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Why do states have territorial rights?

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What gives a particular state the right to exercise jurisdiction and enforcement power over a particular territory? Why does the state of Denmark have rights over the territory of Denmark, and not over the territory of Sweden, and vice versa? This paper first considers a popular argument that purports to ground state territorial rights in citizens' rights of land ownership. On this view, the state has jurisdiction over territory insofar as its people *owns* the territory, and delegates jurisdictional powers over their land to the state. It is argued that we should reject this approach, because it is unable to explain: (a) how the state can establish a continuous territory; (b) why later generations consent to the state's jurisdiction; and (c) why non-consenting property owners cannot secede.

Rather than considering state jurisdiction to be *derived* from the people's prior property rights, this paper claims that we should consider state jurisdictional rights over territory to be primitive. It defends an alternative Kantian account of territorial rights. On this view, a state's claim to jurisdiction over territory is justified if that state imposes a system of property law that meets certain basic conditions of legitimacy. This Kantian approach, it is argued, allows us to make better sense of state territorial rights.

Keywords: territory; political authority; boundaries; global justice; Locke; Kant

Introduction

Recently, global justice theorists have questioned a number of assumptions that have traditionally been taken for granted, both in international law and political practice. Among the questions they have raised are: do states have unlimited rights to restrict individuals' freedom of movement, by enforcing border controls and immigration restrictions? Do states have the right to defend their territorial integrity, by resisting claims for secession or autonomy made by groups within their borders? And do states have rights over a territory's wealth, including rights to exploit its natural resources and to enact taxation schemes that redistribute to insiders over outsiders?

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At the heart of these seemingly disparate debates over secession, boundaries, and the legitimate control of immigration and resources is the thorny issue of state territorial rights. State rights over territory comprise a bundle of claims that include '(a) rights to exercise jurisdiction (either full or partial) over those within the territory, and so to control and coerce in substantial ways even non-citizens within it; (b) rights to reasonably full control over land and resources within the territory that are not privately owned; (c) rights to tax and regulate uses of that which is privately owned within the state's claimed territory; (d) rights to control or prohibit movement across the borders of the territory; and (e) rights to limit or prohibit "dismemberment" of the state's territories' (Simmons, 2001b: 306). Only if a state possesses these titles to its territory can it rightfully police and control its borders, resist secessionist movements, or lay claim to the wealth produced by that territory in its citizens' names, since all these acts are potential *exercises* of those titles.[1]

In investigating state territorial rights, we will want to answer two important questions: first, what grounds a state's right to jurisdictional authority over a given territory? From where might the state obtain this right, and how do we know if its claimed title is good? Second, what are the limits of the state's right to jurisdiction over territory? In particular, does title to territory give the state an unlimited right to control others' access to the use and benefits of the territory, or only some more limited right that must be balanced against the interests of outsiders? In this paper, I will be primarily concerned with the first question, the question of the possible *grounds* of the state's territorial rights. I must defer more sustained consideration of the second question (about the *extent* of those rights, including the extent of the right to exclude immigrants) to future work.

The paper unfolds as follows: in the first section, I lay out a particularity requirement that must be satisfied by any theory of state territorial rights. In the second section, I then examine and criticize Lockean theories that ground the state's right to territory in the prior ownership rights of the people over their land. In the next section, I distinguish between property, jurisdictional, and metajurisdictional rights, and lay out five desiderata for a good theory of state rights to territory. In the final section, I examine a Kantian theory of territorial rights, and I argue that it does a

[1] For the notion that valid claims for or against secession turn on territorial rights, see Brilmayer (1991) and Buchanan (1991); for the idea that state claims to resources depend on valid rights to territory, see Steiner (2005); for the idea that immigration restrictions depend on the same, see Blake and Risse (2008). Any account of territorial rights must presuppose that the state is the kind of entity that can possess rights. For a nuanced discussion of the issues raised by this assumption, see Wendt (2004).

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better job of satisfying the five desiderata than do Lockean accounts. In the paper's final section, I consider an objection to the Kantian theory – *the annexation objection* – and show how the theory can meet it.

Before beginning, I should say a brief word about my method. Since I shall be investigating the grounds on which states may *legitimately* claim territorial rights, I do not assume that all territorial claims made by existing states are necessarily valid. Rather, the aim is to derive some normative criteria by which to evaluate and criticize the claims made by existing states: some of these claims may be legitimate, whereas some will not be. Nevertheless, if a theory has the implication that *no* state could *possibly* possess territorial rights – even under the most ideal of circumstances – I will take that fact to count against the theory. The aim of the article is to make philosophical sense of an existing institution, the territorial state, which it presupposes. The more radical view that the territorial state is itself an illegitimate institution is not engaged with here.

The particularity requirement

Any successful theory of territorial rights will have to explain not just why a state might have a right to some piece of territory somewhere in the world, but more importantly why it has a right to control a *particular* piece of territory. This condition shows that theories establishing merely a general right to territory fail to fully ground state territorial rights, because they do not show the requisite connection between a state and a particular piece of land. A general right, in H.L.A. Hart's terminology, is a right whose origin is not due to any special relationship or interaction, but rather accrues to all rights-bearers equally (Hart, 1984; Waldron, 1988). The scope of general rights is universal: they are rights held against everybody, and every person or body who qualifies as a bearer of that kind of right possesses them. One example of a general-rights theory of territory is the view that every state has a claim to land when its institutions are sufficiently just. Another view is that every state has a claim to land when it represents the aspiration to self-determination of a distinct national group.

To see why a general-rights theory of territory alone is not sufficient, imagine for a moment that the United States raised a claim, perhaps based on the justice of its political institutions, to extend its jurisdictional authority to the territory of Guatemala, by promulgating laws that were addressed to Guatemalan citizens, denying outsiders the right to enter Guatemala, and taxing and regulating the use of resources on Guatemalan territory. Or imagine a proposal that two reasonably just states (say, Sweden and Denmark) switch territories, so that Sweden administers the

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territory of Denmark, and vice versa. We would consider both these claims illegitimate, despite the fact that the institutions in question might be reasonably just. These states, we might say, do not stand in the right relation to the territories they are claiming. So when we investigate state territorial rights, we want to know not just what justifies a state's claim to control *some* slice of territory somewhere – which the legitimacy or the national character of its institutions might, in fact, justify – but rather, we want to answer a more difficult question: what justifies its claim to control its *particular* territory? What is its special relation to that territory? Only states that stand in the proper relation to a territory can validly claim it, and they have a claim *only* to that slice of territory to which they stand in the given relation.

A proposal: territorial jurisdiction grounded in property rights

One well-theorized template for understanding rights to land in terms of a special relation is original acquisition accounts of property. On an original acquisition theory, by performing certain acts with respect to resources – such as laboring on them, or being the first to occupy them – an individual or group in the state of nature can generate a strong 'natural' entitlement to the resources in question. The right generated is a special right, since it pertains only to persons who either performed the acts of acquisition in question, or who have been the recipient of permissible transfers from persons who acquired the resource initially. Moreover, this history of just transactions (acquisition and transfer) is meant to constrain property entitlements down to the present day. Whether or not a particular set of current holdings is just, then, depends on whether it is the product of a just history of transfer that can be traced back to an originally just act of acquisition. Only those owners who can show the proper history can establish a right to the resource in question (Nozick, 1974; Wenar, 1998; Simmons, 2001a).

