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Attachment to Territory: Status or Achievement?

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I Introduction

It is by now widely agreed that a theory of territorial rights must be able to explain *attachment* or *particularity*: what can link a particular group to a particular place with the kind of normative force necessary to forbid encroachment or colonization?¹ Attachment is one of the pillars on which any successful theory of territory will have to stand. But the notion of attachment is not yet well understood, and such agreement as does exist relies on unexamined assumptions. One such assumption is that attachment is an *achievement* of some sort, as opposed to some kind of brute ascriptive *status* that a claimant has irrespective of anything it might do.

But achievements do not come for free. 'Achievement' is a success term, and any theory predicated on success, no matter how minimal, requires a theory of failure. Yet theorists of territory have not grappled with the problem of failure. This is because they have tried to stake out middle positions, such as settlement or longstanding occupancy, which I call *presence* accounts. But presence is itself a minimal achievement —

1 See Kolers 2009; Miller 2007; Simmons 2001; Stilz 2009.

the achievement of 'being there' — and hence is not exempt from the challenges facing achievement views.

An 'achievement' is any demonstrable activity that an agent can now perform or continue performing. In contrast, a 'status' is an ascriptive characteristic that one has or lacks irrespective of anything they might now do, either because what had to be done to get it could only have been done in the past (such as being the first settlers) or because the link is not founded in any action (or at least, any action that the claimant might have taken), but rather in properties such as believing the land to be sacred or having been promised it by a god.² Like a status, 'presence' is also typically experienced as unchosen, and also shapes the agent's identity, and thus has ascriptive characteristics. But because 'being there' is performed and can continue to be performed into the future, presence is at bottom an achievement.

In this paper I shall show that problems with status views have led prominent theorists of territorial rights such as David Miller (2000), Margaret Moore (2001), Cara Nine (2008; 2012), and Anna Stilz (2009; 2011) to embrace presence criteria. Yet presence is not a straightforward idea, and in embracing it these theorists have begged the very question of attachment that they set out to answer. More recently, Miller (2007; 2012) has proposed a full-fledged achievement view. However, his proposal crucially lacks a theory of failure. In contrast, an achievement view based on 'plenitude' does not rely on presence and incorporates a plausible theory of failure. For these and other reasons, I shall argue, plenitude is the most attractive theory of attachment to territory, and hence can ground a theory of territorial rights. I return at the end to deeper implications for theories of territory, including how we should understand territoriality itself.

Before beginning in earnest we need a working definition of *territorial rights*. Most generally, *S* has a territorial right in a particular geographical place *P* when *S* is morally entitled to bear a *territorial relation* to *P*. The content of the territorial relation is some bundle of rights and responsibilities regarding *P* through which *S* attempts to shape its members' common life. The content of this bundle of rights — which particular rights and responsibilities regarding a place constitute the territorial relation — is not straightforward. Yet some consensus has emerged around A. John Simmons's (2001: 306) gloss on the territorial rights of states. To paraphrase, these include (a) rights of jurisdiction over persons within the territory; (b) rights to control unowned land and resources within the territory; (c) rights to tax and regulate prop-

2 For discussion see Gans (2001); Waldron (2003).

erty within the territory; (d) rights to control borders; and (e) rights to territorial integrity.³ Thus the principal job of a theory of territorial rights is to explain how any agent could gain a moral right to exercise these five sets of rights over any *particular* place.

My aim in this paper is to enhance our understanding of the attachment criterion and give some new reasons for preferring one account over others. In the process, I hope to deepen our understanding of territory and territorial rights more generally.

II Attachment: Achievement, Status, or Presence?

The earliest theories of attachment in the liberal tradition are achievement theories. These theories arise in the context of European colonialism. Locke and his followers argued that Native Americans had no ownership rights in the land on which they lived, since they putatively did not enclose or cultivate it, did not have a market in land, and so on.⁴ These views, based in agriculture, efficiency, or other specific criteria, were effectively forgotten for most of the 20th century as territory and international relations disappeared from political philosophy. Since their rediscovery these efficiency arguments have been shown to rest on false empirical premises and to suffer from serious normative flaws (Kolers 2000; Moore 1998, 147-9).

Against this repudiated achievement view, the appeal to *status* appears to have two major attractions. First, a status view does not impose any performance criterion upon territorial claimants, but rather accepts claimant groups just as they are.⁵ This universal recognition avoids what we might call the problem of *ethnocentrism*: the risk, attendant on any achievement view, of smuggling in a culturally particular performance criterion such as the European conception of efficiency. Second, status views do not need a theory of group action. On a status view, groups with status claims to particular places need not actually be able to *do* anything, because there is nothing they are being asked to do. They just have to *be*. In contrast, on an achievement view the group must somehow *earn* its state, and hence, the theory requires accounts of a group that can act, and of an act that it can do. For instance, a status

3 Later I shall have more to say about this definition, but it suffices for current purposes, since it is roughly shared by the authors whose work I shall be discussing.

4 See Locke (1988), ch. 5. For discussion see Arneil (1996); Tully (1994), ch. 5.

5 Maaka and Fleras (2000). An interesting parallel exists in the disability rights literature. See Bérubé (2009); Kittay (2009).

theorist who defends a Jewish 'historical right' to the Land of Israel need only identify who counts as Jewish now, and ascribe to those persons collectively a right that there be a state, in the Land of Israel, that is somehow Jewish (Gans 2001). No group action is required. An achievement theorist, however, must explain what the Jewish People or Nation might *do* to gain a right to create a state, and must be able to determine when that thing had been done. Call this the problem of *group action*.

