

Creating a Space for Politics: Territory and Political Theory

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For Christine, without whom this would not have been possible

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Table of Contents

Abstract.....6

Introduction.....8

Chapter 1.....13

Chapter 2.....60

Chapter 3.....90

Chapter 4.....125

Chapter 5.....167

Chapter 6.....197

Chapter 7.....219

Chapter 8.....246

Bibliography.....278

Abstract

Territory is an important part of contemporary political debates but there is an odd silence about the concept of territory in contemporary political theory. The unraveling of colonization and concerns over global justice should make territory a central aspect of political theory, yet it is not. This silence has the curious feature of recalling the original justifications for territorial acquisition. Because territory is neglected by contemporary thinkers, it is important to return to theorists such as Grotius, Hobbes, Locke, Pufendorf and Kant for a critical engagement with the concept of territory. Understanding the arguments of these thinkers illuminate the presuppositions of present day theorists and contributes to the understanding of contemporary theoretical problems. The thesis is organized into eight chapters. The first two chapters consider the neglect of territory in political theory the role of territory in international law. This sets up the three middle chapters which are critical engagements with historical thinkers organized around three conceptions of territory: territory as possession, as property and as jurisdiction. Contemporary cosmopolitanism is inspired, in part, by unraveling of colonization and a concern for global justice. Chapter 6 considers the relationship between contemporary cosmopolitanism and the legacy of the historical conceptions of territory. The next chapter investigates the communitarian critique of cosmopolitanism and the role of identity in territorial claims. At first glance there seems to be good reasons for contemporary theory to presuppose or ignore territory. However, the answer, though skeptical, is more subtle. Following Rawls and others, contemporary theory is right to remain silent about territory and about property in territory. The main skepticism is about arguments for colonial restitution or global redistribution of resources. This is because many take a crude territory as property view – which when abandoned seems to leave the world un-owned and therefore subject to equal distribution or claims. Yet skepticism is

not the only alternative. Jurisdiction entails some elements of the territory as property view. This is a more sophisticated claim than the straight territory as property argument. Here ownership is a secondary but important claim states make in the absence of a binding universal norm. As a result there is a prima facie but not indefeasible right to particular territory. Identity plays a role in linking peoples to places. It also raises the bar to colonial restitution and global resource redistribution. This legitimates the current view of territory in political theory and international law where territory is pre-supposed but not theorized.

Introduction

Territory is important, yet it is often ignored by contemporary political theory. This thesis argues that territory is an important part of political theory and that it ought to be the focus of more sustained theoretical inquiry. The absence of a serious discussion of territory in theoretical debates is a problem because territory plays an important role in political disputes and in grounding political theories. The emphasis political theory places on global justice and self-determination through the legacy of de-colonialism begs for a broader investigation into the concept of territory. I provide a contribution to the literature in two ways. First, I address the silence of contemporary political theory towards territory by addressing the topic head on. In doing so I argue that territory fundamental to important contemporary queries, yet remains under-theorized. The final chapter comes to a number of tentative conclusions about the things a political theory of territory is reasonably expected to do. Second, I offer an unusual method for approaching territory. Because territory is under-theorized in contemporary discourse, there is little satisfactory literature. Furthermore, several of the most important contemporary theoretical debates presuppose conceptions of territory that were prevalent during the early period of the modern state. As a result, much of my investigation into territory is a critical study of the claims used to justify the original European conquests of the New World.

I consider three claims to territory: territory as possession, as property and as jurisdiction. At the end of each chapter I arrive at some critical conclusions about each of these strategies to ground territory. This is followed by critical discussions of cosmopolitanism and anti-cosmopolitanism. From here I turn to more substantial conclusions in the final chapter. My conclusions serve as an outline for future work. They do not show sufficient conditions for a theory of territory, but rather outline the necessary conditions for a theory of territory and serve

as a starting point for further study. To guide the reader through my argument, I provide a deceptive table of contents below.

Chapter 1: A curious silence about territory

Territory is an important part of contemporary political debates, but there is a curious silence about the concept of territory in political theory. Chapter 1 develops two claims. First, it shows the importance of territory and in doing so describes its complexity and distinguishes territory from other related concepts. Second, the chapter identifies several areas of contemporary theory, such as secession, self-determination and indigenous land rights, where one would expect territory to play a fundamental role. Yet, in these cases where one might expect the concept of territory to be well developed, it is either presupposed or ignored.

Chapter 2: Territory in international law

To determine if this is a problem, I first consider territory in international law. Chapter 2 argues that two sets of issues underlie the development of modern international law: de-colonization and global justice. Debates surrounding these two issues show how the unraveling of colonialism is a return to the kind of thinking that underpinned the original justification for colonial acquisition. These colonial justifications and their legacy in international law can be discussed as three types of claims: territory as possession, as property and as jurisdiction. The next three chapters are critical engagements with key thinkers who developed these original justifications.

Chapter 3: Territory as possession

This chapter considers territory as possession through a critical discussion of the role of territory

in the political thought of Grotius and Hobbes. While there is an intuitive appeal to the idea that possession is the key feature of a claim to territory, possession based arguments are lacking because they fail to address several things that a theory of territory is reasonably expected to do.

Chapter 4: Territory as property

Chapter 4 considers the argument for territory as property. This chapter discusses territory in the political theories of Locke and Pufendorf. Both view territory as a collection of the pre-political property claims of the state's original members. Such theories are compelling because they ground territory in natural rights. However, pre-political property claims cannot be sustained and the territory as property thesis is therefore difficult to defend.

Chapter 5: Territory as jurisdiction

For Kant, property claims play an important role in justifying obligation to the state. Property also plays an important role in his understanding of territory. This chapter discusses the conception of territory in the political theory of Kant. His argument views territory as a jurisdiction. As with arguments discussed in the two previous chapters, the territory as jurisdiction argument has some difficulties. In particular it has trouble explaining why a particular state has a claim to a particular bit of land.

Chapter 6: Cosmopolitanism

Many of the cosmopolitans who played an important role in the development of international law take their start from Kant. The Kantian legacy continues through thinker such as Beitz, Held and Pogge. However, unlike Kant, these contemporary cosmopolitans are skeptical towards any

claims to territory. In their turn towards global justice and property, cosmopolitans develop a crude territory as property concept that they ultimately reject. Not only do they reject several of Kant's central insights, but they also fail to appreciate the important role of territory within their own claims.

Chapter 7: Anti-cosmopolitanism

There are of course many who reject the foundations of cosmopolitanism. Many of these anti-cosmopolitans turn to identity in an effort to ground territory. Following Hegel they argue that claims to territory are justified through the relationship between a group's identity and particular pieces of land. This solves a particular problem with the territory as jurisdiction argument.

Although this identity claim is the only argument that appears to make any sense, it fails in the face of the criticism.