Perhaps this model can be applied to state territorial rights. Maybe states, like individual property owners, have historical claims to territory that can be traced back to originally just acts of acquisition.[2] To determine whether territory actually belongs to some state, on this view, we need to look to the history of transactions involving that territory to see whether or not they were just. There are some important objections to

[2] Cara Nine offers a theory of the original acquisition of state territorial rights that takes this form in Nine (2008). Lea Brilmayer also offers an account that emphasizes the role of historical grievances over wrongfully taken territory, in establishing the case for secession in Brilmayer (1991). For an overview of the role of property in the emergence of the Westphalian international system, see Burch (1998).

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this approach, however. First, and perhaps most obviously, very few existing states can claim a 'clean' historical title to the territory they currently occupy. Almost all states have gained title to parts of their territory through conquest of other states or peoples, or through inheritance of a similarly 'soiled' title from a predecessor state. Moreover, on an original acquisition theory, there is no way that existing states inheriting a soiled title can legitimize their acquisition. Even a perfect modern state with a tainted history could never achieve a 'clean' title to its territory.

A second, equally important problem with this approach is that the territory of a particular state is not the private property of its government, at least not under modern international law (Buchanan, 1991). Patrimonial kingdoms that could be sold or given away at will by their rulers – like private property – were recognized in the medieval and early modern periods, and some features of this understanding of sovereignty persisted in the international system even until much later.[3] Territory continued to be bought and sold by governments independently of the wishes of their subjects through the nineteenth century, including – among other examples – the sale of Alaska from Russia to the United States for $7.2 million in gold, in 1867, and sale of the Philippines to the US by Spain for $20 million in 1898 (Sharma, 1997). But post-1945, with the inclusion of language recognizing a right of self-determination in the UN Charter and other international legal instruments, the patrimonial state is no longer recognized as legitimate. On a modern understanding of popular sovereignty, the territory of a state belongs – in some sense yet to be determined – to the people as a whole.

[3] Both Grotius and Pufendorf, international jurists of the early modern period, distinguished between patrimonial kingdoms, which allowed sovereigns the right of alienation, and usufructuary kingdoms, which did not. Cf. Grotius: 'The Generality of Kings, as well those who are first elected, as those who succeed to them in the Order established by the Laws, enjoy the Sovereign Power by an usufructuary Right. But there are some Kings, who possess the Crown by a full Right of Property, as those who have acquired the Sovereignty by Right of Conquest, or those to whom a People, in order to prevent greater Mischief, have submitted without Conditions' (Grotius, 2005). By the time of Vattel, writing in 1758, however, the Grotian concept of a patrimonial kingdom was roundly rejected in theory, if not yet in practice: 'This pretended proprietory right attributed to princes is a chimera produced by an abuse which its supporters would fain make of the laws respecting private inheritances. The state neither is nor can be a patrimony, since the end of patrimony is the advantage of the possessor, whereas the prince is established only for the advantage of the state'. In a footnote, he adds: 'those whom superior knowledge enabled to distinguish between what is lawful and what is not, could plainly perceive that the administration of a state is the property of the people (thence usually denominated *res-publica*)…' (Vattel, 2008: 114–115). The principle of self-determination, in its original French Revolutionary formulation, was, in part, a rejection of the patrimonial state, expressed for example in Title XIII, Article 2 of the French Draft Constitution of 1793, which repudiates the idea that territory could be alienated without the consent of a majority of the inhabitants (Cassese, 1995: 11).

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Perhaps we could reformulate the original acquisition model to take account of the fact that under modern international law the state's territory belongs to the people. On this reformulated view, it would be the people – either as separate individuals or as a unified collective – who originally acquire property rights in the territory. Then the people might decide to *transfer* elements of those rights to the state. On this view, the state is simply an agent who performs certain functions and exercises certain rights on behalf of a principal, the people (Buchanan, 1991: 108). To see how the principal–agent relation might work, consider an everyday example. Suppose I authorize some agent to act in my name, concerning my property (let's say, to take decisions about the maintenance of my home while I am out of the country). In authorizing him to be my agent, I do not *cede* him my property right in the house – he does not thereby become its rightful owner. Rather, he is granted the title to exercise *aspects* of my property right in my name, by making certain decisions as though he were me. Analogously, on this view, by exercising jurisdiction over a territory, the state does not become the owner of that territory. Rather, it exercises certain aspects of its people's property rights over that territory, by enacting legislation in their names.

If we understand the state's territorial rights in this seemingly straightforward principal–agent framework, then we will conclude that the state's jurisdictional rights over territory are parasitic upon the property rights of its citizens. If the citizens cannot claim property rights in a certain territory, then the state, as their agent, *a fortiori* cannot claim rightful jurisdiction over that territory. Just as a principal cannot authorize an agent to administer an estate to which he has no title – because no third party would have any reason to respect that agent's claims – so a people cannot authorize a state to administer a territory that it does not own.

Imagine a scenario, then, in which a group of prospective citizens have prior ownership rights over the land, and they come together and consent to set up a political authority (Brilmayer, 1989: 14). John Locke's basic answer to our fundamental question – what justifies a state's claim to jurisdictional authority over a particular territory? – unfolds more-or-less along these lines: he argues that a state's claim to exercise jurisdiction over a territory is rightful if (a) individual citizens hold pre-political, 'natural' property rights in parcels of that territory, and (b) each of those citizens has authorized that state by consenting to place his or her parcel of property under its jurisdiction.

According to Locke, citizens get their initial, pre-political rights over territory by being the first to labor the land (Tully, 1980; Cohen, 1995; Sreenivasan, 1995). Like other natural law theorists of property, Locke begins from an assumption of common ownership of the earth: he argues that no human being is responsible for creating the earth's resources, and

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since we are all equal, we all have an equal initial claim to use its resources. The idea of common ownership, though, raises an important problem for theories of private property: if the earth is commonly owned, then how can we appropriate private property without having to ask the permission of all those other owners (Sreenivasan, 1995: 24)? Locke's answer to this problem is that we can acquire rights of property (with correlative duties on others to respect these rights), by laboring on a piece of land or an object, as long as our appropriation does not harm or injure others (Nozick, 1974; Steiner, 1977; Cohen, 1985; Simmons, 1992; Sreenivasan, 1995). The natural property rights initially acquired by appropriators contain a bundle of different incidents, including the right to the use and benefits of land, but also rights to exercise jurisdiction over it, to control entry, and to enforce these claims against others. On the Lockean view, as Lea Brilmayer puts it, 'prior to state formation there existed in essence a group of small kingdoms with each owner of territory essentially possessing governmental power over his or her property' (Brilmayer, 1989: 15).

According to Locke, by consenting to form a political society, these appropriators give up the jurisdictional incidents of their rights over land. 'Every man, when he at first incorporates himself into any commonwealth, he, by uniting himself thereunto, annexed also, and submits to the community, those possessions, which he has, or shall acquire, that do not already belong to any other government' (Locke, 1980: 64). One plausible view of this process understands it by analogy to a land covenant in modern law (Beitz, 1980). A group of property owners can decide to enter a perpetual agreement about the uses of their respective properties – for example, by restricting any construction in their neighborhood of buildings more than three stories tall. Their agreement then binds future owners, who can buy the properties subjected to the covenant only on condition of respecting its terms. On this view, Locke understands the transfer of jurisdiction to the state similarly. Lockean contractors agree to irrevocably transfer to the state those jurisdictional 'incidents' contained in their initial bundle of ownership rights: rights of law-making, control of entry, and enforcement. In transferring these incidents, the initial contractors thereby attach permanent conditions to any later use of the land: it is used subject to state jurisdiction. Future users must 'take it with the condition it is under; that is, of submitting to the government of the commonwealth, under whose jurisdiction it is…' (Locke, 1980: 64).

