are set to belong is the one entitled to wield authority over us when there are many other states that we may discharge our political obligations in a better and more efficient way (Quong 2010: 111). I may be morally required to obey the law and submit myself to just institutions, but public justification view does not clarify why I should owe obedience to this state instead to this other. Why should I owe

obedience to the state I was randomly born into, instead of voluntarily submit myself to a state that does a better job protecting rights, securing property and ensuring public goods?

I believe these objections together could be considered another way to formulate the underdeterminacy thesis. A conception of legitimacy that can face these objections becomes supplementary to liberalism and democratic theory, because it can connect states and their jurisdictions with particular people and it connects people with particular states.<sup>48</sup> That is why the conventional view introduced a principle of political self-determination. Political self-determination performs as a principled way to specify institutions and particularize obligations. But as we saw in II, the principle of nationalist self-determination is incompatible with liberalism because it is grounded in controversial metaethical particularism and nationalist perfectionism. Similarly, as we saw in III, the principle of statist self-determination is grounded in an arbitrary priority of state's corporate rights over the trump rights of individuals.

The point is that public justification view fails as well to address these problems too, insofar as it fails to connect in a principled deontic way, a particular authority with a the specific group of bearers of this natural duty. Instead, it merely provides a conditional instrumental explanation. The deontic principled justification is required because according to Quong, political legitimacy should not be established by only the capacity of states to help citizens to better comply with the reasons that apply to them (Quong 2010: 126). That's why he insists that legitimacy is better understood through the idea of natural duty (Quong 2010: 127).

If we say that compliance is *necessary* because we all are under a duty to bring about justice and states are *necessary* means to achieve that, then a merely functionalist account of legitimacy is not enough to particularize our duties. For it is that necessity of the natural rights argument what the functionalist account misses. We must be able to show the same kind of necessity invoked by natural rights account when we attempt to specify and particularize our duties. Yet, in the face of the particularity problem, he is led to invoke precisely the instrumental account in order to explain particularity of duties.

Institutions which distribute resources, establish and protect property rights, and capture and punish rights violators require, in order to be *effective* exclusive jurisdiction over a given territory. Justice is very unlikely to be realized when there are competing institutions which issue different rules regarding property

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<sup>48</sup> This must include the territorial challenge. But I do not discuss territoriality until §§ 24 and 25.

rights or criminal law within the same territory. Justice is *more likely* to be established if, for a given area, there is a single legitimate authority with the power to protect and enforce people's rights and ensure a just distribution of resources and advantages (Quong.2010: 129-30, the emphasis is mine).

Similarly, Waldron invokes *de facto* legitimacy as the ultimate source of particularity and specificity. After stating the factual importance of having a salient dominant and unchallenged agent in order to specify jurisdictions and particularize our duties, Waldron asks himself if someone could still challenge whether an agent, just by means of being just, mighty and unchallenged could simply impose onto us obligations in a morally meaningful sense (Waldron 1993: 24-27). Waldron answers: "There comes a point when the theorist of natural duty must stop treating this question as an objection and simply insist that the answer is yes" (Waldron 1993: 27).

Whether or not Waldron is right about the rightfulness in the natural duty theorist regarding flipping the above question in this way, what remains is the fact that this answer does not seem to deal with particularity and specificity in a way that endows a conception of legitimacy with the theoretic tools to deal as well with the boundary problem.

For instance, it could be argued that an alternative interpretation of natural duty may require porous borders that allow people to subject themselves to the state that does a better job in providing the means that make possible to discharge our duties to promote justice. If I live in a verily legitimate state, I may be under a duty to subject myself to the state that does a better job administrating justice. But when Quong address this problem, he merely claims that opting out in order to discharge duties of justice in a different state could be too chaotic (Quong 2010: 129).

Quong simply assumes we should comply with particular states simply because we are all better off and our duties are better discharged if we just bring ourselves to accept that we owe obedience to the state we have been born into, as long as this state remains just. By having been born into one particular country we are better situated than anyone else to fulfil the duties of justice through this particular state and not through any other. So at the end, it seems that political obligation owed to a set of institutions is conditional to their performance as justice providers, our closeness to these institutions, and the chaos that a transition to other ways will generate.

But there is no obvious reason why we should all endure the problems of our barely just states; instead of aspiring to the great benefits of being subjected to the protection of a state like Canada or Sweden. So, even if what we have more reasons to do is to comply with

the state we find ourselves subjected by chance, this does not ground by itself a duty owed to that state in particular; nor does it ground control over territory without further argumentation.

The point is that accounts grounded in a justice-based account of legitimacy, such as the basic view and the public justification view, are not endowed to deal with the underdeterminacy problem and the boundary problem, because membership and borders are not problems of public justification and endorsement of a conception of distributive justice. And justice-based accounts lack a principled way to deal with particularity and specificity.

At this point, the defender of the justice-based account may say that still we are bounded by obligations by the mere fact of finding ourselves born in a particular society with specific obligations in the same way that we are bound to help when we find ourselves in an accident scene.

It is true that some accidents bind us morally; for instance, when we find ourselves in the event of saving some child from drowning in a pond. But, states are not this kind of accidents: even if states were sufficiently just, it is difficult to see the fact of born-based citizenship as the kind of accident that we have duties to act upon at a small cost to ourselves.

At this point, proponents of the conventional view may be reduced either to accept that their accounts provide only a conditional basis for control of borders that may be unable to ground the exclusionary rights they wish; or they may wish to accept that there is something odd with their conceptions of legitimacy, because they leave out of their own reach the very question they wanted to answer.

Summing up, the standard objection shows that the underdeterminacy problem is out of reach from the conventional view, but it does not explain why. I argued that the focus on the problems of endorsement and justification of coercion has framed the Anglo-American discussion about legitimacy into the smaller problem of public justification. But problems of public justification do not exhaust problems of legitimacy. It is possible that the conventional view is unable to tackle territorial jurisdiction of borders precisely because it's internally bound with a focus on justice. That's why I claim that the conventional view about borders is grounded in an ill-formed justice-based conception of legitimacy. The public justification view is appropriate for problems of endorsement and stability, but not for problems like underdeterminacy and boundaries. This explains why some accounts of legitimacy presuppose a constituency to whom public justification is addressed.

In contrast, I emphasise this: to face the boundary problem we need to challenge that assumption. We need to assess the justification of political power, including the kind of political power that borders exercises and not only the political power exercised by coercive institutions. This is the intuition behind legitimacy-oriented accounts. I hope that in the next section I can provide an account of legitimacy-oriented accounts that clarifies some of the concerns that this section may provoke.

**§18. Legitimacy-Oriented Accounts.** In the last section, I claimed that it is a misleading idea that legitimacy is only about the distribution of political power in the basic structure. Justice is a virtue of patterns of distribution; while legitimacy is a virtue of the exercise of political power. The imposition of distributive patterns is authoritative, but distributive justice does not exhaust all exercises of political power. Now, we turn to legitimacy-oriented accounts. In this section, I attempt a general description of legitimacy-oriented accounts. I will examine two recent accounts that fit this description. But I will reject them, because of their focus in coercion.

Legitimacy-oriented accounts acknowledge the importance of distributive claims for understanding the concept of democratic citizenship, but they understand that distributive relationships, however important they may be, are only one kind of exercise of political power. What characterizes legitimacy-oriented accounts of borders is that they begin with a strong presumption against the permissibility of political power. By invoking the legitimacy of the political arrangement as a whole, they hope to justify the control and administration of borders. Then they hope to use that justification to orient the discussion about what kind of administration liberal democracies ought to have.

Thus, the two accounts: the legitimacy-oriented account and the justice-based account simply begin in different places: Legitimacy in the first case is a political value independent from justice and a different problem from political obligation, because there are certain circumstances where authority is justified, even if there are no demands of distributive justice and even if people have no duty to comply.<sup>49</sup> In the second case what matters is to justify political obligations towards coercive institutions by placing a requirement of public justification on the permissible coercion coming from distributive basic institutions.

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<sup>49</sup> Consider the case of a just military occupation deposing an illegitimate oppressive regime. This military occupation may exercise legitimate authority, but the people may not have a duty towards the military command. Maybe they will be under a duty of non-interference, but this duty is not owed to the military command.

In the recent literature there are at least two important elaborations of legitimacy-oriented accounts. The first one focuses on democratic legitimacy and points towards multilateral control of borders (Abizadeh 2008 and Abizadeh 2012; Fine 2010). Borders are legitimate insofar as they give voice to the people they coerce, including would-be migrants. The second consist in a Kantian account of territorial rights (Stilz 2009; Ypi 2013). States may have legitimate control over territory as long as they discharge their duties to bring about justice in the world. This requires also the establishment of global just institutions. So, states may permissibly exercise territorial jurisdiction if this right can be assessed and grounded by the morally bounding interaction of the community of nations.

I argue that accounts of the first kind are inconclusive because of their focus on coercion, instead of taking into account the overall authority of the state. I leave aside accounts of the second kind because they are more about a project for the future of liberal democracies rather than an actual account of the legitimacy of borders in the here and now. Here I will focus on the first kind of legitimacy-oriented accounts. I will say some more about accounts of the second kind in part V.

Sarah Fine challenges the idea that democratic legitimacy has a necessary exclusionary logic based on a pre-political body of people (Fine 2011: 632). She believes that “the distinction between citizens and non-citizens is a matter of circumstance rather than a matter of right” (Fine 2011: 633). For liberal democracies, the limits of the scope of influence are not sharp and clear. As a result, liberal democracies govern people inside as they *govern* people outside.

Once liberal democracies govern beyond their boundaries, governed outsiders have a case for being included in the decision-making process that governs them in their relevant parts of life (Fine 2011: 633). If one accepts the idea that democratic government is governed by the people who are governed, it seems that also some non-residents, non-citizens who are somehow governed, are entitled to have a say (Fine 2011: 624). “The argument is not that everyone everywhere should be treated as a political equal by every political system; rather it is that those governed—in the relevant way— should be treated as such” (Fine 2011: 631). The problem arises when we ask, what does it mean to be governed in the relevant sense in order to show that effectively there is a subset of outsiders governed by a foreign state? But, Fine leaves this problem for a future work (Fine 2011: 637).

However, Abizadeh defines the relevant influence in terms of coercion (2008, 2012). Abizadeh explains it like this: He first notes that the establishment of boundaries is an exercise

of political power over both outsiders and insiders (2008, 2012).<sup>50</sup> According to Abizadeh, excluding immigrants is coercive because borders invade in a pervasive and significant way the autonomy of would-be migrants (Abizadeh 2008: 37). According to liberal and democratic principles, this kind of coercion must either be removed or justified. Democratic legitimacy is *coherent* only when it begins with an unbounded demos where all subjected to coercion are entitled to have a say in the decision-making process (Abizadeh 2012: 878). Democratic legitimacy requires a democratic justification of borders, because democratic principle of legitimacy establishes that political power is morally permissible insofar as it is in some sense authored by those over whom it is exercised. Thus, it seems that borders need to be democratically justified to the very same people they intend to exclude.<sup>51</sup>

Note that both Abizadeh and Fine impose a strong requirement of coherence: liberal democracies cannot coherently require as a matter of principle that political power is democratically legitimated inside, and at the same time exercise authoritarian unjustified power outwards against outsiders without jeopardizing the principled justification of political power as a whole.

Against this view, Blake (2008) maintains that overall immigration controls are not coercive (Blake 2003: 287): To insiders the state says: “Yes we coerce you, but we do so in accordance with principles you could not reasonably reject. To outsiders it says: we do not coerce you and, therefore, our principles of justice do not apply to you”. This, however, seems unsatisfactory because it constitutes an arbitrary compartmentalization of coercion’s scope.

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<sup>50</sup> Note that even open borders structure political jurisdictions thereby exercising power over both insiders and outsiders by establishing different jurisdictions, for instance, in the form of their exclusive forms (policies) of regulating property and transactions.

<sup>51</sup> According to Abizadeh, contemporary democratic theory is characterized by the underdeterminacy thesis. Recall that both liberal revisionists and conventional liberals try to determine the scope and the site of state’s institutions in an effort of fixing the boundary problem and, thus, supplement liberalism. Abizadeh explains the underdeterminacy thesis with what he calls the *bounded demos thesis*, which, according to him, democratic theory typically just assumes: The demos is necessarily bounded in principle as a condition for the democratic exercise of political power. Thus, the demos is prior to the exercise of political power and independent from individual will or consent. If this is the case, then democratic theory begins with the impossibility of democratically legitimizing particular boundaries. The bounded demos thesis could be supported as a conceptual or a metaphysical claim. As a conceptual claim it says that specification of a set of individuals is constitutive of democratic procedures. But, one thing is to say that the demos must be defined and quite another is to say that it must be defined in an exclusionary way. There is no conceptual incoherence in saying that the demos must include everyone who is subject to political power. On the other hand, as a metaphysical claim, it says that the demos is not only a collection of individuals, but it is also a collective entity or personality who is author of that power. In this case, the demos is supposed to be bound by necessity, because it is impossible that a set of individuals is able to produce the law without a peculiar and special bond among them. This interpretation is based on the assumption that the collective identity presupposes and external other. According to Abizadeh, this assumption is false. Individuals may need self-identification because their identity develops through relationships framed by mutual recognition, but this is not necessarily the case for collective agents.

Conditions in the international system may be such that liberal democracies, specially those affluent ones, exert powerful coercive influence beyond their borders.

Even if this is too controversial to be accepted, typically borders coerce both insiders and outsiders when the exercise of freedom of association across boundaries requires people to cross boundaries and even settle elsewhere. If I want to marry a willing partner from Senegal and borders forbid me to bring my partner here, borders coerce both my would-be partner and me. If I engage in a business with outsiders, our common affairs may surely require that I spend time where they are located and even settle. When borders ban this kind of exercise of freedom of movement and association, borders may be considered coercive.

Miller denies that outsiders are coerced. According to Miller typically a would-be migrant who is refused entry to a particular state still has a sufficiently wide range of valuable options to choose, including those opportunities available home. We must make two important distinctions. We can distinguish prevention and deterrence from coercion, and also actual coercion from hypothetical coercion (Miller 2010b: 112-116). Coercion is defined as forcing someone to do something, while deterrence is defined as forcing someone *not* to do something (Miller 2010b: 115). The distinction is clear but not sharp: as the set of valuable alternatives becomes smaller, deterrence becomes closer to coercion. Typically borders constitute a case of deterrence and not of coercion, because the autonomy of the rejected migrant is not always curtailed. Even if the would-be migrant is indeed coerced, this coercion remains hypothetical as those affected can always choose not to be subjected to that kind of coercion by selecting a different course of action (Miller 2010b: 117).

Abizadeh may be right to point out that Miller's account of coercion may be counterintuitive, because it seems to rule out even authoritative commands that are normally understood as coercive. Consider, for instance, criminal codes (Abizadeh 2010: 124). Most people would not choose to murder anyone; yet criminal law is coercive and punitive all the time, not only when I finally decide to undertake the murder of my supervisor. So, Miller's account has the unpalatable implication that a vast range of rules that impose negative obligations may be exempt from democratic justification (Abizadeh 2010: 125). This does not necessarily entail that legitimate borders imply democratic participation of would-be migrants.

If instead we admit that borders may be somehow coercive, this still leaves open the possibility that the kind of coercion borders impose is not the one that requires democratic justification. Not all requirements of justification demand democratic justification and

presumably there are certain kinds of coercion that do not necessarily require democratic justification.

Yet, from the fact that borders may be coercive we cannot straightforwardly infer that conceptions of legitimacy are incoherent, as Abizadeh seems to suggest. Abizadeh may be right when he says, "...the constitution, regulation, and coercive and symbolic enforcement of boundaries compose one of the most important ways in which political power is exercised over human beings" (Abizadeh 2012: 876). But to assume that the kind of political power that borders exercise is coercive in a sense that makes democratic legitimacy incoherent with itself, is too quick. The fact that borders exercise political power over outsiders does not imply that this power is coercive and even if it is, it may not be coercion by itself what raises demands of governmental legitimacy.

It is not clear how coercion by itself, even if is systematic and pervasive, can necessarily trigger demands of democratic self-ruling. I cannot include an account of coercion here; but following Nozick, (1975) I assume that a coercive act must include a credible threat of very bad consequences. Typically, tax payment and criminal law are coercive. Of course, the problem of what constitutes coercion in the relevant sense is highly controversial.

A broad consensus has been reached around the idea that a single action of coercion is not enough to trigger demands of self-rule and distributive justice (Blake 2001; Nagel 2005; Cohen & Sabel 2006; Julius 2003). The idea is that the kind of political obligations involved with coercion are grounded on relevant features of a set of social relationships engaged in mutual coercion, social cooperation and provision of collective goods (Sangiovanni 2012). It is necessary to be involuntarily subjected to a body of institutional coercion, such as a system of comprehensive societal norms, in order to give rise to certain relationships, such as the one established by citizenship. Crucially, democratic justification is demanded by political power to design the core institutions that pervasively regulate most aspects of shared lives and the establishment of constitutional essentials that regulate the institutional arrangement.

As indicated above, with the case of marriage between a man and a woman, coercion is not the only way that states exercise political power. States are also engaged in the establishment of a complex net of societal un-coercive norms that exerts powerful influence over the architecture of our choices.<sup>52</sup> So, democratic justification is not required by a single isolated act of coercion; it is rather required by the systematic exercise of state's overall

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<sup>52</sup> Compare it with the case of nationalism as discussed in III. If nationalists were right and states participate in the individual identity formation process, then someone could say that the kind of political power that states exercise the most is eminently non-coercive insofar as it affects our lives in a more pervasive way forming our identities, making us want (or reject) certain things; than by coercing us by making us do (or refrain from doing) certain things.

authority, including, but not limited to, its coercive apparatus. It is the overall authority of the state that raises such demands even if it has a mild or non-coercive force.<sup>53</sup>

The centrality of coercion in the justificatory work of democratic legitimacy is thus challenged. It is not clear that the kind of coercion exercised over would-be migrants is relevant to raise demands of democratic participation, as Fine and Abizadeh seem to suggest. Furthermore it is not clear that coercion is relevant at all. Andrea Sangiovanni (2012), for instance, questions the relevance of coercion as a whole. Coercion is certainly a good way to ensure compliance with distributive obligations, but the fact that we are coerced does not by itself grounds a case for the justification of distributive institutions (Sangiovanni 2012: 83).

Despite coercion playing a strong role in states' historical past, and continuing to play a great role today, it may be the case that states of the future may want to rely less on their coercive power and more on other conditions of legitimacy. Should we conclude from this that the challenge set by Abizadeh and Fine is misleading and as a result my objection to justice-based accounts of legitimacy of borders is in jeopardy too? After all, if democratic legitimacy is not incoherent for compartmentalizing legitimacy inwards by limiting the scope of claims of justification to those with distributive demands of justice, then liberal democracies may be allowed to use anaemic accounts of legitimacy outwards to deal with would-be migrants and disregard their interests and claims of fairness.

While I believe that Abizadeh and Fine are too quick at arriving at the conclusion of the incoherence of democratic legitimacy, I still maintain that liberal democracies cannot compartmentalise their moral and political requirements in the arbitrary way that the conventional view seems to suggest. I endorse the idea that legitimacy must be coherent inside and outside, but demands of coherence focused on coercion do not seem enough to ensure the inclusion of the interests of would-be migrants with regards to the assessment of legitimacy. Instead, I believe that legitimacy must be understood as including a *continuity requirement* that includes borders in the assessment of legitimacy by rejecting the compartmentalization of legitimacy to the internal exercise of political power.

Borders may or may not be coercive against outsiders in the relevant sense; but borders are the result of political power and exercise political power too. Particularly, borders

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<sup>53</sup> It seems that pace Rawls, we may distinguish between political power, coercion and authority. Political power is the capacity to influence the behaviour of those in the polity, for instance, when institutions give those subjected to them reasons for action. Coercion is the political use of state's power to assure compliance and cooperation by means of convincing threats. Thus, to coerce someone is a kind of exercise of political power, although not all political power is coercive. Authority is the property of political power that makes its commands susceptible to being obeyed. Thus, authority is the property that connects legitimacy with political obligation. For the case of liberal democracies, according to its moral character, political power may have authority when it is legitimate.

exercise authority over outsiders when they have demands to be pressed against insiders and they exercise authority against insiders when they have demands that could be only satisfied by the temporal or permanent presence of outsiders within the territory.

