

# Territorial Rights and Colonial Wrongs

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## Abstract

What is wrong with colonialism? The standard—albeit often implicit—answer to this question has been that colonialism was wrong because it violated the territorial rights of indigenous peoples, where territorial rights were grounded on acquisition theories. Recently, the standard view has come under attack: according to critics, acquisition based accounts do not provide solid theoretical grounds to condemn colonial relations. Indeed, historically they were used to *justify* colonialism.

Various alternative accounts of the wrong of colonialism have been developed. According to some, colonialism involved a violation of territorial rights grounded on legitimate state theory. Others reject all explanations of colonialism's wrongfulness based on territorial rights, and argue that colonial practices were wrong because they departed from ideals of economic, social, and political association.

In this article we articulate and defend the standard view against critics: colonialism involved a procedural wrong; this wrong is not the violation of standards of equality and reciprocity, but the violation of territorial rights; and the best foundation for such territorial rights is acquisition based, not legitimacy based. We argue that this issue is not just of historical interest, it has relevant implications for the normative evaluation of contemporary inequalities.

**Keywords:** Colonialism, territorial rights, acquisition theories.

## 1 Introduction

There are at least three reasons why it is of pressing *contemporary* relevance to identify the wrong (or wrongs) of colonialism. First, the consequences of past colonial wrongs extend into the present. The social and economic deprivation suffered by the descendants of indigenous peoples today is at least partly determined by the history of colonial relations.

Second, in several instances, colonial relations persist. It has been often argued that the global economy displays a hierarchical structure that embodies colonial, or neocolonial relations in international trade (Emmanuel 1972). Similarly, the phenomena of ‘land grabbing’ and resource extraction from indigenous lands, and the displacement of communities often associated with these practices raise issues closely related to historical colonialism (Cotula et al 2009).

Finally, the wrongs associated with colonialism undermine the legitimacy of current distributive patterns. This is particularly evident for historical entitlement approaches to justice, according to which distributive outcomes are just when they are the result of a fair initial distribution of resources, and a subsequent set of voluntary and informed trades. If colonial relations involved wrongs that tainted either initial distributions or transfers, then contemporary inequalities are morally unjustified. But a similar verdict is returned by responsibility sensitive theories of justice and Marxist theories of exploitation. According to John Roemer, for example, both exploitation within a country and unequal exchange between countries are caused by differential ownership of productive assets. “If the initial distribution [of productive assets] is highly unequal because some agents robbed and plundered, then clearly there are grounds for viewing the ensuing exploitation as bad” (Roemer 1988: 58).<sup>1</sup>

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<sup>1</sup>In chapter 31 of *Capital I*, Marx (1867) refers to colonialism as robbery, looting, and plunder, such that “capital comes dripping . . . from every pore, with blood and dirt.”

The most common view has historically been that colonialism was wrong, *inter alia*, because it violated the territorial rights of indigenous persons. Territorial rights, and the territorial claims of indigenous people, have been central in analyses of the wrongfulness of colonialism, claims for redress, and in legal and institutional settings (Waldron 1992; Moore 1998, 2016; Buchanan 2004). For example, according to the United Nations' *Declaration on the Rights of Indigenous Peoples*, "indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources" (UN resolution 61/295, 2007). Article 26 states that "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired".

The violation of territorial rights is central in political debates on historic injustice and the necessary measures for redress. In the historic Redfern Speech, delivered in 1992, the then Prime Minister of Australia, Paul Keating, declared that Australian society should reconsider the injustice suffered by Aboriginal people, and that "begins, I think, with that act of recognition. Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. ... [We should do away] with the bizarre conceit that this continent had no owners prior to the settlement of Europeans."<sup>2</sup>

Despite this wide acceptance of acquisition based territorial rights explanations of colonialism's wrongfulness, this standard view has recently come under attack. Many authors have pointed out that, historically, acquisition theorists were colonial apologists, often working for colonial institutions or companies, and believed their theories could be used to legitimise colonialism.

In the light of these problems, novel accounts have been proposed that provide alternative explanations of the distinctive wrong of colonialism. One strand of literature has defended a territorial rights account based on legitimate state

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<sup>2</sup>Available at [https://antar.org.au/sites/default/files/paul\\_keating\\_speech\\_transcript.pdf](https://antar.org.au/sites/default/files/paul_keating_speech_transcript.pdf)

theory (Buchanan 2004; Stilz 2011, 2019a,b). Lea Ypi (2013a) has argued that neither legitimacy based nor acquisition based approaches to territorial rights can explain colonialism’s wrongfulness. Instead, she offers a revisionist account, claiming that what made colonialism “particularly abhorrent was its violation of standards of equality and reciprocity . . . [and a] departure from a particular ideal of economic, social, and political association” (Ypi 2013a: 174).

These approaches share two important features. First, unlike acquisition based accounts that focus on historical entitlements, a strong normative emphasis is placed on the basic structure of political and economic institutions, and their successful performance of their morally mandated functions (Simmons 2016: 60). In this sense, following Stilz (2011) and Simmons (2016), these approaches can be called *functionalist*. Second, while acquisition theories consider the transfer of control over indigenous land and resources a paradigmatic injustice of colonial relations, as Margaret Moore (2016: 455) notes, “one striking element of all these [functionalist] accounts . . . is that they do not discuss the taking of land as an injustice”.

The main purpose of this paper is to defend the view that colonialism was wrong, *inter alia*, because it involved the violation of acquisition based territorial rights. Our defence comprises the following three claims, which are developed, respectively, in sections 4, 6, and 7.

P1 Acquisition based territorial rights accounts can successfully identify a constitutive wrong of colonialism.

P2 The functionalist accounts cannot successfully condemn colonial relations.

P3 The problems functionalist accounts face *can* be solved by acquisition based approaches.

C Thus, acquisition based approaches provide a more convincing account of

a constitutive wrong of colonialism than alternative approaches.

## 2 Preliminaries

First, some important clarifications should be made concerning the scope of our analysis. Before we can begin a discussion of colonial wrongs, we require at least a working definition of the target concept. Ypi (2013a: 161–62) understands colonialism as “a practice that involves both the subjugation of one people to another and the political and economic control of a dependent territory (or parts of it)” and rightly points out that it takes many forms, including settler colonialism, commercial colonialism, and civilising colonialism. Jürgen Osterhammel (1997: 16-17) defines it as a “relationship of domination between an indigenous (or forcibly imported) majority and a minority of foreign invaders. The fundamental decisions affecting the lives of the colonized people are made and implemented by the colonial rulers”. Finally, Georges Balandier (1966: 54) argues colonialism is “the domination imposed by a foreign minority . . . acting in the name of a racial (or ethnic) and cultural superiority dogmatically affirmed, and imposing itself on an indigenous population constituting a numerical majority but inferior to the dominant group from a material point of view”.

Each of these definitions is contentious. As Lorenzo Veracini (2010: 5) points out, the majority/minority condition is problematic, since it implies that “colonisers cease being colonisers if and when they become the majority”. Similarly, the above definitions combine both empirical and normative elements, the latter of which are often influenced by the theorist’s own views about colonialism’s wrongfulness. Colonialism is perhaps best understood as an *essentially contested concept* which inevitably involves endless disputes and for which “there is no one clearly definable general use . . . which can be set up as the correct or standard use” (Gallie 1956: 169). Nevertheless, we think (with the removal

of the majority condition) the above definitions appropriately capture international arrangements put in place by European powers since the early modern era that are commonly described as colonialism.

Though these definitions do a pretty good job of capturing historical relations typically described as instances of colonialism, they are likely too general to appropriately limit the scope of *hypothetical* cases. Some possible instances of subjugation and political and economic control are probably not best described as colonialism. However, rather than attempting to provide a more nuanced definition that also limits the scope of hypothetical cases, we focus our attention on historical colonialism, unless otherwise indicated.<sup>3</sup> We briefly return to this issue in the concluding section.

Laura Valentini (2015: 312–13) has argued “there is no distinctive procedural wrong of colonialism”, but rather the “wrong of colonialism is exhausted by the ‘sum’ of ...familiar wrongs—wronges that are not necessarily tied to colonialism, and that may also occur in noncolonial settings”. We understand ‘distinctiveness’ as a uniqueness claim, such that a wrong is distinctive of a kind of action if and only if it only occurs with that action. And in this sense, we find Valentini’s argument compelling. Neither violations of norms of reciprocity and equality, nor violations of territorial rights occur *only* in the context of colonialism. However, we argue violations of territorial rights are *constitutive* of colonial relations, in the sense that they are a necessary condition of colonialism.