We can delineate four main characteristics of the Lockean view. First, for Locke, the state's territorial rights are simply the *aggregation* of various incidents contained in owners' pre-existing property claims. Each individual is a principal who chooses to delegate certain aspects of his property rights to the state. The state, therefore, does not wield one unitary

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corporate right, delegated to it by the body of the people, but rather a bundle of jurisdictional rights, each delegated by separate citizens. Second, for Locke, property rights are moral claims that do not depend on positive law for their validity. Instead, they depend on a set of 'natural' moral rules that are prior to the state, and that would be apparent to everyone in a pre-political condition. In consenting to enter the state, each individual personally puts his property under the state's jurisdiction, but reserves the right to disobey if the state attempts to divest him of the property to which he has a right under the 'natural' moral rules. Third, on a Lockean view, we can easily explain how the state gets its *special* right to a *particular* territory, thus solving the particularity problem we posed earlier. The state has a claim to jurisdiction over those parcels of land (and only that land) that is owned by the group of citizens who personally consented to its rule in the initial contract. Finally, Locke's view takes *individual consent* to be the source of authorization of the state. Where an individual does not consent to the state's acting as an agent in his name, that state has no rightful authority over that person or his land.

The simplicity and clarity of the Lockean view make it an attractive option for understanding state territorial rights, and its enduring power is attested by the fact that many contemporary theorists continue to apply it. But there are some important problems with the view, each of which is rooted in the close connection Locke draws between jurisdiction and property rights.[4] Consider three such difficulties.[5]

First, since Locke holds that the only legitimate way land might become subject to the authority of the state is through the explicit consent of its owner, he faces the problem that it is at least theoretically possible for some of the individuals occupying a territorial space not to consent to its authority. The territorial jurisdiction of the state might take on a 'patchwork' quality, with holes formed by the property of 'independents' who refuse subjection to the state (Nozick, 1974: 88–119). Yet, we tend to assume that some degree of territorial continuity is a necessary condition for the uniform application of a body of laws, which is required if

[4] Locke is not alone here. A number of contemporary authors also conceive state territorial rights as rights of property. See, for example, Meisels (2005: 6) – 'the territorial demands made by nations are essentially a type of ownership claim'.

[5] The fact that Locke draws a close connection between property and territorial sovereignty is also seen in another feature of his theory: he argues that only populations with certain property regimes – private property in land put to agricultural use – actually have title to sovereignty over the territory, thus invalidating the titles of indigenous peoples with non-sedentary, non-agricultural, or collectivist property regimes. This feature of Locke's theory has been thoroughly discussed and criticized in the literature, and I will leave it aside for the rest of the article. See Tully (1993) and Tuck (2003).

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the state is to fulfill its mandate. Locke sidesteps the possibility of non-continuity, either because he assumes that in states that are established, jurisdiction is *already* continuous, or because he assumes that there will be heavy incentives for independents who are 'surrounded' to submit to the authority of the state. But what gives those who choose to join the state the power to bind nonsignatories to their agreement, or at least the right to place heavy incentives on them to coerce the holdouts' accession to the state's authority (Brilmayer, 1989: 15)?

Second, interpreting jurisdiction over territory as a perpetual condition on land use undermines one of Locke's other important claims: that political obligation is grounded in our voluntary acts. Locke asserts that a child is not born a subject of any country or government, that the only way to become a subject is by consent, and that the consent of an ancestor does not bind the ancestor's descendants (for these claims, see Locke, 1980: 52, 62, 63). He tries to reconcile these views with permanent state jurisdiction over territory in the following way. Suppose that a buyer makes a fully informed and voluntary decision to purchase a house that is already subject to a land covenant. In normal circumstances, we will take his purchase as signaling his commitment to uphold the covenant's terms. If he hadn't wished to accept the covenant, he needn't have purchased the house. Likewise, Locke suggests that a resident's acquisition or even use of any part of the state's territory should be treated as signaling his willing acceptance of the state's jurisdiction. If he does not wish to accept the terms to which the land is subject, he needn't make use of it. Locke counts such acts as 'lodging only for a week', 'barely travelling freely on the highway', and even mere presence on the territory as signaling the individual's tacit consent to the initial agreement.

But the analogy between the two cases is farfetched. We regard buying the house as willing subjection to the neighborhood covenant only because we assume other reasonable options are available. Someone who lives in a covenanted neighborhood because he/she is forced from every other neighborhood at gunpoint, has not willingly submitted to the land covenant. But most people have no alternative to continuing residence in their state. Even where it is possible, emigration is very costly: those who can gain entry visas to some other country leave behind their livelihood, family, and friends, and must adapt to a new language and culture. And often emigration is impossible: the residents of most poor countries have nowhere else to go. Moreover, since all land on earth is currently either under the control of a state or restricted by treaty, each person is forcibly subjected to the jurisdiction of *some state*, even when he/she is privileged enough to be able to leave the state they currently inhabit. So it is difficult to argue that later generations have consented to the initial agreement

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conferring territorial rights on the state. But if they do not voluntarily accept this agreement, on Locke's principles, it is hard to see why they should be bound by it.

The third problem is that Locke assumes, without much argument, that once it is subjected to the authority of a state, a parcel of property can never be removed from that state's jurisdiction. But the premise that states have a moral right to maintain their territorial integrity is not adequately defended.[6] This is significant, because the effect of the territorial integrity premise is to undermine Locke's basic claim that all individuals are born naturally free and equal in rights. One way to redress the weakness of residence as a form of tacit consent would be to strengthen the opportunity to *dissent* from the covenant that awarded the state its territorial rights. If one allowed residents to secede from the state and take their land with them, then their acceptance of the state's jurisdiction would be truly voluntary, since they would have a real option to leave. But Locke disallows this. By holding that initial contractors can bind future generations to accept a state's jurisdiction, then, Locke confers rights on some people (the initial contractors) that others do not have. But this seems inconsistent with his basic contention that all persons are equal in rights, and one person's consent cannot bind another. On that basis, how can a present-day agreement be binding against future property-holders who are not party to it? So, unless we are given a very strong moral reason for believing that the state has a *right* to its territorial integrity that is significant enough to trump our individual right to remain free and independent, the assumption of territorial integrity seems to conflict with some of the foundational principles of Locke's political philosophy. Of course, granting individuals the unilateral right to secede would also have the effect of undermining the state's territorial authority, since individuals could simply decide to secede at will in the face of laws they would rather not obey. The problem renders it difficult for a Lockean account to explain state authority in any consistent way.

The structure of a revised proposal: property vs. jurisdiction/metajurisdiction

Since the Lockean account of territorial rights is subject to these three difficulties, it pays to consider an alternative. If we explained state's rights

[6] See Steiner (1996: 144), for an argument that an individual right to secession is 'very clearly implied by [Locke's] principles. That is, precisely because a nation's territory is legitimately composed of the real estate of its members, the decision of any of them to resign that membership and, as it were, to take their real estate with them is a decision that must be respected'.