Chapter 8: Conclusion

At first glance there seems to be good reasons for contemporary theory to presuppose territory. However, the answer to the question of territory, though skeptical, is more subtle. Following Rawls and others, contemporary theory is right to remain silent about territory and about property in territory. The main skepticism is about arguments for colonial restitution or global redistribution of resources. Skeptics take a crude territory as property view, which when abandoned seems to leave the world un-owned and therefore subject to equal distribution. Yet skepticism is not the only alternative. Jurisdiction entails some elements of the territory as property view. This is a more sophisticated claim than the straight territory as property argument developed in Chapter 4. Here ownership is a secondary but important claim states make in the

absence of a universal norm. As a result there is a prima facie but not indefensible right to particular territory. As argued in Chapter 7, identity plays a role in linking peoples to places. It also raises the bar to colonial restitution and global resource redistribution. This legitimates the current view of territory in political theory and international law where territory is pre-supposed but not theorized. It also allows for the identification of several tentative, but necessary, conditions for any viable theory of territory and provides an outline for further study.

Chapter 1: A curious silence about territory

This chapter aims to frame the dissertation as a whole by articulating two claims: 1) territory is an important part of political theory and worthy of study and 2) much of contemporary theory fails to adequately ground territorial claims. In doing so, territory can be distinguished from other fundamental political concepts such as property and sovereignty. The chapter itself is organized into two sections. The first investigates the concept of territory and isolates exclusive claims to territory from concepts with which it might be confused. The second section aims to show that territory is left under-theorized in areas of political theory where one would expect territory to be of primary importance.

The importance of territory and its role in political theory

The focus of this study is the territorial state and the relationship between a political community and the land over which it claims exclusive jurisdiction.¹ This may include but is not limited to the jurisdiction over individuals within territorial borders, control over entry and exit, use of natural resources within the borders and regulation of economic transactions.² The concept of territory is often connected with other political concepts such as sovereignty, property and identity. This section aims to clarify the concept of territory and to distinguish territory from other related concepts. This is accomplished by first considering two provisional conceptions of territory and identifying why the concept of territory might be more difficult than it first appears.

¹ I recognize that territory plays an important role in contemporary political geography. I will not discuss the ontology of territory, the discourse of territory, a history/archeology of territory or other topics that are critical to political geography. An overview of the role of territory in political geography is in David Delaney, Territory: a short introduction, Oxford, Blackwell Publishing 2005

² Globalization theorists and others note that the level of control states have over activities in their borders is steadily eroding. The point here is not to defend a particular level of control but to simply show that what ever control a state may have a claim to territory is a claim to exclude other political communities from exercising a similar level of control over that particular territory.

From here, territory is distinguished from 'sovereignty' with which it is often conjoined.

One might note that the definition of territory is itself a possible source of confusion. The word 'territory' has a disputed etymology.³ 'Territory' has its roots in the Latin word 'territorium', meaning the land that surrounds a town. One could argue that 'territorium' is derived from the Latin root 'terra', meaning land. However, if this were the case, then, one might speculate, 'territorium' ought to be spelled 'terratorium'. Others argue that 'territory' most likely comes from the word 'terreor', meaning to frighten, via territory. Here, 'territory' is understood as the area extending around a town where one is fearful, or respectful of the town's authority.⁴ There are at least two implications that one might draw from this disputed etymology. First, if 'territory,' is derived from 'terra' and land, then it would seem that the concept of territory and perhaps the ways in which territorial claims are justified rest in property or land based ownership claims to particular pieces of land. Alternatively, if 'territory' is taken to be about authority and jurisdiction, one might separate the concept of territory from that of property. These two provisional conceptions of territory, - territory as property and territory as jurisdiction - provide a useful starting point to clarify not only what contemporary theorists might mean by 'territory' but also why the concept is left under-theorized. Later chapters will provide a more comprehensive discussion of these two conceptions in addition to introducing several additional ways in which territory can be conceptualized.

³ This is noted in J.A. Simpson 'Territory' The Oxford English Dictionary, Oxford University Press 1998, Thomas Baldwin and William Connolly have made similar points, see Thomas Baldwin, 'The Territorial State,' Jurisprudence: Cambridge Essays, ed by H. Gross, Oxford University Press 1992 and William Connolly, 'Tocqueville, Territory and Violence,' Challenging Boundaries: Global Flows and Territorial Identities, ed M. Shapiro, University of Minnesota Press. It was also noted as early as the 17th century, Hugo Grotius, Rights of War and Peace, trans. John Morrice, ed. R. Tuck. Indianapolis, IN: The Liberty Fund

⁴ There may be some historical reasons for each of these uses. See Saskia Sassen, Territory, Authority and Rights, Princeton University Press 2006. This interpretation may be subject to dispute and will be considered in greater detail in chapters to follow.

Territory as Jurisdiction

Some political theorists suggest that only the international community can provide justification for a state's claim to territory. This occurs when states recognize each other as equals. A state is able to do this through the reciprocal recognition that other states may assert similar territorial claims.⁵ Allen Buchanan helps to clarify the importance of linking territorial claims to mutual recognition by making a distinction between the concept of property and the concept of territory.⁶ Territory, he argues, is merely an area circumscribed by boundaries of political units and is therefore a political/juridical concept.⁷ Here a claim to territory entails a claim about jurisdiction over the area bounded by a particular political community. Land is viewed as geographical concept, not a legal concept. Property rights, he argues, can only be asserted in a prior existing legal framework. If territory is a jurisdictional concept, then the right to territory cannot be reduced to a property right. Territories themselves may contain property regimes where individuals are granted property rights. Such an argument is 'territory as jurisdiction.' In this argument a right to private property only has meaning within a legal structure. When individuals attempt to justify their claim to a particular piece of land she refers to the institutions of the state for support. This is what John Rawls has in mind when he argues that private property is an institution within a state designed to assist in maintaining the welfare of its citizens. He claims that regardless of how arbitrary the distribution of state boundaries may be from a moral point of view, the job of a government, among other things, is to maintain the economic and environmental viability of its territory. 'Unless a definite agent is given

⁵ One especially explicit example is Thomas Baldwin, 'The territorial state'. As a principle this also sits at the core of international law Malcolm Shaw, 'Territory' *International Law*, Cambridge University Press, 2003

⁶ Allen Buchanan, 'The Making and Unmaking of Boundaries: What liberalism has to say', *States, Nations and Borders*, ed. A. Buchanan and M. Moore, Cambridge University Press, 2003, and Allen Buchanan *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*, Westview Press 1991, p. 108. Both the arguments by Buchanan and Rawls will be examined below in greater detail.