If borders exercise institutional authority, they should be shaped by the same principles and practices that shape political authority as a whole. In other words, a *continuous account of legitimacy* must be able to include the kind of political power that borders exercise. This indicates that the incoherence suggested by Fine and Abizadeh does not consist in allowing participation of insiders and at the same time denying it to a set of affected outsiders. The incoherence comes from allowing a set of principles and practices to ground the overall authority of the state and at the same time to alienate a parcel of this authority, to be exercised in a way that could only be understood as a denial of the very same principles and practices that ground the political arrangement as a whole.

Fine and Abizadeh's ideas fit the description of legitimacy-based accounts, because they focus in democratic legitimacy instead of approaching the boundary problem in distributive terms. And they use this conception of legitimacy to ground a case of fair terms and conditions for the relationships between insiders and outsiders. But their focus in coercion is misleading, because borders do not coerce outsiders in the relevant sense that could trigger demands for democratic legitimacy.

Still, they seem right in claiming that coherence matters so that liberal democracies should not be able to compartmentalize their legitimacy inside in a way that allows them to exercise political power outside, which cannot be subjected to the moral assessment of the inner moral frame. But in order to accept this idea, demands of coherence are not enough. We need to find a more complex account of legitimacy with a bigger scope. This is the leading topic of the next section.

**§19. Legitimacy as Integrity.** I hope I have shown that justice-based accounts and legitimacy-oriented accounts focused on a distributive case of coercion places the boundary problem out of reach of its own account of legitimacy. This, however, begs the question: What account of legitimacy of political power and authority —if any— encompasses the boundary problem?

There are several accounts of legitimacy with different requirements about what constitutes a legitimate exercise of political power (Christano 2006).<sup>54</sup> Here I do not attempt to

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<sup>54</sup> Crucially, not all formulations of legitimacy and political obligation, not even ones worked out from dignity and associative obligations, can escape the universality challenge: that is, the problem of extracting allegiance and

endorse a single account or conception of legitimacy by providing conclusive arguments in its favour. Instead, I focus on the central organizing idea of this work: the moral character of liberal democracies and the concept of legitimacy it produces. In this section, I try to figure out how the moral character of liberal democracies may furnish the relationship between political power, legitimacy, authority and political obligation in a way that could reach the boundary problem. I argue that the conception of *legitimacy as integrity* explains how political power exercised by borders may be assessed from the point of view of legitimacy.

*Integrity*, Dworkin claims, “[...] requires government to speak with one voice, to act in a principled and coherent manner towards all its citizens, to extend to everyone the same substantive standards of justice or fairness it uses for some” (1986: 165). The hope is to show that legitimacy as integrity establishes a division of labour between different moral standards and conceptions of legitimacy that may be able to reach borders.

I believe that a good way to order and explain these basic principles, conceptions and standards of the moral character is the *concept of dignity*. Dignity seeks to establish that the exercise of political power and the submission to that power respects the equal objective importance of everyone’s life. The *concept of legitimacy as dignity* requires that the political arrangement finds a way to order our social life without jeopardizing the dignity of all.

Societies and associations may set thinner conceptions of legitimacy that are conditional to the attainment of some defined goals, such as the protection of human rights or the cultivation of certain forms of culture. But, liberal democracies with moral character must hope for more: they must try to reconcile *in principle* the dignity of everyone with both the exercise of governmental ruling and the duty of obedience owed to authoritative commands.<sup>55</sup>

It is important to note that a moral concept like dignity is not defined as a set of conditions or a fixed list of traits. According to Dworkin, moral concepts like dignity are *interpretative* in nature. We are bound to seek meaning in the otherwise contradictory and chaotic paraphernalia of values, principles, policies, rules, laws, institutions, roles, obligations, and practices (Dworkin 2011: 101, 134). As such, dignity has an ethical dimension related to

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obligation even to those subjected who rejected their membership to a political community or even any form of governmental authority.

<sup>55</sup> Domination is a form of harm that threatens dignity, but a legitimate government avoids domination when it establishes the conditions that enable institutions to treat everyone with equal concern. This entails that institutions refrain from granting superior importance to any group or individual over the life of anyone in particular. It also means that institutions respect the responsibility that each of us has towards our own lives (Dworkin 2011: 322). Crucially, understanding dignity through equal concern and responsibility entails that those governed should have an equal voice in collective decisions making. When a set of people participates as free and equal members they in turn can treat the authoritative commands as the result of a process where everyone has an equal stake and voice. In this way members of the political community are able to put up with their duties without losing their dignity.

concepts like authenticity and responsibility (Dworkin 2011: 300). Here, though, I focus on its political dimension.

The interpretative political dimension of dignity is explained with the conception of *integrity*. So, dignity does not only require that institutions respect the equal importance of everyone, but also requires from us to work out an interpretation of our otherwise un-reflected moral convictions, all in light of the rest. Thus, interpretation knits values together in a way that institutions become morally responsible for the degree of integrity that our interpretations are capable to achieve in a network of values each can embrace authentically (Dworkin 2010: 99).<sup>56</sup>

According to its moral character, defined through the conception of dignity, a liberal democracy is legitimate when its political arrangement holds structural *integrity*; that is, when institutions and laws *are shown* to pursue together respect of the equal, objective importance of the lives of everyone (Dworkin 2011: 312-15). Recall that legitimacy begins with a presumption against political power that could be defeated. The presumption is defeated by the practical assumption that we all need order and efficiency that is provided by governmental structure in order to flourish and realize our diverse conceptions of the good.

But, this account recognizes that anarchy is not the only threat to dignity. When government is not legitimate, it may threaten dignity as well (Dworkin 2011: 317). Legitimacy as integrity explains under what conditions the exercise of political power may be compatible with dignity. Integrity performs this job by assessing in an interpretative fashion our political values, concepts, conceptions, principles, laws, norms and practices in light of that moral principle. Integrity means that the political arrangement as a whole, including but not limited to its coercive apparatus, must reflect the best, reasonable objective way of protecting one's dignity.

This account allows us to answer an important question. I rejected justice-based accounts of legitimacy because of their focus on justice only. But this begs the question: When legitimacy is not only about justice, what is it about? Now we can see that it is about integrity

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<sup>56</sup> The ethical dimension of dignity, though controversial for its perfectionist temptations, need not concern us now because these conceptions may be worked out for politics in a less thick way. We do not need to endorse Dworkin's aim of theoretical unification between ethics and politics in the realm of values. So in what follows, we should contain the meaning of dignity to equal importance of everyone's life and the responsibility that each one has for his own life. Similarly, interpretation and integrity can be stripped from their ethical role in securing authenticity and personal responsibility, and let them be worked out as epistemological concepts in law and politics. Although I am aware that this move does not really conjure critics coming from political liberalism. Particularly, it is not always clear how this kind of account can be substantive and at the same time plausibly compatible with pluralism in a stable way. Yet, I imagine that political versions of these concepts could be developed, despite the fact that I do not address the problem here. For discussion about political liberalism and perfectionism, see (Wenar 1995; Kelly E. & McPherson, L. 2001; Quong 2010).

(Dworkin 1986: 216). I call this view *the conception of legitimacy as integrity*. This political conception explains then the general concept of legitimacy as dignity.

Note that integrity is not mere consistency or coherence as Fine and Abizadeh required. Consistency demands one to continue with past decisions according to formerly elected standards (Dworkin 1986: 221). Integrity is a more dynamic and radical standard, because it demands imaginative interpretation of how our moral and political principles, such as justice, fairness, due process, efficiency, stability, fit with each other in light of dignity.

This is not to deny that justice and coherence have a paramount role in legitimacy. Instead, it allows legitimacy to approach different kinds of political power from the point of view of distinct values and standards. That's why, I believe, integrity is the best conception to make sense of Abizadeh and Fine's requirement of continuity and coherence that inhibits the compartmentalization of borders (as indicated in the last section).

Perhaps a way to picture the relationship between justice and integrity is to think about Rawls's idea of the division of labour between conceptions of justice. According to him, distributive justice is merely one case of justice among others (Rawls 2001b: 10-11). The different conceptions of justice function on the basis of a division of labour with the common aim of preserving justice in a broader sense established by the general concept of justice.

The intuition is that it is not possible to know much about the overall result of implementing our proposed conception of distributive justice until legitimacy assesses how it fits with the taxation system, the property system, the pension system, etc. (Waldron 1993: 24). It also seems necessary to know how it fits with the various authoritative non-coercive structures, such as civil union rules, the education system, the public ethos, the public political culture, etc. This job can only be performed by a conception of legitimacy that plays an interpretative role between the conceptions of other different political values and their principles.

A potential objector may say that the difference between justice and legitimacy is only apparent, and insist that justice is the main virtue of social institutions. The apparent difference only occurs because legitimacy is really about the division of labour of justice. Recall that Rawls says that, "Justice is the first virtue of social institutions, as truth is of system of thought. A theory however elegant and economical must be rejected if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust." (Rawls 2001:3).

The analogy is misleading. Even before we can consider whether an institution is efficient, effective or just, it should be legitimate; that is, it must be justified to wield authority in order to maintain institutional domain over those subjected to it. Likewise, even before we consider a theory to be elegant, economical or truthful, we must consider whether it is coherent and consistent with itself, how well it expresses its own core claims and how it fits with the rest of what we already think is true. In the same vein, legitimacy as integrity may require a division of labour of different standards like justice, fairness, efficiency, stability, due process, under the light of a basic moral principle like dignity. Justice as integrity uses these different stands to assess our principles and practices in order to know how well they express the core value of dignity. I call this *the division of labour of legitimacy as integrity*.

This view is attractive for two reasons. First, it may avoid a reductionism charge by integrating distinct approaches of political theory into the division of labour. For instance, some forms of political power are better approached as problems of public justification, such as those that arise by pluralism. Other problems are sufficiently dealt with by democratic legitimacy, such as those that arise by the provision of public goods. At other times, hypothetical consent is enough to address difficulties of coordination. Under legitimacy as integrity there are no competing political virtues as Valentini objected (Valentini 2012: 597). Legitimacy as integrity appropriately employs different standards to define what it means to protect dignity while exercising political power in different areas of public life.

All these accounts of legitimacy solve some problems, but they are inconclusive by themselves because they fail to approach all forms of political power and all forms of relationship between authority and those subjected to this authority. When they work together and circumscribe appropriately the problem they address, these different partial accounts of legitimacy, and the standards they use, perform a justification of power as a whole.

Second, legitimacy as integrity has the potential to avoid compartmentalization. As indicated in the last section, Fine and Abizadeh hoped to take the interest of outsiders into account by employing a conception of democratic legitimacy. They failed because this conception is largely focused on certain kinds of coercion and influence exerted only in the kind of societal relationships established inside a liberal democracy. Legitimacy as integrity is not limited in this way, because it potentially can employ conceptions of international legitimacy that could reach the interest of outsiders or it can find or even elaborate an appropriate conception of legitimacy for borders and would-be migrants.

This is all highly speculative, so the natural objection is to say that conditions of legitimacy as integrity only obtain for securing the dignity of members, citizens, insiders, or those coerced by the societal relationships established by the state. But, I suspect this is misleading too. While justice and procedural democracy are bounded conceptions in the sense that they apply to the political arrangement and its practices, dignity is a moral conception, not a status.

Dignity is not something one gains in virtue of participating in specified relationships, such as parenthood or citizenship. Nationalist legitimacy and democratic legitimacy both begin with a pre-political bounded demos or cultural community that explains why equality and justice should apply to this group and not to any other. As justice-based accounts have shown, claims of justice arise as a result of certain relationships, such as being coerced in a certain way by certain basic parts of the political arrangement. In contrast, dignity is an unbounded conception. Beginning with a strong presumption against political power means that we do not begin with a pre-political bounded conception that could ground legitimacy. Or rather it begins with an unbounded demos composed by the kind of human whom conditions of dignity obtain.

This is not to say that dignity is independent from social relationships or institutions. On the contrary, as indicated above, the protection of dignity necessitates establishing morally binding institutions, because it is assumed that they are necessary for the realization of human conceptions of the good. The protection of dignity might require the establishment of legitimate units of distributive justice. This does not mean that dignity only make sense as a member of these communities. If at all, it means the opposite: that the existence of a system of sovereign states makes sense only insofar as they are needed for the protection and development of dignity of all.

Now, a symmetric objection can be formulated challenging the scope of integrity. As there are any basic institutions truly global in scope, it's difficult to see in what sense integrity could be an unbounded conception. This seems correct. The plurality of sovereign states, and the different sets of treaties, covenants and regional institutions that form the world order that we now know, cannot be seen as one single political arrangement ruling over one community and commanding parliaments of all nations; so we cannot expect the globe to speak with one voice. We need to tailor institutions that express the protection of basic moral values.

The scope of integrity is certainly not global, but that does not mean that integrity is limited by political boundaries. As noted by Abizadeh and Fine, borders are institutions characterized by having a broader scope than other basic institutions. That is why borders subject states and individuals to some kind of political power. In the same way, the scope of integrity is larger than the scope of other political virtues like justice. Thus, integrity covers the exercises of political power that goes beyond the borders of a political state.

The scope of integrity lies at the heart of a larger controversy: the overall plausibility of international law. Ronald Dworkin devoted his last (posthumous) paper to this problem (2013). Dworkin reacts to the scepticism about the deontic grounding of international law. Since there is no global sovereign, it follows that there is no international law. What we call international law might be only common practices that no state is really bound to practice. This will certainly be the case if all our institutions with moral character were constrained in a way that coincides with political boundaries. But this is not true.

The possibility that these international affairs could express the inner moral character of liberal democracies relies in legitimacy as integrity. This explains why liberal democracies feel drawn to accommodate their constitutional arrangements according to the international treaties and covenants they sign and why they are also drawn to, “notice and attempt to achieve some integrity with the constitutional principles of other nations” (Dworkin 2013: 21).

If we do not recognize the larger continuous international scope of integrity and its role in defining legitimacy, it will be difficult to explain how liberal democracies fail in their responsibilities towards their own citizens when they sign treaties that subject their citizens to wrongful or unreasonable demands. To see this, suppose that we remain sceptical about the moral ground of international law. Now consider the case of forcible annexation. Most of the explanations of why wrongful annexation could be wrong are focused on the principle of political self-determination (see part III). This kind of arguments shows why, all things considered, it is wrong *for them* that some state disrespects the annexed as a group. But, it does not show why it is impermissible for us. Integrity as a way of understanding legitimacy helps to explain why.

When any state becomes engaged in exercises of political power abroad, such as the power needed for forcible annexation, it not only wrongs members of the annexed state by means of bending their political self-determination. It also wrongs its own members by engaging in activities that diminish the effectiveness of the international order to prevent injustices. To the extent that a state fails to fulfil its requisite functions if it cannot protect

citizens from foreign invasion, a state that contributes to weaken the international system that could prevent such wrongs, like unjust wars and forcible annexations, fails its responsibilities to its own citizens in the same way.<sup>57</sup>

Regardless of the scepticism about the normative nature of international order, the fact is that international cooperation is essential to prevent many forms of harm, including financial crisis, organized crime, medical or environmental disasters. When a state engages in international practices that weaken the possibility of this kind of cooperation, it fails to fulfil the requisite functions that ground its legitimacy with regards its own members. I believe that this conception of legitimacy is fit to reach the underdeterminacy problem and the boundary problem. The hope is to show that it is not only border policy that may harm would-be migrants, but it is also unfair border policies that jeopardizes the legitimacy of the political arrangement as a whole.

A potential critic may accept the requirement of no compartmentalization of legitimacy, but insist that legitimacy need not be symmetrical. For instance, *internally* liberal democracies may invoke thicker conceptions of legitimacy, like those with stringent demands of distributive justice according to the density of the welfare system they think appropriate or just. But, *externally* it may be enough to apply thinner conceptions of legitimacy with minimal moral requirements, like those that only require the protection of human rights, according to the precarious normative development of the international system.

Given that in the international arena there is no salient authoritative agent, like in the state (Nagel 2005), then it makes sense that *externally* liberal democracies invoke a *thinner* conception of legitimacy that is substantive enough to demand only non-interference from outsiders. If this is the case, then the continuity requirement is misleading because given the moral minimalism established now within the international arena, it is permissible to wield political power within a simple moral framework. In the domestic case, stringent requirements of legitimacy obtain, because members are engaged in complex societal relationships that can support this complex normative structure. But in the international case, the relationships are less complex, so less demanding moral requirements obtain.

In the last section, we saw that Arash Abizadeh (2008; 2010; 2012) and Sarah Fine (2011) challenge this objection. According to them, liberal democracies cannot coherently compartmentalize their principles inside and pretend to fulfil them regardless of their practices

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<sup>57</sup> See Dworkin 2013:17-19.

abroad. Either liberal democracies act in a principled way according to their own standards or simply admit that the ground of their authoritative command is merely conditional.

However, we saw that Abizadeh's focus on democratic legitimacy and coercion is misleading, because borders do not seem to exert the kind of coercion that triggers democratic participation as an appropriate justification. Legitimacy as integrity can support Abizadeh and Fine's claim of non-compartmentalization, but not for the reasons they hoped. Regardless of the moral status of the international realm, borders are subjects of moral assessment with the same standards as the rest of institutions of the state. Note that we focus on political power rather than on coercion. This is because legitimacy as integrity must be interested as well in the permissibility and justification of the political arrangement as a whole. Focusing on political power prevents an account of legitimacy from missing any of the authoritative acts of government. Crucially, this includes the authority of borders, including the kind of political power and even coercion that borders could exercise.

If dignity is the right way to understand the moral character of liberal democracies and if this moral character furnishes the conception of legitimacy as integrity as appropriate for liberal democracies, then it seems that compartmentalization is ruled out by integrity. Legitimate government is the one that does a good job at protecting the dignity of everyone. And integrity assesses how the rest of political virtues, like justice, fairness, efficiency, publicity, legitimacy, etc, explain in different areas what it means to do a good job protecting dignity.

Borders may not be coercive in the relevant sense, but borders are the result of an exercise of political power; and as such, they are subjected to the same account of legitimacy as the rest of institutions. At the same time, borders may not exercise the kind of political power over outsiders that trigger claims of democratic justifications, but borders do exercise political power over outsiders and insiders. As borders are a result of the whole political arrangement, they are bound to exercise political power in a permissible way.

When borders fail to protect the dignity of outsiders it not only harms outsiders, but also jeopardizes the internal legitimacy, harming, as a result, the dignity of insiders too. There is nothing in the exercise of political power that permits that some parts of borders could be assessed with less stringent moral requirements than the rest. So, liberal democracies cannot exercise political power in a way that can only be understood as a flat denial of the principles that ground political power as a whole. I call this *the principle of integrity*.

This, however, is too quick because it is not clear what it means for a liberal democracy to protect the dignity of outsiders in a way that preserves continuity. Also, it is not clear how a liberal democracy can preserve continuity when not every country has a moral character. I will make a quick summary of the argument in this part and address the first problem. I will leave the second problem for part V.

**§20. Continuous Legitimacy and Legitimate Borders.** Previously I established that the underdeterminacy problem explains that theories of justice presuppose a given constituency. The standard objection shows that the conventional view fails to supplement liberalism regarding the underdeterminacy problem and ends up presupposing a given pre-political constituency or a political association. Nationalism and statism articulate principles of political self-determination to specify the institutions that apply to us and to particularize our duties; but they do it at the cost of losing liberal appeal.

Recall that the standard objection shows that the underdeterminacy problem is out of reach from the conventional view, but it does not explain why. In this part, I offered an explanation. In this part, I argue that the conventional view about borders, including its further developments into nationalism and statism, are structurally unfit to supplement liberalism, because they are grounded in justice-based accounts.

In order to show this, I started by invoking the basic view of legitimacy, which understands legitimacy as justice (Walzer 1980; Waldron 1993; Valentini 2012). I rejected the basic view because it is grounded in an oversimplified normative framework that makes it really hard to explain why some unjust exercises of political power are legitimate, whereas other unjust exercises of political power are illegitimate.

Legitimacy must be broader than justice in some sense, but its scope is not clear. The public justification view, for instance, believes that legitimacy is broader than justice, but only insofar as it permits public deliberation about distinct conceptions of justice; but at the end, it is always about justice (Quong 2010). The public justification view is inadequate to address specificity and particularity. It is not endowed to fully address the boundary problem, because accounts of borders grounded on the public justification view seem bounded by their own structure to presuppose precisely what is being questioned. Namely, the jurisdictional control over territory and borders, because they cannot address the previous question of why this particular state is under the position of hoping for public justification in the first place.