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to territory in a different fashion, might we circumvent the problems raised? We can begin to develop a strategy for improving on the Lockean model, I think, by more carefully distinguishing the various separate titles involved in rights over land:

(a) The right to exercise control over the use and benefits of a particular resource (*Property Right*);
(b) The right to determine what kinds of control, over which aspects of the resource, can be exercised by holders of (a) – for example, does it include title to transfer? To inherit? Is control of the resource subject to certain conditions, such as taxation, eminent domain, restrictions on permissible use etc.? (*Legislative Power*);
(c) The right to interpret the boundaries of the right to control in (a), and the extent of punishment and reparation for any torts – for example, what kinds of acts by others might constitute an infringement of (a)? When has such an infringement actually occurred? What is a just punishment for the infringement? What kind of compensation is owed? (*Adjudicative Power*);
(d) The right to enforce the boundaries of right (a) against others (*Enforcement Power*);
(e) The right to determine who holds powers (b)–(d) over a certain territory, by creating or altering jurisdictional units (*Metajurisdictional Power*).

In the above list, we can call (a) a *property right* in the strict sense. These first-order rights are the basic elements of any territorial system of control, created by a system of legal rules that applies within a spatially defined range. To better understand property rights, we can make use of Hohfeld's analysis of rights into four basic incidents: the liberty, the claim, the power, and the immunity (Hohfeld, 1923).[7] First-order rules about property allocate a constellation of Hohfeldian incidents regarding property to various agents. These include claim-rights to possess, use, and manage a resource, and to receive income from it; powers to transfer the resource, to exclude others from it, or to waive one's right in it or abandon it; the liberty to consume or

[7] A liberty is the absence of a legal duty not to do an action. Thus, I have the liberty to eat my tomatoes growing in my backyard (because I have no duty not to eat them). A claim is correlated to a duty on a second person. Thus, I have a claim to my backyard, which correlates with a duty on you and others not to trespass on it. A power is the ability to alter one's normative situation by modifying or annulling other Hohfeldian incidents. Thus, I have the power to waive my claim against you not to trespass on my yard, by inviting you to a barbeque. An immunity is the absence of a power on the part of another agent to change one's normative situation by modifying or annulling other incidents. I have an immunity against expropriation of my backyard by other agents, or against expropriation without compensation by the state.

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destroy this resource; and immunity from expropriation by the state or other individuals (Munzer, 1990). When an agent has a number of these incidents allocated to him (at least in Western private property systems), we say that he has an ownership right in the resource. The structure of the first-order rules allocating these Hohfeldian incidents, then, determines who has control over which objects and resources. It defines property rights and attributes them to individuals and groups.

Rights (b)–(d) are what we might call *jurisdictional powers* that are associated with these first-order property rights. To have a power, in Hohfeldian terms, is to have the ability within a set of rules to change the titles of oneself or another, by modifying, interpreting, or annulling some lower-order set of rights (Sumner, 1987; Wenar, 2005). Territorial jurisdiction includes powers to make the first-order rules that define property rights and to interpret and enforce those rules, thus creating or transforming the contours of the basic elements of the system. Who holds jurisdiction over what set of persons and resources is determined by second-order rules that specify who is enabled to manipulate the normative relations defined by the first-order rules. These second-order rules allocate jurisdictional powers and confer authority on states to govern certain territories.

Finally, right (e) is a *metajurisdictional power*: it includes the third-order power to alter the second-order rules allocating jurisdiction among states, including the right to define what territory falls under their jurisdiction, and is subject to their rules about property rights (Buchanan, 2003; Nine, 2008). Metajurisdictional powers are powers over powers: they confer authority on certain agents to decide who has powers to make primary rules over which pieces of territory. The right to secede is an example of such a metajurisdictional power.

What is distinctive about Locke's account is that he attributes all three of these categories of rights – property, jurisdiction, and metajurisdiction – to individuals in the state of nature. Individuals may justly acquire a property right in the sense of (a) by first labor. On acquiring that right, an individual also acquires the title to interpret the boundaries and extent of his control over the resource and enforce his interpretation of the right, thus exercising *jurisdictional powers* (b)–(d). He also acquires the power to transfer his jurisdictional rights, creating territorial authorities via consent, that is, by using the *metajurisdictional power* (e).

But attributing all these categories of rights to individuals also causes the three problems we have noted in the Lockean system. Thus, although individuals seem to possess metajurisdictional powers in the state of nature, they lose these powers once the state has been formed. Not only do individuals party to the initial agreement lose these powers, future

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individuals come into the world without metajurisdiction over their property; this power now belongs to states (Nine, 2008: 150–154). This means that all individuals are not equal in rights: later generations do not have the same rights past generations once had. Given that their subjection to the state cannot reasonably be said to be voluntary, it also puts future generations in the position of being bound by the consent of their ancestors, in violation of Locke's own assertion that a man 'cannot, by any compact whatsoever, bind his children or posterity' (Locke, 1980: 62).

Once we distinguish between property, jurisdictional, and metajurisdictional rights, however, we can imagine allocations of these rights that differ from the Lockean one, and that might explain state territorial claims without entangling us in the problems faced by Locke's own view. Based on the these reflections, I propose five important desiderata for an alternative theory. First, the theory should recognize and reflect the distinction between property rights and jurisdictional rights that we have outlined. In particular, this means that a theory should offer arguments that justify a state's right to exercise *jurisdictional authority* over a certain territory, not arguments that justify *ownership* of that territory. Second, the theory should reflect and be able to explain how state territorial rights are *connected* to property rights: in particular, it should explain the need for a system of public legislation, adjudication, and enforcement of rules governing property. Third, the theory should clarify the sense, enshrined in modern international law, in which a state's territory is said to belong to the people as a whole. Fourth, the theory should be able to show how jurisdictional rights connect the state to a *particular* territory and not just some territory somewhere in the world. Fifth, the theory should be able to show why it is the *state* – and not individuals or groups – that possesses jurisdictional powers, and explain who can exercise metajurisdictional powers and under what conditions the territory can be reallocated or dismembered.

Two rather different allocations of jurisdictional and metajurisdictional rights – one Kantian, one nationalist – are schematically outlined alongside the Lockean one in Table 1. In what follows, I consider a broadly Kantian justification for state rights to territory, and I show that the Kantian account does a good job of fulfilling the five desiderata listed earlier. As a whole, the paper does not fully solve the thorny problem of justifying state territorial rights – that would require defending the Kantian view against other accounts (most prominently, the nationalist one), and also offering a theory of the limits to state control over territory. But, drawing on Kant, the paper outlines a promising avenue for such a justification to take and gives a sense of the problems it would need to overcome.