The group action problem has two aspects: subject (actor) and object (act). The actor aspect goes beyond the scope of this paper. The crucial aspect for our purposes is the act, of which two elements matter. First, achievements must be empirically *demonstrable*: it must be evident what is being attempted, and whether the attempt has succeeded. Consequently, it must be possible to fail, and failures must have consequences if the theory is to be of any use. Second, achievement accounts must *guide action*. The theory must both settle longstanding disputes, and guide current and future claimants on what to do going forward to achieve a valid territorial claim. If a theory posits a required achievement, but that achievement cannot be undertaken or empirically assessed, then the theory has not really solved the problem of attachment at all.

Status views are initially attractive, then, because they seem to avoid these problems of ethnocentrism and group action that confront achievement views. Hence early liberal nationalist views, hoping to affirm the self-determination ideal that each nation is politically on a par with each other nation, treat the linkage to a particular homeland as an essential, brute feature of each nation, presumably but not necessarily based on some historical link. Nothing more can be said, on these views, about the link between nation and land than that it just is.⁶

But status views quickly lose their luster when we try to use them to settle territorial *disputes*. Divine promises and inherited honors from the distant past do not actually resolve disputes, but merely raise their stakes. If group *G*'s essence is its putative attachment to territory *t*, then to deny its valid attachment is to deny that *G* exists, or that its god exists, or that the *G*s really are who they say they are. For instance, a Palestinian might claim that contemporary Jews are descended, not from the ancient Hebrews, but from the medieval Crimean Khazars, to which an Israeli might reply that there is no such thing as a Palestinian. Appeals to status do not avoid conflict but exacerbate it, for to deny a competitor's status-attachment is to existentially repudiate

6 Miller (1995), 1-2; Tamir (1993), 123; Walzer (1983), 44; for discussion see Gans (2001); Levy (2000).

the competitor altogether. Call this the *existential* problem. One might, instead, grant *G*'s essence but deny its attachment by saying that *G*'s status is irrelevant to attachment, or is overridden by *H*'s status, which is more important. Faced with such a challenge, *G* nonetheless cannot *do* anything to cement its claim — cannot settle, build infrastructure, cultivate — because such actions must be irrelevant to a status claim. Status views thus leave groups inert. In the face of territorial disputes, then, the virtues of status views turn into vices. The only way out of an impasse will be to abandon status altogether and posit an achievement.

This dynamic is evident in Michael Walzer's (1983, 43) pioneering effort to explain 'a kind of territorial or locational right.' Initially, he argues against Otto Bauer's repudiation of territorial rights by positing, 'Nations look for countries because in some deep sense they already have countries: the link between people and land is a crucial feature of national identity' (Walzer 1983, 44). But as Walzer immediately notes, 'The argument cannot stop there'; instead, appealing to Hobbes, he suggests that territorial rights are grounded in need, and that in principle it should be possible to redraw borders in order to make available 'countries not sufficiently inhabited,' 'constraining [the prior residents] to inhabit closer together and not range a great deal of ground to snatch what they find.'⁷ In other words, the initial appeal to 'some deep sense' in which Nations already have countries must be supplemented by appeal to whether the people who claim a place actually *need* it, which is to be determined by whether they *use* it in a certain way or with a certain degree of efficiency. The existence of excluded others who might make a countervailing claim thus obliterates the initial appeal to status.

Presence views are the natural alternative to status views. And presence seems to avoid all these problems. 'Being there' is an achievement, and hence avoids the existential problem. Yet as an achievement it is so minimal that it avoids the risk of ethnocentrism and appears to raise no difficulties of group action. Further, presence boasts the added benefit of being strongly 'conservationist' (Christiano 2006) — that is, defaulting in favor of present arrangements so as to prevent expulsions and minimize revisions of extant territorial regimes. In contrast, an achievement view might license encroachment or upheaval on grounds that a certain claimant had failed to do what was required in a territory. Call this the problem of *revisions*. Status accounts are, of course, also susceptible to this problem, since current settlement patterns might not match whatever the status view regarded as the legitimate basis of attachment.

7 Walzer (1983, 46), citing Hobbes, *Leviathan*, Part II, ch. 30. See Hobbes (1996), 239.

Achievement views are thus subject to challenges from ethnocentrism, group action, and revisions. These three problems are encapsulated in a more pointed problem of *failure*. If attachment to territory is an achievement, then it must be possible to fail, and if the theory is to have any teeth, then failures must have consequences. But a theory of achievement failure runs the risk of imposing a requirement that is ethnocentric, that cannot guide action or be empirically demonstrated, or that licenses radical revisions once failure occurs. Hence the problem of failure encapsulates the three basic problems for achievement views.