Justice-based accounts of legitimacy, such as the basic view and the public justification view, are not endowed to deal with the underdeterminacy problem and the boundary problem, because membership and borders are not problems of public justification and endorsement of a conception of distributive justice. I argued that the focus on the problems of endorsement and justification of coercion has framed the Anglo-American discussion about legitimacy into the smaller problem of public justification. But, problems of public justification do not exhaust problems of legitimacy.

It is possible that the conventional view is unable to tackle territorial jurisdiction of borders precisely because it's internally bound with a focus on justice. That's why I claimed that the conventional view about borders is grounded on an ill-formed justice-based conception of legitimacy. Public justification view is appropriated for problems of endorsement and stability, but not for problems like underdeterminacy and boundaries. This explains to a certain extent why some accounts of legitimacy presuppose a constituency to whom public justification is addressed.

The idea that legitimacy is only about the distribution of political power in the basic structure is misleading. Justice is a virtue of patterns of distribution, while legitimacy is a virtue of the exercise of political power. Of course, the imposition of distributive patterns is authoritative; but distributive justice does not exhaust all exercises of political power.

I believe that the conventional view is bound to find territory and borders out of the scope of its normative structure, because of the account of legitimacy that lies at its core; that is, because of its focus on coercion and justice, the conventional view cannot approach the boundary problem. At the same time, I suspect that the moral character of liberal democracies rules out the kind of exclusion that the conventional view hopes to ground, because the moral character subjects authority to further moral requirements than the mere protection of basic state political rights and the mere implementation of procedural majoritarianism in favour of national majorities.

I believe that in order to assess the boundary problem we need to challenge justice-based accounts so we can tackle the justification of political power, including the kind of political power that borders exercise and not only the political power exercised by coercive institutions. Once we see borders as basic institutions that exercise political power, it becomes clear that these institutions should be legitimate and sensitive to claims of fairness. This is the intuition behind legitimacy-oriented accounts.

Legitimacy-oriented accounts of borders begin with a strong presumption against the permissibility of political power. By invoking the legitimacy of the political arrangement as a whole, they hope to justify the control and administration of borders. One example of this account is the one articulated by Abizadeh. He focuses on democratic legitimacy and points towards multilateral control of borders (Abizadeh 2008; 2012). Borders are legitimate insofar as they give voice to the people they coerce, including would-be migrants. Liberal-democracies refrain from taking into account the voice of coerced would-be migrants at the cost of rendering democracy theory incoherent.

Yet, from the fact that borders may be coercive we cannot straightforwardly infer that conceptions of legitimacy are incoherent, as Abizadeh seems to suggest. To assume that the kind of political power that borders exercise is coercive in a sense that makes democratic legitimacy incoherent with itself is too quick of a judgment. A broad consensus has been reached around the idea that a single action of coercion is not enough to trigger demands of self-rule and distributive justice (Blake 2001; Nagel 2005; Cohen & Sabel 2006; Julius 2003).

I maintain that liberal democracies cannot compartmentalise their moral and political requirements in the arbitrary way that the conventional view seems to suggest. Demands of coherence focused on coercion do not seem enough to ensure the inclusion of the interest of would-be migrants to the assessment of legitimacy. Legitimacy must be understood as including a *continuity requirement* that includes borders in the assessment of legitimacy by rejecting the compartmentalization of legitimacy to the internal exercise of political power.

I have used the central organizing idea of the moral character of liberal democracies to explain how a suitable account of legitimacy could engage with the continuity requirement. I argued that when legitimacy is not about justice it is about integrity. Integrity, Dworkin claims, “requires government to speak with one voice, to act in a principled and coherent manner towards all its citizens, to extend to everyone the same substantive standards of justice or fairness it uses for some” (1986: 165).

I argued that the conception of legitimacy as integrity explains how the political power exercised by borders may be assessed from the point of view of legitimacy. I understand *the general problem of legitimacy* framed with the moral character of liberal democracies as finding out what kind of political arrangement can order our social life without jeopardizing the dignity of all. Dignity is a formulation of the moral value of equal concern, as it seeks to establish that the exercise of political power and the submission to that power respects the equal objective importance of everyone’s life.

Integrity is a more dynamic and radical standard, because it demands imaginative interpretation of how our moral and political principles, such as justice, fairness, due process, efficiency and stability, fit with each other in light of dignity. Legitimacy as integrity may require a division of labour of these different standards. Legitimacy as integrity uses these different stands to assess our principles and practices in order to know how well they express the core value of dignity. I call this *the division of labour of legitimacy as integrity*.

The division of labour is important, because it endows legitimacy to reach borders. Legitimacy as integrity employs different standards appropriately to define what it means to protect dignity in the exercise of political power in a determinate area of public life. Thus, legitimacy as integrity is attractive for at least two reasons. First, it may avoid a reductionism charge by integrating distinct approaches of political theory into the division of labour. Second, legitimacy as integrity has the potential to avoid compartmentalization, focusing on political power rather than in coercion. This is because legitimacy as integrity must be interested as well in the permissibility and justification of the political arrangement as a whole.

Focusing on political power prevents the account of legitimacy of missing any of the authoritative acts of government. Crucially, this includes the authority of borders, including the kind of political power and even coercion that borders could exercise. There is nothing in the exercise of political power that permits that some parts of it could be assessed with less stringent moral requirements than the rest. So, liberal democracies cannot exercise political power in a way that can only be understood as a flat denial of the principles that ground political power as a whole. I call this *the principle of integrity*.

Legitimacy as integrity defines legitimate borders as those grounded on the protection of dignity. One obvious problem arises from this account. Dignity is an unbounded conception: having dignity does not rely on the participation to any relationship. So the protection of members' dignity has no evident priority over the dignity of outsiders. It is not clear, then, how dignity requires the existence of borders; but at the same time, the dignity of members does not have the kind of priority that grounds special ties or duties among members. This is *the dilemma of the authority of borders*.

On one hand, as indicated in the last section, borders are necessary for the protection of the dignity of insiders. On the other hand, borders may threaten the dignity of outsiders by limiting important basic rights, like freedom of association or freedom of movement. Conventional conceptions of legitimacy do not face this problem, because, as we saw, the scope of coercive institutions is stipulated to coincide with those subjected to them, so the

justification is always required and is addressed to members that are coerced. This kind of stipulation has been ruled out, because, as discussed previously, not all exercises of political power are coercive and the scope of some institutions is larger than the basic structure.

So now, we are left with the problem of identifying what kind of justification is required for institutions, such as borders, that have a larger scope and that subject non-members to their forms of political power. Recall that democratic legitimacy is not appropriate for this job, because as indicated previously, the kind of political power that borders exercise is not enough to trigger demands of self-rule.

The hope is that the division of labour has the potential to deal with this problem. It seems to me that a conception of continuous legitimacy as integrity needs to be fleshed out. I shall argue that non-compartmentalization entails a *continuous account of legitimacy*. Continuity has the potential to explain how borders can be established without jeopardizing the dignity of outsiders and how borders may be able to command authority from outsiders by requiring them not to trespass or at least not to interfere with its commands. A continuous account of legitimacy does not focus on the moral permissibility of specific borders, instead it assess the moral permissibility of the system of states as a whole.

With this idea in mind, we now face the dilemma of the authority of borders: borders are necessary for the protection of dignity and at the same time they may threaten dignity. The first horn of the dilemma is partially addressed by the discussion in the previous section. Insofar as borders are considered necessary features of the state, borders are necessary for the protection of the dignity of insiders. However, when we consider the argument of dignity as general in scope, an important question is presented: What does it mean for a liberal democracy to protect the dignity of non-members? What does it mean for a liberal democracy to protect the dignity of non-members?

It is argued that political power is necessary to protect dignity, but at the same time we are required to control political power because its exercise may threaten dignity too. Similarly, borders are necessary for the protection of dignity, but the exercise of border authority may threaten dignity too. For liberal democracies, it is not enough to think that overall political power and borders enforcement protect dignity. According to their moral character, liberal democracies are bound to question what kind of borders protect dignity in a way appropriate to their values, principles and best practices. This is the requirement that integrity faces regarding border control or what I have called the continuity requirement.

I believe the dilemma could disappear if we specify the scope of the dignity argument. Arguments of legitimacy begin asking in *general* for the permissibility of coercion or political power. But, the scope of this question is normally defined by the state and its boundaries, and the site is circumscribed to the basic structure of the society.<sup>58</sup> This is the case especially for justice-based accounts.

Note that justice-based accounts move inadvertently from a general query about the general permissibility of political power to a particular claim for the permissibility of political power or coercion as exercised by specific institutions. Yet, the mere role in advancing moral values like justice or dignity is not enough to ground legitimate authority to specific institutions. This is the worry that the specificity objection presents (Quong 2010: 110). The mere collaboration on the advancement of justice or dignity fails to single out who the legitimate authority is, from a set of similarly just states that protect dignity.

This is mostly taken as a flaw of accounts of legitimate authority, but I believe the problem resides not in the account but in the move. The problem is to expect specificity from these accounts, instead of simply acknowledging their general scope. Instead, I believe that general accounts about what kind of coercion and political power is permissible can only deliver general justifications without specificity and particularity.

We are wrong to expect specificity and particularity from these justifications. Consider an alternative way of telling the story: legitimacy as integrity may be addressed to justify *first* the *general* permissibility of states and the political power they exercise. Put it in another way, dignity may ground first the existence of a *system of states* that protect dignity. In this way, we can make sense of the kind of dominion that states in general claim over the globe as a whole.

A legitimate state is, thus, one that belongs to a system of states aiming at the protection of human dignity. What the general argument supports is not the establishment of one single state, but plainly the establishment of *states* in general. And similarly, the general argument does not justify the existence of a single set of boundaries, but the erection of a system of *boundaries*.

Once the argument of dignity is redirected to the ground of a system of border institutions, the dilemma is now framed into different questions. A liberal democracy must describe what it means to protect the dignity of everyone in general. It also must describe what it means for a liberal democracy to make a contribution in the general enterprise of dignity by focusing on the protection of the dignity of members.

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<sup>58</sup> Compare Abizadeh 2007.

Borders should respect the dignity of insiders by acknowledging that borders are institutions subjected to democratic rule and participation. Borders should respect the dignity of outsiders in a way that preserves the continuity of the scope of legitimacy as integrity. As liberal democracies have moral standing, they establish morally meaningful relationships with both insiders and outsiders. This means that they establish relations with people, organizations, big corporations or other states that have moral character. But, continuity has a limit: not all states in the international realm are communities of principle. So, borders become specialized by the associative international obligations they engage with. This is the subject of the next section.

The contribution of this work is modest: The standard objection shows that the conventional view and its further developments fail to address the territorial component of the boundary problem, but it does not explain why. The idea of this section has been to explain why. The conventional view and its further developments are grounded on an oversimplified account of legitimacy characterized as justice-based accounts that are inappropriate for the complexity of liberal democracies. The oversimplification charge highlights that only in this moral framework nationalist legitimacy may require minorities to sacrifice their dignity and well-being for the sake of the cultural majority (Dworkin 2001: 229-233), or a state's freedom of association can be a trump card even over harmful effects of vulnerable individuals and groups (Blake 2012: 750). But, liberal democracies are more than mere associations protecting basic rights, as they are more than societies organized by majority rule.

My objective has been only to lay the initial groundwork for an alternative moral framework for the kind of institutional borders that liberal democracies need to have. I have suggested that to reach borders, a conception of legitimacy needs to be coherent between the local assessment of institutions and the assessment of institutions with a larger scope. In order to perform this role, legitimacy needs to be continuous inside out. The conception of legitimacy that performs this work is legitimacy as integrity, because it allows a division of labour between several conceptions of legitimacy that are able to assess what it means to protect dignity in different exercises of political power. I hope that this account has the potential to encompass borders.

However, I haven't said what it means to protect the dignity of outsiders. Answering this question is the beginning of answering the boundary question: What kind of political borders liberal democracies ought to have? I cannot answer this question here, but this work

would not be complete if I at least did not suggest what are the main traits of the kind of political borders that liberal democracies ought to have. That is the subject of the final part of this work.

## **Part V**

### **The Moral Character of Territorial Borders**

**§21. The Desiderata of the Standard Objection.** Boundaries pose a general moral problem: What kind of political borders liberal democracies ought to have? Along this thesis I have been discussing the conventional view and its further developments into nationalism and statism. I have concluded that in general defenders of broad rights of exclusion fail to make a liberal case for their claims. I particularly argued that defenders of border controls tend to invoke an oversimplified account of legitimacy that rather assumes the answer instead of providing a normative explanation of the dominion over territory and border institutions.

In this part, I offer a sketch of a more plausible account of the right to control the administration of territorial borders. The sketch I present here is highly underdeveloped and it raises more questions than it answers. But my aim is merely to point out in what direction I believe legitimacy as integrity may be developed. The objective of this thesis was to establish the groundwork for an alternative view of the morality of borders. I believe that the objective is more or less achieved by the discussion deployed in parts I to IV. In this part, I only present a conjecture on the shape that legitimate borders would take under legitimacy as integrity.

As with the rest of this work, I approach the issue from the point of view of the central organizing idea of this thesis: the idea of the moral character of liberal democracies (§3). The normative problem of borders arises because liberal democracies are states with certain moral character. They are more than mere associations that protect basic rights and more than societies ruled by majority rule. They are communities morally bounded by the public endorsement of certain core moral principles, like dignity. In a liberal democracy, political power must be exercised in a way that allows members to abide by rules and laws without losing their dignity.

Legitimacy as integrity must show some potential to deal with the standard objection, to address the underdeterminacy problem. In order to show how legitimacy as integrity performs facing the standard objection I gather the following *desiderata* that a successful

conception of legitimate borders must satisfy. A conception of legitimate borders should explain at least the following:

- i. Why *we* (but not anyone else) belong together; why this set of institutions (and no other) applies to *us*. This is what I have called the specificity objection.
- ii. Why *we* are under a duty to comply with this set of institutions. This is what I have called the particularity problem.
- iii. Why *we* (and not others) have legitimate rights over this territory. This is what I have called the territorial challenge.

In §21, I show how legitimacy as integrity may address the first two desiderata. I argue that borders are a complex set of specialized institutions subjected to democratic legitimacy, because that's the appropriate way to respect the dignity of insiders. In order to address particularity and specificity, the division of labour subjects the complex account of borders to democratic legitimacy and associative political obligations. In §22, I explain that acknowledged associative international obligations is the appropriate way to understand what it means for a liberal democracy to respect the dignity of outsiders. Finally in §§ 22 and 23, I address the puzzle of territory. I introduce the idea of *trust territorial rights* that ground the right to control the exclusive administration of borders. But I also emphasize how this right is limited by consideration of the dignity of outsiders.

Recall the requirement of continuity established by integrity in the last part. Legitimacy as integrity assesses continuously all forms of political power so that they can hope to live up to the principle of dignity. As borders exercise political power, integrity requires that their exercise of power should also be subjected to the assessment of dignity. Thus, compartmentalization is not appropriated.

A liberal democracy is required to respect the dignity of everyone, not only the dignity of its members. When liberal democracies wield political power abroad, like the kind of power that borders exercise, this kind of power should command authority grounded on the same principles that justifies the political arrangement as a whole. Yet, it is not clear how this kind of authority can make sense of partiality between members of the same political state. So, we need to know what dignity, characterized by the moral character of liberal democracies, will require from borders of liberal democracies regarding both insiders and outsiders. So we need to specify what it means for borders to respect the dignity of both insiders and outsiders. That is the subject of §§22 and 23 respectively.

**§22. Democratic Borders.** Once compartmentalization is taken as inappropriate for liberal democracies and continuity is taken as a general ground for political authority, we can now turn to the two first desiderata: our account of borders needs to be supplementary in a way that deals with the specificity objection and the particularity problem. This is challenging because dignity provides only a general ground for the establishment of legitimate political authority. It does not provide by itself elements for specification and particularization.

Recall I have argued that legitimacy as integrity entails a division of labour between different conceptions and principles. Particularly it entails the participation of various delimited accounts of legitimacy. I believe the division of labour may be able to explain what dignity requires from borders and at the same time deal with particularity and specificity. I argue that borders should be understood as a complex set of basic institutions that are part of the basic structure. As such, borders should be subject of democratic legitimacy to exercise power over insiders in a way that respects their dignity. So far I have been working under the assumption that borders are not merely jurisdictional ends of other institutions. This assumption needs to be explained.

I believe the best way to make sense of the idea that borders could be subjected to integrity is to conceive borders as a specialized set of complex basic institutions. We have seen that borders exercise political power on behalf of the state. As indicated in the last two sections, compartmentalization is rejected, and integrity requires that this political power be subjected to the assessment of legitimacy on the same grounds as the rest of the political arrangement. I believe this entails that borders be part of the basic structure of society; and as such, they will seek to exercise legitimate political power and command legitimate authority on relatively similar grounds that the rest of state's institutions. I call this the *complex account of borders*.

With the complex account I do not seek to deny the obvious. Borders are certainly a consequence of objective facts, such as territorial scarcity and the need for jurisdictional delimitation or for a secure perimeter. Borders are a result of cultural incommensurability, chance and of the scope of basic institutions. However, note that justice-based accounts have systematically overlooked that borders of liberal democracies are also institutions that exercise political power and authority over other states, corporations, organizations, and associations. Borders also exercise political power and authority over individuals and their goods, assets, promises, contracts, knowledge and information.

Under this perspective borders are not only conditions of possibility for states, and their connection with the rest of the globe. Current conditions are such that the best interpretation of liberalism, according to its principles and practices, is to acknowledge that borders are basic institutions subjected to political and moral standards. Crucially, by considering borders as part of the basic structure, the complex account avoids the problem of relying on oversimplified moral frameworks that cannot account for the complexities of international relationships. Borders as part of the basic structure can be grounded on the full moral character of liberal democracies as interpreted by legitimacy as integrity.

I anticipate great resistance on the idea that borders can be considered basic institutions. Because of its *sui generis* nature, it can be challenged that borders are a special case of institutions that would not fit a Rawlsian normative criteria for basic structure. I believe this is partially true, because 'basic institution' is a Rawlsian concept. So, conceptual discrepancies must be avoided and the use of the concept needs to be justified or abandoned.

There are three traits that characterise basic institutions from other institutions. Borders are, first, institutions without which a society cannot remain ordered and unified as a cooperative structure (Rawls 2001b: 74-77). As a result, secondly, this group of institutions shapes the social background that sustains all the interaction and activity of associations (Rawls 2001: 10). Thirdly, these institutions are constituted as a system of rules that determines the main traits of the social arrangement, in particular the kinds of legitimate demands that members can demand against each other (Rawls 2001b: 74-77).

According to this definition of basic structure, I can say that borders of liberal democracies are necessary for preserving the order and unity of society. Borders define the jurisdictional scope without which the rest of institutions will be incapable of orderly fitting with each other. Borders also contribute to the definition of the background where associations are deployed. Borders not only define the limit of this background, but they also establish the social, economic and political background within which domestic associations extend their relations to associations abroad. Finally, borders also determine what kind of demands insiders and outsiders may press against each other. They administer demands of exclusion or inclusion from current members as well as administer demands of inclusion from aliens and would-be migrants.

As a result, the set of border institutions needs to be constituted by a system of rules that determines the main traits of the social arrangement in its relationship abroad. As they have a larger scope than any other institution of the state, borders are *transnational*

*institutions* integrated in a complex global system of borders. Note importantly that this account of borders may include also embassies, airports, customs offices, foreign affairs bureaus and all the basic core institutions with transnational scope. I will say more about this feature of borders in the next section. For now, note that if these criteria are sufficient and necessary to consider an institution part of the basic structure, in virtue of their pervasive influence in our political arrangements, borders should be considered part of the basic structure.

To define borders in this way is not trivial. The systematic reluctance of defining borders in a normative institutional fashion is a serious omission. If the above characterization is sound, to define borders in a different way seems incoherent with respect to liberal theory. Importantly, this way to understand borders accommodates legitimacy as integrity, because it allows a continuous account of legitimacy assessing all the exercises of political power of the state without compartmentalizing any of them. With this manoeuvre, legitimacy as integrity may connect the moral character of a liberal democracy with border's exercise of power.

If a potential critic is not convinced of the complex account, or thinks that some or all of the conditions above are only necessary but not sufficient, then I will say this: I am deeply interested in this characterization, but I am ready to abandon it if liberalism proves to be more coherent by leaving borders aside from basic institutions. However, I must insist that it seems enough to conceptualize borders as essential and strategic institutions that have a pervasive effect in the life prospect of members and non-members to render borders an object of public morality, particularly as a subject of legitimacy.