We focus on two main functionalist alternatives—legitimate state theory and the reciprocity and equality account—because they are among the most prominent alternatives to acquisition based theories. We discuss hybrid accounts that combine acquisition based and functionalist elements, such as Nine (2012), only when specifically relevant. Our main arguments extend to hybrid accounts in so

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<sup>3</sup>When we do consider hypothetical cases, this is merely as an illustration of some general properties of the approaches analysed.

far as they incorporate functionalist elements. We also ignore liberal nationalist accounts, such as Meisels (2005) and Miller (2007), because we do not think they provide a robust explanation of colonialism’s wrongs. Broadly speaking, in the nationalist view “nations acquire territorial rights by imprinting their culture on a particular territory” (Stilz 2011: 600). Yet it is notoriously very difficult to identify a pre-political and historically well-defined unified ‘culture’ belonging to a collective of individuals that somehow permeates or shapes a territory (Stilz 2011, 2019a; Nine 2012; Simmons 2016).

We analyse alternative explanations of the wrongfulness of colonialism *on their own grounds*. Namely, we ask whether the approaches under consideration are *internally* capable of condemning colonialism. We do not consider the external plausibility of the political theories underpinning each account. This provides a partial viewpoint. A theory may be unacceptable not because of its internal inability to condemn colonialism, but because it is independently false. Nonetheless, our approach allows us to directly tackle the recent arguments that acquisition accounts are *internally* incapable of condemning colonialism.

This approach helps to clarify the internal logic and different varieties of acquisition theory. Given the relevance of colonialism in the definition of territorial rights, it also provides more general support for acquisition based theories.<sup>4</sup> As Moore (2019) has convincingly argued, the idea that colonialism as a historical practice was systematically unjust, and wronged many people is a widely held belief. A theory that is internally incapable of condemning colonialism will therefore conflict with fundamental moral views.

Finally, we focus on the internal ability of different approaches to identify the wrong of colonialism *at the time it is committed* and do not explicitly address the issue of reparation.<sup>5</sup>

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<sup>4</sup>For a discussion, see Miller (2011); Steiner (2011); Ypi (2013b) and Simmons (2016).

<sup>5</sup>For a thorough account of rectification of colonial wrongs from a historical entitlement perspective, see Simmons (1995, 2016).

### 3 Acquisition Theories and Their Problems

Here we briefly outline the fundamental structure of acquisition based theories of territorial rights and the main critiques of this approach. In the rest of the paper, for the sake of concreteness, we shall sometimes illustrate our points by focusing on a specific approach – which we dub ‘the minimalist account’. It is important to stress, however, that our arguments hold for a whole *family* of contemporary acquisition theories that share a basic conceptual structure.

#### 3.1 Acquisition Theories

A number of different definitions of territorial rights have been proposed, but we adopt a definition according to which territorial rights comprise a bundle of rights, including the rights to control and use the land and resources<sup>6</sup> within a particular area; rights of jurisdiction, to make and enforce laws; and rights of exclusion, to control who and what passes over territorial borders.<sup>7</sup> According to acquisition theories, such rights are grounded by claims to previously unclaimed land and resources. Once land and natural resources are legitimately appropriated, these property rights ground territorial rights.

Many acquisition based theories of territorial rights are *individualist* (Steiner 2008, 2011; Simmons 2016). Individualist acquisition theories are ‘bottom up’ theories, in the sense that they claim territorial rights are derivative, second-order rights that follow from the property rights of individuals. Individuals acquire rights to land and resources, and then cede some of the associated rights, such as rights of jurisdiction, to the state. Individualist theories of territorial rights are therefore essentially consent theories: individuals are the initial

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<sup>6</sup>In the rest of the paper we follow Moore (2012: 86) and use the term ‘resources’ “in a deliberately open way: to refer to anything, derived from the environment, that is instrumental to satisfying human needs.”

<sup>7</sup>For a discussion, see Miller (2011); Stilz (2011) and Nine (2012).



bearers of rights and consent to state authority and jurisdiction.

However, acquisition theory need not be individualist. Collectivist variants are possible. Collectivist acquisition theories are ‘top down’ theories that claim territorial rights are the rights of collective agents without prior reference to individual property rights. A collective acquires previously unowned land and resources, which then form the basis of their territorial rights. Individual property rights devolve from the group’s territorial rights and are enforced by the collective. The collective is a pre-political entity and may, but need not, share a national culture or set of beliefs: its defining feature is simply its members’ shared intention to acquire resources.

How do individuals, or collectives, legitimately acquire, and hold, the land and resources that form the basis of territorial rights? Different approaches provide different answers, but in general acquisition theories specify: (i) *criteria of just acquisition*, whereby natural resources can be legitimately appropriated under certain conditions; (ii) *provisos for takings and holdings*, which limit the amount of resources that can be legitimately appropriated, held in case of changed circumstances, and redistributed; and (iii) *criteria of just transfer*,<sup>8</sup> whereby justly held rights can be transferred to other individuals or collectives.

Acquisition theories have two defining features. First, they are fundamentally *historical*: the territorial claims of a state, group, or individuals are evaluated by looking at the sequence of acts of acquisition and transfer of rights backing such claims. The existence of a state fulfilling legitimising roles is irrelevant to the existence of territorial rights.<sup>9</sup>

Second, unlike alternative approaches, which draw a sharp distinction be-

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<sup>8</sup>Criteria of just transfer normally require that resources be exchanged by means of free and informed trades. Although the notion of ‘free and informed trade’ can be specified in a number of ways, we shall not discuss these differences since, as argued in section 4.1, they are not relevant for our arguments.

<sup>9</sup>Thus, on our definition, Nine’s (2012) hybrid theory is not an acquisition based account. For her account “is ‘Lockean’ only in a fairly thin sense. Indeed, the core of her theory is a straightforwardly functionalist account of political legitimacy” (Simmons 2016: 146).

tween territorial rights and property rights, and conceptualise control of jurisdiction as fundamentally different from control of property (Buchanan 2003), according to acquisition theorists there is neither “any very strong historical pedigree for a distinction” (Steiner 2008: 952), nor are there strong theoretical barriers to treating territorial and property rights *in the same way*.<sup>10</sup> As Nine puts it, acquisition accounts essentially conceive of “territorial rights as a kind of property right” (Nine 2019: 308). In acquisition theories, territorial rights are grounded by (individual or collective) claims to previously unclaimed land and resources.

The conceptual relation between property and jurisdiction is immediate in collectivist, top-down approaches: when collectives justly acquire land and resources, while respecting limiting provisos, they obtain full ownership rights, including rights of exclusion and jurisdiction. But the relation is also strong in individualist variants. As Steiner (2008) has argued at length, these are essentially consent theories and territorial rights of jurisdiction and exclusion derive from analogous rights at the individual level.

Thus, according to acquisition theories, legitimate acquisition provides the moral basis for property rights, and property rights ground territorial rights, including rights of jurisdiction. The theories entail that colonialism was wrong, at least in part, because it involved the violation of a political collective’s acquisition based territorial rights. The taking of land and resources legitimately held by indigenous people is akin to theft and a violation of their acquisition based territorial rights. In cases of colonialism involving no taking of land and resources, acquisition based accounts provide solid ground for condemning these practices’ violations of the *jurisdictional* rights, including the rights to freely trade and exchange, associated with or grounded on the indigenous peoples’

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<sup>10</sup>According to Grotius, for example, jurisdiction and property are usually acquired “by one and the same act” (Grotius 1625: book II, ch. iii, section iv).

ownership of land and resources.

### 3.2 Problems for Acquisition Theories

In the light of the previous account, one might conclude that acquisition based approaches straightforwardly condemn colonialism. However, this verdict is not as easy to establish as it seems.

There is abundant textual evidence that early modern acquisition theorists were actually colonial apologists, often employed by colonial institutions to defend the legitimacy of the colonial enterprise. According to van Ittersum (2010: 385) Grotius' biography is "a lifetime of devotion to the Dutch empire overseas", and his theory evolved over time in order to accommodate the changing needs of Dutch colonialism (for example with significant caveats added to his original theory supporting unrestricted maritime trade). Similarly, Locke famously defended British colonialism and the settlement of the American colonies. Colonialism and colonial practices have left sufficiently abundant traces in his main writings "to sustain a well-developed 'colonial' reading of Locke's political theory" (Armitage 2004: 603). Analogous claims have been made concerning other prominent early modern authors, and natural law theorists—including Vitoria, Pufendorf, and Vattel—whose work has been seen as providing the ideological ground for colonial practices.<sup>11</sup>

As Armitage claims, broadly speaking, "it is now a commonplace in the history of political thought that there has long been a mutually constitutive relationship between liberalism [of the kind traced back to Locke] and colonialism" (Armitage 2004: 602). Early modern acquisition theorists argued the appropriation of foreign land and resources was legitimate because indigenous people did *not* hold territorial rights. Two sets of arguments were used to reach this conclusion.