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Table 1. Lockean, Nationalist, and Kantian distribution of rights

	Lockean	Nationalist	Kantian
Property rights	Individuals or corporations	Individuals, corporations, or peoples (defined as cultural groups)	Individuals or corporations
Jurisdictional powers	Individuals (but may be placed in trust with States)	States	States
Metajurisdictional powers	First-generation individuals (but irrevocable transfer to states)	'Peoples' (defined as cultural groups)	The 'people' (defined as Rights-bearers residing on territory)

A Kantian view of territorial rights

A Kantian view holds that a state's claim to territory is rightful if: (a) the state effectively implements a system of law regulating property in that territory; (b) the system of law meets minimal criteria for securing the people's consent, by guaranteeing their most basic rights; and (c) the state is not a usurper.[8] Unlike Locke, Kant argues that to be subject to the political authority of a state is the only way to possess conclusive property rights, that is, he argues that there are no 'natural' titles to ownership. The reason why the state is necessary is that rights to property can be coordinated with others' rights, and rendered interpersonally binding, only when there is a public authority to delineate and enforce their contours. Kant suggests that human beings therefore have a duty to accept the authority of states, in order that the bounds to their respective properties can be determined, and even goes so far as to claim that we may be forced into the state against our will (6:312).[9] A corollary of this view is that, for Kant, it is states – and not individuals or groups – that possess jurisdictional powers over territory. State rights to territory are not derived through prior delegation of jurisdictional rights by individuals: they are primitive.

[8] There is a strain in Kant's political thought that claims that citizens are always obliged to obey any state that exercises *de facto* control over them. I concentrate here on a separate strain of his argument, which provides conditions for understanding when state authority is legitimate. This is partly because I am more interested in using Kant for my own purposes than providing a faithful reconstruction of his views. The theory I offer is Kantian, in the sense of being based on broadly Kantian principles, rather than Kant's own.

[9] I cite Kant's writings by the standard German edition of Kant's works, *Kant's Gesammelte Schriften*, edited by the German Academy of Sciences (Berlin, Walter deGruyter & Co., 1900). These numbers are widely noted in the margins of English translations.

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To establish these conclusions, Kant begins by defining the concept of right as 'the sum of conditions under which the choice [*Willkür*] of one can be united with the choice of another in accordance with a universal law of freedom' (6:230). He goes on to draw an important distinction between rights that belong to us innately and those we must *acquire*. Each person has an innate right to external freedom (defined as independence from constraint by another's will). To guarantee his innate right, each person also has a claim to a scheme of acquired rights that secures his external freedom consistent with the freedom of others (6:237). Kant points to three broad kinds of acquired rights: (1) my claims of ownership or property; (2) my contractual claims against others; and (3) my status as an occupant of a role, as a spouse, parent, or head of household. An important feature of acquired rights is that the *particular* acquired rights persons possess are not naturally defined. Kant also argues that jurisdiction over acquired rights can only be exercised by the state, because private jurisdiction and enforcement of acquired rights is not consistent with a relationship of equal independence between persons.

Unlike Locke, then, Kant allocates first-order property rights to one party – individuals – while allocating second-order jurisdiction and enforcement rights to another party – the state. States do not derive their jurisdictional titles from delegation by individuals, since individuals never possess these titles in the first place. But why does Kant claim that only states, and not individuals, can exercise jurisdiction over acquired rights? He points out two different ways that private jurisdiction undermines our innate right to independence: first, through unilateral interpretation; and second, through unilateral defection and lack of assurance.

The problem of unilateral interpretation arises, in part, because property rights are not naturally particularized. External freedom requires that I have rights of control over a particular body (my own), but it does not specify which particular objects I should have rights of property in, only that I must have some such rights (Ludwig, 2002: 180). In any stateless condition, each actor would therefore have to interpret for himself which particular share of property he has rights over, signal to others that this share belongs to him, and decide how far his claims over it extend. This conventional aspect of property rights contains the potential for grave conflict when these rights are interpreted and enforced by private actors in an uncoordinated way.

Unilateral interpretation is further exacerbated by the fact that individuals cannot, by private will, impose an obligation on other persons to respect their property (Kersting, 1984):

> By my unilateral choice I cannot bind another to refrain from using a thing, an obligation he would not otherwise have; hence I can do this only through the united choice of all who possess it in common (6:261).

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This problem is rooted in each individual's equal claim to moral authority, which gives him a basic 'right to do *what seems right and good to him* and not to be dependent upon another's opinion about this' (6:312). Because each individual has equal moral authority, another person's interpretation of rights is just as authoritative for him as our interpretation is for us.

Kant centrally appeals to the idea that in order for a right to impose an obligation on others, it must be a *publicly imposed* right, rather than a *privately imposed* right based on one person's interpretation of what justice requires. In the state of nature, an individual's good-faith belief about his rights gives him title to coerce others to keep off resources he has appropriated. But it does not yet place others under a correlative duty to respect his property. It would place others under a duty only if those other individuals shared his interpretation of the extent of his rights. But since they can exercise equally authoritative jurisdiction in the state of nature, whenever others do not share that person's interpretation, his belief imposes no *duty* on them at all. Instead, they are obliged only by the duties imposed by *their own* good-faith interpretation of justice, which may not be concordant with his.

But since the point of property rights is to coordinate our actions and avoid mutual interference, the goal of a system of property is undermined so long as individuals exercise unilateral jurisdiction in this way. To really secure our innate right to independence, we must construct one *univocal* interpretation of the property rights and correlative duties to which everyone is subject. To eliminate private interference, we require a single, unitary exercise of jurisdiction that can provide a public definition of our property rights and place everyone under an obligation to respect it, not a slew of competing private interpretations.

There is also a second problem of unilateral defection involved in any private enforcement system, which creates a lack of assurance about our rights. Kant thinks that this second problem undermines my independence even if my state-of-nature neighbors and I happen to *agree* on the bounds to our rights 'all the way down', that is, even if there are no problems of interpretation between us. Even when you agree on the limits of my rights, I am still dependent on your private will to sustain this agreement at every moment, and Kant argues that this is itself a form of insecurity that compromises my independence. You might respect my rights now, but your will could change at any time, and so you retain the *power* of arbitrary interference with me and my rights, even if you do not, in fact, exercise that power. To be fully independent, I should not have to depend on your private will as the only source of security for my rightful claims; instead, I must have a mechanism to *assure* me that my rights will be

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guaranteed, no matter what the state of your will. Inside the state, that mechanism is the public use of coercion. Outside the state, though, I can have recourse to my own arms whenever I am insecure about the reliability of your will and disposition. I do not have to wait until you actually violate my rights; instead, since I am dependent on your will, any sign you might be *intending* to violate them gives me moral title to coerce you.

Because of the problems of unilateral interpretation and unilateral defection, Kant thinks that to secure our acquired rights (especially property rights), we must establish an institution that can impose one objective interpretation of these rights, and coercively enforce this interpretation. Legal jurisdiction is necessary if anyone's property rights are to impose duties on other people, since no private person can impose these duties. And a coercive enforcement apparatus is required to provide the assurance needed to free each individual from dependence on the will of others. Fundamentally, then, the state is necessary in order to maintain a relationship of equal independence between subjects while still allowing them to claim rights to property.

Kant therefore argues that persons have a duty to enter the state, and to subject themselves to its jurisdiction, since they cannot respect others' external freedom without it: 'when you cannot avoid living side-by-side with all others, you ought to leave the state of nature and proceed with them into a rightful condition' (6:307). Since the state is required to define and enforce property rights consistent with everyone's freedom, living under the state is not a choice, but a moral imperative. In a state of nature – where no legal authority is present, and other people refuse to cooperate in constituting one – we may be forced to exercise jurisdiction over our property on a provisional basis. But our exercise of these powers is only rightful if we do all we can to establish a condition of positive public law as soon as possible. The conclusive determination of the extent of our property claims must await the state's future existence.