The upshot is this: despite their enormous potential of harm and influence over the life prospect of so many (obviously by controlling freedom of movement but also by controlling free exchange of goods, assets, knowledge and state's relationships with other states and foreign institutions), traditionally many if not all border institutions have been isolated from public opinion and remain far from the deliberative control of citizens. Borders, especially embassies and foreign affairs bureaus, are almost certainly concealed under the secrecy and discretion of the *raisons d'état*. The complex account of borders grounded on legitimacy as integrity rejects this view.

If instead we conceive borders as a complex set of basic institutions, we can see how borders respect the dignity of members. When we consider borders as basic institutions that exercise coercion over members, the division of labour requires rendering borders as subject

also to *democratic legitimacy*. This means that borders are also required to give voice to the insiders that borders coerce.

In this way, the complex account realizes in a more complete way the principle of political self-determination advanced by the conventional view. The complex account focuses on the moral character of liberal democracies and thus on the public and political nature of borders. As a result, it highlights that the administration of these border institutions should be under the control (as much as possible at least) of members. (I will discuss how borders respect the dignity of outsiders in the next section).

Recall that Walzer says that reasons for rejection are based on political self-determination because members should decide what membership means for them (Walzer 1993: 31). This idea characterizes the conventional view and its further developments into nationalism and statism. But note, as discussed in III, that one may coherently endorse the principle of political-self determination and still support porous or open borders. If instead one insists on a political bias towards close borders, one may be exercising a form of statism, giving priority to state sovereignty over political self-determination.

Instead, the complex view realizes the principle of political self-determination in a more complete way by submitting the authority that borders exercise to the principle of democratic legitimacy. As a result, borders that exercise political power that is not the result of public deliberation are rendered as *authoritarian*. Note that authoritarian borders are a threat against the dignity of members and outsiders. Also note that democratic borders are not necessarily closed or highly constrained.

The complex account has other advantages. Crucially it may point out to a more coherent way to address our collective responsibilities abroad. The complex account of borders, then, realizes political self-determination, because the authority of borders is subject to democratic legitimacy and at the same time, democratic legitimacy transforms the political power that borders exercise into democratic authority susceptible to *public endorsement and collective responsibility*.

Political self-determination of members entails the endorsement of the actions that are done to outsiders by the exercise that borders make of their political power. Recall that borders may include not only international toll offices, and immigration offices, but also foreign affairs bureaus. This makes members responsible from the exercise of political power against outsiders. The upshot is this: Complex democratic borders may realize the principle of self-determination that the conventional view defended. But for the case of liberal

democracies, with moral character, democratic borders are not *prima facie* closed as the conventional view defended. Nor borders are *prima facie* opened as revisionists defend.

So far, what the argument from dignity supplemented with democratic legitimacy allows to establish is that in general borders are needed and a liberal democracy may permissibly exercise control over the administration of *political* borders, insofar as it exercises that control on behalf of members. It does not say anything else about how this administration is to be exercised. To say something more we need to deal first with the particularity problem and the specificity objection.

I believe, however, that the role of democratic legitimacy supplementing legitimacy as integrity, according to the division of labour, is crucial to deal with the specificity objection. When borders are subjected to public consideration as institutions, it is not only the political arrangement that is being assessed from the point of view of legitimacy and political obligation, but also its very limits. When the limits of institutional authority and the relationship of the polity with the exterior are publicly deliberated, then in some sense, the specification of authority is also publically addressed.

To see this, recall the specificity objection. Justice-based accounts fail to establish who the legitimate authority is because they only point out the conditions under which a set of institutions may permissibly exercise political power. But from a set of similarly legitimate states, they fail to point out who the legitimate authority is (Quong 2010: 110). Contrast this with what the principle of democratic legitimacy requires. First, democratic legitimacy requires the existence of borders (Abizadeh 2008: 38), because a demos needs to be delimited in order to single out those governed from those who are not. Second, democratic legitimacy requires that those governed could have the possibility to be included in the procedural process of decision-making (Fine 2011: 628).

According to this, democratic legitimacy may help to specify the institutions that apply to us by requiring the existence of boundaries and by requiring the participation of those governed. Specificity is not a colossal problem for democratic legitimacy, because our compliance and participation with democratic institutions determines who is the authority that applies to us. Consider Christiano's account of democratic legitimacy as an explanation for this. Christiano (2006: 81-5) argues that the relevant principle for addressing particularity is *interdependence*. Only members of the same political community share a common world where a strong net of relations of interdependence connects everyone with the rest. I believe the idea is that when states take care of (insiders') dignity, they establish as a result an

intricate and pervasive system that regulates the provision of public goods, taxation, redistribution, criminal law, property rights, law enforcement, markets, etc. (Provided of course that, first, a group of people have taken care of themselves in such a way that the establishment of a state was possible).

The unified administration of all these goods knits a strong dependency of each member towards the others, which results in the political, societal and economical establishment of a common world. Once these institutions allow the political participation of those integrated in this net, a common ground of equal stakes is established between particular institutions and members.

When institutions are specified in this way, regarding members of the same community, the individual duty to protect dignity is not discharged by supporting institutions elsewhere (Christiano 2006: 250). If one is integrated in this kind of net and one has been participating in the shaping of a set of institutions, then *suddenly* discharging arbitrarily the totality of one's duties in institutions elsewhere would be to mistreat one's fellow citizens.

This does not mean that migration or to exit the state is morally impermissible. This means that one could wrong one's fellow citizens if one lets oneself get embedded in a social structure of interdependence, but refuse to cooperate with this structure by supporting another social structure elsewhere. It is permissible to migrate to another state where I think I could develop my conceptions of the good in a better way. But it seems odd that once I do so, I keep supporting institutions that I left behind or any other set of institutions different from the one that regulates my societal life for that matter.

Integrity requires us to participate in the shaping, interpretation and understanding of the institutions that arise from that interpretative process. By continuously realizing integrity in a way that considers borders part of the basic structure, even the boundaries of the state are subject to public and democratic consultation. Instead of tackling particularity and specificity on abstract grounds, legitimacy as integrity specifies authority and particularizes our obligations by focusing on us and the institutions produced by our relationships. This, as I have said, gives rise to the idea of *public endorsement and collective responsibility of borders*.

One obvious objection to this is that this explanation is circular because it presupposes a pre-political *demos* that creates democratic institutions that democratically deal with particularity and specificity. As noted by Abizadeh (2012), the problem arises because democratic legitimacy lacks a normative explanation to justify the prior question of why we

belong to that pre-political demos. This means that on closer examination, the division of labour of integrity may be failing to address the underdeterminacy problem.

Democratic legitimacy merely kicks back one step the question about the moral justification of membership to the demos. This means that democratic legitimacy does not have a way to deal with the *particularity problem*, as it fails to establish why the particular state that we belong to is the one that has legitimate authority over us.

Note that it seems that justice-based accounts find it extremely difficult to address both problems —specificity and particularity— at the same time, as they always seems to be kicking back the problem one step. For instance, liberal legitimacy as public justification presupposes both that closed societies exist and that institutions apply to their members. Democratic legitimacy specifies what authority applies to whom, but assumes that a previous pre-political demos exists. Nationalist legitimacy particularizes the demos by presupposing that nations exist, but they fail to determine normative criteria of membership without invoking a previous common ancestry. As nations are often in multinational, multicultural states they also fail to specify what institutions apply to the cultural groups, and so forth.

But, I believe legitimacy as integrity may find a way to go around this problem. Instead of pushing the problems one step back, integrity as a division of labour seeks to integrate various scope-limited accounts of legitimacy and supplement them with an account that tackles directly the question of the authority applicable to “us”. I believe that the theory of associative obligations may perform this role. Legitimacy as integrity may have a chance to deal with the particularity problem by invoking the complex account of borders and the theory of associative obligations, because the contextual nature of associative obligations may include institutional borders.

We begin with individuals situated in a complex net of more or less personal social relationships as brothers, mothers, colleagues, costumers, producers, friends, acquaintances, lovers, neighbours, fellow workers, comrades of the same union, etc. These personal relationships grow gradually into other more complex forms of organization that require also forms of special care or concern (Simmons 1996: 251). Some of these forms of organization, because of their complexity and specialization, acquire an institutional character. Some of these institutions, including airports, embassies, foreign affairs offices, and immigration offices are devoted to the administration of borders.

As they begin to develop in their context, associational political obligations do not have problems connecting specific institutions with the correspondent set of people. We simply

grow into those roles and status attached to certain obligations. Thus, these obligations are not acquired by a datable act of consent but they arise from a shared and piecemeal moral experience (Simmons 1996: 249). Associative obligations establish why the particular state that we belong to can extract duties from us, because there is only one authority that shapes and structures, along with each of us, the overall social life that a set of people experience together as their community.

This net of institutions structures everyone's life and we all participate in the way this net is knit together. Associative obligations merely appeals to the responsibilities that these individuals already have in order to justify their political obligations. The complex account of borders guarantees that borders, as any other institution, will be considered as part of this net of duty-generating relationships. Importantly, when borders bind us in this morally meaningful way, the particularization of our obligations and the specification of the authority become clearer, as borders themselves limit the scope of authority and political obligation.

Associative obligations raise many concerns and definitely they are not the panacea for problems of legitimacy and political obligations.<sup>59</sup> But legitimacy as integrity does not require that the theory of associative obligations address all objections. There is one job that associative obligations perform well. They explain particularity and explain why we must discharge our obligations through one set of political institutions instead of any other without invoking the existence of a pre-political demos. The division of labour takes benefit from this, and may incorporate to other explanations like consent and hypothetical consent when appropriate. Unfortunately, I cannot show in detail how this may be done.

In sum, the division of labour hopes to offer some ground to support the specific right of liberal democracies to control the administration of their borders. Dignity establishes a justification for the establishment of a system of states and a system of boundaries (see part IV). Continuity explains why borders are basic institutions with a larger scope of political power. The division of labour allows democratic legitimacy to step in and explain how the complex account of borders ought to respect the dignity of members. The complex account and democratic legitimacy help to deal with the specificity objection by specifying the institutions that apply to us by our public endorsement. Associative obligations, meanwhile, help to deal with the particularity problem by explaining why we may owe obedience to the institutions that apply to us.

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<sup>59</sup> See Simmons (1996) and Renzo (2012) to consider some of these objections.

**§23. Associative Borders.** Before I deal with the last desideratum about the standard objection and the territorial claims of the state, it is worth pausing in order to discuss what it means for a state to respect the dignity of outsiders. In this section, I argue that states with moral character are engaged in complex international affairs that may give rise to associative international duties between states. This in turn may raise claims of inclusion from outsiders.

Associative international obligations and the demands of inclusion that they may generate may ground a case for porous borders. The difficulty is that not all states have a moral character and this may raise limits to continuity limiting, thus, the case for porous borders. I introduce the notion of *specialized borders* and explain how specialized borders may accommodate the continuity requirement in order to sustain the case of porous borders as the appropriate way to understand borders with moral character.

The moral character of liberal democracies entail not only that political power must be exercised in a way that protects dignity, but also that the kind of authority that liberal democracies command respect the dignity from those it extracts duties from. If, for instance, the moral standing of liberal democracies commands at least a duty of non-interference from outsiders, then outsiders need to abide by this command without losing their dignity. That means that they must be able to respect the non-interference principle without feeling that they are oppressed. This also means that the authority of borders should be grounded on ways that outsiders could share at least in principle. This kind of justification, however, is impossible without taking the interest of outsiders into account in some way. But, how can we accommodate the particularization and specification of borders with the respect for the dignity of outsiders? Specification of authority and particularization of duties encompass special duties among members of a bounded community. That is the dilemma of borders discussed in §19: Borders are necessary for the protection of dignity within communities; yet, borders may threaten dignity as well.

I cannot address the problem of how a theory of international law should accommodate the kind of political power that borders exercise. Instead, in order to discuss the dilemma of borders and the problem of the dignity of outsiders I gather three *familiar facts of international relations* that I have previously presented in §3 (Beitz 2008: 30-37).

First, liberal democracies have knowingly and willingly established a system of states. The financial system, the trade system, the monetary system, the borders system, all of them configure a complex net of shared relationships where collective and singular actions have powerful consequences for all. This means that most of the *states are interdependent*. The fact

of interdependence is also confirmed by objective circumstances. For instance, the integration of ecosystems and the very fact that we all share the same planet makes us dependent upon actions taken far away from us by people we will never know.

Second, there is *the fact of globalization*. Liberal democracies have also knowingly and willingly developed the possibility of global transportation and electronic communication. These, along with the population increment, result in the fact that the world has overall become smaller, at least for those with enough resources to benefit from globalization. As a result, we all are more aware of the problems abroad, but also aware of the opportunities that may arise in distant places.

Third, these last two facts demonstrate, to a certain extent, that liberal democracies have autonomously engaged in the construction of a complex and intricate morally binding system of global cooperation. Global trade, financial interconnectedness, and diplomatic relations have taken the facts of interdependence and globalization to a level of sophistication never experienced before for human kind. This entails that *international cooperation* is not only necessary but also possible.

These facts of international affairs reflect the moral character of liberal democracies because the principles that liberal democracies endorse are associated with certain local and international practices. For instance, insiders may have a legitimate interest in engaging in associations of various kinds. Recall that according to its moral character, liberal democracies are committed to the defence of members' freedom of association. This defence in turn is associated with certain practices, such as the endorsement of many kinds of associations, the establishment of various relationships and contracts, the flourishing of trade, science, exchange, etc.

These internal practices, however, are associated with similar relative external practices. Members have a legitimate interest in establishing associations of various forms with outsiders, which entail the engagement in many forms of morally significant relationships with them. This engagement is pervasive and systematic. Even when I in particular do not establish any relationship with outsiders, I do benefit directly or indirectly from the relationships established with outsiders by my fellow citizens; for instance, when I purchase goods at lower costs, eat in international restaurants or enjoy the technical breakthroughs produced by international exchange of knowledge.

This suggests that the appropriate *locus* of meta-national forms of justice (either transnational or global) is the international system of borders, including their many trade-

oriented institutions and their foreign affairs bureaus. However, I cannot defend this thesis here. For now it suffices to say that these facts and their related practices give rise to what I call *transnational associative duties*.

Recall the general account of associative obligations. As indicated in the previous sections, the idea, roughly, is that we not only acquire obligations voluntarily. Some obligations are acquired by our participation in certain roles we simply find ourselves in. As we grow into these roles, the strength and dimension of our obligations increase. Similarly, not all obligations that states acquire are voluntary in nature, for instance those acquired by signing covenants and treaties. Some other obligations are acquired by roles that states simply grow into within the global realm. The more our relationships develop between states the greater the demands that members of other states may have against our state and its members. That is the *general principle of transnational associative duties*.

Recall that the division of labour invoked the theory of associative obligations in order to deal with the underdeterminacy problem by dealing with particularity. But the division of labour invokes other accounts in order to deal with the problems that associative obligations raise for itself. Now associative obligations become handy again, but in a collective formulation in order to explain the moral character of international affairs and the transnational scope of integrity. So the division of labour takes benefit from it again.

The complex account of borders is crucial to make sense of international associative duties. Only complex and specialized institutions may administer the sort of demands that arise from transnational associative duties. Consider an example. There are three democracies in the north part of one continent. C, U and M are engaged in a strong and deep relationship with each other; they have established terms for free trade and deep diplomatic relations. They are also engaged in institutional cooperation regarding key subjects such as security, development and administration. As a result, they plan and design together their institutions and policies. Country U treats C as its partner, thus administering border institutions relative to C accordingly. U welcomes C's nationals and his foreign affairs offices, and other institutions exercise political power in order to accommodate the close relationship with C. Yet, U treats M in a different way. U does not welcome M's nationals and also places other kinds of restrictions to the rest of M's border institutions. Overall, U treats C as a friend and partner, and M as a subordinate.

According to the complex account of borders, U wrongs M and its habitants because it has established a relationship with M that has moral character and as such it entails certain

obligations. U has grown into a complex and deep relationship with both C and M. This deep relationship creates associative responsibilities. Yet, U only consents to acknowledge those obligations for the case of C. The lack of explicit consent in the case of M, however, does not cancel the associative obligations that U has acquired with M through its practices. When U engages in a deep and complex relationship with M and yet decides to exclude M's nationals, it undermines the ground of legitimacy insofar as it exploits and subjects M's nationals by benefiting from a relationship with them, but mistreating them at the same time. Complex continuous borders need to take associative international obligations into account to preserve continuity.

I shall say more about the sort of practices that may give rise to collective associative obligations. According to Dworkin, we should trust associative obligations, because consent theories fail to make sense of international law insofar as consent is neither necessary nor sufficient to ground legitimacy (2013: 10-11). Here, of course, I cannot discuss at length these different approaches. Instead, I can appeal to how this account makes sense of the system of borders we are familiar with; in particular, with what I call *the specialization of border institutions*.

Borders are not a unique institution. Not even international border tolls are part of the same institution. Different border institutions are created depending with what country a relationship has been established. For instance, Spanish border institutions with Morocco are different from their border institutions with France. As a principle, continuity of integrity demands that each country be treated according to the associative duties established with each country. Associative obligations of border institutions make each institution different according to the particularities of the thickness of the relationship that arises.

However, one problem arises: not every country is moral in character. This fact poses a challenge. How can liberal democracies abide to the continuity requirement and abide to associative international duty when the majority of regimens do not act according to a moral character? One way to understand this fact is arguing that we face a problem of partial compliance. In the ideal case, all states have a moral character establishing equitable relationships between each other that allow preserving continuity. But I fear that this level of idealization may bring problems of its own.

Instead, I believe that legitimacy deploys diachronically in the globe. The social technologies necessary to make it possible for certain regimens to achieve a moral character are a matter of historical and social coordination. Moral character and the protection of dignity

are not achieved at the same time. So, the moral quality of specific transnational relations may vary according to the different character of different states. But the fact that we establish thin relationships with certain states does not entail that we demand less from ourselves.

That is how continuity is preserved: what matters is that our borders should not engage in relationships that contradict our most basic principles, not that all our relationships with external parties achieve the deepest possible moral status. This means that the general principle of integrity may preserve continuity even in a world of regimens lacking moral character.

Perhaps an analogy may illustrate the last remark. Suppose that J is a good person with a remarkable moral character. But J, as any other person, has affinities. She cannot establish, thus, the same relationships with everyone. J establishes deep powerful relationships with few people. She establishes friendly relationships with some, and also she establishes formal good relationships with others. She is not required to treat acquaintances with the same regard she treats her best friends. The fact that J has affinities does not affect her moral character. She has a set of values and standards that assess her relationships. But she simply has different kinds of relationships. The fact that she treats some with special concern is not only permitted but sometimes required by the associative obligations she engages with.

Similarly, borders are a system of specialized institutions. Each of them reflects the nature of the relationships they administrate. This is particularly true with international border immigration offices. These offices change depending with what country the relationship has been established. In effect, a country has as many different borders as it has relationships with different countries with which it establishes official relations.

According to this, we can distinguish between *factual* and *virtual* borders. Factual borders are those physically established by territorial vicinity, such as those from borderlines or embassies. Virtual borders are those established politically without actual territorial vicinity, such as those established by airports and foreign affairs bureaus. Each border establishes different standards depending on the thickness of the relationship they establish. And just as J's moral character is not compartmentalized because of her different affections, legitimacy is not compartmentalized when our state establishes thin relationships with some other countries. International border offices, airports, embassies, consulates and foreign affairs bureaus *change* according to the thickness of the relationship established with the specific country.

As there are certain things that are odd to ask from mere acquaintances, demands of inclusion may not be grounded on relationships between states with none or very limited international relationships. States that have deep and close diplomatic, financial and trade relationships, may find it difficult to overlook these demands without conflicting with integrity; jeopardizing, as a result, external and internal legitimacy. Furthermore, the states that benefit the most from their participation within the international system, like the USA and the UK, may establish, as a result, a complex net of international relationships that raise, in turn, associative obligations.

In the internal sphere, integrity is required because there is a central authority that is required to exercise political power in a way that could harmonize distinct principles, values and practices. In the international realm, there is not such authority. So, continuity is always an internal fact with some externalities, but it is never a global feature. This means that the authority that borders exercise is accountable in a continuous way; but not from the global point of view, only in each case from the internal point of view of members.

But still, how can we describe this international pluralism in a way that could accommodate continuity? I believe we can distinguish different forms of international mutual concern determined by the different international associative obligations incurred by specific relations. Here, again, Dworkin's forms of mutual concern become handy.

When a liberal democracy establishes international relationships with states without moral character these relationships resume to less stringent forms of mutual concern, such as *de facto* relationships or committed relationships. As we are not required to be friends with everyone, liberal democracies could establish minimal relationships with regimens without moral character.