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<sup>11</sup>See, among the many others, Arneil (1994); Anghie (2006) and Cavallar (2008).

First, early modern authors claimed that indigenous people lacked rights over land and natural resources because they failed to satisfy criteria of just acquisition. Grotius famously argued, “if within the territory of a people there is any deserted and unproductive soil, this also ought to be granted to foreigners if they ask for it. Or it is right for foreigners even to take possession of such ground, for the reason that uncultivated land ought not to be considered as occupied” (Grotius 1625: book II, ch. ii, section xvii). Locke endorsed a rather stringent acquisition criterion for land focusing on agrarian activity, claiming, “As Much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property” (Locke 1689: II.32). He argued that the establishment of colonies in America was legitimate because indigenous people did not satisfy this use-based acquisition criterion: “where there being more land than the inhabitants possess and make use of, any one has liberty to make use of the waste” (Locke 1689: II.184). Similarly, according to Vattel, the cultivation of the soil is a natural obligation. In his *Droit des gens* he argues that peoples who, “to avoid labour choose to live only by hunting, and their flocks” pursue an “idle mode of life, usurp more extensive territories than . . . they would have occasion for, and have therefore no reason to complain, if other nations, more industrious, and too closely confined, come to take possession of a part of those lands” (Vattel 1758: book I, ch.7, §81).

Second, some early modern authors argued that need based limitations on acquisition could justify the taking of indigenous resources. Grotius argued that in case of “extreme necessity,” it is legitimate to resume the original right of using things as if they still remained in common (Grotius 1625: book II, ch. ii) and Vattel claimed, “In a case of pressing necessity, I think people might without injustice settle in a part of that country [which is not efficiently cultivated or used]” (Vattel 1758: book II, ch.7, §97).

Contemporary critics have also argued need based limitations can provide an acquisition-theoretic basis for the justification of colonialism. According to Ypi, for example, acquisition theories cannot conclude that the appropriation of indigenous land and resources was akin to theft, because indigenous people violated a proviso requiring them to leave “enough and as good for other needy newcomers” (Ypi 2013a: 165). If one adopts an acquisition based approach with a need based proviso, then when colonisers were in dire need, the transfer of indigenous land and resources to them would not violate territorial rights.

In short, acquisition theories appear *internally* unable to identify a constitutive wrong of colonialism because it seems that indigenous people did not hold acquisition based territorial rights over the territories they inhabited. Either they failed to satisfy acquisition criteria, or the needs of newcomers superseded these territorial rights.

#### 4 A Defence of Acquisition Theories

Although these challenges are serious, we will argue that they can be met by acquisition theories. The first point to note is that claims *historically* made by early modern acquisition theorists are insufficient to falsify P1: that acquisition theories have been endorsed throughout history to legitimise the appropriation of indigenous land and resources does not mean colonialism did not violate the acquisition based territorial rights of indigenous people. One would need to argue that the interpretations of acquisition theories early modern writers used to support the colonial enterprise are not the product of cultural bias, but are the most plausible ones. However, this claim cannot be sustained.

As discussed above, acquisition theories are defined by a set of acquisition criteria, a limiting proviso, and principles of just transfer. Thus, P1 would be false—and the colonisers’ taking of land and resources could not be

condemned—if indigenous people *lacked* territorial rights because

- (a) they failed to satisfy plausible acquisition criteria,
- (b) they violated provisos on appropriation that required them to cede land and resources to colonisers,

or, though indigenous people had valid rights to land and resources, the transfer of control of these goods did not involve the *violation* of these rights because,

- (c) the control of land and resources was justly transferred through exchange with colonisers, e.g., through treaties and trade.

The critiques outlined in section 3.2 focus on (b), provisos limiting acquisition and (a), acquisition criteria. Consequently, we will focus our defence on these issues. However, first we briefly discuss (c), transfer.

#### 4.1 Transfer

Historically, the claim that indigenous people had legitimate territorial rights, but control of these territories was justly transferred through exchange is the least plausible of the three claims. In most instances there is no reason to believe the transfer of territorial control occurred through anything resembling exchange. Usually colonising groups took land and resources by (often lethal) force. The 1621 slaughter and enslavement of 10,000–15,000 Bandanese islanders by Dutch spice merchants in pursuit of nutmeg provides but one of many typical examples (Milton 1999).

Nevertheless, some transfers of control *did* involve exchange. In certain cases, trades were conducted and treaties were signed that ceded land and resources to colonisers. However, the terms of these compacts were rarely adhered to by the colonisers, and when they were, it is unlikely that the ‘consent’ given

by indigenous people was sufficiently free and informed to render the transfers morally valid. For example, according to the US State Department the US government used “coerced treaties” and then contravened both “treaties and judicial determination”, in the country’s pursuit of indigenous territory (US Dept State 2017). When indigenous people signed treaties attempting to preserve their lives, or when they traded land and resources in fraudulent transactions, their consent to these transactions was compromised in such a way that the colonisers’ subsequent control of territories was not valid.

Ypi acknowledges that in many cases “native inhabitants of particular territories were persuaded by fraudulent means to sign contracts with colonizers selling the territory in which they lived” (Ypi 2013a: 174). However, she claims such wrongs do not represent violations of territorial rights. Instead, because they violate norms of equality and reciprocity, they represent “departure[s] from a certain ideal of political association” (Ypi 2013a: 174). Yet, these are two separate claims. It is true that the background conditions of such exchanges violate certain norms of equality and reciprocity, but this does not entail that the cases do not also involve territorial rights violations. Rather, in part because these norms are violated, the transfer of justly held territory is not morally valid.<sup>12</sup>

While claim (c) is false, it grants much to the acquisition theorist since it presupposes indigenous peoples legitimately held territorial rights. So we now consider (a), the problem of acquisition.

## 4.2 Acquisition

Claim (a) poses a difficulty for early modern accounts. As we noted, during the colonial period acquisition theorists themselves often argued indigenous people did not have territorial rights because they failed to satisfy acquisition criteria such as ‘continuous use’, or ‘mixing of labour’. However, the cogency of claim

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<sup>12</sup>See Ferguson (2018) for a discussion.

(a) rests on two key arguments: first, that the acquisition criteria adopted by early modern authors are indeed the most plausible ones and, second, that the application of these criteria is based on solid empirical foundations and is not the product of cultural bias. We consider the latter first.<sup>13</sup>

**Early Modern Acquisition Criteria.** Let us grant, for the sake of argument, the relevance of *stringent* acquisition criteria—such as ‘continuous use’, or ‘mixing of labour’, or ‘occupancy’—in founding territorial rights. The early modern theorists’ claims about the inability of indigenous people to satisfy acquisition criteria largely reflect false empirical assumptions that betray common cultural prejudices of that era. Early modern authors contended that indigenous people lacked rights because land and natural resources were unused and/or unworked, and that this was due to their innate indolence. For example, Locke (1689: II.49) assumed America to be in the pristine state of nature and considered the different lifestyles of indigenous people as proof of their inability or unwillingness to use natural resources purposefully (Locke 1689: II.41). Both assumptions were widely shared, for a long period of time, and not only by acquisition theorists. So, although some passages in Locke may be interpreted as allowing for the *possibility* that acquisition theories applied to native populations, his prejudices on the cultural traits and attitudes of indigenous peoples led him to the conclusion that they could not *actually* be right-holders. Thus, even under reasonably stringent acquisition criteria it is difficult to claim that indigenous people always lacked territorial rights because they failed to use, or continuously occupy their territories, or did not mix their labour with natural resources. The claim that they did at least partly reflects early modern theorists’ cultural biases.

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<sup>13</sup>In what follows, we shall distinguish the acquisition criteria proposed by early modern authors from those endorsed by contemporary theorists by referring to them as early modern and contemporary acquisition criteria, respectively.



To be sure, one may argue that cultural bias provides only a partial explanation, and in at least some cases indigenous peoples *did* fail to satisfy early modern acquisition criteria—as did the colonisers, both at home and in the new territories. Yet, we need not venture into a debate on whether indigenous peoples always held territorial rights based on *early modern* interpretations of acquisition theory. For it is now widely acknowledged that *stringent* acquisition criteria are both unnecessary to ground legitimate claims to land and resources, and generally unsatisfactory from a theoretical viewpoint. They certainly do not fully account for our intuitions concerning rightful holdings.