⁷ We might note, as Buchanan does, that not all jurisdictions are geographical, some may be personal. Religious law may have jurisdiction over persons without regard for the territory in which they happen to live

responsibility for maintaining an asset and bears the responsibility and loss for not doing so, that asset tends to deteriorate. On [Rawls'] account the role of the institution of property is to prevent this deterioration from occurring.'⁸ An agent is *given* responsibility by the people to maintain the people's territory. On this view, property cannot arise before territory, because it is the state that distributes responsibility for the management of property to an agent. There are, however, many political theorists who argue that property is not a thing that is the state's to give.

Territory as property

A number of contemporary theorists find support for the 'territory as property' argument in Locke's Second Treatise of Government.⁹ Locke provides a positive argument for a legitimate government that is limited, constitutional and confined to securing an individual's property.¹⁰ This right to property is part of the natural order and can be discovered by the powers of reason. Men come to property by mixing their labor with raw materials available in nature. There are limits to what one may justly claim. Individuals must not waste resources or inhibit the ability of others to acquire free resources. The key point for Locke is that individuals have a right to property independent of and prior to any state. The state itself is created through the consent of property owning individuals, because, in Locke's view, beings like us recognize a right to private property prior to the formation of any state. The state itself must take property as primary and

⁸ John Rawls, Law of Peoples, Boston, Harvard University Press, 1999, p. 8

⁹ Locke's argument with be dealt with in greater detail in chapter 5. Among the contemporary theorists who appear to be inspired by Locke, see Robert Nozick, Anarchy, State and Utopia, Basic Books, 1974, Hillel Steiner, 'Territorial justice,' Theories of Secession, ed P.B. Lehnig, London, Routledge, 1988. A. John Simmons, 'On territorial rights of states', Philosophical Issues (11) 2001 and Harry Beran, 'A democratic theory of political self-determination' Theories of Secession, ed. P.B. Lehnig, London, Rutledge, 1988, who will be discussed in greater detail below. Note that several conceptions of nationalism view a nation's claim to territory as something similar to an individual property claims, see Anthony Smith, Nationalism: Theory, Ideology, History, Polity Press 2005

¹⁰ John Locke, Two treatises of government, Cambridge University Press 2004 See Chapter 5 of this manuscript for a more detailed explication of Locke's argument and its implications compare to George Gale, 'John Locke on territoriality' Political Theory (4) 1973, pp. 472-485

conceptually prior to the state's jurisdictional claims to territory. The territory of a state is simply the collective property claims of its citizens.

Such an understanding of territory as analogous to property lends itself to consent theories in general. For Locke the social contract binds one's private property to that of the other contractors. Although one is free to leave the contract at any time, an emigrant may not take his property with him. This is because joining one's land with that of others is an irrevocable part of Locke's contract.¹¹ This is not the case with arguments of other consent theorists.

An alternative understanding of legitimate political authority is put forth by Harry Beran who argues that a moral right to territorial boundaries resides in communities of voluntary democratic political association.¹² The right of self-determination is the right of a community to freely determine its own political status. A political association worthy of respect, he argues, is based on freedom of association and the consent of its members.

Beran lists a number of social groups that may be candidates for claims of self-determination.

'Any theory of rightful secession has to specify what sorts of groups have the right not only to leave their state but to leave it with their territory: in other words, has the right of continuing occupation of their territory (the right of habitation). The best candidates for the right of habitation are states, nations or territorial communities.'¹³

Yet, this formulation is question begging. Beran claims that groups with the right of self-

¹¹ John Locke, Two treatises of government, paragraph 121 – the reasons for and implications of this are discussed in Chapter 6

¹² Harry Beran, 'A democratic theory of political self-determination'

¹³ Harry Beran, 'A democratic theory of political self-determination' p. 35

determination are those with a right to occupation of a particular territory because they themselves are territorial communities. What is missing is an account of what grounds a community's original claims to territory. Nevertheless, Beran makes it clear that he believes these territorial communities are no more than social groups capable of self-perpetuation as distinct entities. It is interesting that this allows for a wide variation in the size of potential communities. He suggests that a village or township can, in principle, have the same status under the right to secession as a large cohesive state.¹⁴

Beran appeals to the ideal of free association to support his argument that one ought to have the freedom to withdraw their commitments from a political community and take territory with them. Individuals have a right to free association, including the right to form territorial communities. Communities of free association ought to be able to maintain themselves and for this they need territory, which entails a right to habitation, provided the land was rightfully obtained from the start. This begs the question of how one might justly acquire property to begin with.¹⁵ Because political communities are free associations, individuals, both by themselves and in groups, have a right to leave the community with their territory. Thus, for Beran, it must be that group claims to territory are derived from individual claims to particular pieces of land and a political community's territorial claim is no more than the collective land claims of individual property owners. Yet, the status of this claim is precisely the issue in many disputes about territory. In the 1990's, for example, Canadians were confronted with determining whether or not Canada could be Canada without Quebec. If the answer to this question is no, then the Quebecois are not justified in seceding and taking their land with them because the land in which the Quebecois resides belongs to Canada as a whole.

¹⁴ There may be some issues of efficiency and utility involved here, for an economic analysis on the optimal size of states see Alberto Spolaore and Enrico Alesina, *The Size of Nations*, Cambridge, MIT Press 2003

¹⁵ In chapter 4, the territory as property argument is discussed in greater detail

However, others argue that territorial claims are a group property right that does not ultimately rest on the rights of individual land owners but in the community as a whole.¹⁶ Any property claim entails the right to an object whether or not it is in one's possession. If groups can have property claims, then the group retains rights to the property when it has been unjustly taken away. When territory is treated as a property claim, dispossessed groups are armed with a strong argument to have their property returned as part of corrective justice.¹⁷ What is central to the argument of this thesis is the source of the original claim. Often group territorial rights proponents ground the original claim in original occupation and the constitutive role territory plays in the formation of a group's identity or both.¹⁸

The efforts of the theories discussed above that focus on property and jurisdiction fail to offer an account of what property rights are. If one is going to use an argument grounded on claims to property, it is important to understand what sorts of claims are being made when one appeals to property rights. Without such clarification, it is not clear how these two conceptions of territory, 'territory as jurisdiction' and 'territory as property,' might relate to each other. For Buchanan, property claims are appeals to jurisdictional authority. States, not people, have authority over territorial boundaries. To make a claim about territory entails a claim about jurisdiction. But it would also seem that to make a claim about jurisdiction is to make a claim about the area (land) over which the jurisdiction is exercised.