What does all this mean for state territorial rights? From what we have said so far, we can already see how Kant's account fulfills the first two of our desiderata outlined earlier. The first was that the theory should reflect the distinction between property and jurisdiction, by offering arguments that ground the state's right to authority over territory, not a right to ownership of land. Kant argues that states have rights to jurisdiction because only they can promulgate a unitary, public, and objective criterion of the limits to property that binds everyone in a given area. Since individuals, as moral equals, cannot bind others through acts of private will, only states can rightfully perform this function. The second desideratum was that a theory should explain how state territorial rights are connected to property rights. Kant's answer, in a nutshell, is that state

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jurisdiction is essential to individual freedom and the peaceful enjoyment of property. In the absence of binding state jurisdiction – in any condition where we live as 'independents' – no one can be secure against the constant threat of violent interference with his property by those who do not share his interpretation of justice. This also allows Kant to explain why states should have the authority to bind 'independents', by creating a continuous territorial jurisdiction. For Kant, the state is not an institution to which we must consent in order to be bound by it: instead, it is a necessary condition of our standing in a rightful relation to others. Since we are bound by duties of justice to bring about such a relation, we are bound by duties of justice to enter the state. So Kant's theory is much more successful than Locke's at explaining why it is the state – and not individuals or groups – that has a right to territory, since state jurisdiction is a necessary condition for the promulgation of objective and binding property claims.

One consequence of accepting this kind of Kantian account – where state jurisdiction is primitive – is that we must abandon the role of the social contract in justifying territorial rights (Nine, 2008: 154). Since individuals never have jurisdictional powers over territory in the first place, they do not have to consent to the state – thereby transferring these powers – in order for it to acquire authority over them and their property. Kant argues that an essential precondition for property rights to be defined and enforced is that a group of people comes to be united under a common jurisdictional authority. And he even thinks they can be united by being forced to submit: if some power is able to set up a lawful state by force, it does no wrong by doing so, simply because a state is a necessary precondition for property rights to be established. So entering the state is not a choice, instead it is an unconditional moral requirement, and indeed, it is something we can be forced against our wills to accept.

Since one of the principal roles of social contract theory, however, has been to limit the power of the state over individuals by grounding its authority in their voluntary consent, Kant's abandonment of this tradition could seem disconcerting. But this worry may be premature. For Kant continues to use the idea of a social contract as a heuristic device for testing the legitimacy of the state's laws: he holds that no law can have legitimate authority if it 'is so constructed, that an entire people could not possibly agree to it' (8:297). This idea of an 'original contract' serves as a norm by which to judge actually existing constitutions, and each ruler is under an obligation to reform his government so that it is suited to this ideal. Kant further stipulates that any constitution conforming to the original contract will enact a scheme of acquired rights that secures three fundamental interests for all members: the freedom of each member of

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society as a human being, his equality with all others as a subject, and his independence as a citizen (8:290). A rightful constitution will also be republican in form: legislative, executive, and judicial power must be divided and the people should have a voice in legislation through the election of representatives (6:314–318). So Kant does not merely require that states determine and secure *some* scheme of acquired rights, he also requires that these rights have at least a minimally just content and that they be defined and enforced through republican institutions (Hill, 2002; Holtman, 2002).

I believe that Kant's continuing employment of the social contract device allows us to argue that only *legal states* (*Rechtstaaten*) that protect a minimal threshold of freedom for each citizen can possess territorial rights. I won't enter into the controversy as to whether this view is best attributed to Kant himself.[10] But I do think it is the view that is most compatible with Kantian principles.

We can construct a theory of legitimate statehood by focusing on Kant's contention that a rightful constitution must protect the freedom, equality, and independence of each citizen. These, he says, are 'laws by which a state can alone be established in accordance with pure rational principles of external human right' (8:290; see Rosen, 1996: 15–39). The criterion of *freedom* holds that any legitimate state must grant a sphere of private liberty to all its citizens. The principle behind a private sphere of liberty is that 'each may seek his happiness in the way that seems good to him, provided he does not infringe on the freedom of others to strive for a like end…' (8:290). A constitution that protects freedom, thus, requires the provision of a scheme of private autonomy rights to all citizens. These rights will protect the interests of citizens that are most essential to the formation and pursuit of a personal conception of happiness. The precise rights

[10] For an argument that this is *Kant's* view, see Byrd and Hruschka (2002) and Westphal (1992); for an argument that is a plausible *Kantian* view, though not Kant's own, see Hill (2002) and Holtman (2002). As I read Kant, he believes that justice imposes strong substantive requirements, but he also thinks that justice depends on unified authority. Justice requires surrendering our own title to privately decide when coercion in defense of our rights is warranted, since unilateral jurisdiction cannot be reconciled with freedom. Because political authority is a necessary prerequisite to justice's establishment, Kant concludes that we must defer to existing political authorities, in the hope that justice will eventually be brought about through them. He argues that 'the presently existing legislative authority ought to be obeyed, whatever its origin' (6:319). Kant therefore prioritizes the *procedural* requirements of justice above its *substantive* requirements. Once we appreciate the continued importance of substantive justice for Kant, however, we might reverse his order of priority. On this view, only states that meet a minimal threshold of substantive justice could qualify as legitimate, and should be recognized by their subjects and outsiders as *legal states* capable of imposing obligations. This is the line I shall pursue here.

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necessary to guarantee the interest in civil freedom will vary over time and with the circumstances of a particular society, but it is reasonable to believe that they will include basic rights to personal inviolability and security, as well as a degree of freedom of conscience, private property, freedom of thought and expression, freedom of association, and freedom of movement. These rights are enshrined in all liberal constitutions, and have historically been justified on similar private autonomy grounds.

Kant's criterion of *equality* holds that each subject must be able to claim equal treatment before the law. This rules out privileged classes of citizens, including a hereditary aristocracy, as well as any system that would treat humans as property or as unequal legal persons, such as slavery and serfdom. Kant also takes equality to require that careers and official positions in the state be equally open to all, and argues that each subject must be able to attain any position her luck, effort, and talents will allow her to achieve. A degree of formal opportunity is thus a basic condition of state legitimacy. Although he allows for inequalities of wealth (8:292), Kant does suggest that a rightful state must guarantee, through public welfare, the basic needs of subjects who cannot provide for themselves, and that the state is entitled to tax the wealthy for the purpose of providing for their poorer fellow-citizens (6:326). A state that secures constitutional equality is therefore one that guarantees equal treatment before the law, formally equal opportunity, and basic subsistence for each subject.

Finally, the criterion of *independence* requires that citizens be consulted in the law-making process. Kant does not require that voting rights be extended to all citizens; he distinguishes between 'active citizens', who can vote for their representatives, and 'passive citizens', who merely enjoy civil rights without the ability to vote. He argues that those who are economically dependent and have no property or profession fall into the latter category (8:295). But independence requires that there be some mechanism for citizen consultation in the law-making process. While Kant suggests that the ideal republic would have a representative system in which laws are made by elected delegates, he is also willing to extend provisional legitimacy to unelected rulers (as in a monarchy or aristocracy), as long as the rulers undertake republican reforms and as long as they rule 'in a republican way', by securing constitutional freedom and equality, and thus a scheme of civil rights, for their citizens.