Locke’s (1689: II.27) claim that when a person has “mixed his *Labour* with [a resource], and joyned to it something that is his own, [he] thereby makes it his *Property*” encounters the problem of *under-use*. It is counterintuitive to maintain that an agent is entitled to vast tracts of land simply because she has cultivated the land once in the past, while she is now deliberately leaving it unused and a large number of agents possess little land, or no land at all.<sup>14</sup>

Continuous use criteria also encounter problems. If ‘continuous’ is interpreted strictly, then many resources typically assumed to be legitimately claimed by both individuals and collectives will not actually be so held. Keepsakes in storage, unplayed media, and some forms of investment seem unable to satisfy the use-based criterion. Untapped natural resources and nature preserves are also problematic, and a continuous use criterion would not assign ownership of grazed land to nomadic groups.

Neither labour based, nor use based acquisition criteria of the kind endorsed by early modern authors appear to fully account—either individually, or conjunctively<sup>15</sup>—for intuitions about rightful claims on land and resources, *and*

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<sup>14</sup>See Steiner (1994: 233-36) for a discussion of the labour mixing theory and its criticisms.

<sup>15</sup>Murray Rothbard (2009) has suggested an acquisition criterion that represents the conjunction of labour mixing and continued use. This solves the under-use problem, but in so doing, sets an implausibly high standard for acquisition.

encounter problems in condemning at least some instances of colonial relations. However, as we argue below, contemporary acquisition criteria fare far better.

**Contemporary Acquisition Criteria.** Acquisition criteria can serve three different functions. First, they *associate* agents with particular external goods, such that when agents fulfil these conditions they have *pro tanto* entitlements to partial or full ownership of precisely those external goods.<sup>16</sup> Second, they can play a role in *constraining* holdings, since there are limits to the amount of resources agents continuously use, improve, occupy and so on. Finally, they can also provide a *justification* of property rights: the satisfaction of an acquisition criterion can be seen as providing a moral reason that agents associated with certain resources are entitled to some or all of the rights conferred by ownership.

Early modern authors often adopted stringent acquisition criteria because they played all three roles, but there is no reason these functions *must* be satisfied by the acquisition criterion alone. Indeed, contemporary acquisition theorists have opted for weak, easily satisfied acquisition criteria, giving them a primarily associative role which links particular agents to particular pieces of land or property.<sup>17</sup> The roles of constraint and justification are dealt with via limiting provisos and antecedent moral arguments, respectively.<sup>18</sup> For example, after criticising Locke’s labour based criterion, Nozick (1974: 175–76) argued that “The crucial point is whether appropriation of an unowned object worsens the situation of others. Locke’s proviso that there be ‘enough and as good left in common for others’ . . . is meant to ensure that the situation of others is not

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<sup>16</sup>As Honoré (1961) points out, resource ownership comprises various rights, powers, claims and immunities, not all of which must be vested in one agent.

<sup>17</sup>The main exception is Rothbard (2009) which provides an extreme example of a multi-function acquisition criterion. Rothbard includes no proviso based limits on acquisition and both association and constraint are handled by his use and improvement criterion.

<sup>18</sup>Broadly speaking, there are two general approaches to the justification of property rights: instrumental justifications from consequentialist and contractarian traditions, or transcendental arguments from natural right theory. Given the focus of our paper, however, the question of justification is secondary and we shall not discuss it further. We refer to Ferguson (2019) for a comprehensive discussion.

worsened.” Importantly, Nozick follows this statement with the parenthetical aside “(If this proviso is met is there any motivation for his [Locke’s] further condition of nonwaste?)”. For Nozick, the most important *constraints* on resources are handled by a proviso, not by the acquisition criterion.

A similar shift in theoretical emphasis can be found in left-libertarian approaches. While endorsing a labour mixing acquisition criterion, for example, Steiner (1994: 235-6) argues “we each have a vested liberty to mix our self-owned labour with only as many of these things as would, in Locke’s famous phrase, leave ‘enough and as good’ for others . . . Mixing our labour with more than this share constitutes a relinquishment of our titles to that labour” (see also Otsuka (2003); Vallentyne (2000)).

Because acquisition criteria play primarily an associative role,—associating particular agents with *particular* pieces of land,—most contemporary approaches adopt rather extensive notions of ‘labour mixing’, ‘use’, or ‘occupancy’. For example, Simmons (1995, 2016) adopts a labour based acquisition criterion according to which “property can be acquired by incorporation into our *purposive activities*, [and] the collective tribal activities of hunting, fishing, migratory residence, nonsedentary agriculture, and the like, could certainly have grounded tribal property rights in land and resources” (Simmons 1995: 183, emphasis added). The same conclusion can be extended to all of the main contemporary approaches: as soon as stringent, and often culturally biased notions of labour and sedentary residence are abandoned, it is clear that indigenous people largely succeeded in satisfying acquisition criteria associating them with the particular land and resources they used, improved, inhabited, or incorporated into their purposive activities.

As a further illustration, consider the limit case of an acquisition theory adopting what may be dubbed a ‘minimalist acquisition criterion’. On this

approach, in order to make *pro tanto* acquisitions agents would only need to stake a successful claim that credibly signals to others the agent's intention to remove (or the agent's prior removal of) an unambiguously defined resource from the set of previously unowned resources. Successful claims will often take the *form* of continuous use or improvement. For example, if a resource is in use or shows signs of improvement, this signals to others that it has been acquired. But use and improvement are not the only ways to stake a claim and their absence does not entail that a claim based acquisition criterion has not been met. The necessary information may also be alternatively transmitted. Claim flags, public avowals, notices, barriers, and similar means may also be used to signal a claim.<sup>19</sup>

The criterion is not satisfied only when the acquiring agent's signal fails. Consider what signal failure would look like: it would involve a situation in which an individual or group had claimed territory, but signals of this claim have not been recognised by a second group. Such circumstances are surely rare and would often result in the claiming group adopting a different signal that better communicates their claim. So, signal failures are likely to be infrequent, and short lived.

Certainly, signal failure *did not* play a role in historical instances of colonialism. Indigenous peoples made clear to colonialists, via open resistance and often direct military responses, that the land was not unowned and not free to be taken. Whether or not these claims to land and resources were *justified*, there should have been little doubt that *pro tanto* claims had been struck.<sup>20</sup> Historically, indigenous groups satisfied the minimalist criterion.

In summary, in the light of these contemporary interpretations, it is even more evident that indigenous people largely succeeded in satisfying acquisition

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<sup>19</sup>See Otsuka (1998: fn 28) for a discussion.

<sup>20</sup>Similar *de facto* signals may be used as evidence of the tacit consent required to transfer individual rights of jurisdiction to a group.

criteria associating them with the particular land and resources they used, improved, inhabited, incorporated into their purposive activities, or simply had staked a claim to. We conclude that claim (a) is false: indigenous groups did not fail to satisfy plausible acquisition criteria.

**The Problem of Supersession.** Even if indigenous people could have satisfied acquisition criteria, it does not follow that the lands they held were, as a matter of historical fact, *cleanly* acquired. Suppose indigenous group B stole land and resources legitimately held by group A. If colonising group C takes these goods from B, group C does not violate B's rights since B does not hold legitimate titles to them. Call this the *problem of supersession*.<sup>21</sup>

Of course, this does *not* imply that C has legitimately acquired the resources, since A retains that title, and the resources should be returned to A (rather than B). Thus, the supersession problem does not threaten the acquisition theories' ability to condemn colonialism—colonialism remains wrong because it involves a violation of acquisition based territorial rights. The case simply shows that the rectification of these wrongs does not necessarily involve paying restitution to the immediately antecedent holders. Historically, colonial powers acquired *entire* territories and established political and economic control over *all* indigenous groups. While the restoration of resources to the legitimate owners requires the identification of A, establishing the wrongfulness of C's appropriation, does not.

A complication arises if B kills A in the process of acquiring resources. But note, first, that in the context of our discussion 'B kills A' implies the extermination of the *entire* population belonging to A which, historically, is arguably a marginal case. Second, A's absence does not legitimise the unilateral acquisition of the entire territory or resource by C. Even if one assumes they become unowned in the event of A's demise, any acquisition by C or other groups would

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<sup>21</sup>We thank X for pressing us on this point.

remain limited by a proviso. The scale of historical colonial appropriation makes it unlikely that colonisers respected any reasonable provisos in those cases where the legitimate owners were exterminated.<sup>22</sup>

In other words, although the problem of supersession complicates the rectification of injustice, it does not undermine acquisition based accounts' ability to condemn colonialism.