¹⁶ A wide variety of multiculturalist arguments seem to rely on this understanding. Nationalists in general and liberal nationalists in particular trade on the idea that a group claim to territory is a constitutive feature of a nation, see Will Kymlicka, Multicultural Citizenship: A liberal theory of minority rights, Oxford University Press, 1995 and Yale Tamir, Liberal Nationalism, Princeton University Press, 1993

¹⁷ This is presented in Lea Brilmayer, 'Secession and self-determination: a territorialist interpretation', Yale Journal of International Law (16) 1991, pp. 177-202

¹⁸ A number of these themes are the focus of Tamar Meisels, 'Can corrective justice ground claims to territory?' The Journal of Political Philosophy (11) 2003, pp. 65-88 and Chaim Gans, 'Historical Rights: the evaluation of nationalist claims to sovereignty' Political Theory, (29) 2001, pp. 58-79 For several reasons why historical claims to territory might prove to be a poor grounding for corrective justice, see Jeremy Waldron, 'Superseding historical injustice' Ethics, (103) 1992, pp. 2-28

One formulation of this problem appears in Rawls' The Law of Peoples. As mentioned above, Rawls sees property as an institution within a state to promote justice. Yet, he also suggests that a right to personal property is a basic human right.¹⁹ To claim something is a basic human right is to say that the claim exists independent of any particular legal institution and is therefore prior to any institutional scheme.²⁰ It is possible that Rawls' two positions are incompatible, but such an answer seems to move too fast. Alternatively, one can understand that the relationship between territorial jurisdiction, the right to private property and the basic human right to personal property is more subtle. The differences between these various positions may depend on exactly what is meant by concepts such as a right to property, a right to personal property, territory and jurisdiction.

Later in this thesis I look more carefully at territory as property and territory as jurisdiction. Nonetheless, the above suggests that the division between these two conceptions is not as clear cut as it appears at first glance. Yet, territory also appears to play an important role in various elements of political theory. This helps to establish the conclusion that territory is complex and worthy of further study. The remaining part of this section considers two important relationships. The first is the relationship between territory as property and territory as jurisdiction. This is followed by outlining the distinction between territory and both sovereignty and globalization. With this complete it will be possible to turn to the second part of the chapter and the way contemporary political theory neglects territory in the places where I would expect it to play a prominent role.

¹⁹ J. Rawls, The Law of Peoples, Boston, Harvard University Press, 1999, p. 65

²⁰ For example Henry Shue, Basic Rights, Princeton University Press, 1996

Combining property and jurisdiction

Roman law made a distinction between *dominium*, a person ruling over things, and *imperium*, a monarch ruling over people. Contemporary legal scholars often refer to concepts relating to the first as private law and the second as public or civil law.²¹ The legal right to property seems to fall under the first set of labels. It is rule over a thing by an individual and its use is generally not subject to continuous public scrutiny. The right to private property though is not a single right, but rather a collection of various rights and privileges.

If one has a right to a particular piece of property, a person is said to own that property. Honoré notes that this entails a wide variety of claims.²² To investigate these claims, he asks one to consider the conditions required for one to say that a state has an institution to protect property. Ownership itself may become clear in a variety of ways, Honoré calls these incidents of ownership, which vary from the right to exclusive physical control to the right to use and gain income. If a society did not protect these rights, it could not be said that the society protects private ownership.²³ In addition, ownership entails the right to alienate, sell, destroy or simply make poor use of the thing that is owned. The incidents of ownership just described do not have meaning outside of social relationships, because civil society not only provides reasons for an owner to do things with his property, but also restrict others from doing things without his or her permission. In this sense property presupposes social organization. The interaction between society and ownership becomes clear when one considers that ownership entails not only a right

²¹ Morris Cohen, 'Property and sovereignty,' Property, Profits and Economic Justice, ed. V. Held, Belmont CA, Wadsworth Publishing 1980

²² A.M. Honore, 'Ownership' Oxford Essays in Jurisprudence, ed. A.G. Guest, Oxford University Press 1961, also see Jeremy Waldron, The Right to Private Property, Oxford University Press, 1988, part 1

²³ Of course they could use the utterance 'ownership.' They just could not mean what we mean by 'ownership.'

to security, but also a prohibition against harmful use.²⁴ An owner may expect that others will not use his property without appropriate permission in the same way that one can expect a property owner not to use her property in a way that will cause harm. This suggests that ownership, and therefore a right to property, does not stand wholly independent of interpersonal relationships.

Although Roman law may have distinguished between sovereignty (imperium) and private property (dominium), early Anglo-Saxon law did not. A feudal lord not only owned land on which other people lived, but, as a condition of living on the land, serfs had to submit to the legal authority of the local squire. At first glance this may seem like nothing more than an outmoded social institution. Morris Cohen suggests that under closer examination, the connection between the concepts imperium and dominium is close. An individual seeking a wage enters into a contract with the owner of a firm. The employee, as a condition of employment, must submit to the bounded authority of the employer. The owner of the firm has not only a bundle of rights with respect to his property, but also a limited amount of jurisdictional authority over whomsoever accepts employment. Cohen writes that ‘it may well be that compulsion in the economic as well as political realm is necessary for civilized life. But we must not over look the fact that dominion over things is also imperium over our fellow human beings.’²⁵ The upshot is that a right to private property is only meaningful in civil society. This is not because one cannot gain possession of things outside of society, but because mere possession is not sufficient for a right to private property. The right to private property entails several components that only make sense when people come together in a community;

²⁴ For an alternative point of view, see Jeremy Waldron, The Right to Private Property, Chapter 2, who argues that prohibitions against harmful use are part of larger moral prohibitions against harm and are not a necessary component of a theory of property.

²⁵ Morris Cohen, ‘Property and sovereignty’, p 43

these include the right to security of one's property and the prohibition of using one's property to cause harm. This leads to two conclusions: first, a right to private property only has meaning in civil society and, second, the right to private property can generate jurisdictional authority. Of course, there may be other ways to generate jurisdictional authority.

In its most straightforward sense, jurisdiction merely expresses a power relationship between two or more things. In some cases the relationship is between an institution and an individual such as a religious authority. The Catholic Canon requires that followers adhere to the religious authority of the Church no matter where a member of the Church happens to live.²⁶ Similarly the Islamic faith extends Sharia Law as a binding force across the worldwide Muslim community.²⁷ To the extent that religious law has jurisdiction over a person of faith, it can be said that a conception of authority is the operative component.²⁸ Here, we can begin untangling the relationship between jurisdiction, institutions and individuals by asking what has authority over whom. In this case, an institution (the Church) has authority over its individual members.