If we take Kant's constitutional criteria seriously, then, we will extend territorial rights only to *legitimate legal states* that protect a minimal degree of freedom, equality, and independence for each citizen. These minimal standards, I believe, include most of the core rights set down in the UN Declaration of Human Rights, including rights to life, liberty, and security; rights against slavery, torture and cruel and inhumane

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punishment, and arbitrary imprisonment; rights to equal protection of the law; to a sphere of property and privacy; freedom of movement, freedom of conscience, and freedom of association; and rights to some form of political representation. If a state guarantees these rights, then we ought to see its laws as making moral demands on its subjects, and not as mere forcible impositions. Legitimate states secure at least a minimal degree of external freedom for each citizen, and each person has a basic duty to uphold institutions that guarantee such freedom, since this is the only way they can stand in a rightful relation to others. Where the laws make no pretension to securing even this degree of freedom, they likewise make no pretension to imposing any obligation on their subjects, nor should they command respect from outsiders.

Let us now see how this Kantian theory of territorial rights performs with respect to two more of our desiderata. We held that a successful theory ought to be able to explain the sense in which, according to the modern doctrine of popular sovereignty, the state's territory is meant to belong to the people as a whole. On a Kantian view, the state's territory belongs to the people as a whole because the state ought to rule in the name of the entire people. 'A true republic', Kant says, 'is a system representing the people' (6:341) and the united will of the people ought to be the source of all legislation, including legislation concerning property and land use. Each subject has an innate, though indefinite, claim to a fair scheme of property and in this sense 'all land belongs to the people (and indeed to the people taken distributively, not collectively)' (6:324). The state serves as 'supreme proprietor' of its people's land: if the state puts into place a system of property rights that secures its subjects' fundamental interests, then it is defining and enforcing their claims to a fair share of property, by providing a conclusive public definition of what these claims entail.

Our fourth desideratum was that a successful theory of territorial rights should explain how the state's jurisdictional powers are connected to a *particular* territory. There are two ways our Kantian theory makes sense of this connection. Most basically, the boundaries of a particular state's territorial jurisdiction correspond to the boundaries of recognition of its legal system. A state has a claim to a particular territory because it defines and enforces property rights on that territory. In this sense, a state's jurisdiction is, in part, a matter of convention: it is because officials generally accept and enforce laws that are held to be valid under that system's rule of recognition, and because subjects generally orient their behavior to these laws, that a state can be held to exist in that territory and define property rights there. In a democratic state, our Kantian theory additionally ties a state's right over its territory to its authorization, in a representative process, by the people who inhabit that territory. It is thus

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the state's special relation to that territory's population that confers territorial rights upon it: it represents this *particular people*.

Metajurisdiction and the annexation objection

Recall that our final desideratum was that a successful theory of territorial rights should explain who possesses metajurisdiction, or the right to (re)allocate jurisdiction among states. Who (if anyone) possesses metajurisdictional powers in our account?

As a way of addressing the metajurisdiction question, consider the following objection to the Kantian theory:

> *Annexation.* Think of two geographically contiguous legitimate states, say the United States and Canada. Suppose that the US could annex Canada without incurring major human rights violations. (Perhaps it bluffs and threatens the use of nuclear weapons, knowing Canada will capitulate). Once annexed, the US proceeds to govern Canada's people and territory in a legitimate way, protecting their basic rights and granting them rights of democratic participation in the now-unified state. Could the annexed Canadians legitimately secede or use violence in an attempt to recover their own political institutions?[11]

I think it is a widely shared intuition that it is illegitimate to annex territory against the will of the territory's inhabitants. And a Lockean theory may seem to have an advantage in explaining this intuition, since it holds that the state's territorial rights derive from the people's consent. Can a Kantian theory accommodate this intuition?

Kant himself clearly rejects the idea that states can be rightfully annexed, even by other equally just states, on the basis that the state itself is a 'moral person':

> For a state is not (like the land on which it resides) a belonging (*patrimonium*). It is a society of human beings that no one other than itself can command or dispose of. Like a trunk, it has its own roots, and to annex it to another state as a graft is to do away with its existence as a moral person and to make a moral person into a thing, and so to contradict the idea of the original contract, apart from which no right over a people can be thought (8:344).

By 'moral person', Kant means that the state is an entity that can be held responsible for its actions and that it is properly subject to the moral

[11] I thank a reviewer and editor for *International Theory* for urging me to address this objection.

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law (Byrd, 2006: 380). Legitimate states are moral persons worthy of respect because they uphold a rightful internal constitution. For this reason, states cannot be coerced to unite with one another in the way that individuals in the state of nature can rightly be forced to enter the state (8:356). Although their moral personhood and internal constitution need not be given up, states do have a duty to establish a permanent condition of international peace by creating a lawful federation of republics (8:356). But they are not required to amalgamate into one unitary world state.[12]

One way we might explain the importance of the state's moral personhood and internal constitution is with reference to the value of collective autonomy. Kant is clear that the members of the state have only a contingent relationship to one another: they need not form a 'nation' or pre-political 'people'. Instead, a group of people have reason to unite in a state solely because of their proximity and mutual interaction (6:307; 6:311). People who regularly interact come into conflict about rights and

[12] While Kant suggests that states are not required to amalgamate into one world state, he does argue that they are required by justice to give up their right to unilaterally engage in war as a means of settling disputes. The right to unilaterally engage in war is only a *provisional right*, which can be temporarily justified as a response to injustice on the part of other states in a non-ideal world, but which must be relinquished in a world where compliance with justice was fully realized. States must give up the right to go to war because the threat of war jeopardizes individual freedom and independence, since though individuals may be secure against their fellow-citizens, they are never secure against foreigners as long as war remains a possibility. Kant is clear that unless domestic right is supplemented by peace among states, it 'is unavoidably undermined and must finally collapse' (6:311). Kant seems to have changed his view over time about whether eliminating violence in international relations requires a world state with coercive enforcement power, or simply a voluntary federation of republics, eventually coming down on the side of the latter (see 8:25–28; 8:356). He offers us two sets of reasons for preferring a voluntary federation to a world state. First, he points to various problems with a world state: it would be difficult to administer over such a large and diverse expanse and population. Also, if it descended into tyranny, it would be very difficult to resist, since a world state by definition has done away with competing centers of power. Second, Kant points out ways in which a condition of anarchy between republics may be more peaceful than a condition of anarchy among individuals or nonrepublican states. Republics are committed to the rule of law internally and thus more likely to respect the rule of law internationally. And republics are ruled by their citizens, who are naturally disinclined to risk their lives and bear the costs involved in an aggressive war. Kant's idea seems to be that if these facts are common knowledge, they may allow a group of republics to 'credibly commit' to peace even without an external enforcement power to compel their compliance. I am not able, here, to discuss the merits of Kant's view that a voluntary federation could genuinely secure international peace without centralized enforcement power. But I do wish to underscore his view that sovereign communities must give up the right to unilaterally engage in war in order for justice to be fully realized, though they may legitimately retain other sovereign rights (such as the right of lawmaking and enforcement on their territory). The right to engage in war is a right that states possess only in a non-ideal world. I thank an editor of *International Theory* for urging me to be clearer on this point.