### 4.3 Provisos

Since indigenous peoples did not fail to satisfy plausible acquisition criteria, claim (a) is false. Since claim (c) is also false, the rejection of P1 hinges on claim (b): although indigenous people nominally controlled territory, they had no right to it because they violated provisos limiting acquisition.

As noted earlier, according to critics, claim (b) *would* be true under a need based interpretation of the proviso. If one adopts an acquisition based approach to territorial rights and a need based proviso requiring agents to downsize holdings in response to the arrival of needy newcomers, then if colonisers were in dire need, the transfer of indigenous land and resources to them would not violate territorial rights. This argument is not entirely compelling. Given the scale of the forcible appropriation of land and resources during the colonial period, it is not obvious that the acquisition of territories by colonial nations historically respected such a need based proviso.

More importantly, the need based reading is neither a common, nor a plausible interpretation of the proviso. On the need based reading, the Lockean proviso “places original appropriators under an obligation to ‘downsize’ their holdings should changes in circumstances create new needs for outsiders to access land and resources” (Ypi 2013a: 165). This is not the standard understanding of the proviso. Locke writes not of need, but of “the yet unprovided”

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<sup>22</sup>For a detailed discussion of issues that arise in such cases see Simmons (2016: ch. 7).

(Locke 1689: II.32). Rights to land and resources are not downsized based on the needs of others, but rather because control of these goods is illegitimate when one holds more than a fair share of resources (Locke 1689: II.37).

No acquisition theory incorporates a moral obligation to reallocate entitlements purely based on need as a matter of justice, for the following reason. Suppose Bob is well-off and freely chooses to leave his house. He walks to Alice's front step and refuses to leave. Having brought nothing with him, Bob eventually becomes needy. It would certainly be *charitable* for Alice to provisionally feed Bob and maybe ensure he can return to his home. But no contemporary acquisition theory implies that Bob's need unconditionally triggers a duty for Alice to relinquish part of her holdings as a matter of *justice*. Within an acquisition based approach, it is implausible to claim that, so long as Bob remains on Alice's stoop she is required to not only sustain him, but *to transfer the rights over some of her land, house, and resources* to him in order to support his welfare. If such actions were required by a proviso, Alice's right to her resources and territory would be very weak indeed. She would be forced to parasitically sustain Bob even when Bob's holdings at his own home are equal or greater than Alice's. Clearly, such provisos are inconsistent with the core insights of entitlement theories. Yet, such a reading is required to support claim (b)—that indigenous people did violate need based provisos—thereby allowing one to conclude that colonialism does *not* represent a violation of acquisition based territorial rights.

The common, and most plausible interpretation of the Lockean proviso on acquisition is that it serves as a distributive principle that places limits on the amount of unowned land and resources that can be appropriated (and subsequently held) without compensating others. If the role of acquisition criteria is only to serve the function of association, provisos limiting takings and holdings

serve a constraining role and function as general requirements that “no individual be made worse off (in some appropriate sense) by the appropriation (compared with the situation before appropriation)” (Vallentyne 2000: 7). Rights to land and resources must be downsized when one holds more than a fair share. Locke’s ‘enough and as good’ clause admits to a number of interpretations of fair distribution, each of which places different constraints on appropriation. However, *all* standard interpretations are incompatible with the truth of (b).

To see this, observe first that the weaker an acquisition theory’s proviso, the more likely it is that (b) is historically false. In the limit case where there is no proviso, claim (b) is straightforwardly false. Hence, in order to show that (b) is false under any plausible proviso, we show that it is false under what we take to be the most stringent version: an egalitarian proviso according to which agents can only remove their per capita share of resources from common ownership (Vallentyne 2000; Steiner 1994; Otsuka 1998; Steiner 2005; Tideman 1998).<sup>23</sup>

It is unlikely that indigenous peoples violated such an egalitarian proviso since colonisers collectively controlled greater resources in their home territories and were more advantaged than those they colonised. With respect to the global pool of resources that was known and available to colonisers, (b) is false. If egalitarian interpretations of the proviso apply, they apply to colonisers before indigenous people.

One may object that the previous claim holds only if one considers collec-

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<sup>23</sup>Different authors focus on different sets of resources, ranging from unimproved natural resources to worldly resources, sometimes including also internal resources such as skills and talents. For our purposes, however, the key point to note is that, in all of the egalitarian provisos considered, agents are not entitled to a share in the *physical* amount of the relevant resources but have “a right to an equal share of their total *value*” (Steiner 1994: 271, italics added). Otsuka (1998: 80-81), for example, appeals to welfare: “You may acquire previously unowned worldly resources if and only if you leave enough so that everyone else can acquire an equally good share of unowned worldly resources . . . someone else’s share is as good as yours if and only if it is such that she would be able (by producing, consuming, and trading) to better herself to the same degree as you, where ‘betterment’ is to be measured in terms of increases in welfare . . . It follows from this reading of the egalitarian proviso that those who are, through no fault of theirs, less able to convert worldly resources into welfare are entitled to acquire additional resources in order to compensate for this lesser ability”.



tive actors since there certainly were individual colonisers who held less than an equal, or even fair share of resources. This objection is unconvincing. For it is unclear why individual colonisers holding less than a fair share had a claim to worldly resources held by indigenous peoples, rather than resources overappropriated by their compatriots. Further, and perhaps more important, colonialism is a practice that involves collective agents, “not individuals, family members, interest groups, or civil society associations” (Ypi 2013a: 162). If collective agents are considered, and the world-wide pool of resources is taken into account, then it seems very difficult to argue that native populations had over-appropriated vis-à-vis colonial nations.

Finally, granting, for the sake of argument, that indigenous peoples had over-appropriated and thus, had a duty to relinquish goods to colonisers, *this duty only concerned the land and resources that had been over-appropriated, according to the relevant proviso*. Yet, historically, it is false that the transfers of land and natural resources respected the latter condition: the practice of colonialism involved the transfer of control over entire territories, leaving only residual amounts of resources—well below any reasonable definition of a fair, let alone *equal* share—to indigenous peoples.<sup>24</sup> In order for claim (b) to be true, indigenous people must not only have violated provisos, but must have done so to a degree that justified colonisers’ vast seizures of land and resources. Under egalitarian provisos, claim (b) is false and noting that egalitarian provisos impose the most stringent constraints on indigenous peoples’ acquisition of land and resources, we conclude that claim (b) is false under all standard interpretations of the Lockean proviso.

In summary, the standard reading of the Lockean proviso does not legitimise the need based transfers necessary to support claim (b). Since claims (a) and

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<sup>24</sup>In the case of the United States, the 2000 census reports the total geographic size of all reservations and tribal territories under indigenous control at 291,729 km<sup>2</sup>, or less than 3% of the country’s total area of 9,833,517 km<sup>2</sup>.

(c) are also false, P1 is true. Acquisition based accounts are internally capable of identifying a constitutive wrong of colonialism. According to acquisition theories, native inhabitants held just acquisition based claims on their territories and the control of these territories was not justly transferred to colonisers through exchange or because the native inhabitants had over-appropriated resources. By taking their land and resources colonisers violated the acquisition based territorial rights of indigenous peoples.

These are general claims. In certain isolated cases (a)–(c) may be true. Perhaps some resources were justly exchanged. In some instances, involving nomadic people, certain signals may have failed, leaving the status of unoccupied land and unused resources ambiguous. Perhaps some native inhabitants over-appropriated. But colonialism is not an isolated instance of transferred control rights, and it cannot be argued that colonialism did not involve territorial rights violations because particular transfers of control by some individuals may have been legitimate. Colonialism is a general practice involving collective agents *and* a collection of many such transfers.

We have argued that P1 is true, acquisition theories can account for colonialism's wrong. We shall now defend P2, arguing that functionalist accounts, the main alternative to acquisition theories, face insurmountable problems.

## 5 Functionalist approaches

Here we outline the two main alternative accounts of the wrongs of colonialism: legitimacy based territorial rights accounts and the reciprocity and equality account. The main characteristic that differentiates functionalist approaches from acquisition theories is their normative emphasis on the structure of political and economic institutions and social interactions. The theoretical focus of functionalist approaches is on the ability of (broadly conceived) institutions to perform

their morally mandated functions (Simmons 2016). Hence, they take an inherently “presentist view” (Stilz 2019b: 378) in that historical entitlements and historical wrongs are morally secondary: they matter only insofar as they have bearing on the *current* structure of society.