The same construction can be used to describe jurisdictional authority within a state. Again an institution (the state) has authority over individuals (citizens, aliens and their organizations). However, there are at least two differences between religious and state jurisdiction. First, it is not clear over which individuals the state has authority. States make laws and it is normally expected that one must adhere to the laws of the state when one is within a

²⁶ 'Can. 212 §1 Christ's faithful, conscious of their own responsibility, are bound to show Christian obedience to what the sacred Pastors, who represent Christ, declare as teachers of the faith and prescribe as rulers of the Church.' <http://www.vatican.va/archive/ENG1104/INDEX.HTM>. For an overview of Catholic thought on territorial boundaries see Anthony Pagden, 'The Christian tradition' *States, Nations and Borders*, ed A. Buchanan and M. Moore, Cambridge University Press, 2003

²⁷ For more on Islam and territory see Khaled Abou El Fadl, 'Fadl, Ibid. The Unbounded Law of God and Territorial Boundaries', *States, Nations and Borders*, ed A. Buchanan and M. Moore, Cambridge University Press, 2003

²⁸ I realize that there is some question as to whether religious law is properly titled law, the key point here however is about jurisdiction. If jurisdiction has meaning across law proper and law otherwise, it is important to understand what the common element is. See Anthony Pagden, 'The Christian tradition'

state's boundaries without respect to one's status as a citizen. Second, the authority of the institution is geographically limited.²⁹ A state's claim to its geographic boundary appears analogous to the social nature of property described above. States do things with their geographical location; sometimes they allow citizens to use the land, other times the institutions of states use the land. Other states generally refrain from taking or destroying the geography of another state without permission. When they do it is often in self-defense. States as institutions begin to appear as though they are property owners. Things that states do with territory might be analogous to the things individuals do with property.

The source of this state sense of ownership may ultimately derive from the private property of individuals within the state. Alternatively, its source could be in the collective ownership rights of the intergenerational political community that makes up a citizenry. Whatever the source, it seems that a state's claim to territory, the geography over which it has jurisdiction, bears some relationship to a conception of property, but this seems to lead us back to where we started. It is difficult to conceive of territory as jurisdiction without thinking of the geography over which authority is exercised. Likewise it is hard to think of property without an institutional scheme to formalize the relationship between what one owns and what others own.

Because jurisdiction centers on questions of authority, one might consider how an institution comes to have authority over a particular individual or group. As noted above, Baldwin suggests that only the international community can provide justification for a state's claim to territory. This presupposes something called an international community with jurisdiction over such questions. Instead of solving the problem, this formulation simply

²⁹ I think this in fact might be wrong. The US government has a claim to part of the income I make while working in the UK. However, I could not be tried for in the UK for failure to pay taxes in the UK. For this to happen, I would have to be transferred to a territory where US courts have jurisdiction. This is quite a bit different than many religious jurisdictions which are not bounded by territory. If I am Catholic, I can be excommunicated no matter where I am located.

relocates it. Yet, even if this is acceptable, it suggests that our justifications are only as good as our beliefs about them. The challenge for theory is to distinguish between those beliefs that are worth having and those that ought to be abandoned. In doing so, it will be helpful to distinguish territory from other concepts with which it might be confused.

Distinguishing between territory and sovereignty

Political theorists often speak of territory and sovereignty as though they are necessarily linked.

‘Territorial sovereignty’ forms the boundaries of the state, is the focus of an enormous amount of both political and theoretical work and is the guiding principle of ‘Westphalian’ sovereignty.

The underlying notion is that states are sovereign within their territorial borders.³⁰ This

sovereignty is both internal and external. Internal sovereignty means that the political authority within the state is the supreme legitimate legal authority within its territorial boundaries.

Externally states have equal status with regard to each other. The upshot is the principles of non-intervention and non-interference where states can expect that others will interfere with neither a state’s internal policies nor their external relations.

Some argue that this Westphalian conception of territorial sovereignty has eroded, others claim that such sovereignty never existed in practice while more contend that this conception of sovereignty is an ideal necessary for framing relations between states.³¹ I take no position on these issues because they are logically independent from questions about the nature of territory. One can distinguish title to an object from the powers one has over an object once title is

³⁰ Consider J. Ruggie, ‘Territory and Beyond: Problematizing Modernity in International Relations,’ International Organization, (47) 1993

³¹ See Anne-Marie Slaughter, New World Order, Princeton University Press 2004, Stephen Krasner, Sovereignty: Organized Hypocrisy, Princeton University Press, 1999 and Fredrich Karochwil, ‘Sovereignty as Dominium’, Beyond Westphalia? State Sovereignty and International Intervention, ed Gene Martin Lyons and Michael Mastanduno, Johns Hopkins University Press, 1995 respectively.

obtained. Looking back to Cohen, a contract to take work may grant an employer some powers over an employee, but this does not tell us what the content of the contract ought to be.

For example, suppose two individuals own homes in different jurisdictions. It is one thing to question how each of the owners came to the title of their home and another to determine what they can and cannot do within their home. Assume that the same procedure is used in each jurisdiction to determine title. From this we cannot say much about what one is (or perhaps even ought to be) allowed to do with and on their property. The two jurisdictions might differ on the rights to use the property for commercial purposes, the sanctions individuals might place on trespassers and the activities one is allowed to perform in private.

In fact, it would seem that popular coupling of ‘territory’ and ‘sovereignty’ into ‘territorial sovereignty’ helps to show why territory is logically distinct from sovereignty. In the phrase ‘territorial sovereignty,’ ‘territorial’ is an adjective and tells us something about ‘sovereignty’. It is a particular type of sovereignty that is limited by political boundaries over a particular geographic area. There may be other forms of sovereignty, perhaps over persons alone, or, alternatively, over things that are neither persons nor land. When one asserts ‘territorial sovereignty,’ knowing something about territory tells us something about sovereignty. However, this is not a reciprocal arrangement. Knowing something about sovereignty does not add anything to our understanding of ‘territorial.’

Perhaps one can understand questions about a state’s claim to territory by looking at the way individuals claim their home. The claim to territory, like owning one’s home, is about title. That is to say, who has the claim to exercise powers over a particular object? Here the particular object is land and the powers referred to are sovereignty. In the case of private ownership they are property rights. We might be able to agree on the source of one’s title and yet disagree as to

what powers one has over their property. Likewise, we may agree that a state has a claim to a particular piece of land, but disagree over what powers states ought to have over that land.

It could be the case that states ought to have absolute control over what goes on inside their borders as articulated in the phrase ‘Westphalian sovereignty.’³² Alternatively, one might argue that a state’s power ought to be much more limited and that other states have an obligation to intervene in the domestic affairs of another state should moral concerns require. Theorists can disagree about the powers a state ought to have and agree that individual states have a justified claim to a particular piece of land. In recognizing this, one comes to realize that the two concepts, territory and sovereignty, are logically distinct.

Globalization, borders and territory

One of the chief difficulties that critics have with Rawls’ conception of global justice is a perceived ignorance on the part of Rawls with respect to the interconnected nature of the global basic structure. Much of this will be discussed in Chapter 6. Here, the importance of global justice is worth noting. Academic discourse with respect to globalization can be distinguished from that of global justice. Whereas global justice might be perceived of as top down (there are obligations we have and here is how we meet them in conditions where globalization obtains) globalization theory is bottom up (there are empirical facts about a globalized world and here is how they impact our moral obligations).