We should distinguish between moral and political standards, on one side, and the requirements appropriate to several kinds of relationships, on the other. Note that the moral thinness of these relationships does not change the moral and political standards that regulate our institutions. Suppose that currently I have no friends but only acquaintances. This fact does not imply that I am subjected to less stringent moral standards than the rest. It only means that the requirements of my relationships are less stringent than the requirements that the rest have in their relationships with their friends.

Associative international obligations are important, because they may identify an important way that a state may harm members of other state. Consider as an illustration the following case. Country U is a liberal democracy under strong pressures from its economic

system due to a shortfall of labour force. As most of the developed liberal democracies, country U can only deal with these issues in the short term by admitting new comers to its society. Dignity requires, then, that country U arrange its border system in a way that welcomes the needed labour force. However, country U acts in the opposite way. U strengthens its borders in a way that seeks to exclude the needed labour force. Labour markets are, however, rather accurate: when labour is needed, it is supplied. So, outsiders come anyway, but in an undocumented way. This has the perverse effect of labour being cheaper while the country has enormous benefits, but at the cost of the new comers and at the cost of the less trained local labour.

The last example shows how borders may harm the dignity of outsiders when their interest is not taken into account. This also shows that the continuity of dignity cannot permissibly admit the exercise of border's political power in a way that can only be understood as a denial of the very same principles and practices that ground the overall political arrangement. I believe this case is parallel to other familiar examples.

Developed liberal democracies often use their bargain advantages to sign trade and financial treaties with poorer or weaker states in unfair terms of cooperation. Under the continuity view, this constitutes an illegitimate expression of political power, because it is not morally permissible to exercise political power outside in a way that it is not permissible for us inside. This stands even if the other state has no moral character or if we have established *de facto* or merely committed relationships with it.

Note, however, that these acquired associative obligations, in turn, will inform considerations of the fair terms of border policy. For instance, fairness should explain in what way the interest of outsiders should be taken into account. Recall that the problem of defining what both sides can legitimately demand from each other, and how borders should administer these demands. I won't address the problem of fairness here.

In sum, the conventional view conceived borders as a single jurisdictional device presumably with a homogeneous normative structure; in contrast, the complex account of borders acknowledges that borders change according to the kind of relationship that a country establishes with another. As liberal democracies are characterized for sustaining relationships of many kinds with several countries, borders simply change accordingly, acquiring a different normative structure shaped by the kind of relationship established.

Someone may argue that this view makes it permissible, in principle, for a liberal democracy to isolate itself by closing its borders, if it wishes. But this is misleading, because as,

indicated above, the moral character of liberal democracies entails internal and external freedom of association. A liberal democracy that suddenly isolates itself from the exterior world, in a way that prevents it from acquiring any associative international responsibilities, will soon cease to be a liberal democracy, at least as we know them. This is because integrity will require isolation in both directions. Closing one's borders will also require stopping the benefits from international trade and cooperation, as specified in the familiar facts of international relations and its related practices.

In this thesis, I have focus on how legitimacy as integrity may frame the demands of insiders and outsiders with the respect of their dignity. The respect of the dignity of outsiders, thus, establishes important limits to a state's claim over the control of the administration of its borders. Particularly, members of a community who have important associative relationships with the state may gain inclusion claims as a result of the associative duties established.

In the case of liberal democracies this is an important limit, as liberal democracies are highly interested abroad. Their interest in global markets and financial dependency raises strong associative duties with nations abroad. Additional countervailing reasons against these duties may only come from their territorial claims. That is the subject of the next section, where we come back to the last desideratum.

**§24. The Puzzle of Territory.** According to the previous sections, legitimacy as integrity seems to have the potential to deal with the two desiderata. Continuity allows integrity to determine what kind of authority borders may permissibly exercise; and division of labour allows integrity to deflect at least some of the tension coming from the underdeterminacy thesis. Much more argument needs to be provided, especially for the specificity and particularity claim. But I think we can move on, insofar as legitimacy as integrity has at least the potential to deal with these enormous challenges.

This takes us to the last desideratum and the standard objection. In this section, I explore the puzzle of territory. I discuss various forms of territorial dominion. Strong exclusionary rights could only be held by states that claim ownership over the territory. This kind of sovereignty is ruled out by the moral character of liberal democracies. I argue that the only way to ground a state's territorial claim in a principled way corresponds to the Kantian account. But this view is committed to highly developed international relationships that rule out the possibility of broad exclusionary rights. In a world of states with legitimate dominion over their territory, no state will be permitted or even interested in closing their borders. In

any case, this kind of territorial claim is not yet available to us, given the current state of underdeveloped international affairs.

Recall that the standard objection claims that justice-based accounts of borders fail to address the territorial grounds of exclusionary rights. Justice-based accounts discuss matters of membership to political communities. Yet, when borders are discussed it is not only membership or law enforcement that is under discussion; states claim also to have sovereignty over territory. The importance of territorial claims is explained by the *moral dimension of territory*. Territory has a moral dimension in three main ways: De facto, telic and deontic. The three explain different kinds of morally meaningful relationships with territory.

The *de facto dimension of territory* includes all the natural, historical, emotional and symbolic aspects of territory. We all naturally have been born in a place and this place evokes past events occurred there. In virtue of the history and familiar culture in a territory, landscape often evokes, as well, strong symbolic force. This *de facto* dimension, thus, explains our *legitimate interest* in territories, but it does not, by itself, ground any claims or rights.

The *telic dimension* includes the various aspects where territory is necessary for human life. We all need soil to lay our feet on and space to walk around. A territory provides the resources needed to sustain life. It is necessary to establish a jurisdictional space where dignity can be protected. The telic relationship with territory may explain *the permission to use it, administer it or control it*. For instance, it may explain why institutions may have a permission to delimit a bounded jurisdiction.

Finally, as indicated in the last section, there is a deontic dimension of territory that attempts to explain a *privileged position of dominion* over territory. It explains the possibility of acquiring rights over territory. This kind of relationship requires the realization of international legitimacy not available to us now or in the foreseeable future. But in this section and the next, I argue that deontic importance also explains weaker and limited trust rights.

Note that justice-based accounts overlook the deontic importance of the territorial dimension of states. Instead, they take what I call the *jurisdictional view of territory*: the idea that certain control over territory is simply included or presupposed in jurisdictional rights. Beyond that, the dominion over the territory is assumed to be intractable (Simmons 2001: 302, n8). Justice-based accounts are greatly focused in the importance of jurisdiction, but often overlook the prior and fundamental question of territory. That was the main criticism of the standard objection. Justice-based accounts simply assume that a certain portion of land is

needed to make jurisdiction possible, but the actual claim over a certain portion of land is never examined in normative terms.

Recall the functionalist account of legitimacy I discussed before. As indicated in §15, justice-based accounts argue that a state is legitimate just in case it is necessary to bringing about justice, fairness or due process. As states can only perform this when they have complete and exclusive dominion over territory, then it is simply assumed that states are also justified in exercise this territorial dominion. Yet, the arguments provided explain only the interest over territory and perhaps a claim to exercise control over *civic* borders. It does not justify the territorial claim. However, in order to ground the broad exclusionary rights that the conventional view hoped for, it would be necessary to bare a strong privileged position of dominion over it.

Perhaps another way to put the standard objection against the jurisdictional view is to invoke the conception of sovereignty. Sovereignty is the set of rights exercised by modern states (Simmons 2001: n3). According to Simmons, sovereignty consists in at least three important clusters of rights: Jurisdiction, international standing and rights over territory (Simmons 2001: 300). Jurisdiction includes the rights that states exercises over those subjected to their authority. International standing includes the rights that states exercise against outsiders. Territorial sovereignty includes a set of rights exercised over a particular geographical extension of land, including crucial rights to control its airspace, rights to control settlements over territory and rights to exploit its natural resources.

The right to administrate borders seems to me an expression of the three clusters. Borders certainly entail the control over a determined jurisdiction, but also the capacity to enforce this border control in the international community and, crucially, the rightful dominion it has over a defined portion of land.

States may need to be territorial in order to perform their requisite political functions successfully. What the standard objection is suggesting is that this only explains why states need to be territorial. It does not justify a state's claims over a particular extension of territory. It does not explain either to what extent states may have a permissible power to control movement, permit settlement and administrate exploitation of natural resources. Crucially, it does not identify the conditions where a state may forbid movement, ban settlement and exercise ownership over resources. Call this *the territorial challenge* of the standard objection. For, most would agree that even the ideal case of legitimate authority cannot be justifiably exercised over an extension of land where this authority has no legitimate claim (Simmons

2001: 302). In other words, the normative problem is to define in which sense liberal democracies may be territorial entities (Simmons 2001: 301).

The question is controversial and difficult to address. Instead of developing a full theory of territorial sovereignty, I follow the central ordering idea of this work: the moral character of liberal democracies. Once we identify that the jurisdictional view is vulnerable to the territorial challenge, we may ask in what other sense it is possible to frame the territorial dimension of the state. I present three models of territoriality and then contrast them with the moral character of liberal democracies. Particularly, I hope that I can identify the one that accommodates legitimacy as integrity.

I identify three models of territoriality: the ownership model, the trust model, and the international community model. The ownership model claims that the territory is owned, in some sense, by the political community. It is characterized by establishing a deontic dominion over territory grounded on relationships of property that could ground broad exclusionary rights.<sup>60</sup> This rough idea of ownership over territory would entail immunity against all those who are not in possession of the territory and a power to exclude others from it.

The trust model begins with the idea that individuals are entitled to a certain space to live on. States are legitimate because they make possible the protection of dignity; states are trusted to control certain territories in the benefit of all, so members can realize their several conceptions of the good and lead their lives.

Finally, international community of principles is characterized for integrating both models. International community may establish a strong deontic dominion over a territory comparable to ownership, but it grounds this dominion on the individual claim to space and resources. This view, however, does not ground broad exclusionary rights, because the relationship between individual claims and states' dominion can only be established by a global community of principles. This seems a project for the future of liberal democracies.

Consider first ownership model. The main difficulty with this approach is that it is not clear who exactly possess the territory. There are three plausible answers to this question: the state, members, or the nation. The first answer corresponds to a traditional idea of sovereignty as trump rights. I have discussed in the first part that liberal democracies have a moral character in part because sovereignty rights are not trump rights. The moral standing of states and the rights that encompass it are rather grounded by individual rights, not the other way around. States are legitimate to a certain extent because they protect the ownership rights of

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<sup>60</sup> I am assuming here that theorists have succeeded in grounding the deontic justification of private property. But this continues to be a controversial problem that I won't address here.

individuals. Thus, the idea of state's ownership of territory seems to be at odds with the moral character, insofar as it leads to illiberal forms of statism. I won't address this here. I will concentrate in the other two models.

The second account follows Simmons's (2001) Lockean analysis of the foundations of governmental territorial claims. Under this analysis, state's dominion over territory is a consequence or derives from member's prior ownership rights. Members with private property transfer certain property-powers to the state in exchange, at least, for the protection of their property by the state. In this way owners cease to have absolute dominion over their property and states end up with certain dominion over territory establishing a group or an association of co-owners. That's why this view is often framed within *transactional accounts of legitimacy*. The transactional account explains first how certain rights could be transferred to the state, and crucially explains how states' territorial claims may have a deontic ground.

Transactional theories are those that ground our political obligations on consent or on reciprocity (Renzo 2012: 106). Some part of the individual dominion over land may be transferred to the state, thus preserving the structural integrity of its deontic ground, provided that they were transferred through the appropriate transactional history. This means that acquisition and transference must respect all transactional points and maintain certain criteria of justice. So, membership to a particular group and the property of each member are both taken as crude and unquestionable facts prior to any other question.

Similarly, justifying jurisdiction over the group has priority over the sovereignty rights. But once jurisdiction is legitimated by consent, the appropriate amount of just individual dominion over land is transferred from members to state.

From the normative point of view, this account is powerful because it harmonizes an attractive account of the scope and limits of political power with a powerful account of political obligations. Crucially, it deals successfully with the territorial challenge because states claim the particular territories over which their members have a rightful dominion. The problem with the transactional account is its historic implausibility. It seems descriptively false that acquisition, property and transaction could fulfil appropriate criteria of justice that could preserve, in turn, a deontic ground for a state's dominion (Blake & Risse 2007: 8).

The focus on individual property seems to render most, if not all, territorial claims of states as illegitimate, because the requirement of justice in transactions is too high. That's why the third account focuses on collective ownership. This account takes Locke's idea of original

ownership by mixing labour, and reframes it in cultural and collective terms. I have discussed this account in part II.

Very briefly, nations have a collective claim over territory grounded on their cultural nature. So, it is not the fact of individual ownership that grounds territorial rights, rather it is the fact that a community mixes its own culture with the soil in a way that it is not detachable without causing an enormous collective harm (Miller 2007: 218). This answer is attractive because it deals with the territorial challenge by arguing that states are permitted to claim the particular territories that cultures transform. At the same time, nationalist account does not suffer the historical implausibility of the Lockean account. However, on closer inspection the nationalist account causes more problems than answers.

The main problem with the nationalist account is that the deontic force of a state's claims is grounded on controversial cultural claims. For now it is not clear that the connection between labour-culture mix with collective jurisdictional rights is necessary or sufficient to ground authority over the territory (Stilz 2011: 577).

We may question, for instance, why the "nation" should be the one that gains the territorial claims and not individuals or a "movement of artists"? The participation of the nation is metaphorical compared with the actual involvement of, say, modernist architects and craftsmen in the Bauhaus movement in Germany. Furthermore, the Bauhaus movement influenced architecture globally and it seems farfetched to think that Germans or German Modernist architects gained territorial claims in Tel Aviv as a result of the blend of their cultural movement with the soil and landscape.

As indicated before, in the moral dimension of territory, culture and its influence over the landscape seems to explain why a group can be legitimately interested in holding dominion over territory, but it does not explain under what conditions this group may permissibly exercise dominion over this territory.

Blake and Risse insist that the idea of ownership may still be helpful if it is restated in egalitarian terms. According to Blake and Risse, the state's claim over territory is dependent on a prior individual claim to occupy an individual share of land and resources (Blake & Risse 2007: 2, 24). This grounds a *prima facie* case of collective ownership of the earth and its resources. This, however, entails that equal concern and respect should trump a state's claims over territories. There are cases at hand to illustrate how political or cultural self-determination are not always prior to the rights of outsiders (Blake & Risse 2007: 22).

Consider, for instance, the USA's reluctance to sign the Kyoto protocol. It is claimed that the distinctive USA lifestyle is more important than an equitable distribution of resources. But according to Blake and Risse, global demands of a more responsible use of resources in the USA are not tantamount to the destruction of USA's culture as a whole. The basic rights of people around the globe to have a fair share of the globe's resources may render the idea of a state's dominion at least inconclusive.

Justice may demand modifications of people's habits and cultural traits on egalitarian grounds. The basic property rights of outsiders are not necessarily less important than cultural rights (Blake & Risse 2007: 22). If human ownership is sound, then the state has at least to accept that the ownership claims of outsiders need to be weighed on the same grounds as those coming from insiders. Crucially, there is not a global institution that could make sense of global ownership.

Suppose, however, that the ownership account finds a way to bypass these difficulties. Would it be appropriate for liberal democracies? I suspect not. As with the case of models of societies and legitimacy, I cannot deliver a complete answer here. But as a preliminary it seems that the ownership model may not be able to accommodate the moral character of liberal democracies.

Consider, in particular, the fact that consent and transactional history are unable to explain the requirements of the moral character (Dworkin 2013: 7). For instance, individuals and states are subjected to peremptory obligations they have never consented to. Similarly, history of transactions finds it difficult to explain the claims of newcomers, including new and future generations. This is because contracts and transactions reflect only a small part of our moral universe. As indicated before, liberal democracies have a moral character because they endorse moral principles that require them to do more than enforce contracts and assess transactions.

Ownership is a very controversial concept, so it is not clear how it can be helpful to explain the normative relationship between states and their territories. Ownership is helpful in the individual context to make sense of certain basic human needs and the permissible ways to secure their fulfilment. In this vein, states may hold property of common lands or national parks. Again, states may gain legitimacy to a certain extent with regards to their role protecting individual basic rights, including ownership. But the possibility of an entity such as states permissibly holding ownership over vast extensions of land seems at odds with the idea of using ownership as a way to secure individual needs.

Now in contrast with the ownership model, consider the international community model. Anna Stilz (2011) and Lea Ypi (2013) draw over Kant's steps to explain how territorial claims are grounded in a continuous account of legitimacy that encompasses the internal legitimacy of states as much as the legitimacy of an international community of legitimate states. Territorial claims and border control will be fully legitimate when all nations fulfil their duties to establish rightful political relationships with each other and with citizens (Ypi 2013:13). According to this view, our current situation is characterized by states exercising *de facto* ungrounded dominion over territories (Ypi 2013: 20).

Even developed liberal democracies, with their thick internal conditions of legitimacy and justice, fail to secure deontic territorial rights because of their lack of international legitimacy (Stilz 2011: 578-9). The core part of legitimacy is that states are under the obligation of bringing about justice into the world. So the fact that only the members of some affluent democracies enjoy the benefits of moral progress while the majority of global population lives in precarious conditions shows the failure of all states to fulfil that requirement. As a result, internal legitimacy is also compromised.

This account is very attractive because it seems to cover the desideratum in a satisfactory way, because it is capable of grounding territorial claims in a deontic way. The problem is that, for this account, full legitimate control over borders is a project yet to be realized, since no state is legitimate in a complete, conclusive way. In order to see this, according to the moral dimension of territory, consider three kinds of border control that can be exercised: *de facto* control, permission of administration and a right to administrate borders. Let's examine first the two extreme positions: *de facto* control and right to administrate borders. The first describes the current situation while the last one establishes a normative ideal. I leave the middle ground for the last section as I think it has some potential to partially deal with the territorial challenge of the standard objection.

*De facto control* describes the historical evolution of territorial claims. Institutions control certain territories not because they have the right to do it, but because they can; and this kind of saliency may raise claims to a right to control territory (Ypi 2013: 20). In contrast, in order to gain a *right over territory* and the administration of its borders, the state must satisfy conditions of continuous (i.e., internal and external) legitimacy.

To see why, recall the Kantian account of legitimacy. A state is legitimate insofar as it makes property and freedom possible by overcoming the unilateralism and arbitrariness of will. A legitimate state makes it possible for all to endorse the commitment to make our will

consistent with the will of the rest by means of collective rules of participation, law enforcement and property arbitration (Ypi 2013: 12).

Note that this principle is not bounded to internal legitimacy. As legitimacy assessment begins in a pre-political ground; by asking what kind of political power is permissible, it is not in principle bounded by the boundaries of a single community. This, however, entails that a state's domestic jurisdiction cannot be assessed regardless of how it affects the international sphere (Ypi 2013: 23). So, the justification for the legitimate control over borders and its territory are not only addressed to members, but in principle to everyone.

To have a right is to hold a position of dominion over something or someone. A *full deontic right to control borders* is grounded on the idea of exclusive dominion over territory. Note that only this kind of universal right may justify broad exclusionary rights, because without the position of dominion, claims over territory may be easily overridden by considerations of fairness, interest, need, etc. So this raises the question of whether this kind of universal and general justification can be possible for the case of great extensions of land and collective rights.

The argument is similar to Kantian justification of private property. Acquisition is justified when it entails a full commitment to join a political condition where relationships are regulated (Ypi 2013: 12). Similarly, dominion over territory is grounded when states endorse a full commitment to join a global political condition where all relationships are regulated. Thus, a state should not only establish relationships of mutual concern with those subjected to their authority but also with everyone else, and that includes outsiders, international corporations, other states and so forth. In short, a community of nations endorsing basic moral principles is needed in order to make possible the existence of deontic rights over territory.

To be able to exercise rightfully broad exclusionary authority is not enough to have *de facto* control over territory, it seems necessary to have dominion over it and dominion comes with a right. But on closer examination when a right is finally gained, it seems that broad exclusionary rights are ruled out by the very same conditions that make it possible to gain that right in the first place.

Once rightful relationships between individuals, states, and other agents are established in the global realm, isolationism is not possible. It is not only that it may be difficult to find someone interested in isolation within a developed community of states with a moral character, it is also that global cooperation, intense diplomacy and thick relations are needed

to participate in a community of this kind. To maintain borders closed in that situation may be at odds with the task of supporting this kind of international community.