Defenders of *legitimacy based theories* of territorial rights agree that colonialism is wrong, at least in part, because it involves the violation of a political collective’s territorial rights. However, they argue territorial rights derive not from the just acquisition of land and resources, but rather from the legitimacy of the political collective. A state is morally justified in exercising political power over a population and territory, and thus enjoys territorial rights when it performs a number of morally relevant functions.

Various legitimacy based approaches are characterised by different lists of requirements. According to Buchanan (2004: 247) a state is morally justified in exercising political power if it “(1) does a credible job of protecting at least the most basic human rights of all those over whom it wields power and (2) it provides this protection through processes, policies, and actions that themselves respect human rights.” Buchanan (2004: 264–65) also includes the ‘Non-Usurpation’ requirement that “an entity is not legitimate if it comes into being by destroying or displacing a legitimate state by a serious act of injustice.”

Thus, a state only has a claim to territory if it meets the relevant criteria for being a legitimate representative of its people and serves their interests. The lack of the relevant legitimacy-conferring features, however, leaves a state open to being colonised or annexed. In response to this objection, legitimate state theorists have argued that the state also has no claim to territory that its people have no prior right to occupy or control. For example, Stilz (2011: 574) adds the further conditions that “(a) [the state] effectively implements a system of law regulating property . . . ; [and] (b) its subjects have claims to occupy the ter-

ritory”. Occupancy rights are granted to individuals who reside in the territory and have location-specific plans and projects.<sup>25</sup> Even if a state is not legitimate, then, colonisation and the displacement of indigenous people is wrong, because it violates their occupancy rights. Similarly, wrongful annexation violates the rights of people in the annexed territories: “even if states are the only actor that can possess rights of jurisdiction over territory. . . the people. . . possesses a kind of right over territory too. This is the residual claim, vested in the people, to reconstitute legitimate political institutions on their territory when their prior state fails, becomes illegitimate, or is usurped. Annexation is wrong because it violates this residual claim” (Stilz 2011: 590–91).

In contrast, Ypi (2013a) defends a *reciprocity and equality* based account. Although she grants that violations of territorial rights may be descriptively primary in our understanding of colonialism, she argues that, normatively, they do not constitute its primary wrong. Instead, according to Ypi (2013a: 174), “what made the colonialism practiced by European states particularly abhorrent was its violation of standards of equality and reciprocity. . . [and a] departure from a particular ideal of economic, social, and political association”. For Ypi, legitimate political association requires, *inter alia*, that rules related to trade and settlement promote reciprocal and equal interactions, taking into account all parties’ claims. The wrong of colonialism then consists “not in the allegedly wrongful occupation of others’ land [but] in its embodiment of a morally objectionable form of political relation” (Ypi 2013a: 190).

The Kantian cosmopolitan ideal requires “the establishment of political institutions that allow people to relate to each other as equals, guaranteeing that their voice will be heard and that their claims will be equally taken into account when decisions affecting both are made” (Ypi 2013a: 175). Thus, indigenous people have a duty to associate politically with newcomers, while newcomers are

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<sup>25</sup>Occupancy rights can also be granted to groups (Moore 1998, 2012; Nine 2012).

morally compelled to make associative offers that respect ideals of equality and reciprocity. Nonetheless, “[f]or an associative offer to be considered effectively equal and reciprocal, the consent of those on the receiving end is required” (Ypi 2013a: 179). Ypi notes that this requirement of consent is potentially problematic since it threatens to provide veto power to indigenous people, allowing them to refuse to engage with needy newcomers. Ypi responds to this ‘status quo objection’ by arguing that in certain cases, pressing needs of newcomers can trump the consent requirement: faced with the persistent refusal to engage in fair and equal political interaction, needy newcomers may unilaterally ‘move in’. This justified “unilateral form of political association” (Ypi 2013a: 184) limits refusals to consent and thus, avoids the status quo objection.

According to their proponents, functionalist accounts provide a condemnation of colonialism that aligns more closely with common moral intuitions about norms of justice and fair interactions, and reconcile the protection of indigenous rights with basic human needs.

## **6 Problems for Functionalist Approaches**

In section 4, we argued that P1 is true: acquisition based accounts can successfully identify a constitutive wrong of colonialism. Yet, one may argue that defence of territorial rights has unattractive implications, as acquisition theories seemingly license the withholding of aid in situations of duress. Even though acquisition theories survive internal criticisms, perhaps alternative approaches provide more convincing accounts of what’s wrong with colonialism that can avoid the perceived harshness of acquisition theories. Here, we argue that functionalist accounts cannot successfully condemn colonial relations.

## 6.1 The Non-Legitimate-State Problem

Recall that legitimate state accounts claim territorial rights depend upon the existence of an individual or collective that fulfils certain political roles within a territory, *and* does so in a legitimate way. However, as Ypi (2013a: 169) points out, “If territorial rights are contingent upon a particular way of delivering justice (that of the legitimate state), and if the wrong of colonialism is reduced to violations of territorial claims, agents who fail in that task could arguably be colonized”. In order to avoid this problem, legitimate states must also avoid what Stilz (2011: 590) calls ‘defeater claims’. Not only must the state govern legitimately, but there must not be a group that has a prior right to the territory that was wrongfully displaced or annexed.

Yet, either the prior right is itself legitimacy based, or it is not: “If it is, we are back to the defense of colonialism with a civilizing mission. If it is not, we can only support the [defeater claims] condition with arguments external to the legitimacy-based account” (Ypi 2013a: 169). Consider the external horn first. According to Stilz (2017: 353), “occupancy is rooted in the role that geographical space plays in individuals’ most important projects and relationships”, and the importance of located life plans—for example, to promote one’s autonomy—is significant enough to ground occupancy rights: “If occupancy of a particular place is fundamental to a person’s located life plans, and if he has established these plans without wrongdoing . . . then I believe he has a moral right to occupy that place” (Stilz 2017: 355). This justification does not appeal to legitimacy theory, and is indeed structurally similar, in various respects, to acquisition approaches: it identifies criteria of just acquisition and limiting provisos,<sup>26</sup> and occupancy rights are conceptually close to property rights. For “property is a concept that admits of a wide variety of forms, [and] it seems

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<sup>26</sup>Claims to territory are legitimate in so far as they do not deny “foreigners’ claims to an equitable distribution of space” (Stilz 2017: 355).

reasonable to interpret occupancy as a kind of (weak) property” (Stilz 2017: 353). Nonetheless, occupancy is “less robust than a private ownership right” (Stilz 2017: 353) and, as Ypi (2013a) has convincingly argued, the protection afforded by occupancy rights is rather weak and easily overridden. External arguments based on occupancy cannot successfully ground the prior territorial right: the external horn is not viable.

Here we focus on the alternative horn, examining the problems associated with ‘colonising’ *illegitimate* states as well as indigenous peoples that are not organised within state-like institutions.

In many historical cases, legitimacy based arguments were employed in attempts to justify the subjugation of ‘barbarian’ peoples. However, as we saw with acquisition theories, this was often the product of cultural bias. Many indigenous peoples described as ‘savages’ by settlers were in fact members of advanced cultures with complex social and political systems. Thus, the fact that legitimacy based considerations were invoked by colonial apologists does not itself show these accounts cannot condemn historical colonialism.

Nonetheless, historically, not all indigenous peoples were organised in states that fulfilled the basic obligations at the heart of legitimate state theories. Indeed, even today, there are states that can hardly be described as legitimate according to any plausible reading of legitimacy based approaches. Such *illegitimate* states lack (legitimacy based) territorial rights, and therefore their subjugation by a foreign *legitimate* state cannot be condemned.<sup>27</sup>

It may be objected that colonising states themselves often violated legitimacy criteria, and therefore did not hold territorial rights. This objection is not

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<sup>27</sup>This is particularly evident in more sophisticated accounts of legitimacy. In her recent work, for example, Stilz (2015, 2019a,b) has argued that in addition to substantive and procedural conditions, legitimacy requires a further, subjective condition of *affirmation*: “Citizens, by and large, must actually affirm their political cooperation together” (Stilz 2015: 15). However, logically speaking, the addition of an extra affirmation condition makes it even *less* likely that indigenous peoples held legitimacy based territorial rights over their lands.

compelling. That the colonising state was itself equally illegitimate does not imply that the transfer of control of territory and resources violated indigenous peoples' territorial rights. If the indigenous state was indeed illegitimate, it definitionally lacked such rights. Legitimacy based approaches might not positively condone the transfer of territory and resources from an illegitimate state to another equally illegitimate state, but they cannot condemn it either.

It is important to stress that, by construction, the transfer of control does *not* violate 'Non-Usurpation' conditions (Buchanan 2004) or 'defeater claims' (Stilz 2011, 2017, 2019a), because these conditions require indigenous people to have a prior right to the territory. Yet, as noted above, we exclude external, non-legitimacy based, arguments in support of 'defeater claims'. Hence, illegitimate states definitionally lack such rights in the cases we are considering.