A number of political theorists point to facts of globalization and arguments about the moral necessity of free movement between borders and come to the conclusion that territorial sovereignty has been eroded. Many go further to suggest that states have lost exclusive claims to

³² Indeed, this appears to be what some of those in the ‘new sovereigntist’ movement suggest, Jeremy Rabkin, The Case for Sovereignty, Washington D.C, The AEI Press, 2004

their territory. These arguments are similar to those with respect to sovereignty discussed above. Goods and people moving through borders raise the question of justified power and control. To the extent that there is some control over what happens inside a territory such as building codes, rules of the road, punishments for crimes, there is a need to understand how and why territories are demarcated. Both globalization and open borders presuppose territory. If there were no claims to territory then we these would not be issues at all. Movement suggests going from one jurisdiction to another and globalization is about the amount of trade going through these jurisdictions. This says nothing about how political communities come to have control over their territories.

The globalist's thesis is that certain facts inhibit the state's ability to exercise power within its own territory and this is a direct assault on the territorialist principle that assumes a direct correspondence between social and economic interactions and a territorially bounded state. As Held and McGrew write, 'in transforming both the context of, and the conditions for, social interaction and organization, globalization also involves a reordering of the relationship between territory and socio-economic and political space.'³³ Among other things, globalists point to the pervasive influence of multi-national corporations, the integration of world-wide financial markets and the influence of what appears to be a global culture.³⁴ In short, globalization theorists argue that while the Westphalian territorial state once made sense as a relatively self-contained economic unit, but that this is no longer the case. The Westphalian state, they argue, has in fact lost its monopoly on economic and cultural authority.

Chris Brown, among others, has noted three difficulties with globalization theory. First,

³³ David Held and Anthony McGrew, *Globalization/Anti-Globalization*, Oxford, Polity/Blackwell 2002

³⁴ Some, of course, take issue with this interpretation of the facts and contend that the intensity of inter-state trade, for example, is not exceptional, see Barry Buzan and Richard Little, *International Systems in World Politics: Remaking the Study of International Relations*, Oxford University Press, parts 3 and 4

it is often not clear what globalization means. It is often taken as an economic change, but this not necessarily the case. Globalization can also refer to cultural forces, a movement towards global civil society, changes in international law or a combination of the above. While this might make it difficult to pin down the particulars of the argument for globalization, these disputes need not concern us here. Rather, I am concerned with the relationship between territory and globalization.

Brown also notes that the conclusions with regard to the impact of economics on globalization may be challenged on its own terms. As mentioned above, some interpreters argue that the international trade, as a percentage of world-wide trade, is little different, or in some cases lower, than it was at the height of the Industrial Revolution. Furthermore, many of the changes in economic organization that one might associate with globalization, such as cross border investment, developed in the Victorian era rather than in the 20th century.³⁵

Finally, Brown questions the inference that the facts of globalization mitigate the normative force of the Westphalian state. Here, he questions the relationship between the nation-state and the national economy. If one takes the mid-seventieth century as the beginning of the Westphalian state, then the state pre-dates industrial capitalism by more than a century. If the links between the two are not essential links, then the inference that the normative force of the nation state falls as globalization rises is not valid.³⁶

Taken further, there is no reason to infer that facts about globalization can tell us anything about a state's claim to territory. As mentioned above, in the absence of a world state, there will be a plurality of states each with territorial claims. Now, globalization might tell us something about the sort of authority a state exercises over its territory, but this does not tell us

³⁵ See P. Hirst and G. Thompson, Globalization in Question: The International Economy and the Possibilities of Governance, Cambridge, Polity Press, 1999

³⁶ Chris Brown, Sovereignty Rights and Justice, Cambridge, Polity Press, 2002, p. 215

about the claim to its territory over which it has some authority.

It should now become clear how territory is distinct from two related concepts. Furthermore, the discussion of two provisional conceptions of territory as property and jurisdiction served to highlight the ways in which territory proves to be a challenging topic for theoretical inquiry. With this in mind I turn to the second part of this first chapter.

Territory in contemporary political theory

The first section of this chapter helped to explain the importance of territory, the difficulty of the concept and to distinguish territory from other, related concepts. This was done by first considering the nature of territory and presenting two provisional understandings of the concept. From here I distinguished territory from two related concepts: sovereignty and the importance of borders.

Understanding the importance of territory might lead one to believe that it plays an important role in theoretical debates and is itself the focus of substantial inquiry. Unfortunately this is not the case. To make this argument conclusive, the second half of this chapter identifies four areas of political theory where one would expect territory to play a fundamental role: global justice, globalization, secession and nationalism, and indigenous issues. Each of these areas of concern shows a curious neglect of territory. While it is clear that territory is an important concern for each, these areas of study either presuppose or ignore arguments that ultimately ground claims to territorial claims.

Territory and global justice

Global justice concerns the distribution of goods, resources and opportunities across political

boundaries. Many of its supporters argue that justice ought not to be tied to membership in a political community. Whereas traditionally these items are distributed by governments to a closed society of its citizens, global justice theorists argue that we have a moral obligation to give an appropriate distribution to all individuals across the globe irrespective of their political membership. This challenges not only the structure of the state system, but also the particular claims states have to their territory. Instead of states having primary control over what happens to resources within their borders, global theorists argue that we all have a claim to all of the earth's resources. At first glance this is a radical rejection of territory. But, as we will see below, the territorial aspect of global justice is pushed aside. The work of John Rawls casts a large shadow over contemporary disputes about justice. Concerns of global justice are often extensions of Rawls' work or friendly criticisms of its implications. It is therefore appropriate to begin with a discussion of territory within Rawls' work before moving on to consider some different conceptions of global justice.

In A Theory of Justice, Rawls begins his discussion by listing a number of his presuppositions. Among these is the idea that individuals live in self-sufficient, well-defined political communities. The way in which the argument is framed makes it clear that Rawls presupposes a community's exclusive claim to territory. A number of cosmopolitan theorists take issue with Rawls's account of justice. These critics argue that we ought to assume the interdependence of political communities in a way that requires Rawls' principles of justice to be extended globally. Yet, these critics are not world state theorists and many respect the principle of self-government. If there is no world state then there must be a plurality of states. This requires some sort of explanation as to why states and territories are matched the way they are. Now, it could be that all claims to territory are contingent and rest on force and fraud, but this

does not get us out of our problem. Even if the initial acquisition of a particular territory is contingent, we still have to explain why dispossession is wrong and why it is unacceptable to move political communities from their present location to another far off land. For example, in the early part of the 20th century a parcel of land in central Africa, was proposed by then British colonial secretary Joseph Chamberlain and Zionist leader Theodore Herzl as a refuge for Russian Jews.³⁷ Called the British Uganda Program, the plan was rejected at the 1906 Sixth Zionist Conference in Basil, Switzerland. With the benefit of historical hindsight it seems odd that such a proposal would ever have been taken seriously. It is clear that if there were to be a Jewish state, it would have to be over a particular land and could not be located anywhere else. The location of present day Israel is important because the land itself has an important relationship with Jewish identity. The particulars of the relationship between territory and identity are discussed in more detail in Chapter 7. I mention this here because our intuitions suggest that particular territories are important. It seems to matter that a particular group is located here and not elsewhere. Rawls presupposes this relationship.