III Presence Views

While the existential problem and the problem of revisions sink status views, and the failure problem seems to repudiate achievement views, the presence criterion seems to emerge unscathed. For this reason, liberal nationalists such as Miller (2000, 116) and Margaret Moore (2001, 191) embrace presence views by affirming *longstanding occupancy* as a necessary condition of attachment. Moreover, the recently developed views of Cara Nine (2008; 2012) and Anna Stilz (2009; 2011) both embrace presence. Nine, a Lockean, treats territorial rights as a species of land rights analogous to (without being an instance of) property rights. The state that labors productively on a place — where productive labor is understood to entail establishing justice there — gains a territorial right there. Yet she holds that, in the event of state failure, the extant landed population — a Lockean ‘Body Politick’ (Locke 1988, 330-3) — has foundational rights to be the population whose state tries to establish justice there. She remains agnostic on how landed populations gain their exclusive attachments to places, though she denies that territorial rights are grounded in property rights. On attachment, then, her view comes down to presence; her theory of state territorial jurisdiction requires states to establish justice, but attachment *per se* is a property of landed populations and is not susceptible of failure. States may fail to achieve justice, but landed populations cannot normally fail to be there. Stilz, for her part, follows Kant in holding that all people have a possession right to be ‘wherever nature or chance (apart from their will) has placed them’ (Stilz 2011, 584, quoting Kant 1996, 6:262). Persons then have a right and duty to enter into states in order to have property rights as such. In doing so they constitute themselves as self-governing ‘peoples,’ who become the bearers of territorial rights. But these rights to property and territory are built on the prior assumption of natural possession. Like Nine, Stilz holds that states can fail, and persons can fail to organize themselves as peoples; but they cannot fail to be where they are, or to have a right to possess the place.

Presence views seek to answer the attachment question by ostension — to point at who is here now. Who could deny that? To be sure, a long list of colonizers and expansionists have done just that, but, the presence theorist might say, these imperialist claims have always been demonstrably false, and so this tainted history should not count against the presence criterion. But it is not so easy. For mere presence does not answer the question of *who* is present and in what their presence *consists*. Consider Iroquois attempts in the late 18th and early 19th centuries to avoid expropriation by leasing land to white settlers.⁸ The leases would have maintained Iroquois title while allowing for white settlement and agricultural development. The state government, of course, systematically destroyed these efforts and interposed itself as the monopsonist for outright ‘purchase’ of Iroquois land. But imagining that this lease plan had succeeded, such that a settler population boom had occurred on Iroquois territory: whom would a presence theory say was ‘present’? The land would be primarily populated by European settlers and reflect European norms of development. Yet the Iroquois would have leased the land in part *so that* this development would occur. The settlers would have been doing to the land what the Indians wanted them to do to the land, because the Indians wanted them to. And yet the reason the Indians wanted this development was to increase the ‘value’ of the land under the settler system of property — a system that the Iroquois did not recognize as having political authority over them, yet which structured the terms under which they could alienate or keep their land. Whose labor, then, would this have been? The settler-leaseholders’? Their employees’ and servants’? The Iroquois’? The American people’s? It is not at all clear. Or if the issue is not labor but unchosen possession, we may fast-forward one generation to the children of the settlers, the first generation of white children born under these Iroquois leases in upstate New York. In discerning whose land this is, the fact that some people have been placed there by ‘nature’ seems normatively inert. To be sure, we are imagining, contrary to fact, that indigenous title has been preserved in law. But title is a legal mechanism for distributing rights. The question is whose legal mechanism should have carried the day, in that place, at that time.

Prior to European encroachment, the Iroquois were not permanently settled in any one place, population density was low, and most of the land was radically undeveloped by European standards. Were the Iroquois, then, *occupying* the place in any sense that the settlers or anyone

8 This paragraph and the next draw on Taylor (2009). I am grateful to John Cumbler for discussion.

else were morally bound to recognize? If so, in what did the occupation consist, and in what proportion of the place did it occur? Afterwards, although there was a white population boom, it is important to remember that ‘boom’ is a relative term. Even at its peak population density, most of the land in upstate New York has never had people physically on it; much of it, indeed, is officially Wilderness. Yet now the New Yorkers would claim to be there.

In short, the notions of settlement, occupancy, presence, and the mixing of labor are themselves culturally variable and contested. Like the status view before it, presence leaves open the very question that it sought to answer. The strategy of ostension fails. Instead, presence theorists owe an account of what ‘being there’ entails. Such an account, however, requires specification of what someone must *achieve* to count as ‘present’ — in which case presence must be fleshed out into a full-fledged achievement.

Nine and Stilz might reply that what counts as settlement is indeed arbitrary, but that this is not a problem because it is to be determined by the legitimate state which structures the property rights of the people or the landed population. That is, that arbitrariness at the level of *property* is resolved at the level of *jurisdiction*.⁹ But the distinction between property and jurisdiction cannot bear this weight, on either a Kantian or a Lockean view. A Lockean view must somehow link the jurisdiction of the state to the People’s antecedent ‘metajurisdictional’ right to create the state — and to create it *there* — and thence to the individuals’ prior right to create the People and the territory. An orthodox Lockean establishes these links by treating property rights as prior to jurisdictional rights (Simmons 2001); but an orthodox Lockean view is for this reason *not* a presence view, but an achievement view founded in original appropriation. Nine’s view is a presence view precisely because she repudiates the foundation of territorial jurisdiction (the People’s right to the place) in property (the individuals’ rights to the places). It follows then that the People’s say-so about where it is or where its members are is arbitrary and contestable. A similar problem besets Stilz’s Kantian view. For Stilz, jurisdiction is a primitive relation, not grounded in the property rights of individuals; and yet its scope is determined by the allegiances of the individuals whose property the state encompasses; yet, *that it is their property* is determined by the state. So an outsider might question the basis on which a certain piece of land was accorded to a particular property holder. The answer must be that that property holder was *there*. This state’s decisions about where its people have

9 I am grateful to an anonymous referee for this way of framing the objection.

settled cannot decide the question, if what is in question is precisely what 'settlement' entails. Stilz might say that the state is a moral person and hence its internal constitutional order must be respected by outsiders. But in what sense is the constitutional order *internal*? The internality presupposes the state, not vice versa.¹⁰ In this respect it is useful to note that Kant's initial defense of natural possession is founded on the roundness of the Earth and the attendant impossibility of being so radically dispersed that we never come in contact with one another. The judgment by some subgroup of persons that they and only they are the ones who cannot avoid daily interaction, and hence they and only they are the ones who may enclose a territory against others, presupposes conceptions of interaction and avoidance. The sense in which persons cannot avoid interacting is one of the things that needs to be explained.