So an enthusiast of border control is cornered between a permission that looks inoperable, as it can be easily overridden, and a full territorial right that is not yet available, but even if it was, it may make border controls redundant. This picture, as attractive as it may seem for the enthusiast of more permissive borders, is still inconclusive, as it fails to give ground to our best practices. In the here and now states and their borders are necessary to ensure dignity, and we need to find the appropriate territorial ground for liberal democracies.

**§25. Territory as Trust.** In the last section I have discussed the puzzle of territorial rights. Territorial rights are puzzling because they may not exist, or at least not in the sense that individuals or groups exercise certain rights over the land. Yet we have to act as if nation-states could permissibly wield them.

I resist, however, the idea of giving up territorial rights. I believe we can find some middle ground between the Kantian account of full deontic rights over territory and the jurisdictional view of the mere *de facto* exercise of control over political jurisdictions. I find this ground in the third model of territoriality: the trust model. I argue that the trust model entails a right to exercise jurisdictional control over the territory, but crucially a conditional permission to particularize territory that deals to a certain extent with the territorial challenge. In this case, liberal democracies may have a case for weaker rights (with respect to the Kantian provision of rights) to exercise jurisdiction and control over a determined territory.

When we consider the moral dimension of territory and the territorial challenge at least two particular problems arise: the *problem of legitimate authority over territory and borders* and the *problem of geographical location of territory and its borders*. I have addressed the first problem from the point of view of legitimacy as integrity and the theory of political obligations (§21). The difficulty is that according to the territorial challenge, this account does not provide any ground for particular territorial rights.

In order to address this problem I begin by clarifying the difference between having a right and having permission. Permissions are remedial responses to practical problems and unsatisfactory states of affairs. Permissions authorize an action otherwise against principles, but only insofar as this action promotes the very same principle it violates (Ypi 2013: 3-4). So permissions are characterized by its partial and conditional nature. As a result, permissions are very weak as they may be suspended anytime by the same principle that grounds them. I

believe a permission of this kind could deal with the territorial challenge. Permissions are formed mainly by claims of non-interference that could be overridden. Rights are formed by clusters of incidents that specify when the right barer is in a privilege position of dominion over something or someone.

This may seem very confusing, because a claim is often taken as a right. But in Hohfedian terms, strictly speaking, a claim is an incident that is part of what it means to have a right. Recall that having a right is defined as being in a privilege position of control over something or someone (Wellman 1995; Wenar 2005). This privilege position is defined by a bundle of different specific incidents that define the broad general right in different circumstances. For instance, what we call the right to own the computer I have purchased, denotes a bundle or set of related complementary incidents that specify my property right as privilege to use it, a claim against others using my computer, a power to transfer my rights over the compute and an immunity against others to alter my other rights and claims over my computer. We cannot make sense of my right over my computer without reference to these other specific incidents that integrate the set of what we normally call “my right over my computer”.

Consider a putative permission to particularize geographical location: *the case of territorial trust rights*. Territory as trust draws upon the last two models of territoriality, because it recognizes the importance of individual entitlements and the Kantian focus on international legitimacy. Instead of allocating ownership claims to the state or granting disproportionate legitimating powers to the international community, it establishes some middle ground between the mere permission to control borders and the right to exercise border control.

This follows the central organizing idea of this work. Liberal democracies have a moral character. This entails that the international community of principles is not the only community with moral standing. As states have a moral stand too, states may have trust rights to perform certain political functions over territory. The trust right is held by legitimate states for the benefit of individuals. Trust over territory grounds limited and qualified rights to perform certain political functions over it, but it does not ground full dominion over it, as territoriality is only grounded on permission.

Trust right over the territory has two main components. First, it has a ***trust right to exercise jurisdiction over a territory***. Second, it has a ***trust permission to particularize that territory***. The reason is that the limited scope of trust rights for jurisdiction does not ground

particularized rights over specific extension of territories. Because the general arguments for dignity are limited, they can't deal with the territorial challenge. This is when permission kicks in: individual occupancy rights may ground permission to administrate particular portions of land. This kind of trust right to hold and particularize administration may ground limited and qualified rights to control borders under certain limits.

The trust right to jurisdiction over territory begins as well with the idea of dignity. As states are needed to protect dignity and states need territories to perform this function, then a sufficient amount of territory is needed to protect dignity. As indicated before, the general argument of dignity may face with relative success the specificity objection and the particularity problem with the complex account and the division of labour of legitimacy.

Once we can specify who the relevant authority is and can particularize who can extract duties from us, then we can argue that legitimate authority and the obligations that this authority command, imply the need of certain extensions of land. Of course, this argument may only ground a general right to exercise jurisdiction over *some* territory and it does not specify what territory should be under the control of what jurisdiction. Thus, this general right is unable to deal with the geographical question, as it cannot particularize claims over a specific territory.

The general right to some territory may be supplemented with a permission to particularize the claims over a determined piece of land. The trust permission to particularize territories begins with the idea that we all have a *prima facie* right of occupancy. Suppose, as indicated before, that we acquire certain associative obligations by means of growing into a community. Suppose further that this community reaches democratic legitimacy and this kind of legitimacy includes complex borders. Then, insofar as complex borders reflect members' collective rights of self-determination, we may collectively transfer certain jurisdictional permissions to administrate the land we occupy, grounded on our personal occupancy rights. As our communities occupy more or less defined territories, then we may transfer our occupancy rights to the political community in order to grant them a permission to exercise the trust right of jurisdiction over specific portions of territory.

The difficulties with this approach are many. The most obvious difficulty is the weakness of permission. The minute the permission gets in the way for the advancement of dignity, it is overridden. So for instance, when serious deprivation or exploitation is happening somewhere outside, and we do nothing following the rule that the permission establishes,

then it is not clear that the permission is helping at all in the advancement of the overall objective.

Note as well that permission only entails one incident: a claim; whereas a right entails also powers, immunities and privileges. The one exercising the permission has only a claim against others interfering with that exercise. In contrast, having a right to control territory and its borders entails both a claim, but also a privilege to exercise the kind of dominion over territory that grants in turn a right to control movement, settlements and resources. Thus, they gain a power over their territories and immunity against altering their power.

For the enthusiast of border controls, the difficulty of having permission and not having rights is straightforward. First, broad exclusionary rights are ruled out because states do not have a right to enforce them. But importantly, the permission can be easily overridden when inclusion is needed to establish rightful relationships with the interest of outsiders. Considerations of external justice, fairness, due process, and legitimacy may override that permission constantly. As a result, conditional permission to control territory implies *porous borders*.

Another obvious difficulty is that it does not particularize territories with precision. Under this account, the precise location of boundaries could always be challenged and disputed because territory as trust only particularizes certain territory around us. As population is not evenly distributed across territories, the exact scope of the trust may not coincide with actual territorial boundaries.

The problem of the definition of precise limits raises concerns about large concentrations of territory. Limits may be contested, especially when there are large extensions of unoccupied land. Particularly, this account does not justify the large concentrations of territory we observe in some of the largest countries we know.

I suppose that a fair amount of empirical work is necessary to determine what extension is ideal for each population, or even a well-ordered liberal democracy according to the demographics and geographical particularities of each case. Instead, it seems, useful to think about the population/territory ratio of traditional European states. It may be the case that urban concentration is good for an efficient use of resources and infrastructure. The rest of the territory should be ordered considering the preservation of a fair amount of resources and sustainability of production.

The point is that even if this empirical work were available, the limits would still be unclear. The ultimate definition of boundaries is by its own nature conventional. The

convention may be informed by the empirical studies, but borders will be defined by the states themselves. I believe this is less problematic than it seems. As it has been always the case that borders are conventionally defined by the intervening countries. The idea is that the moral character of liberal democracies is bound to turn this *de facto* definition of territorial boundaries into a legitimate division of territories. The fact that now borders remain challengeable only shows that states have the duty and the incentive to advance a global community of principles able to develop a legitimate and fair global territorial arrangement that delivers rights over their territories to each legitimate state.

In any case, under this account, states like Russia, Australia, the United States, or Argentina would find themselves facing a decision between becoming smaller and gain permission and rights over their territory, or remain large and without morally grounded permissions and rights over the territory they *de facto* occupy.

The upshot is that liberal democracies that we know in the here and now could achieve a trust right to exercise certain jurisdictional control over a fair extension of territory *and* a permission to particularize the territory and borders that they have a trust right to control; provided that they could achieve the continuity of legitimacy as integrity. But this is a problem for the account of fairness of borders, so we do not need to discuss it now.

But, this raises another problem. How can liberal democracies achieve this continuity of legitimacy in the less developed international realm that pushes them to carry on with less stringent legitimate relationships? The answer is that liberal democracies must discharge their duties of dignity in the international realm by promoting the development of an international community of principles.

This last requirement takes us to the ground of a normative theory of international law that I won't address here. Instead, I will suggest a general outline that reflects the moral character of liberal democracies regarding international affairs. As a general principle, liberal democracies should not exercise political power abroad in a way that can only be understood as a denial of their moral character, particularly in ways that could threaten the dignity of persons; because according to continuity, this exercise of political power jeopardizes not only international moral standing, but also internal conditions of legitimacy. As indicated previously, this is *the principle of integrity*.

According to this general principle, liberal democracies must at least follow these four requirements. First, they must maintain *the social basis of international cooperation*. Immigration and international relations are not only a possibility open to liberal democracies

they are a need according to their moral character and their institutional structure. To change this and make liberal democracies less dependent on the exterior would imply a major readjustment in the way of life as we now know it. Thus, the cost and burdens of the international practices of liberal democracies, including the cost of immigration, is not optional, as sometimes governments seem to suggest, in the same way that it is not an option to endure the internal costs of social cooperation.

Second, as a result, liberal democracies must also establish fair terms of integration of immigrants. Liberal democracies must publicly acknowledge that immigration and international relations are a salient component of growth and development. Liberal democracies must recognize this fact and make it part of their public and political culture avoiding politics that manipulate xenophobia and racism in order to gain votes. Importantly, liberal democracies must incorporate in their public planning international affairs and, particularly, their immigration needs in order to make the political power exercised by border institutions a subject of democratic deliberation. Particularly, they must avoid exploitative forms of labour that takes advantage of undocumented and guest workers. This makes it possible for members of the community to see immigrants and outsiders as important contributors of the wellbeing that members enjoy.

Whether immigration is beneficial or detrimental for both the sending and receiving communities highly depends on the financial and economic planning, regulative frames, policies and programmes. For this to happen, immigration, emigration and international affairs as a whole need to be publicly recognized as a central subject of democratic deliberation. Liberal democracies discharge their international duties of dignity in part by establishing international affairs addressed to tackle these problems.

This grounds the third element: the *legitimate conception of citizenship*. This entails that a conception of citizenship is not only grounded on the democratic participation of their members or on requisites of distributive justice, but also on their participation in the preservation of integrity.

Thus, a conception of citizenship appropriate for the moral character of liberal democracies cannot be grounded on the exploitation of outsiders or in forms of international law based upon the bargaining power of affluent liberal democracies. This is because the democratic complex account of borders and the principle of collective self-determination allows for collective endorsement and responsibility of the kind of political power that borders exercise abroad.

When a liberal democracy manifests its moral character through a legitimate conception of citizenship exercised according to the social basis of international cooperation and the fair terms of integration, then it reaches to a certain extent the continuity of legitimacy required by integrity. If it also exercises the permission to particularize its territory and borders grounded on the trust right to exercise jurisdiction over territory, then a liberal democracy has a right to administrate borders appropriate to its moral character. However, this kind of border cannot ground broad exclusionary privileges, as liberal democracies must acknowledge the various demands of inclusion that outsiders may have.

So finally, borders of a liberal democracy are porous because, as discussed before, the control that states may have over them is grounded on a conditional permission. As a result, borders are subjected to several demands of inclusion. According to the moral character of liberal democracies and its requirements of continuity, legitimate demands of inclusion take the following shape: Associational individual rights, associative international duties, and protection of dignity.

I have discussed associational individual rights in III. Recall that according to their moral character, liberal democracies protect basic individual rights. These rights are associated with certain practices connected with the support and blooming of various kinds of associations. These internal practices are connected with similar practices abroad.

As liberal democracies endorse the protection of associational rights of their members, liberal democracies should also protect their associational rights even when they are exercised with outsiders. In turn, outsiders gain various rights that could or need to be exercised inside the territory in the form of claims, privileges, immunities and powers. They may also gain correspondent duties, though. The conventional view limits these rights of association with the sovereignty of the state, but this is misleading because the story goes the other way around: the sovereignty of the state is grounded on the protection of individual duties and rights, including when these rights are exercised internationally, so state's sovereignty is limited by the rights of individuals. Particularly, a state's trust control over borders is limited by individual rights.

Second, as indicated in §23, international associative duties also give rise to individual claims of admission. When a country increases its trade, financial, diplomatic and governmental cooperation with another, it reaches the point where a special relationship is established. Certain claims of admission may be grounded on these relationships. Indeed liberal democracies normally establish a list of nations that are granted with special privileges.

Failure of recognizing special relations and the relative associational duties they generate may jeopardize integrity, as the idea of continuous legitimacy shows.

The affluent countries that benefit the most from the international system may find that they have far too many special relationships. These relationships may ground claims of admission from the citizens of those nations. Under this account, this represents the legitimate cost they need to bare from participating in the international system.

Finally, admission claims can be granted on dignity itself. Recall that under legitimacy as integrity and its requirements of continuity, the whole idea of having a system of states relies on the protection of dignity. Recall also that the capacity of current liberal democracies to specify their hold of their territory is based on a conditional permission of protecting dignity too. So when the existence of this system of states threatens dignity, modifications should be undertaken in order to accommodate the dignity of the affected group or person. This explains the rights of *refugees*, but it also may grant claims to those called *economic migrants*.

The vast majority of economic migrants are the result of partial or total lack of internal or international legitimacy. Corrupt governments or elites controlling governments leave billions of us suffering the *de facto* dominion of unqualified governments that fail to protect us. Justice-based accounts normally dismiss these claims, because conditions of justice are internal traits of the institutions that are the responsibility of members of the society. But under legitimacy as integrity, the overall structure of the system of states is a responsibility of us all, since it is grounded on our own personal entailments and rights. The minute the permission to specify territories gets in the way for the advancement of the principle of dignity, this permission is overridden. So for instance, when serious deprivation or exploitation is happening somewhere outside, and we do nothing following the rule that the permission establishes, then it is not clear that the permission is helping at all in the advancement of the overall objective.

I won't address the problem of global justice here. But following Pogge (2001; 2008), considerations of global justice may jeopardize the internal legitimacy of states. For legitimacy as integrity the lack of global justice shows the poor job that the system of states may be doing overall on the protection of dignity in the globe.

In order to see this, consider a conjectural picture of our world similar to the conditions documented by Pogge. Recall that the current system of borders is an artefact established by international consensus after World War II. Suppose that after the rearrangement of the international system the global GDP has doubled, but the global

distribution of welfare has worsened. Suppose further that the vast majority of wealth is concentrated in elites of a small group of affluent nations. Someone may think that in this conjecture, a league of nations is taking advantage of the permission in order to mistreat and exploit people outside their borders by invoking compartmentalized accounts of political morality that overlook the international dimension of legitimacy. But in cases similar to this conjecture, the moral ground of the permission is called into question by the same principle that authorized it in the first place.

These considerations take us far from the problem of legitimacy. Presumably these problems and others should be picked up by an account of fair borders. Legitimacy as integrity only establishes the appropriate moral framework for a conception of fair borders to be developed. Legitimacy as integrity should establish appropriate conventional limits to clarify to what extent the permission holds. I suspect that given the current levels of global deprivation and injustice permitted abroad by liberal democracies, and their reluctance to establish international relationships (political, financial and trade) with moral character, the permission is at risk of being constantly overridden to the point of being inoperative. In practice, a serious lack of international coordination to deal with global injustice may seriously jeopardize the claims of all to control their territories and their borders; cancelling, thus, their permission. In this case, liberal democracies won't have a permission to particularize their territories and their borders. Thus, they will lack the relative right to administrate their border institutions.

Someone may object that these three kinds of cases of inclusion claims are in fact pointing to cosmopolitan open borders. I agree that the idea of an international community of principles could be understood in those terms. But the account of continuous legitimacy as integrity is not pointing to this idea. Instead of open borders, this account points to the idea that porous borders are the appropriate kind of borders for liberal democracies, at least for the time being.

Porous complex democratic borders accommodate the moral character of liberal democracies, because they are sensible to conditions of internal legitimacy but also to conditions of external legitimacy. They are sensible to the idea that borders and the system of states are necessary to protect dignity, but also that borders and the system of states may harm dignity in various and pervasive ways.

It is true that the political structure of the world as we know it may be so illegitimate that perhaps the rights and permissions of liberal democracies over the administration of borders are mostly suspended. This does not entail that borders should be open. While

legitimate liberal democracies may lose their permission to specific bounded territories, they may retain their trust right over some territory. This entails that they may not have the permission to exclude, but they may retain the trust right to administrate the control over their border institutions. In order to see this, imagine a crowded popular restaurant. The restaurant does not have a right to exclude anyone; yet at the same time, it may permissibly control entry.

As a matter of principle, everyone is welcomed. But the restaurant can't as a matter of fact include everyone. If the restaurant includes everyone without order, the restaurant certainly will be unable to perform its requisite functions and provide its customers with reasonable service and its employees with reasonable, decent conditions of work. The restaurant is under the dilemma to welcome everyone, but turn people away at the same time. The solution to this problem is more than familiar. Restaurants administrate entrance by opening reservations. Countries in a familiar situation that lack international legitimacy are like restaurants in this way. They may lack the right to exclude outsiders, but they have the permission to administrate entrance in the benefit of everyone's dignity, including of course the dignity of outsiders.

**Conclusions.** *The standard objection* identifies a structural problem of the many views defending border controls, particularly of justice-based accounts of borders (Carens 2003, Abizadeh 2008, Pevnick 2009, Fine 2010). The defender of border control often conflates civic boundaries with territorial borders. Justifying a putative right to control and restrict membership to a political community does not necessarily entail the right to control a bounded territory and the right to use its border to exclude outsiders from that territory and political community (§§2, 10, 15). Importantly, defenders of border controls often overlook what I have called *the territorial challenge of the standard objection*. This means that defenders of restrictions seldom tackle the problem of grounding legitimate collective and institutional rights of dominion over a continuous portion of land (§§19, 24-25).

Intuitively, it seems odd to wield a dominion over borders necessary to exclude outsiders without having first a dominion over a specific bounded territory. Note that it is not enough to argue that states have the right to control *some* territory in order to perform their requisite functions; in order to ground a putative right to exclude, it seems necessary that

states have indeed a justified dominion over the determined bounded territory that they *de facto* exercise over a jurisdiction.

My elaboration, all across the text, of the standard objection helps to establish the following desiderata that, I think, a conception of legitimate border control should fulfil (§21). First, a conception of legitimate borders needs to identify, in a principled fashion, a specific *demos*. It needs to identify a group entitled with rights to political self-determination that exercise those rights through the institutions of a liberal democracy. As Walzer suggests, the exercise of political self-determination in a legitimate fashion determines rights to political membership (Walzer 1983).

Second, a conception of legitimate borders needs to specify, in a principled fashion, *who* the legitimate authority is. We may have duties of justice to support just institutions. But from a set of similarly just states, it is not clear why we should support this state and not any other. Or why not all should emigrate and support a state that does a better job in protecting justice, compared to the state we accidentally have been born into. Quong (2010: 110) calls this problem of legitimacy, *the specificity objection*.

Third, a conception of legitimate borders needs to particularize why the particular state to which we belong is the one that has authority over us in a way that can legitimately extract duties over us and not from any other set of people. This problem of political obligation is called by Quong (2010:129) *the particularity problem*.

Finally, a conception of legitimate control over borders needs to particularize dominion over a determinate bounded territory. A conception of legitimate exercise of political power may deal with membership, specificity and particularity more or less successfully, but this only shows that a state has rights to *some* territory (§§4, 18, 19, 20). It does not ground *per se* a position of dominion over a specific and particular portion of the earth. A putative right to exclude needs to deal with the puzzle of territory.

I contrasted the standard objection with three liberal views about borders. In part one, I discussed what I call the conventional view about borders. According to this view, members of a political community are endowed with a basic right of political self-determination. One important property of this right is to determine who should be considered a member. Walzer explains that membership is the most basic good that a political community may distribute (Walzer 1983: 31-32).