While defeater claims based on actual legitimacy conferring features are ruled out by assumption, one may invoke counterfactual and/or historical arguments to support legitimacy based defeater claims. According to Stilz for example, when a legitimate state fails "[i]ndividuals are not dissolved into a disconnected multitude, . . . they retain important bonds to one another. . . . [T]he people's history of political cooperation through their state creates morally salient bonds" (Stilz 2011: 591). This gives the people a residual claim to reconstitute legitimate political institutions on their territory when their prior state fails, and makes annexation morally wrong. Yet, our arguments cast doubts precisely on the existence of a history of cooperation within a legitimate state.

The problem is strengthened if the transfer of control occurs from an illegitimate to a *less* illegitimate state. For legitimacy is neither unidimensional nor a binary variable, and the criteria identified by legitimacy based accounts can be satisfied to varying degrees. Indeed, if the criteria are interpreted stringently, then virtually all states that ever existed may be deemed (more or less) illegit-



imate. But then, the unilateral transfer of control over territory and resources from a deeply illegitimate state to another illegitimate state with a *better* record in terms of securing justice, respecting the rule of law, and protecting basic rights cannot be condemned, and indeed may be considered as an improvement.

This argument does not depend on a maximising view of legitimacy and continues to hold if one adopts a threshold account focusing on “a standard of legitimate, not perfect, representation” (Stilz 2011: 588). For, given that legitimacy is measured along several dimensions, and includes a bundle of rights, states may do well in one dimension while failing to reach the appropriate threshold in some other dimension. Hence, states may be ranked according to the number of dimensions where the appropriate threshold is reached, even though it may be impossible to rank them precisely along any individual dimension.<sup>28</sup>

Colonial relations arising from the political and economic subjugation of an illegitimate state thus pose serious, and potentially ubiquitous, problems for legitimacy based approaches. In response to the ‘annexation problem’, Stilz (2011) argues a lack of territorial rights does not entail a state can be invaded or occupied since invasions are still subject to conditions of just war. This argument is not entirely convincing. First, while formal annexation of states normally involves an armed invasion, the taking of land and resources typical of colonial relations does not necessarily (and historically did not always) involve a war. Second, and perhaps more important, if a state lacks territorial rights (and, as we have argued, ‘defeater claims’ do not apply), then definitionally a colonial appropriation of land and resources—albeit possibly wrong for other

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<sup>28</sup>Again, this problem is more evident in approaches where legitimacy requires the satisfaction of a longer list of conditions. In Stilz (2015, 2019a,b), for example, a colonial state remains illegitimate unless indigenous people eventually *affirm* their political association with the colonisers, even if basic human rights and democratic procedures are respected. Nonetheless, the inherently multidimensional definition of legitimacy makes it possible, and even historically plausible, that the transfer of control occurred from a deeply illegitimate (indigenous) state to a *less* illegitimate (colonial) state respecting at least some basic human rights while violating the subjective condition of affirmation.

reasons (e.g. an unjust war)—does *not* constitute a violation of territorial rights. Thus, at a theoretical level, legitimate state theory cannot identify a constitutive wrong of colonialism.

The second problem case involves *non-states* and poses a fundamental challenge to legitimacy based accounts. Consider, for example, uncontacted peoples living in the Amazon basin. Some of these groups have small populations comprising only a few families. Isolated tribes hardly constitute a state, legitimate or otherwise. Small groups will certainly have social norms governing behaviour and likely some codified social rules, but these features will fall short of those forms of governance that would be required by a plausible theory of the legitimate state. Yet, this absence is not due to a *flaw* in the groups' form of governance. They are not living within an *illegitimate* state. Instead, the groups lack legitimacy-conferring features because their forms of life simply do not require a formal state. Hence, under a legitimacy based account, these groups lack territorial rights and thus, their subjugation and the taking of their land and resources do not represent violations of legitimacy based territorial rights.

Nor, indeed, do they represent a violation of non-usurpation conditions or defeater claims, given the emphasis of legitimate state theory on state-like institutions. For even if a people's history of political cooperation could ground certain rights supporting defeater claims, in legitimate state theory "only a history of sharing a state demonstrates the existence of the moral bonds that support political authority" (Stilz 2011: 593). Yet, the indigenous people and small tribes considered lack precisely such history of shared statehood.<sup>29</sup>

Legitimacy based accounts cannot condemn the transfer of control either

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<sup>29</sup>Nine proposes an alternative approach in which "the collective is the normative source of property rights" (Nine 2012: 15), not the state. This better protects indigenous peoples with social organisations different from traditional Westphalian states. Nonetheless, it is unclear whether all, or indeed most, of the native populations would have qualified as a 'collective'. For in order to be a candidate for self-determination rights over territory, "the people must: 1. demonstrate the capacity to meet minimal standards of justice . . . and 2. have members who share a common conception of justice" (Nine 2012: 67).

from *illegitimate* states or from *non-states* to foreign states. Since historical colonialism involved such transfers, as P2 claims, legitimacy based accounts cannot successfully account for the wrongs of colonialism.

## 6.2 The Status Quo Dilemma

Consider again Ypi's solution to the 'status quo objection' discussed in section 5. According to Ypi (2013a), faced with the persistent refusal to engage in fair and equal political interaction, needy newcomers may unilaterally 'move in'. Yet, allowing the pressing needs of newcomers to trump indigenous consent means the newcomers can unilaterally take political and economic control of land and resources, to establish what, at least *prima facie*, looks a lot like colonial relations. More specifically:

D1 Either the account is insensitive to need—the 'status quo objection' applies because indigenous peoples can withhold consent to engage with desperately needy newcomers—or

D2 It cannot condemn some forms of colonialism—settlers' needs trigger a requirement for indigenous peoples to relinquish land and resources.

Ypi acknowledges this dilemma, and attacks the second horn. She argues her account places limits on the actions of needy newcomers that ensure the account does not end up legitimising settler colonialism, as claimed by D2. We quote her at length.

The claims of visitors to nonessential portions of the territory and resources used by residents are nonexclusive and provisional. They apply in conjunction with an ongoing duty to associate, and they can be radically revisited once appropriate political institutions are in place (just as the claims of residents can be radically revisited). They

also remain open to be challenged by the claims of other prospective newcomers. Settler colonialism [in contrast] is neither provisional nor open-ended nor welcoming of newcomers. It is based on the enforcement of unilateral claims to acquisition. (Ypi 2013a: 183)

Note that the last feature cannot distinguish her account from settler colonialism, for the situation under consideration is also one of *unilateral* appropriation of land and resources, legitimised by settlers' needs. The difference between settler colonialism and the relations allowed under the reciprocity and equality account must therefore lie in the fact that needy settlers' claims are to non-essential resources, are non-exclusive, and non-permanent.

Yet, these distinguishing features are *contingent*. Settlers' needs may require essential land and resources if there are many visitors or if the need is severe. Some claims on the resources necessary to satisfy pressing needs are naturally exclusive, such as those on food, and because it is need that triggers the legitimacy of unilateral use, these claims are not necessarily provisional. As long as visitors would remain needy without the resources, they are entitled to them. Thus, the account fails to preclude the unilateral, exclusive, and even persistent use of indigenous persons' essential territory and resources.

Furthermore, because the reciprocity and equality account is responsibility insensitive it places no restrictions on the ways in which this need comes about, leaving it open to desert based objections and creating a moral hazard problem. To see this, suppose a group of wealthy settlers sets out to colonise a territory and subjugate its indigenous population. Suppose (a) the settlers make themselves needy by destroying their ships and resources upon arrival, and (b) they outnumber the indigenous population. Then it follows that if indigenous people refused to fulfil their associative duty and relinquish resources and a portion of territory to the intended-to-be colonisers, the needy settlers could

legitimately unilaterally appropriate some of the indigenous people's territory and resources. Moreover because settlers outnumber the indigenous population, their need could entitle them to a majority of the land and resources.