Presence views thus cannot explain attachment. Either they leave open the very questions that they purport to answer, or they owe a more robust account of the achievement that links people to territory.

Yet even if status and presence views are nonstarters, achievement views are not in the clear: they must confront the problem of failure. To overcome this problem they must impose non-ethnocentric demands that guide action and can be empirically assessed; and while an achievement theory must be able to deny territorial rights to those who fail in the required achievement, it should not license radical revisions that risk systematic violations of human rights.

IV Miller on Universal Value

Most recently, Miller (2007; 2012) has defended a full-fledged achievement theory. And while he continues to emphasize longstanding occupancy and mutually formative interactions between nation and place as morally significant elements of territoriality, his theory of attachment now rides on the quasi-Lockean thesis that a nation attaches itself to a place by enhancing the value of that place — primarily by increasing its capacity to meet universal human needs such as those for nutrition, health, habitation, and so on. 'Any change that increases a society's capacity to fulfill these conditions over time adds universal value' (Miller 2012, 8). Adding universal value is sufficient for attachment, but it is not necessary. To avoid the ethnocentrism problem, Miller grants

10 In addition, even when she relaxes the assumption that the claimant population has, or ever had, a legitimate state, or even constitutes a politically organized 'people,' Stilz continues to refer to the land as 'its territory' (Stilz 2011, 599). Presence is doing the work here, not jurisdiction.

that a nation might also gain attachment by adding ‘culturally specific’ values, such as memories of battles fought or treaties signed, provided the nation does not in the process reduce the universal value of the place:

territorial rights can also be justified by the adding of culturally specific value *provided* that universal value is not diminished by the groups’ activities. That is to say, groups that lay waste to land in the pursuit of some culturally specific project do not deserve territorial rights, whereas groups that simply add cultural value but without reducing universal value can claim such rights, as a way of capturing the value they have added. By preserving universal value they have done enough, under normal circumstances, to defeat the claims of outsiders who might otherwise wish to use the land. (Miller 2012, 260)

Thus Miller’s criterion of failure is *a decline in the universal value of a place*. Such a decline would, in Miller’s view, defeat the claim to territory, thereby delegitimizing the nation’s efforts to practice the rights Simmons enumerates — particularly regarding borders and natural resources. Outsiders would then be justified in coming into the territory to dwell or use resources.

If a claimant must preserve or enhance the capacity of a territory to meet universal human needs, then *unsustainable use* constitutes failure. So suppose that, in part or all of its claimed land, group *G* achieves culturally specific values, but does so in a way that is mildly unsustainable — say, its hunters are taking deer at a rate slightly greater than replacement. Nonetheless, *G*’s patterns of use lend culturally specific meaning to their entire way of life. For Miller, *G* would seem not to deserve territorial rights: notwithstanding the culturally specific value, *G*’s use detracts from the land’s capacity to meet universal human needs. Hence Miller must reject *G*’s claim. But this result produces a dilemma for Miller: either *G*’s unsustainable use does not in fact decrease universal value, because other uses, such as cultivation, remain possible — *G* has not *laid waste* to the land; or *G*’s unsustainable use *does* decrease universal value, and *G* loses its territorial right.

The first horn of the dilemma revises the theory to hold that the mere possibility of sustainable use in a place is sufficient to ‘preserve universal value.’ *G* will not then have reduced universal value as long as someone, doing something with the territory, could meet (the same or other) basic needs at least as well as *G* does now (or could do now, or did or could have done at some point in the past). But then Miller will have avoided the ethnocentrism problem only by running into the group action problem: the criterion will not guide action, and will not be susceptible of empirical assessment.

The second horn of the dilemma holds fast to the theory by insisting that *G*’s mildly unsustainable use is, indeed, territorially illegiti-

mate, and hence G lacks territorial rights because its 'culturally specific project' reduces the universal value of the territory. But now, although Miller avoids the group action problem, he runs into the problem of revisions. It is well known by now that added consumption does not enhance the quality of life or health of the people of the developed western societies.¹¹ The only thing that justifies the continued mass consumption of, for example, Americans, is their steadfast commitment to the infamously nonnegotiable 'American way of life.' But given that added consumption serves only a 'way of life' that does not help the health and welfare of those who live it, added wealth is merely a culturally specific value, not a universal one. And if these societies' uses are not sustainable, then no matter how much culturally specific value they generate, they nonetheless *decrease* the land's universal value. It follows from Miller's view, on this reading, that OECD countries lack territorial rights and may not police their borders.