The standard objection shows that this argument grounds rights to restrict a certain kind of memberships, but states do not claim rights over people only. States claim complex

sovereignty rights that entail also rights to control jurisdiction, rights to control territories, rights to control resources contained in those territories and rights to control borders of that territory (Simmons 2001: 300). Presumably, a putative right to exclude is a complex compound of all those rights. In any case, this basic formulation of the conventional view tends to circularity. It presupposes a determined *demos*, and then, this *demos* distributes membership to itself and to others. But prior *pre-political* membership to the *demos* itself is never explained.

Supplements to this basic formulation of the conventional view have arisen. I considered particularly two of them. Miller's nationalism (2010b) and Wellman's right to universal patterns of exclusion (2008). Both views follow a similar strategy, though. The idea is to ground membership to the *demos* in a principle of political self-determination reengineered by a supplementary account of legitimacy. Under certain conditions, a group of people acquires a right to determine its own destiny. An account of legitimacy specifies and explains those conditions. Once these conditions are fulfilled, the *demos* is explained by this principle. For instance, in part I, I presented the nationalist account of legitimacy. Under this account members of a nationalist community are defined by shared nationalist culture. Those who share the culture of the nation are those who might be rightfully considered members of the state. Cultural nationalism seems a form of perfectionism that elevates the values and morality of one nation to the structure of the political arrangement as a whole.

I resisted nationalist principle of political self-determination on two grounds. I fear that nationalism fails in its own terms to protect the culture of the nation (§9). If culture is what matters, then it is not clear why the culture of one group must be elevated to constitute the culture of the state and then stand in a position of dominion and priority over other cultural groups within the same nation-state.

It seems nationalists conflate cultural self-determination with political self-determination. It is possible for members of the state to share one identity, but it seems implausible to expect from them to share one single culture. This seems to point to a form of statism that arbitrarily impose one culture over many, which would not be able to submit to the cultural statism without losing their dignity. This kind of cultural statism does not seem nationalist enough to live up to nationalist ideals, provided that these ideals would require the protection of cultural national minorities too.

I also fear that nationalism is not compatible with liberal standards (§10). This form of cultural statism or nationalist perfectionism seems to imply that the state engages in certain

forms of centralized cultural management. The state makes a selective interpretation of what would be the culture of those who share the same identity. This has the adverse effect of threatening what it intended to protect in the first place, insofar as it endangers the spontaneity and authenticity necessary to generate cultural production. The result is an *official culture* that seems alienated from the cultural life of the society. The thing is that culture seems something that is better produced and protected organically rather than collectively. It is not a centralized authority what creates or protects culture, rather it is the free participation and involvement of each of us that nurtures culture. Cultural management does not seem compatible with basic freedoms.

I am convinced that statism may be inappropriate for a liberal democracy even if we remove the nationalist cultural perfectionist element from the equation. That is why I presented in part III Wellman's view about closed borders. Wellman rejects nationalism on similar grounds as I do (§11). According to him, nationalism is grounded on the empirical postulate that nationalist morality is necessary to the attainment of certain social goods, such as unity, endorsement of coercive institutions, compliance, development, etc. But nationalists never support their claims about a putative right that members *qua* members of the nation would have over borders (Wellman & Cole 2011: 52).

For Wellman, cultural claims are not required to ground a putative right to control borders and exclude everyone else if one wishes. Legitimate states have the right to exercise universal patterns of exclusion if they think fit simply because states have a good claim of political-self determination. Analytically, this claim entails not only the right to associate with others in many ways, but also to be free from unwanted associations.

It is important to note that in order to ground rights of exclusion, Wellman focuses on a minimalist account of legitimacy as the protection of human rights. But according to him, only three or four states might be considered legitimate. Also note that Wellman defines his exclusionary right as a *prima facie* case. This means that there is a strong presumption to consider closed borders as the default position, but this presumption may be overridden by sufficiently strong reasons.

From these general traits (of Wellman's case) I think that he is mostly interested in showing that the presumption of closed borders is not as easy to cancel, as many liberals, like Carens and Cole, seem to believe. But Wellman repeatedly says that he is not justifying the *status quo*. So, I believe that Wellman's case is more coherently grasped if we think it as a *prescription*. If liberal democracies were legitimate, they would have rights to exclude

everyone, if they wished. But most liberal democracies are still not legitimate, so they do not yet have the right to exclude anyone. So at the end, Wellman is merely providing incentives for liberal democracies to pursue legitimacy by means of acquiring exclusionary rights, even if liberal democracies are not really interested in those rights, given their globalist and internationalist orientation of free trade and liberalization of markets.

I suspect that Wellman's case, just as the case of liberal revisionists for open borders (§1), sets indeed an important normative ideal of what properties a global structure of legitimate states with moral stand would have. Liberal revisionists imagine a globe of free and open borders. Wellman imagines something else. A world of units of human rights protection that is self-sufficient, closed and contained. Perhaps dignity is better achieved by free of movement across the globe, or perhaps it is easier to protect dignity if we administrate and focus efforts in small administrative units. In any case, for us to achieve any of these ideals we need first to deal with the liberal democracies we know and the global structure that is familiar to us.

Regarding the conditions that are familiar to us, I resisted Wellman's principle of political self-determination on two grounds. First, it seems that Wellman's case constitutes an illiberal form of statism that arbitrarily establishes priority of state's rights of association over individual rights of association. Not all forms of association are morally equivalent. For instance, basic human rights protect the most intimate forms of association. If under Wellman's account state's legitimacy is extracted from the protection of human rights, including the rights to establish intimate associations, then it is not clear why the state's rights of association have priority over the associative rights of individuals, at least from those basic rights of association. The state's dominion over individual rights of association seems arbitrarily imposed, if Wellman does not conceive his *prima facie* right of universal patterns of exclusion rather as a trump right. But trump state rights are incompatible with his view of legitimacy as the protection of human rights. That's why he structured his claim as a *prima facie* right and not a trump right in the first place.

States have a disproportionate potential of harm compared with other forms of associations. This is why for the case of liberal democracies, states' rights are limited. That includes sovereignty over borders. This is the second reason that made me resist Wellman's case (§15). Universal patterns of exclusion seem appropriate for intimate associations that run under a basic moral framework ruling only one form of mutual concern, like that established

within spouses; but it does not seem appropriate for liberal democracies that need a complex account of morality for an intricate net of distinct forms of mutual concern.

It is true that Wellman sets the standard too high when he establishes human rights as the basic condition for legitimacy. As indicated before, almost any state is legitimate. But on the other hand, it sets the standard too low. When it establishes human rights as the *only* condition for legitimacy, it leaves out many requirements for the exercise of power in the case of liberal democracies. This is what I have called the *oversimplification charge*. If states were typical intimate associations they may have trump rights to be free of any unwanted associations. But states, particularly liberal democracies, are subjected to further moral requirements that limit state's sovereignty rights. These limits include state's rights of exclusion.

So, it seems that cultural nationalism and rights-statism fail in principle to ground a case for border restrictions and broad exclusionary rights. First, they remain vulnerable to the standard objection. Nationalist legitimacy seems to ground rights over cultural boundaries, but that does not necessarily entail rights over borders. One can coherently defend the right that a group has to participate in their own cultural life and at the same time defend porous or open borders. Similarly, the statist principle of political self-determination may perhaps ground control over civic boundaries, but not control over territories and their borders, let alone universal patterns of exclusion.

Second, it seems that these views may only ground broad rights of exclusion under circumstances alien to the moral requirements of a liberal democracy. If liberal democracies were only associations devoted to the protection of human rights or societies ruled by the majority rule, then maybe states would be entitled to ask minorities to defer their individual associative rights for the sake of those extracting benefits from welfare systems or protected labour markets; or they would be entitled to ask minorities to defer their cultural rights and accommodate themselves to the official culture for the benefit of the culture of a dominant group. But liberal democracies are not only associations pursuing the protection of human rights or cooperative societies organized by the majority rule. Liberal democracies are communities bounded by a specific moral character.

The moral character of liberal democracies is the central organizing idea of this work and obviously its weakest point. I said that liberal democracies have a moral character because they abide, in its political arrangement, by both its basic political principles and its exercise of political power to certain moral basic values like dignity. If this description of the moral

character is wrong, and principles like the protection of human rights and majority rule are enough to describe the moral standing of liberal democracies, then maybe states can rightfully impose both the culture of the majority and state's rights of association over the individual interest in international associations. But I hope it is not.

To make of this claim more than a mere hope, I have put forward an explanation (part III). I contended that the conventional view, cultural nationalism and Wellman's view are all vulnerable to the standard objection, precisely because they are grounded in oversimplified moral frames like nationalist legitimacy and legitimacy as human rights. I suspect that these accounts of legitimacy are not enough to sustain the moral qualities of liberal democracies. Particularly, I argued that these accounts of legitimacy were justice-based. This means that legitimacy is defined as the exercise of coercion according to standards of justice. Then, I claimed that justice-based accounts find the territorial challenge out of reach, because when legitimacy is conflated with justice, it is bounded to focus only in the coercive basic structure of the state, not in other kind of institutions, like borders (§16).

Justice-based accounts of legitimacy are especially tailored to deal with the problem of public justification of coercion and endorsement. That is why they focus on coercive institutions and deal with justification by means of liberal and democratic legitimacy. Defenders of border restrictions invoke these accounts, because they allow a great deal of compartmentalization of duties. Compartmentalization is not a substantive claim of these accounts, they are only a side effect of focusing on coercive institutions.

Justice-based accounts merely take advantage of this side effect for isolating members of a political state from duties that they may acquire abroad, allowing a great amount of partiality. This partiality, in turn, would ground border restrictions shielded from duties coming from outside by the compartmentalization of the limited scope of justice. But once we realize that compartmentalization is only a side effect, we realize that broad exclusionary rights are not really grounded on legitimacy.

One way to see this is to see borders as a special kind of institutions. Borders are not coercive, or at least not in the same sense that the basic structure is, because borders do not seem to ground demands of self-ruling and democratic justification. Yet they seem part of the basic structure (§22), but they are international institutions too (§23). Justice-based accounts of legitimacy are not appropriate for dealing with the justification of the kind of political power that the state exercises by means of its border institutions. That is why I invoked legitimacy-oriented accounts of borders (§18).

These accounts avoid the conflation between justice and legitimacy. They are characterized also by beginning with a strong presumption against political power including the kind of power exercised by borders. Thus, legitimacy-oriented accounts do not argue for *prima facie* closed or open borders. They argue for a *prima facie* case against any kind of borders.

Of course, the presumption against borders may be cancelled in an analogous way where it is argued that the strong presumption against political power may be cancelled by an account of legitimacy. But as indicated above, justice cannot define this account. Of course, my intention never was to claim that legitimacy is never about justice. Legitimacy and justice are concurrent virtues at least for the case of liberal democracy, just as prudence and intelligence are concurrent, but not the same. I argued that when legitimacy is not about justice, it is about integrity (§19).

Political integrity is more than mere coherence with past decisions. It implies an interpretative assessment of our values, virtues, principles, concepts, conceptions and practices so we can adjust them in order to make sense of them. In order to show how legitimacy as integrity has the potential to deal with some desiderata, I invoked the concept of *the division of labour between different conceptions of legitimacy*. From the point of view of integrity, justice and legitimacy are not competing virtues (Valentini 2012: 597) and liberal legitimacy and democratic legitimacy are not competing standards.

Legitimacy as integrity is a general concept that allows the use of different standards and virtues when it is appropriate. For instance, liberal legitimacy is appropriate for addressing the problem of public endorsement, and democratic legitimacy is appropriate for addressing the justification of some coercive institutions. But not all exercises of political power are coercive, and legitimacy is not exhausted by public justification. So, legitimacy as integrity uses other standards accordingly.

When legitimacy as integrity is explained by the division of labour, its potential to deal with the underdeterminacy problem and consequently its potential to reach the boundary problem become clearer. Legitimacy as a division of labour is not restricted to an assessment of only coercive institutions or to assess coercion only with standards of justice. It is not bounded to evaluate exercises of political power using democratic legitimacy or to measure outcomes according to the due process standard. Legitimacy as a division of labour can assess borders even if borders are different than any other institution and even if borders exercise

political power under a scope larger than any other institution; provided, of course, that integrity can find the appropriate standard.

What matters here, for now, is not the standard that legitimacy as integrity may apply to borders. Probably this may be a source of controversy. The important thing is that legitimacy as integrity has the potential to establish what I have called a *continuous account of legitimacy or continuity*. This means that the international institutions of the state like borders, customs or international affairs bureaus should be assessed by the very same standards that ground the political arrangement as a whole. This is better expressed by the *principle of integrity*: a liberal democracy must not engage in practices abroad, which cannot be interpreted in another way than as a contradiction to the values and principles that ground its political arrangement as a whole. Legitimacy as integrity has many resources to evaluate the internal arrangement of principles and practices. So, legitimacy as integrity must use those resources too in order to subject border institutions to the same exercise of institutional assessment.

I have previously endorsed the general idea that political power is legitimate when its exercise is necessary for the protection of dignity. This concept of legitimacy as dignity justifies in general the exercise of political power. But political power may threaten dignity as well, so the conception of legitimacy as integrity steps in and arranges the division of labour of the rest of conceptions and standards to explain how power may be compatible with dignity according to the various circumstances.

The agenda that the division of labour establishes for integrity is of course the subject of political theory and I didn't engage with that discussion. Instead, I merely pointed out that the justification of border controls is analogous. Borders are necessary for the protection of dignity, but the erection of borders and the kind of political power that borders exercise may threaten dignity as well. This is what I have called *the dilemma of borders*. At the end of section IV I was satisfied to point out that the dilemma is addressed by the division of labour. Integrity will select standards like fairness or explanations like associative obligations in order to explain what dignity requires from borders of liberal democracies. But, I felt that my work was done.

To me, at this point, the objective that I set at the beginning of this work was achieved. I have shown that the status of the discussion about broad exclusionary rights within Anglo-American political theory was unsatisfactory and that justification of broad exclusionist policies was inconclusive as it is. I have also put forward an explanation of why this is the case. I argued

that defenders of broad exclusionary controls share a moral structure that is unable to reach the boundary problem. Finally, I proposed a direction that I suspect the discussion must take. I laid the initial groundwork to show how legitimacy as integrity can tailor an account of what kind of borders a liberal democracies ought to have. Crucially, this account points out to the idea that broad exclusionary rights are not appropriate for liberal democracies. Rather, porous borders seem necessary to fulfil the requirements of integrity.

However, I have established a stringent desiderata and I fear that legitimacy as integrity may turn inconclusive after all. I felt I needed to show at least its potential to deal with the desiderata. That was how the last section arose: as an anguished attempt to support my claims. The last section is, thus, merely a sketch. Two things I trust though: The *complex account of borders* (§22) and *international associative obligations* (§23). These two accounts show how legitimacy as integrity may deal with the dilemma of borders by means of the division of labour.

The complex account of borders sets the ground for the social basis of collective international responsibility and international cooperation. Traditionally, international basic institutions of the state like borders have been administrated under the discretion of the state. The complex account rejects this arguing that international basic institutions need to be subjected to democratic legitimacy. When the international exercise of political power is subjected to democratic deliberation, these international institutions respect the dignity of insiders making them responsible for this exercise of power. The democratization of international basic institutions is crucial for preserving continuity in a way that the external projection of political power abroad shows the same moral character of institutions inside.

The account of international associative obligations will argue that states acquire obligations not only consenting to international treaties and covenants, but also by playing certain roles in the international arena. When a state establishes certain kinds of relationships with other state, then members of states may gain rights of free movement between these two states. The hope is to show that the affluent countries that benefit the most from the international system have indeed stringent obligations of inclusion with members of other countries. Sadly, this account is largely underdeveloped.

Although I have enormous hopes for the complex account, I fear I haven't found yet a strong argument for international associative obligations. In particular, I do not say anything about the scope and limits of these obligations. It is not clear, also, how and to what extent associative obligations between states can be transferred to its members. Yet, I trust that

associative international obligations may be developed further. In his posthumous paper about international law, Ronald Dworkin seems to share this hope (Dworkin 2013: 10-11). The task must be tremendous, because he also resisted showing how this might be achieved.

The ultimate challenge is the puzzle of territory: what I have called the territorial challenge of the standard objection. On one side, Kantian accounts require an international just global structure in order to gain justified dominion over a determined territory. On the other side, the general account of dignity delivers only rights for dominion of *some* territory but is unable to particularize those claims over a determined bounded piece of land. So, my intuition was to find some middle ground. I offered this conjecture. I suspect we can argue for a *permission to particularize territories* as opposed to wield a right over those territories. This suspicion is grounded on the idea of *territory as trust*.

The account of territory as trust is also an undeveloped suggestion. It begins with the general concept of legitimacy grounded on dignity. The protection of dignity grounds, in general, the existence of states and the erection of boundaries. But it does not ground the legitimacy of one particular state nor the dominion over one particular territory. I have shown how the division of labour may deal with particularity and specificity, but these accounts cannot address the territorial challenge.

To have a right over a territory is to hold a position of dominion over a bounded territory. This right presumably is a compound of a complex set of incidents (liberties, claims, and immunities) that would ground the collection of sovereignty rights, including the right to administrate border institutions. Instead, having permission entails merely wielding a claim of non-interference that may entail also a claim against trespassing. Borders are legitimate when they protect the dignity of insiders and outsiders. The protection of the dignity of insiders and outsiders grant a permission to particularize territories. Once territories are particularized, states may gain permission to administrate border institutions. But this permission is not a full right, or at least not yet. It is not a position of dominion over borders, because it is constituted only by a conditional claim of protecting dignity.

Permission to particularize territories and exercise jurisdiction over territory and over the administration of borders is a weak principle. But, I used an analogy to show its potential. I compared territorial permission with a popular restaurant. A restaurant is, in principle, open to everyone. But if everyone came at the same time, the restaurant would fail to treat with respect all its clients. That is why reservations are required. This requirement does not mean that one is, in principle, excluded from the restaurant. It simply points to a shared

responsibility. In order to provide a good service, restaurants do their best and clients must plan their visits and make reservations.

By the same token, the protection of dignity is a collective responsibility of everyone. States have the obligation to perform their requisite political functions the best way they can, so they can keep their permission to administrate borders. This, of course, includes the obligation to improve the international system so it begins to respect the dignity of everyone. But individuals are obligated too to participate in this human collective enterprise. They have a duty to engage in the public deliberation about international basic institutions like borders and a duty to plan as much as possible their migratory plans so institutions of other countries can respect their dignity.

Of course, this requirement does not apply to those migrants (15.4 million [IMO]) escaping from a life threatening situation. But, the permission for administrating entrance does not apply to them either. As states merely hold a permission to administrate borders, they lack a full position of dominion over borders. Their permission is conditional on the protection of dignity. Insofar as the dignity of this fifteen million people is threatened, and that our current system of states and borders does not protect their dignity, the permission does not apply to them.

This might seem a puzzling conclusion, because it may entail that liberal democracies lack the right and even the mere permission to exclude the vast majority of migrants. But I believe what this conclusion shows is not that liberal democracies lack, in principle, the permission of exclusion. On the contrary, it establishes the conditions under which liberal democracies are permitted to turn people away. It merely points out the poor job that liberal democracies do regarding the protection of dignity in the international realm. During the twentieth century, liberal democracies have developed their moral character, establishing forms of mutual concern among citizens. Hopefully, during the twenty first century liberal democracies will be able to also express their moral character in their international exercise of political power, particularly the kind of political power they exercise through international institutions like borders.