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they need a system of public law in order to resolve these conflicts in a way that safeguards their freedom and independence. And as a matter of historical fact, Kant concedes that the boundaries of states are shaped by territorial conquest (8:371). But though state boundaries are historically contingent in this way, that does not mean the citizens of a state are a mere aggregate of people, with no meaningful connection to one another. In a well-ordered republican state, citizens participate (via their representatives) in making their laws and shaping their institutions. They cooperate in legislating these laws, and through their deference to state authority, in imposing them on persons in their territory. This helps explain why political cooperation can constitute a group of citizens into a collective with important ties binding them together (Pettit, 2005, 2006).

A widespread objection to invoking the value of collective autonomy in the case of states, however, is that states are not like clubs or private associations. Membership in a state is not voluntary (see Beitz, 1979; Wellman, 2005). We are born into states, and whatever options we may have to leave, they usually are far too onerous to render membership an act of free and autonomous choice. Indeed, following Kant, we can argue that membership in a state is a moral imperative rather than a choice, since living under a common system of law is the only way to respect others' freedom. But if the coercive authority of the state can be legitimate in the absence of our voluntary consent to it, then why can't the coercive authority of some external body – like the rule of the US over Canada – be equally legitimate? If the citizens of Alabama do not need to consent to the US government in order to be legitimately ruled by it, then perhaps the citizens of Canada shouldn't have to either (Beitz, 1979: 80).

But although their membership in the state is unchosen, a forced merger of two states nevertheless *does* violate citizens' autonomy. To see why, consider for a moment another unchosen association: the parent–child relation. From the perspective of the child, his bond with the parent is always involuntary: he is merely born into it. But that does not mean that we can depose the old parent and replace him with a new one without doing the child any wrong. Over time, the child is likely to have developed a bond with the parent he originally had, and that bond will be of significance to him. A bad parent should be removed; a good parent should not be, even if a slightly better one is waiting in the wings. For there may be a wide range of good parenting styles, and a significant part – perhaps even the most important part – of what is valuable in the parent–child bond is the way it is shaped by the history of interaction among the particular parties involved.

Our bond with our fellow-citizens and our state is equally unchosen. But as in the previous case, that does not mean that we can destroy a state

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and annex its people without doing them any wrong. As long as their state takes account of their fundamental interests in freedom, equality, and independence, and allows them political representation, it is not a forcible imposition on them. Over time, citizens shape their state institutions in accordance with their principles and priorities, even though they did not choose these institutions. For that reason, the forcible merger of democratic states disrespects the collective autonomy of citizens. Even though they did not choose their compatriots, if their state is a legitimate one, they will have freely engaged in shaping their terms of citizenship, and the laws to which they are subject will reflect the history of that interaction. Thus, while the boundaries of 'the people' are historically contingent and unchosen, 'peoples' may still exist today – having been brought into being by states – and will reflect forms of political cooperation that we have reason to respect.[13]

These remarks point to the view that states deserve collective autonomy when they possess – and can sustain – a democratic tradition that is worthy of our respect. Respect should also extend to states that, while not yet republican, are 'reforming states'. Kant suggests that republican institutions are not easily constructed; instead, they are the outcome of a long process of political evolution. Countries that uphold a scheme of civil rights and are gradually reforming their political institutions in a republican direction are worthy of our respect, and their territorial rights ought to be recognized by other states, even if they are not yet fully democratic.[14]

With all this in place, let us consider the role of metajurisdiction in a Kantian theory. Our previous remarks have indicated that states cannot unilaterally seize power and annex territory without wronging the members of other political communities. Instead, I believe the best Kantian view of metajurisdiction is that it is a right over territory that inheres in

[13] This Kantian view of 'the people' differs from that put forward by nationalist theories of self-determination, which, for reasons of space, I cannot discuss in detail here. On the Kantian view, to qualify as a people, a group need not share objective cultural characteristics. All they need to share is a history of political cooperation. Individuals with very different cultural characteristics – as the citizens of India, South Africa, Switzerland, or Canada – can share such a history. The bond that constitutes a democratic people can thus be quite thin.

[14] This account will not rule out all territorial annexations, and I am not certain that it should. Consider severe failed state cases, such as present-day Somalia, for example. When there is no collective agent capable of constituting a state to secure basic rights, it may not be wrong for another state to annex the territory, if they can commit to ruling legitimately. Conditions for annexation in such severe failed state cases raise issues – such as problems of unilateralism – that I cannot fully consider here. But it is not clear to me that an internationally authorized annexation would be wrong in cases where there is no domestic actor capable of setting up a legitimate state.

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the people, the political community that has historically formed a state. Where their state has failed entirely, forfeited its claim to represent its people, or where its jurisdiction has been wrongfully usurped, this historic political community has a continuing claim to establish a state on their territory. This claim rests on the fact of their moral personhood, which has been established through a prior history of political cooperation. If they can constitute separate republican institutions on their territory, then the members of this people have a claim to do so in the absence of interference by other states.[15]

Metajurisdiction is thus a right over territory that inheres in the citizenry, the group that has historically cooperated in sustaining a state together. But it can only be exercised by the people in extraordinary circumstances, when their state fails to legitimately represent them or has been usurped. And there is only one object of the right: to set up a legitimate state that can exercise jurisdiction over their territory. In ordinary moments, the people exercise metajurisdiction simply by having a legitimate state in place over them.[16]

Conclusion

I have defended the claim that a Kantian theory of territorial rights improves on Lockean alternatives by more sharply distinguishing between rights of property and rights of jurisdiction. Lockean theories, I have argued, draw too close a connection between property and territorial sovereignty, which renders them unable to explain: (a) how the state can establish a continuous territory; (b) why later generations consent to the state's jurisdiction; and (c) why non-consenting property owners cannot secede from the state.

Kant, on the other hand, is able to show why jurisdictional powers must be attributed only to states – and not to individuals or groups – because

[15] I leave aside the thorny question of the conditions under which *parts* of an existing state may rightfully secede from that state. I am inclined to think that if the state is legitimate, its administrative units do not have a right to secede unilaterally, and thus that preserving the status quo in terms of boundaries deserves some moral weight. Recognizing a primary right to secede would allow seceding regions to undermine the legitimate expectations of their fellow-citizens, making it more difficult for the state to establish distributive justice. And as Allen Buchanan emphasizes, such rights would confer veto power on separatist groups, allowing them to undermine the democratic process by threatening secession in the face of unpopular legislation (Buchanan, 1997). For these reasons, I think secession should be a remedial right. For a contrasting argument that secession should be viewed as a primary right, see Wellman (2005) and Copp (1997). The issue of secession (including the possible grounds on which a remedial right might be extended, such as infringements of cultural autonomy) requires more consideration than I can give it here.

[16] I am grateful to an anonymous reviewer for some of the phrasing in this sentence.

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only states can articulate an objective interpretation of property rights that imposes binding duties on individuals. A Kantian theory also allows us to derive criteria for the legitimacy of state jurisdiction, since the state must guarantee the basic rights of its subjects – thereby ruling in their name – in order to gain the right to control its territory. Finally, the Kantian theory can also explain why states cannot unilaterally exercise metajurisdiction through territorial annexation. A fuller defense of a Kantian theory of territory would require consideration of other alternative views (in particular, the nationalist account of self-determination) and an account of the limits that may be placed on state territorial control by the rights of foreigners. But I hope to have shown that – when compared to its principal liberal competitor – a Kantian view provides a more promising avenue to pursue.

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