The problem of failure thus raises a dilemma to which Miller's achievement view has no adequate reply. If actual production of value determines who deserves territorial rights in a place, then the OECD countries lack territorial rights, and the view is seriously challenged by the problems of ethnocentrism and of revisions. If, on the other hand, claimants can deserve territorial rights on the basis of merely possible production of value, then the deeper problem is group action.

Miller might object that failure and conflict are not legitimate tests for his theory, because these cases are fodder for a *non-ideal* theory of territorial rights, rather than an *ideal* theory. Why should ideal theories of territorial rights be expected to address failure? The reason is that, without a conception of failure, there is no conception of success. We would need a theory of failure in order to know that we had entered the purview of non-ideal theory in the first place.

Miller might, though, seize the second horn of the dilemma — grant that OECD countries are territorially illegitimate — but then shift to non-ideal theory to guard against excessive revisions. A conservation principle could justify allowing nations to remain where they are even

11 See United Nations Development Program (1997), 67; World Wildlife Fund (2010). These sources exemplify a widely recognized pattern that emerges whenever a consumption variable is plotted against a quality of life variable, namely, that up to a certain threshold, added consumption is strongly correlated with quality of life improvements, but beyond that threshold, added consumption is virtually worthless and may eventually even correlate negatively with quality of life. The OECD countries are all well past the threshold into the region where added consumption is basically worthless. It therefore cannot be seriously maintained that the added consumption achieves 'universal values.'

if they are territorially illegitimate, because the costs of revisions are too high.¹² Whether this reply is plausible as a principle of order for the international system depends on how it is worked out. But a few observations are possible. First, since conservation overrides the consequences of failure, the reply is really just shifting Miller's view from achievement back to presence. And given the previously noted cultural variability of presence, we cannot expect everyone to agree upon which nations are where. If in the face of this further problem Miller retreated from nations as right-holders to states as right-holders, perhaps presence would be more straightforwardly determined just by looking at the recognized borders of current member states of the United Nations. But then all that remains is the traditional principle of territorial integrity, and no theory of territorial rights at all.

V Plenitude

Miller's quasi-Lockean achievement view thus cannot countenance failure. But as we have seen, presence and status views are even less promising. Elsewhere (Kolers 2009, ch. 4) I have proposed an achievement view, based on *plenitude*, which can come to grips with the logic of achievements. Plenitude holds claimants to a significant achievement criterion by demanding that they empirically justify attachment against competitors and others. In the current section I shall present the plenitude criterion more clearly than I have previously done, and show that it has the resources to succeed where other views have failed.

Plenitude is fullness or abundance. We tend to think of fullness as the property of being full *of* something. But the notion of plenitude denotes instead a kind of abundance built around diversity. A place is empty when it has very little internal diversity or is not distinct from its surroundings; it is full when it is internally diverse and distinct. A 'vacant lot' is not empty of *stuff* — rather, it is likely to have countless weeds growing through oil-stained and cracking asphalt, litter, perhaps a rusted part of an old fence, one wall of a former building, and so on. What makes the lot vacant is that we don't perceive this diversity but instead see nothing there, since there is nothing of interest to us in it — we did not put the stuff there, or if we did, we were using the vacant lot merely as a repository, with no effective plans for the place. In this event, our having left stuff in the vacant lot would not make us stop calling it 'vacant,' and hence would not count as filling it. But by the

12 I am grateful to an anonymous referee for this reply.

same token, if someone else had plans for it, then our putting stuff in it haphazardly would interfere with their plans. They would demand that we empty the lot of our stuff precisely because it was not previously vacant.

Places become full when we perceive their internal diversity, and we begin to fill them not necessarily by adding stuff but by understanding and enhancing this internal diversity. Thus suppose we began to transform the vacant lot by clearing out the trash, pulling up weeds, setting aside a certain spot for athletics, while finding a sunny spot to grow flowers for sale at the local farmer's market and a shady spot for neighborhood meetings. Now we would refer to part of the lot as 'the court,' part of it as 'the garden,' part of it as 'the patio,' or whatever. It would have become a do-it-yourself community center. We would thereby have turned emptiness into plenitude. In the process we might even have reduced the sheer number of objects (by removing weeds and trash), but now the place would be full. It would be full all the time, even if we only went there once a week. A passerby who knew nothing of our plans might still see just a vacant lot, perhaps noticing the soil and lamenting that it was not even fully paved. But this would entail only that the place was empty *from the passerby's perspective*, not that it was empty full-stop.

Plenitude is neither a historical criterion nor an exclusively prospective one, but incorporates past, present, and future. *Empirical* plenitude begins in the past and continues into the present, and is a feature of the world: the demonstrable internal diversity and external distinctiveness of the place. *Intentional* plenitude, on the other hand, begins in the present and continues into the future, characterizing the plans and intentions of the claimant: the group has feasible and operational plans to realize or maintain empirical plenitude in perpetuity. When already present in and governing a territory, the claimant can be expected to achieve both empirical and intentional plenitude. But in some cases, plenitude may be only future-oriented — for example, when plans for reclaiming the vacant lot have yet to be implemented — in which case intentional plenitude may suffice for attachment to territory.