*Enrique Camacho*

Mexico City, August 30<sup>th</sup> 2013

[L.E.Camacho-Beltran@warwick.ac.uk](mailto:L.E.Camacho-Beltran@warwick.ac.uk)

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## GLOSSARY

- *Associative International Obligations*: States play certain roles in the international arena that may give rise to certain duties towards other states and their members. States that benefit the most from the international system will find that they have acquired broader duties. See §23.
- *Boundary Problem, general*: It is the discussion about what border institutions we are morally permitted to have according to the basic moral and political principles we endorse; and what they owe to would-be migrants. We don't ask in depth questions about current practices of borders. Rather, in general terms we ask what kind of entailments and jurisdiction liberal democracies ought to have over the territory and the people within it, and how these entailments should be exercised. See §§ 4 and 5.
- *Boundary Problem, particular*: From the general boundary problem, two particular concerns emerge. First, what is the nature of liberal democracies' entailment over borders? Second, what kind of border control may liberal democracies permissibly exercise? See §14
- *Borders, Complex Account of*: Borders are not just limits or lines in the ground. They are a complex set of specialized institutions subject to democratic legitimacy. I believe this entails that borders be part of the basic structure of society; and as such, they will seek to exercise legitimate political power and command legitimate authority on relatively similar grounds that the rest of state's institutions. See §22.
- *Border Control, De facto*: It describes the current situation of illegitimate system of borders. Institutions control certain territories not because they have the right to do it, but because they can; and this kind of saliency may raise claims to a right to control territory. See §23.
- *Border Control, Right of*: Describes a prospective structure of a system of legitimate borders. This requires that the system of states satisfy conditions of integrity. See §23.
- *Borders, Dilemma*: Borders are necessary to protect the dignity of insiders, but the erection of bounded states may threaten dignity of outsiders. So we need to know how borders can accommodate the protection of both the dignity of outsiders and insiders. See §20.
- *Borders, Factual*: They are those physically established by territorial vicinity, such as those from borderlines or embassies. See §§ 3, 22.
- *Borders, Functionalist Account of*: It establishes that there are instrumental reasons to control borders, because of the benefits involved in a centralized territorial control. States need territorial continuity in order to enforce justice, define property rights and provide public goods. It is often invoked by defenders of the conventional view. The main objections against this account are *the particularity problem* and the *specificity objection*. See § 4.
- *Borders, International System of*: It is the appropriate *locus* of meta-national forms of justice (either transnational or global). It is one of the international facts of international relations. See §23.
- *Borders, Right to Administrate*: It is a complex right to control borders encompassing the three clusters of sovereignty-rights: jurisdiction, moral standing and territorial sovereignty. Borders certainly entail the control over a determined jurisdiction, but also the capacity to enforce this border control in the international community and, crucially, the rightful dominion it has over a defined portion of land. See §23.

- *Borders, Specialization of*: Borders are not a unique institution. Not even international border tolls are part of the same institution. Different border institutions are created depending with what country a relationship has been established. See §23.
- *Borders, Virtual*: They are those established politically without actual territorial vicinity, such as those established by airports and foreign affairs bureaus. See §23.
- *Community, Morally Bounded*: A self-determined group connected by forms of mutual concern with each other that express the moral character of the group. Thus they are groups with political rights to self-determination that, first of all, need to specify their common set of rules in order to decide who has dominion over what and in what circumstances. They also set the appropriate ways that rights could be interpreted, discussed, questioned and changed, as a suitable way to discuss and identify the moral principles that they share. See §3.
- *Continuity Requirement*: Constitutes a rejection to the compartmentalization of legitimacy to the internal exercise of political power. It points out that liberal democracies cannot compartmentalise their moral and political requirements in the arbitrary way by using borders. Instead legitimacy must be coherent inside and outside political borders. Illegitimate exercises of political power outside borders may jeopardize internal legitimacy. See §8.
- *Contradiction of Rights Objection*: Rights are commonly considered as general and absolute, but if they are general and absolute, they shouldn't conflict with each other. By definition, *prima facie* rights conflict with rights associated with countervailing reasons. If rights conflict then rights cannot be absolute. See §4.
- *Conventional View on Immigration*: It defends the claim that states are entitled with a broad right to control borders; encompassed with an also broad right to exclude whoever they see fit according with the interest of the state and its members. See §2.
- *Cultural Self-Determination*: The claims that members of a societal group have to participate and change the culture they share. See §9.
- *Culture, Broad*: Social technology that transmits folk information, customs, and forms of socialization from one generation to the other. See §8, 10.
- *Culture, National*: Broad culture of a societal group that sees itself as a nation. See §10
- *Culture, Nationalist*: Broad culture of a national group that is nationalist in character. See §10.
- *Culture, Public Political*: It is a conception customized by philosophers and theorists around certain political features of the broad culture shared by a group. It is worked out from member's broad culture as an attempt to provide support to a political conception like justice. See §8, 10.
- *Culture, Political Nationalist*: Public political culture developed by philosophers or political theorists that introduces nationalist morality into a customized public political culture. See §8, 10.
- *Division of Labour*: Entails addressing a conceptual problem using different kinds of conceptions. In the present case the boundary problem requires the interpretative interaction of different political virtues and conceptions of legitimacy. See §21.
- *Division of Labour of Legitimacy as Integrity*: Is the integration of several virtues and values such as justice, fairness, efficiency, stability, due process, all under the light of a basic moral principle like dignity in order to assess the moral justification of several different exercises of political power. It employs these different stands to assess our principles and practices in order to know how well they express the core value of dignity. See §21-
- *Dignity*: It means that everyone's life has objective equal importance for the institutions of the community in a way that allows for participation, social cooperation and compliance

with the rule of law without being oppressed or without losing one's self-respect. Thus it seeks to establish that the exercise of political power and the submission to that power respects the equal objective importance of everyone's life. See §21.

- *Equal concern*: It is a form of mutual consideration established between members of a community with a moral character. It is in principle, more than political equality and equality of opportunities. For the state to treat everyone with equal concern also means that, in a liberal democracy, everyone could develop the minimum degree of capacities to take part fully in the cooperative life of society. For instance, individuals need to be able to think about themselves as a valid source of legitimate reasonable claims instead of thinking themselves as submitted to domination and fortune. This means that a legitimate liberal democracy must provide the conditions for everyone to be a member without losing one's dignity. See § 3, 21
- *Fair terms of integration of immigrants*: Liberal democracies must publicly acknowledge that immigration and international relations are a salient component of growth and development. Liberal democracies must recognize this fact and make it part of their public and political culture avoiding politics that manipulate xenophobia and racism in order to gain votes. Importantly, liberal democracies must incorporate in their public planning international affairs and, particularly, their immigration needs in order to make the political power exercised by border institutions a subject of democratic deliberation. Particularly, they must avoid exploitative forms of labour that takes advantage of undocumented and guest workers. See §25.
- *Functionalist Account of legitimacy*: There are certain functions that can only be performed by states. A state is considerate legitimate only when it performs certain political functions. For instance, one of those functions is providing justice. Justice has many currencies, but the most general of these is captured by the conception of *human rights*. Thus a typical functionalist account assesses legitimacy depending on how well a state is able to protect human rights. See §14.
- *Globalization*: It is a common practice of international affairs of states with moral character. The current technologies in transportation and electronic mass-media, as well as the increment of global population, implies that the world is much smaller than it was a century ago, in a way that a great many are now aware of the circumstances and opportunities everywhere. See §3.
- *Global Interdependency*: It is a common practice of international affairs of states with moral character. Certain facts of the international arena like the financial and international trade systems, and even global climate, suggest that the welfare of states depends on responsible actions and politics that every state should take. See §3.
- *Human Rights*: They are a subset of moral rights that act as protections or trumps that place constrains on permissible exercise of power by states, guaranteeing the access to basic human interests and needs in order to live decent human lives. See §14.
- *Immigration*: It is defined as the movement of persons from one state into another with the purpose of temporary or permanent settlement. See §5.
- *Integrity, political*: It is a political virtue that requires radical coherence and consistency. It also requires systematic moral endorsement as responsibly supporting the several believes, principles, virtues, values, conceptions, concepts and practices that compose a complex system such as public institutions of the state. See §21.
- *Integrity, Principle of*: It states that liberal democracies cannot exercise political power outside their borders in a way that can only be understood as a flat denial of the principles that ground political power as a whole. See §21.
- *International Affairs, Common Practices and Facts of*: They include at least global interdependency, globalization and international cooperation. They can be seen as an

external expression of states' inner moral character. These common facts, based on sociological and international law generalities, also configure the problem of borders as we know it. See §3.

- *International Cooperation*: It is a common practice of international affairs of states with moral character. Liberal democracies have engaged willingly and knowingly in the construction of a complex and pervasive international system that encompasses financial, trade, diplomatic and mutual support activities. The establishment of this international system has taken interdependency and globalization to levels never seen before. These general facts of international relationships entail that international cooperation is both possible and necessary. See §3.
- *International Standing*: It is considered a sovereignty-right. It includes the rights that states exercise against outsiders. See §24.
- *Jurisdiction*: It is considered a sovereignty-right. It includes the rights that states exercises over those subjected to their authority. See §24.
- *Justice, Distributive*: In its more general sense is a virtue of patterns of distribution undertaken by the basic structure. See §16.
- *Justice-based accounts of borders*: Characterize the boundary problem as a problem of justice; for instance as the just distribution of membership, or the just distribution of resources, opportunities or even territory across political boundaries. Thus the problem relies in establishing what kind of demands of justice each side may legitimately make to the other, across political boundaries. They typically conflate justice and legitimacy as two sides of the same virtue. For most justice-based accounts, outsiders are rightfully excluded because they lack distributive claims. Outsiders do not have strong demands of justice because only those coerced by basic institutions have strong legitimate claims of this kind. See §16.
- *Legitimacy*: In its most general meaning it is a virtue of the exercise of political power. See §5.
- *Legitimacy as Dignity, Concept of*: It requires that the political arrangement finds a way to order our social life exercising justified political power without jeopardizing the dignity of anybody. Thus it seeks to reconcile *in principle* the dignity of everyone with both the exercise of governmental ruling and the duty of obedience owed to authoritative commands. See §21.
- *Legitimacy as Integrity, Conception of*: Exercises of political power are morally justified when the whole system of beliefs, principles, virtues, values, conceptions, concepts and practices that compose a complex system such as public institutions of the state can be seen and interpreted as responsibly endorsing the protection of dignity of everyone. So Legitimacy as Integrity explains under what conditions the exercise of political power may be compatible with dignity. See §21.
- *Llegitimate conception of citizenship*: This entails that a conception of citizenship is not only grounded on the democratic participation of their members or on requisites of distributive justice, but also on their participation in the preservation of integrity. Thus, a conception of citizenship appropriate for the moral character of liberal democracies cannot be grounded on the exploitation of outsiders or in forms of international law based upon the bargaining power of affluent liberal democracies. See §25.
- *Legitimacy, Basic View*: It claims that justice and legitimacy are not distinct values; rather, they indicate the different requirements of equal concern according to distinct circumstances. See §17.
- *Legitimacy, Continuous Account of*: It is the conception of legitimacy that embodies the continuity requirement. Crucially it realizes that if borders exercise institutional authority

*outside*, they should be shaped by the same principles and practices that shape political authority as a whole. So this account of legitimacy may face the boundary problem because it reaches the kind of political power that borders exercise. I argue that a continuous account of legitimacy has two components the concept of legitimacy as dignity and the conception of legitimacy as integrity. See §20, 21.

- *Legitimacy, Transactional Account of*: They are those that ground our political obligations on consent or on reciprocity. Some part of the individual dominion over land may be transferred to the state, thus preserving the structural integrity of its deontic ground, provided that they were transferred through the appropriate transactional history. See §§5, 15, 21.
- *Legitimacy-oriented accounts of borders*: Characterize the boundary problem as a problem of the permissible authority and coercion that borders may exercise over people both sides. They typically understand justice and legitimacy as different virtues. The kind of political power that borders exercise needs to be justified to those subjected to them independently of their distributive claims. See §§ 5, 18.
- *Legitimacy, Public Justification view of*: This view holds that a state is legitimate insofar as coercive power is justified to all members of the public on the basis of good reasons or reasons that apply to them. Coercion is taken as the main object of public justification, because political power is conceived as always coercive. But on closer examination it becomes clear that the view is invoked only regarding one case of legitimate institutions: Basic coercive institutions. These kinds of institutions are legitimate when they are publicly justified to reasonable citizens that could reasonably endorse the kind of coercion exercised upon them. Thus under this view legitimacy is the same as democratic public justification of coercion. See §17.
- *Liberal Democracies, Moral Character*: Central organizing idea of the thesis. Establishes moral restrictions and constrains about what kind of political power that liberal democracies are permitted and morally justified to exercise. For a liberal democracy, conditions are such that sovereignty over borders cannot be a trump card because liberal democracies are distinguished by endorsing certain basic political values. The moral character of liberal democracies, then, is both shaped by internal conditions of legitimacy and external facts of international affairs. It is the central organizing idea because it explains under what conditions border control and restrictions on immigration are a normative problem. It thus guides the discussion about what kind of borders liberal democracies are permitted to establish and about what kind of border policy liberal democracies are permitted to implement. See §3.
- *Nationalism, Cultural*: It is an account of nationalist legitimacy that attempts to supplement liberalism regarding the underdeterminacy problem by explaining membership in terms of a special relationship established between people that share the same societal culture. The pervasive importance of sharing the same societal culture is said to ground political rights of self-determination and partiality. See §§ 6, 7
- *Nationalism*: It is a doctrine that prescribes that states coincide as much as possible as nations. As such nationalism, in its developed forms constitutes an account of legitimacy that attempts to supplement liberalism regarding the underdeterminacy problem with a conception of nationalist legitimacy. It is not clear however that any form of nationalism could be made compatible with liberal standards. In case of succeeding, that form of nationalism will constitute liberal nationalism. See §6
- *Nationalism, Familiar*: It is one of the forms of nationalism held by states. This is a form of nationalism compatible with liberal democracies. All liberal democracies are nationalist to the extent they are organized as nation-states. But this does not entail a special commitment to make the nation and state to coincide. This form of familiar nationalism is

civic as opposed to ethnic or cultural; it is not explained in terms of common genetic descent, or common broad culture; but merely based in a public culture open, in principle, to all citizens, and ideally acceptable from their own pluralist point of view. See §10

- *Nationalism, Substantial*: It is one of the forms of nationalism held by states. This is a form of nationalism I argue is not compatible with liberal democracies. In a substantially nationalist state, the comprehensive culture of a dominant group is to be expanded to everyone within the state. The link between nationalist culture and the institutions of the state creates an environment where we all live and breed the same cultural aims, values, and the characteristics of this environment makes a difference to all citizens. See §10.
- *Nationalism, Ethnic*: It is the form of nationalism that fixes legitimacy with a myth of common descent. See §10.
- *Oversimplification Charge*: It states that the different formulations of justice-based accounts of borders share one common trait: they run over the simple view of legitimacy. This view constitutes a simplified moral framework that seems not appropriate to fully express and realize the moral character of liberal democracies. See §16.
- *Particularity Problem*: Is one of the traits that render an account of legitimacy as unfit to supplement liberalism regarding the underdeterminacy problem. It claims that accounts of legitimacy may lack any sound way to establish *why* the particular state that we are set to belong is the one entitled to wield authority over us when there are many other states that we may discharge our political obligations in a better and more efficient way. It arises when an account of legitimacy only establishes the importance for a state's institutions to have a determined territorial site, but fails to deliver further criteria to determine *where* precisely the limits of this site should be. See §§2, 10, 15, 21.
- *Permission-rights*: They are remedial responses to practical problems and unsatisfactory states of affairs. Permissions authorize an action otherwise against principles, but only insofar as this action promotes the very same principle it violates. So permissions are characterized by its partial and conditional nature. As a result, permissions are very weak as they may be suspended anytime by the same principle that grounds them. Permissions are formed mainly by claims of non-interference that could be overridden. Rights are formed by clusters of incidents that specify when the right bearer is in a privilege position of dominion over something or someone. See §25.
- *Political self-determination*: The claim that members of a group have to determine and control their shared stakes such as the rules that apply to the group. See §§2, 5, 6, 12, 16.
- *Social basis of international cooperation*: Immigration and international relations are not only a possibility open to liberal democracies they are a need according to their moral character and their institutional structure. To change this and make liberal democracies less dependent on the exterior would imply a major readjustment in the way of life as we now know it. Thus, the cost and burdens of the international practices of liberal democracies, including the cost of immigration, is not optional, as sometimes governments seem to suggest, in the same way that it is not an option to endure the internal costs of social cooperation. See §25.
- *Sovereignty*: It is the set of rights exercised by modern states. It consists in at least three important clusters of rights: Jurisdiction, international standing and rights over territory. See §2.
- *Specificity Objection*: Is one of the traits that render an account of legitimacy as unfit to supplement liberalism regarding the underdeterminacy problem. It states that accounts of legitimacy may fail to establish *who* the legitimate authority is. It arises when an account of legitimacy only establishes the importance of obedience to the law and submission to just institutions, but fails to deliver further criteria to determine *who* should be submitted to these institutions instead those others. See §§2, 10, 15, 21.

- *Standard Objection*: Is one of the traits that render an account of legitimacy as unfit to supplement liberalism regarding the underdeterminacy problem. The underdeterminacy problem entails that conventional justifications of exclusionary borders (conventional view) just assume, but never fully justify some kind of dominion over territory and its borders. But these theories seldom explain how the connection between control of membership and control over territories and borders entails some border policy. According to this objection, the conventional view conflates arguments to control membership with arguments to control jurisdiction, territory and ultimately borders. See §§2, 10, 15, 21.
- *Territorial Challenge of the Standard Objection*: Is one of the traits that render an account of legitimacy as unfit to supplement liberalism regarding the underdeterminacy problem. It states that accounts of legitimacy may fail to establish why we (and not others) have legitimate rights over this territory. The normative problem that it express is to define in which sense liberal democracies may be territorial entities. See §§19, 24-25.
- *Territorial sovereignty*: It is considered a sovereignty-right. It includes a set of rights exercised over a particular geographical extension of land, including crucial rights to control its airspace, rights to control settlements over territory and rights to exploit its natural resources. See §§24, 25
- *Territory, De Facto Moral Dimension of*: It includes all the natural, historical, emotional and symbolic aspects of territory. It explains our *legitimate interest* in territories, but it does not, by itself, ground any claims or rights. See §24.
- *Territory, Deontic Moral Dimension of*: It attempts to explain a *privileged position of dominion* over territory. It explains the possibility of acquiring rights over territory. See §24.
- *Territory, Jurisdictional View of*: It encompasses the idea that certain control over territory is simply included or presupposed in jurisdictional rights. Beyond that, the dominion over the territory is assumed to be intractable. See §24.
- *Territory, Telic Moral Dimension of*: It includes the various aspects where territory is necessary for human life, like soil. See §24.
- *Territory, Moral Dimension of*: Territory has a moral dimension in three main ways: De facto, telic and deontic. See §24.
- *Territoriality Models*: They explain in which way a liberal democracy may be territorial. There are at least three: Ownership model, trust model and international community model. See §24
- *Territoriality as Ownership*: It is one way to explain in which sense a liberal democracy could be territorial. It claims that the territory is owned, in some sense, by the political community. It is characterized by establishing a deontic dominion over territory grounded on relationships of property that could ground broad exclusionary rights. See §24
- *Territory as Trust*: It is one way to explain in which sense a liberal democracy could be territorial. This model begins with the idea that individuals are entitled to a certain space to live on. States are legitimate because they make possible the protection of dignity; states are trusted to control certain territories in the benefit of all, so members can realize their several conceptions of the good and lead their lives. See §25.
- *Territory as International Community of Principles*: It is one way to explain in which sense a liberal democracy could be territorial. It seeks to establish a strong deontic dominion over a territory comparable to ownership, but it grounds this dominion on the individual claim to space and resources. This view, however, does not ground broad exclusionary rights, because the relationship between individual claims and states' dominion can only be established by a global community of principles. This seems a project for the future of liberal democracies. See §24

- *Traditional view of borders*: that each state has a right to admit or refuse entrance of would-be migrants on its own terms. According to its own interest and the interest of its members, the state has a straightforward right to decide whom, if anyone, to admit. It is essential for the modern state to exercise *supreme* dominion over a particular portion of the earth's surface. Therefore the state wields discretion on movement across its political and territorial borders. The state also has discretion on the conditions it wishes to impose on admission. See § 5, 22.
- *Transnational Associative Duties*: Not all obligations that states acquire are voluntary in nature, for instance those acquired by signing covenants and treaties. Some other obligations are acquired by roles that states simply grow into within the global realm. The more our relationships develop between states the greater the demands that members of other states may have against our state and its members. See §23.
- *Trust territorial rights*: Attempt to ground the permission to control the exclusive administration of borders in certain individual rights transferred in trust to a legitimate state. This permission is conditional on considerations of the dignity of outsiders. Territory as trust draws upon the last two models of territoriality, because it recognizes the importance of individual entitlements and the Kantian focus on international legitimacy. Instead of allocating ownership claims to the state or granting disproportionate legitimating powers to the international community, it establishes some middle ground between the mere permission to control borders and the right to exercise border control. See §§24, 25
- *Underdeterminacy problem*: It is a sort of diagnosis to the state of contemporary liberal and democratic thought. Contemporary liberal theory and democratic theory both begin by presupposing the existence of the *demos*: a political community and its members. They do not provide a definitive criterion to decide who is in and who is out. Neither takes the existence of borders as problematic at all. This means that liberalism and democratic theory remain undecided and underdetermined about a normative explanation of membership. See §2, 5, 10, 15, 25.