Would such a case constitute settler colonialism? Under the definitions of colonialism discussed in section 2, including Ypi's own, it could. By allowing need to trump the requirement of consent of indigenous people, the reciprocity and equality account fails to condemn persistent colonial relations arising from need and allows for unilateral, exclusive, and persistent appropriation of essential land and resources. The general point is that responsibility *insensitive* theories create incentives for free-riding and moral hazard problems and lead to counterintuitive verdicts about the distribution of resources and aid.<sup>30</sup>

Of course, ideally the colonisers would either not burn their ships or would rebuild them and leave, after having done so. But an upshot of the example is that the reciprocity and equality account can neither condemn the ship burning, nor require the colonisers to leave. It cannot condemn the ship burning because what makes the burning *bad* is the colonisers' use of the burning as a justification for colonisation. But this justification is only provided by the equality and reciprocity account itself. So it cannot condemn the burning without repudiating its own moral requirement of association. Similarly, it cannot require the colonisers to leave, because so long as they are needy, the indigenous people have a duty to associate. Thus, the equality and reciprocity account proves counterintuitive in non-ideal circumstances.<sup>31</sup>

The approach has an even more unpalatable implication: whenever colonial relations are triggered by the need of newcomers, the account shifts the justificatory burden away from the colonisers and onto the colonised. If, in our example, indigenous people refused to engage with the needy colonisers who had set out

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<sup>30</sup>See Stemplowska (2009) and Ferguson (2016) for similar points.

<sup>31</sup>We thank an anonymous referee for pressing us on this example.

to enslave them, *they* would be committing a *pro tanto* moral wrong. Because Ypi grants that historical colonisers were often in dire need, the reciprocity account requires us to ask not whether the enforcement of unilateral claims to acquisition was wrong, but first and foremost (and counterintuitively), whether indigenous people could have legitimately resisted the need claims of colonisers.

In summary, the equality and reciprocity based account cannot avoid the status quo dilemma and, as P2 claims, it cannot successfully condemn colonial relations.<sup>32</sup>

## 7 Two Acquisition Based Solutions

In the previous section, we have shown that, as P2 claims, functionalist accounts cannot provide satisfactory explanations of the wrongfulness of colonial relations. Here we defend P3 and demonstrate that acquisition based approaches *can* solve both the non-legitimate-state problem and the status quo dilemma.

### 7.1 Solving the Non-Legitimate-State Problem

The problem for legitimacy based accounts is that if a state does not fulfil its political roles, or if a set of individuals do not adopt state-like forms of governance, then colonial relations cannot be condemned as violations of legitimacy-based territorial rights.

Recall that acquisition based approaches may be individualist, ‘bottom up’ theories, according to which territorial rights are derivative rights, which follow from the property rights of individuals; or collectivist, ‘top down’ theories, which claim territorial rights are vested in collective agents. In either case, the validity of acquisition based accounts does not depend on the state fulfilling

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<sup>32</sup>Indeed, the status quo dilemma highlights some problems common to other functionalist accounts. For any theory in which need automatically triggers a redistribution of territory and resources as a matter of justice would face similar difficulties in condemning colonial relations (Moore 2012).

certain legitimacy-conferring functions. As noted in section 3, territorial rights are grounded on considerations other than the existence of a legitimate state, and so acquisition based accounts can easily support the intuition that tribes, small groups of people, and collectives living in states lacking the relevant legitimacy conferring features, nonetheless have territorial rights. Claims to land and resources can be made by a small group, or tribe, and do not require the presence of an organisational structure like the state. Thus, both collectivist and individualist varieties can avoid the non-legitimate-state problem.

## **7.2 Avoiding the Status Quo Dilemma**

The status quo dilemma does not arise in acquisition based approaches. The acquisition based explanation of colonialism's wrongs bites the bullet on D1, the status quo objection, by denying that (mere) need always justifies the transfer of resources. Rather, provisos employed by acquisition based accounts appeal not to need, but to the distribution of resources.

While acquisition based accounts can straightforwardly avoid D1, and are internally capable of condemning colonialism, they appear ill suited to tackle problems created by need, which leaves them open to harshness objections. Various strategies might be employed in response to such objections. For example, one may diminish the harshness directly (Stemplowska 2009), or adopt egalitarian formulations of provisos on acquisition, as in the left-libertarian literature. While the limits egalitarian provisos place on appropriation will depend on the scope of natural resources (for example, on whether they extend to internal goods such as skills and talents), their effect is to generate, broadly speaking, a responsibility sensitive egalitarian distribution of opportunity for advantage.

This may still be deemed insufficient when dealing with desperately needy newcomers. Can, in principle, acquisition accounts accommodate the view that need triggers some duties of justice without legitimising colonialism? At the

*theoretical* level, a concern for need can be incorporated by taxing the benefits agents receive from the land and resources they appropriate in order to create a social fund, which can be drawn upon by those in need (Vallentyne 2000; Steiner 1994, 2005; Tideman 1998).<sup>33</sup>

Importantly, a tax on benefits does not entail a reallocation of rights of control, transfer, or certain forms of use to needy persons, nor does it entail ‘tax slavery’, since taxes are levied only on the *flows* received from productive assets. Various levels of benefit taxation are possible, as are various justifications for the distribution of the social fund (Vallentyne 2000: 8-11). Depending on one’s prior commitments, the fund may be directed towards the needy *tout court*, or distribution may be weighted according to the cause of, or responsibility for need. The essential point, however, is that benefit taxation incorporates a dynamic element that is often absent from traditional territorial rights accounts and it can be used to address need without compromising essential aspects of territorial rights.<sup>34</sup> Consequently, acquisition theories can successfully escape ‘through the horns’ of the status quo dilemma.<sup>35</sup>

In this section, we have argued that because acquisition based accounts do not depend on the existence of a state fulfilling legitimising roles, they avoid the non-legitimate-state problem. Further, we have shown that while the status quo dilemma does not arise in acquisition theories—they provide strong protection to the territorial rights of indigenous people—the adoption of suitable provisos, a protection against brute luck, and the inclusion of benefit taxation means these rights are compatible with a sensitivity to need without endorsing settler

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<sup>33</sup>Of course, in *practice*, the creation of such a social fund would likely depend on the existence of a state or collective to administer it.

<sup>34</sup>See also the detailed discussion of resource rights and incidents of property in Nine (2012: 120). A similar conclusion on the adoption of benefit taxation to address need is reached, from a rather different perspective, by Moore (2012: 85).

<sup>35</sup>Benefit taxation will not be attractive to all acquisition theorists—right libertarians, for example. Yet the fact that many acquisition accounts are *typically* insensitive to need does not mean they *cannot* be sensitive.



colonialism. Hence, we conclude P3 is true, acquisition based accounts can solve problems encountered by alternative approaches. Consequently, the paper’s main claim C is true, acquisition based approaches to territorial rights provide a more convincing account of a constitutive wrong of colonialism than alternatives.

## 8 Conclusion

In closing, we think it is worthwhile reflecting on why it matters what the wrong-making features of colonialism are, especially when we can plausibly claim that *particular* acts of theft, domination, and the like are wrong.

One reason the identification of the relation between these individual and broader wrongs is important is that if *historical* colonialism did not involve territorial rights violations then, “[t]o the extent that descendants of colonized groups make a claim to rectification for past wrongdoing, appropriate rectificatory measures may or may not be related to the return of land and to the use of natural resources available to their ancestors” (Ypi 2013a: 187). Since we have argued territorial rights based explanations do not fail, it is much more plausible that the rectification of colonial wrongs *does* involve the restoration of land and resources to indigenous groups. Any attempt at rectifying colonial wrongs will have to start from the massive expropriation of land and resources, and the associated violations of the territorial rights of native peoples.

In this paper, we focused on historical instances of colonial relations because those are perhaps the most pressing and the most theoretically salient cases. It is, in our view, a significant advantage of acquisition based theories that they can provide a more convincing account of a constitutive wrong of historical colonialism than alternative approaches. Nonetheless, we believe that our arguments can also be used to condemn many contemporary practices, and even hypothetical cases, that might aptly be described as colonialism. Addressing

hypothetical cases, however, requires a precise definition of colonialism in order to clarify the target domain for analysis. This would be an interesting avenue for future research. Since we did not aim to provide a novel, general theory of what colonialism *is*, and we wanted our analysis to apply to a broad range of existing definitions, we focused on cases where these definitions are broadly in consensus, namely, historical cases. In these cases, we have argued, colonialism was wrong, *inter alia*, because it violated the acquisition based rights of indigenous peoples.

The defence of the claim that historical colonialism involved just this sort of wrong resonates with the way in which indigenous people themselves experience the wrong of colonialism. A recent radio documentary examining the British government's massacre of Kenya's Kikuyu people in response to the Mau Mau uprising ends with an interviewer recounting that a Kikuyu man said, "what he and most people want, *need*, isn't so much an acknowledgement [of wrongs], it's to get back what was *taken* from them":

... pieces of land, a place where one can keep some goats or cows, so that I can do what anyone wants to do, leave something behind; to give our children a better life. (Radiolab 2015)

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