As noted above, plenitude is perspectival. But this does not generate an objectionable relativism because, although the particular requirements of plenitude — what a 'full' place looks like — vary depending on the particular claimant's aims and the means chosen to achieve them, the people who fill a place must be able to demonstrate their achievement of plenitude to outsiders. In our vacant lot case, when the passerby challenges the plenitude of the place, an insider might point out the variety of productive and other uses to which the lot is put, or explain how the court differs from the garden. In other cases, insiders will have other means of materially demonstrating plenitude — being

able to name the different grass species and the order in which different animals should be let loose on different fields; being able to use the place to generate a sustainable income; tracking migratory mammals from one season to the next; and so on. The perspectival character of plenitude does not mean that just ‘anything goes’; rather, it means that what has to ‘go’ is determined from a particular perspective. That it does indeed ‘go’ in any given case must be demonstrable to those with different perspectives, and particularly, to competing claimants.

It follows that failure is possible and meaningful. A territorial claimant that cannot recognize a place’s internal diversity or external distinctiveness, or that has no plans to maintain them in perpetuity, is not attached to it and hence lacks territorial rights there. Those whose methods of land use are unsustainable have no effective plans for maintaining plenitude in perpetuity. Those that leave a trail of ghost towns, or who can achieve their aims only through permanent expansion of the land base, have also failed. And those OECD countries demonstrating insatiable consumption that fails to enhance quality of life even as it generates catastrophic global warming are in the process of manufacturing emptiness on a massive scale — including the emptiness of whole countries and regions sinking under rising seas.

But what to make of these sinking island states, which fail through no fault of their own, as a result principally of the OECD countries’ malfeasance? In general, claimants that fail to achieve plenitude, for whatever reason, are free to revise their aims and try again, in the same territory or elsewhere. (This does not, of course, guarantee exclusivity or success.) But the claimants in question — residents of sinking islands or low-lying coastal regions, as well as those whose lands will be parched due to the disappearance of glaciers or the onset of droughts — fail to achieve plenitude not due to their own error but due to the malfeasance of the OECD states. If they develop no plans for future plenitude anywhere else, then they lack territorial claims anywhere else; the individuals presumably have rights to be taken in as refugees elsewhere, but their state in effect disappears.¹³ But if, even as their countries sink or become uninhabitable, the people develop actionable plans to achieve plenitude (by their own lights) elsewhere, they can gain territorial rights in a new place. Since emptiness will have been generated by the OECD states, those states’ claims would be invalid. Hence reconstitution of ‘ecological refugee states’ (Nine 2010) within the wrongfully claimed territories of OECD states could be a legitimate response to the depredations of the latter.

13 For discussion see Nine (2010); Risse (2009).

This conclusion raises the problem of revisions. Are territorially illegitimate OECD states subject to carving up and reconstitution as, say, New Maldives, Mumbai North, etc.? The answer is yes and no. An illegitimate territorial claimant may be replaced by a legitimate one — one that has alternative rules of admission, land use, and so on — provided the new legitimate one achieves plenitude. But a project of achieving plenitude could not justify the new claimants in violating anyone's human rights, including those of the citizens of the failed claimant-state. To the contrary, expelling persons would be a way of generating emptiness rather than plenitude. Moreover, prior failure would not disqualify the people of the OECD state from also trying again. Should two or more claims be successful in the same place, neither one has an exclusive right to it, and each must be respected. Successful showings of plenitude ground territorial rights, but territorial rights as such do not guarantee unilateral rights to sovereign statehood.¹⁴ Hence, while revisions are possible, it does not follow that they would involve massive upheavals.

It might, however, be objected that each state, including territorially legitimate ones, will then never be secure against other states' designs on their territory. Group *A* could lose sovereignty as soon as *B* set its sights on *A*'s land, provided only that *B* achieved intentional plenitude there. Three answers to this challenge are available. First, *B*'s claim to new land is subject to a test of plenitude by *B*'s own criteria. But then, such claims are not asserted in a vacuum; the plenitude test must be applied to *all* the land *B* claims, not just its new target. If *B* has a home territory that is not full, then its claim to new territory cannot be successful and *A*'s claim is secure. Only if *B*'s home territory is indeed full — or if the people of *B* are stateless — would the theory take seriously its claim to expand. Second, even if *B*'s home territory is full (or if it lacks a home territory), intentional plenitude might not uniquely pick out a single target territory. Instead, it might sharply narrow down the range of options. For instance, sinking south Pacific island nations might be able to achieve plenitude in any of several locations at higher elevations and latitudes but with otherwise similar climates. Hence the achievement of intentional plenitude is compatible with directing *B* to the least disruptive of the options where its plans are feasible. Thus only if *B* i) lacks a homeland or its homeland is full; *and* ii) has no less-disruptive options, would *B* have a legitimate basis for a territorial

14 I have discussed this issue at much greater length in Kolers (2009, ch. 5). See also a brief comment in the conclusion below.

claim that impinges on *A*.¹⁵ Bearing in mind the prohibition on violations of human rights and other normative principles, this seems to be a plausible result, similar to the Walzer-Hobbes view discussed at the outset.¹⁶

A third reply is also available: we might appeal to the conservation principle in order to prioritize extant empirical plenitude claims over merely intentional plenitude claims, at least where the two are strictly incompatible. To be sure, earlier, when discussing Miller, we found that an appeal to conservation constituted a shift back to a presence criterion, as opposed to achievement. But there is a crucial difference. The reply ascribed to Miller would have loosened the demands of legitimacy themselves; the view would no longer have demanded the achievement of ‘universal value.’ In contrast, what I propose is to maintain the demands of legitimacy and use conservation as a means of insulating the fragile achievements of legitimate claimants.¹⁷ The criterion of territorial legitimacy remains constant — an achievement, namely, plenitude — but the conservation principle insulates legitimate territorial claimants from the designs of outsiders and secessionists.