Many liberal accounts of justice seek to justify and explain particular institutions within a society. Rawls makes it clear that his account of justice is intended to apply domestically to a single society. The notion of such a society, with its citizens identified and claims to territory already settled, is a simplifying postulate intended to assist in understanding a notion of just institutions. In A Theory of Justice, this society is a cohesive and distinct unit of organization for the mutual advantage of its members. Rawls builds his argument on at least two assumptions. The first is that societies are self-sufficient and self-contained entities. ‘Let us

³⁷ This was not the only idea of this sort. Hannah Arendt mentions an early Nazi idea to give Jews Madagascar in H. Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil, Penguin Classic 2006, p. 76-78. There was also the Kimberly Plan to settle Jewish refugees in Australia after the Second World War, see S. Jenkins, ‘Refugee Settlement in Australia,’ Far Eastern Survey, Vol. 13, No. 13 (Jun. 28, 1944), pp. 120-122

assume,' writes Rawls, 'that a society is a more or less self-sufficient association of persons who in their relations to one another recognize certain rules of conduct as binding and who for the most part act in accordance with them.'³⁸ In this description, though, Rawls does not indicate the boundaries of a society. Only later does he clarify this with a second assumption: justice between societies, or nations and states, is a distinct issue that it is not necessary to develop to understand obligations of justice internal to a society. Rawls 'assume[s] that the boundaries of these schemes (for cooperation) are given by the notion of a self-contained national community.'³⁹ The implications of this are interesting. First, the principles of domestic justice are to be worked out before any principles of international justice are considered. Second, a conception of the territorial state is presupposed in Rawls' account of domestic justice. These two points are closely related and the second follows from the first.

Both of these can be seen most clearly in Rawls' The Law of Peoples. Here he argues that although borders themselves are morally irrelevant, they are significant in determining the types of commitments people have to one another. Several theorists are more than willing to accept the fact that boundaries are historically contingent. Rawls, in The Law of Peoples, argues that it is wrong to focus on this feature. 'It does not follow from the fact that boundaries are historically arbitrary that their role in the Law of Peoples cannot be justified. On the contrary, to fix on their arbitrariness is to fix on the wrong thing.' Despite the horrors of colonialism, boundaries can be taken as a fact about the world. Given that there are boundaries, it is important to see how we can deal with them. Rawls continues,

'in the absence of a world state, there must be boundaries of some kind, which,

³⁸ John Rawls, A Theory of Justice, Oxford University Press, 1973 4, also see John Rawls, Justice as Fairness: A restatement, Boston, Belknap Press 2001, pp. 10-14

³⁹ J. Rawls, A Theory of Justice, p. 457

when viewed in isolation will seem arbitrary and depend to some degree on historical circumstances. In a reasonably just (or at least decent) Society of Peoples, the inequalities of power and wealth are to be decided by all peoples for themselves.’⁴⁰

This places an importance on justice within societies, no matter how principles of justice may be formulated. In fact, this introduces a key distinction between Rawlsian international justice on one hand and cosmopolitan accounts of justice on the other.

The cosmopolitan perspective is concerned with the well-being of individuals. Here, the concern is that all individuals live in a world that provides them with an adequate level (as determined by the particular theory) of material well being. As a result, many cosmopolitans endorse world-wide wealth redistribution schemes.⁴¹ Rawlsian justice, on the other hand, is concerned with the justice of societies. Under this conception, a high level of material well-being is not a necessary component of a just society. There may be many societies, with drastically different amounts of wealth. So long as the institutions of each meet the two principles, each society is said to be just. Borders may be morally arbitrary, but what goes on inside the borders is not. The obligation is straightforward: states ought to create just institutions.

Much of the discussion above focused on the relationship between territory, property and jurisdiction. Recall Rawls’ property argument. It is clear that Rawls sees property as an institution created by the state and subject to the demands of justice. The institution of private property, he argues, is intended to ensure that the territory of a people does not deteriorate. A people’s territory must support the community in perpetuity. Assets without owners, he argues,

⁴⁰ J. Rawls, Law of Peoples 38-9

⁴¹ Such as Charles Beitz and Thomas Pogge, both of whom are discussed in Chapter 6

tend to lose their value. It is therefore important to place an agent, whether it is an individual or an organization, in a position to bear the loss for failing to keep the value of the asset.⁴² This appears to be a pure territory as jurisdiction claim. Certainly, it seems as though property is an institution created by the state to maintain assets. However, Rawls' position is more subtle. Rawls sees at least some amount of personal property as a human right.

In The Law of Peoples, Rawls lists personal property as a human right that is not only a necessary component of just societies, but also as a condition that decent hierarchical peoples must meet before they can enter the society of peoples.⁴³ The reasons for this seem clear. To create and execute a life plan, individuals must be able to utilize objects of choice in the world. While there may be an upper limit to the possessions one is able to acquire justly, there is also a minimum that one must have to act as a social being in the physical world.⁴⁴ The right to personal possessions is in the set of primary goods without which no individual can create a life plan. Certainly this leaves a lot of room to determine both the minimum and maximum amount of property one ought to be able to justly acquire as well as deciding the content of the property itself. The institution of private property may include the means of production, but it need not. For Rawls, these are questions that are prioritized in the original position and it is left to the institutions of the state, the executive, legislature and judiciary to work them out in full detail.⁴⁵ Private property does play a role in creating the state, but it cannot be said that the territory of the Rawlsian state is merely a collection of property owners. Rather, property is an institution created and regulated by the state. The explanation for this is a distinction between the need for

⁴² Rawls' comments on property are spread throughout his works; see J., Rawls, A Theory of Justice 270-74, J. Rawls, Political Liberalism, Columbia University Press 1993, p 298 and J. Rawls, The Law of Peoples, p 8 and 39

⁴³ J. Rawls, The Law of Peoples p. 65

⁴⁴ There is a similarity between this view and the one presented by Kant in The Metaphysics of Morals, trans Mary Gregor, Cambridge University Press 1996. Unlike Rawls' political liberalism, Kant's position is deeply situated in a larger argument about the metaphysical qualities of individuals.

⁴⁵ J. Rawls, Political Liberalism, p. 298 and 338

personal property and the institution of private property. It thus appears that territory is merely the jurisdiction over which the institutions of a particular state have force.