Finally, it may be useful to test the plenitude view by application to a real territorial dispute. The ‘Buffalo Commons’ proposal involves an actionable plan that would restructure sovereignty in the US Great Plains and the Canadian Prairies, restoring these regions to Plains Indian nations such as the Sioux and the Comanche, so that they could establish a modern economy founded on the buffalo.¹⁸ The territory in question — parts of ten Great Plains states and three provinces — is, under US and Canadian sovereignty, undergoing a long-term process of emptying-out through urbanization, drought, ecological destruction, and economic decline. At the least, such a plan would require a

15 Though this leaves aside for the sake of clarity any retributive considerations, for instance if the reason *B* lacks a home territory is that *A*’s global-warming emissions have caused sea-level rise to destroy *B*’s home. In this event, as I noted above, *A* might rightly be held territorially accountable for *B*’s plight, since *A* will have perpetrated emptiness, the opposite of plenitude.

16 Which does not entail that the views are exactly the same; the point is that revisions would be permitted under specific conditions but at no point would such revisions license the expulsion of prior inhabitants or any effort to undermine their achievement of plenitude.

17 See Christiano (2006). For further discussion of the resolution of territorial disputes, and application to the Israeli-Palestinian dispute, see (Kolers 2009, ch. 6).

18 (Churchill 2002, 386; Matthews 2002). I am grateful to Burke Hendrix for the reference and for discussion. Though its core is shared, the Buffalo Commons is not just one idea. The version I describe is closest to Ward Churchill’s.

number of changes to the current landscape. Fences would have to be removed — at least seasonally, or perhaps only when the buffalo were coming; certain crops, pesticides, and fertilizers would have to be eliminated and replaced; stretches of highway and railroad would either be moved or raised onto bridges, which would permit buffalo to migrate and might be a means of directing them one way or the other. The plan would also require important jurisdictional changes. The Indian nations should (re)gain or at least share sovereignty over the territory, including criminal and civil matters that arose in the covered regions, and would at least share in regulating property rights in land. But despite these physical and legal changes, such a territorial claim would be compatible with shared rather than exclusive sovereignty, and would not require uprooting or expelling current residents. They could rather remain as they were, with (in most cases) only slight modifications to their property rights. Anyway, outside the cities (which could easily be accommodated), virtually the entire region has a population density close to zero.¹⁹ Moreover, many of the changes required — such as elimination or modification of certain agricultural and mining practices — would be marked improvements from the standpoint of sustainability and human rights.

In defending the Buffalo Commons proposal, Ward Churchill (2002, 386) appeals to historical rights, noting that ‘the bulk of this area is unceded territory.’ But the core argument in favor — what makes it worth pursuing today — is the prospect of ‘allowing the indigenous nations involved to begin the process of reconstituting themselves socially and politically and to recreate their traditional economies in ways that make contemporary sense.’ The land could be demographically and politically shared with the goal of long-term sustainability of human and nonhuman habitation.²⁰

Of all the attachment criteria canvassed here, only plenitude can make sense of the Buffalo Commons proposal. The proposal makes

19 Matthews (2002, 4) writes, ‘If you mapped this panorama of the United States at night you would notice that darkness [from lack of artificial light] descends like a curtain almost exactly at the 98th meridian, one of the great fault lines of American geopolitics.... These midgrass and shortgrass prairies are the Great Plains, containing two time zones and nearly a fifth of the area of the forty-eight contiguous states but barely 3 percent of the American population.’

20 The 1996 RCAP Report also emphasizes sharing of land and resources rather than exclusive sovereignty. History is emphasized for purposes of recognition and repair rather than as a status claim justifying exclusive sovereignty claims for the future (Royal Commission on Aboriginal Peoples 2006). I am grateful to Burke Hendrix for the citation and discussion.

no necessary reference to status conditions, such as historical title or identity, or to current presence. Thus the link to a place is not mysterious but rather predicated on a demonstrable ongoing achievement. In this case the achievement is the maintenance of human population in sustainable interaction with the buffalo and the ecosystem that this sustainable interaction requires. This achievement is particular to the place and people, but universally empirically demonstrable. The criterion thus avoids ethnocentrism while still requiring that goods of some sort be achieved and maintained. Moreover, although compatible with revisions of sovereignty and requiring certain changes in land-use patterns, plenitude does not require all-or-nothing Westphalian sovereignty or expulsions of people. Achievements are demonstrable, failure is meaningful, and plenitude guides action. Plenitude thus plausibly responds to all three elements of the failure problem: ethnocentrism, revisions, and group action. In sum, plenitude answers the question of attachment, which could not be answered using status or presence views.

VI Conclusion: Having a Right to Bear a Territorial Relation to a Place

Notwithstanding the problem of failure, achievement views of attachment are preferable to status and presence views, including some versions of liberal nationalism as well as some current Kantian and Lockean views. But 'achievement' is both abstract and a success term; views appealing to it must specify what the achievement is. And it must be possible to fail: otherwise the supposed achievements would just be statuses that had been dressed up for rhetorical purposes. To answer this challenge I have argued that plenitude constitutes a meaningful criterion of attachment to territory that solves the problem of failure and does not smuggle in status or presence assumptions.

But there is a further difference between plenitude and these other criteria. Till now we have accepted Simmons's account of the content of the territorial relation because it is widely accepted in the literature, including by the authors whose work is at issue here. But Simmons's account is adequate, at most, only for its stated purpose: to lay out the territorial *rights* of *states*. This ignores territorial *responsibilities*, and ignores any *nonstate* holder of territorial rights. I want to discuss these briefly so as to reach a better understanding of the territorial relation. Take them in reverse order.

Territorial rights do not entail rights to independent statehood. Not only are territorial rights normatively independent of statehood rights, but independent statehood is not the *telos* of territorial rights. For territorial rights predate the states system and may outlast it, and at least

sometimes accrue to nonstate claimants. To be eligible for territorial rights it is essential that the claimant have the capacity to try, using valid law, to shape its members' common life in a place. States typically do this, but so might nonstate groups that have no interest in or capacity for sovereign statehood.

When we speak in terms of states we tend to smuggle into the territory debate a number of assumptions about what state legitimacy entails: republican government, domestic tranquility, respect for human rights, justice as regularity, a system of property rights, even perhaps giving public expression to a national culture. But while these criteria of state legitimacy are highly plausible in their original context, they all evince what we might call *juridical* or *bureaucratic* aims. Such aims are specifiable independently of the land; they implement a constitutional order, for which legal jurisdiction over land is useful and perhaps indispensable; but these are not intrinsically land-related aims. The notion of shaping the common life, however, includes aims that are intrinsically related to place and systems of land tenure: being nomadic, sedentary, agrarian, extractive, and so on. Call these *terrestrial aims*. The use of legal means to achieve terrestrial aims is no less a part of the territorial relation than is the use of legal means for juridical aims. To the contrary, the fundamental decisions about the terrestrial aims structure the pursuit of the juridical aims. If realizing the terrestrial aims is not part of the territorial relation, it is not clear what would be. Moreover, the terrestrial aims seem organically linked to the idea of attachment to a particular territory, but only accidentally linked to the idea of the state, understood as a constitutional regime. For the juridical and bureaucratic aims can, in principle, be achieved anywhere. If anything can link a polity to a particular place, it would seem to be the way the terrestrial aims and the place itself become adapted to one another. That Simmons and his followers ignore the terrestrial aims helps to explain why the problem of attachment causes such difficulty.

Let us now turn to the other problematic element of Simmons' formula: *rights*. It seems natural to speak of *territorial rights* in much the same way as *property rights*. But I believe that we would be better off speaking in terms of having a *right to bear a territorial relation*. There is more to the territorial relation than rights. The relation is a bundle of rights and responsibilities. Among the responsibilities associated with territoriality are stewardship of the territory as a trust for future generations, and nonderogation from the valid territorial claims of others (be they 'inside' or 'outside'). Immediately when we accept that there are responsibilities associated with legitimate territoriality, we begin to move from a status or presence view of attachment to a full-fledged achievement view. I want to briefly explicate these responsibilities by

raising a distinct problem for presence views. Call it the problem of *absence*.

Not everyone who has an interest in a territory is present on it at any given time, or indeed, ever. Consider two types of cases. First, an extant population might be destroying its land like human locusts, blithely expecting to be able to move elsewhere once the land is exhausted. Or it might be building ‘McMansions’ on fertile soil even as outsiders starve in an overpopulated and underfed world. In such cases outsiders might plausibly charge that the inhabitants’ territorial claim was a fraud. The charge might not be decisive, but it must be answered; and merely invoking presence or the internal legitimacy of the state — or still less, insisting that the insiders can avoid daily interaction with the outsiders — is no answer at all. Alternatively, a group of outsiders might define itself by its diasporic alienation from a certain land, but if this alienation happened, say, three generations ago, then a presence view would regard their territorial claim, and hence their self-identity, as confused. Again, the outsiders might be wrong; but merely pointing out that they are outsiders does not show that this is so. In these cases, people who are *spatially* absent from a territory might have a legitimate interest in its disposition.

Second, the residents of one country might emit so much carbon into the atmosphere that other countries or regions disappear under rising seas, or become uninhabitable due to climate changes. Then, the climate refugees from these sunken states are present in no land at all, and hence the presence view must regard them as — territorially, at least — out of luck.²¹ More generally, territories are held not only for current residents but in trust for future generations (Buchanan 1991, 134). Yet both past and future people are not present. In these latter cases, those who are *temporally* absent from a territory, either because they do not currently exist or because their territory no longer exists, are also out of luck. A presence view thus establishes a ‘tyranny of the contemporary’ (Gardiner 2011, 143). Whether spatial or temporal, some absentees have some legitimate interests in the control and governance of a territory. While some persons or populations are present ‘through no fault of their own,’ it is also true that others are *absent* through no fault of their own.

If we think in terms of the territorial rights of states, we are bound to downplay if not ignore territorial responsibilities and the interests of those who are absent. Instead, we should think in terms of what justi-

21 Nine has addressed this problem in her (2010) and (2012). I discuss her view in Kolers (forthcoming).

fies some claimant in bearing a territorial relation to some place, and in what that relation consists.

Plenitude is not in the first instance a property of *states*, but of *places*. And it goes to the terrestrial aims of particular claimants rather than, in the first instance, the juridical or bureaucratic aims. Moreover, it is an ongoing achievement through which territorial claimants may be held accountable not just to those who are present but to those who are spatially and temporally absent. These contrasts between plenitude and the various status and presence criteria help to explain why plenitude succeeds where these other views fail.²²

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