The jurisdiction of a Rawlsian state is bound by its territory. Forceful action between states is generally prohibited and can be used only in cases of self defense.⁴⁶ Such a claim might suggest an affinity with various realist theories of international relations that privilege state sovereignty and the inviolability of territorial boundaries. State boundaries, it might be argued, have moral importance because they protect political communities that have the opportunities to create just institutions.⁴⁷ Rawls, however, makes it clear that he views borders as morally arbitrary. The concern is whether or not the societies contained within such boundaries are just. For this reason Rawls makes a distinction between *states*, that act according to means/ends rationality and *peoples*, who are tempered by reasonableness and a common moral sense.⁴⁸ But all of this presents a problem to many theorists. Rawls does more than suggest that states are self-contained entities, he presupposes it. Critics claim that this may have been an appropriate starting point at one time, but that it no longer reflects the facts of the contemporary world. A different set of assumptions impact not only international distributive justice, but also the ways in which a state may justify its claim to territory.

Cosmopolitanism and Global Justice

The Rawlsian model is one where the world's population is grouped into communities, peoples and states. These organizations are assumed to be self-sufficient and politically homogenous.

Charles Beitz provided an early and detailed cosmopolitan critique of Rawls. In Political Theory

⁴⁶ For Rawls' comments on the just war doctrine see J. Rawls, The Law of Peoples, p 94-105 Many of his comments follow those of Michael Walzer, Just and Unjust Wars, Basic Books 2000

⁴⁷ Such an argument seems rather close to those of communitarians such as David Miller, On Nationality, Oxford University Press 1995 and M. Walzer, Spheres of Justice, Basic Books 1983

⁴⁸ This is presented in J. Rawls, The Law of Peoples, p. 23-30

and International Relations, Beitz argues that empirical facts demand that we revise Rawls' conception of the basic structure and expand it to the entire globe. According to Beitz the principles of distributive justice ought to apply to relations between states.⁴⁹ In doing so, he makes it clear that this cosmopolitan moral position does not require a world government, if only because this is a practical impossibility. In fact, much of Beitz's discussion presupposes a world of states, because only in a world of states do non-intervention and self-determination become problems. Furthermore only in a world of states could you have an international original position of state representatives. Beitz's argument will be developed later in Chapter 6 along with those of other cosmopolitans such as Thomas Pogge and David Held. The key point here is simply that Beitz's critique of Rawls presupposes states with territories.

However, other cosmopolitans take issue with the practical necessity of states. Simon Caney, among others, argues that there ought to be no distinction between domestic and international political theory. He suggests that this demands that we reject realist and society of states conceptions of international political theory. Caney rejects the moral importance of independent political communities in favor of supra-national political institutions to meet the demands of justice.⁵⁰

Note the language that Caney chooses to use: 'supra-national.' Here, he means a set of institutions that sit on top of nations. As with Beitz, this is only possible if there are nations prior to the principles. Nations, like states, have territorial features and the ways in which this territory is acquired is simply presupposed so that Caney can get on to other issues. Neither Beitz nor Caney is a world state theorist in the way that Dante or H.G. Wells were. If one rejects a world state, then one is compelled to accept a plurality of territorial political communities. One

⁴⁹ Charles Beitz, Political Theory and International Relations, Princeton University Press 1999, p. 151, and Brian Barry, The Liberal Theory of Justice, Oxford, Clarendon Press, 1973 pp. 128-132

⁵⁰ S. Caney, Justice Beyond Borders, Oxford University Press, 2005, chapter 5

might argue that the source of these claims is contingent, but nonetheless there may be a normative argument with which a state may justify its claim to territory. At a minimum this would need to explain why contemporary territorial arrangements cannot be overturned on a whim. One might suggest that the claim to territory is dependent upon the way in which a state treats its citizens. This idea is taken up and developed by Allen Buchanan.

Buchanan criticizes Rawls for failing to understand the ways in which peoples interact in the contemporary world.⁵¹ Buchanan's conception of global justice is worth considering because it links up nicely with his account of secession. He argues that the world is characterized by a global basic structure, and these aspects of international and transnational organizations can impact the ability of states to do things for their citizens. The global-basic structure is 'a set of economic and political institutions that has profound and enduring effects on the distribution of burdens and benefits among peoples and individuals around the world.'⁵² The structure is comprised of international economic institutions (e.g. World Bank and the International Monetary Fund), regional agreements (the European Union, North American Free Trade Agreement) as well as the increasing scope of information technology and international legal and moral norms.

The global basic structure is important because it impacts on the ability of states to take care of their citizens. To the extent such a structure exists, principles of justice will be required for the global structure in the same way that principles of justice are required for the domestic basic structure.⁵³ Buchanan contends that Rawls ignores the existence of the global basic structure and therefore endorses a law of peoples that gives great deference to the legitimacy of existing states. In fact, Buchanan characterizes The Law of Peoples as rules for an idealized

⁵¹ Also see C. Beitz., Political Theory and International Relations, Part 3

⁵² Allen Buchanan, 'Rawls' Law of Peoples: Rules for a Vanished Westphalian World' Ethics, (110) 2000, p 705

⁵³ Rawls makes the point about domestic basic structure in J. Rawls, A Theory of Justice 7-12

Westphalian world where states are economically self-sufficient and, when well governed, autonomous in the distribution of their resources.

Buchanan argues that with an understanding of the global basic structure, the representatives of peoples would choose principles of global distributive justice. First, peoples would choose rules that allow their society to retain the capacity to pursue their own conception of the good. Second, Buchanan contends that representatives of peoples would choose egalitarian principles with respect to other societies because peoples here are represented as ‘free and equal’ and would reject any principle that might assign them an inferior status.⁵⁴ As a result, political communities would not choose Rawls’ laws of peoples, but rather more substantial principles of international distributive justice.

Because knowledge of the global basic structure would motivate representatives to accept principles of justice, Buchanan argues, that justice is the primary goal of international organization.⁵⁵ In practice, this is about protecting a basic set of human rights that respects the fundamental moral equality of persons. Buchanan does not provide a comprehensive grounding for human rights, but rather he points to an overlapping consensus of a variety of doctrines that together offer a general description of a human rights program. This sets up justice, conceived as the protection of human rights, as the test for international legitimacy.⁵⁶

Buchanan does not provide a history of how the current international order came into being, nor how particular states acquired their territory.⁵⁷ Rather, he is concerned with the legitimacy of the world order as it exists today. Justice, Buchanan argues, is not only the standard by which legitimacy is judged, but also is used to limit the scope of territorial state

⁵⁴ Allen Buchanan, ‘Rawls’ Law of Peoples: Rules for a Vanished Westphalian World’, p. 708

⁵⁵ See A. Buchanan, *Justice Legitimacy and Self-Determination*, Oxford University Press 2004 76- 83

⁵⁶ A. Buchanan, *Justice, Legitimacy and Self-Determination*, p. 89-91

⁵⁷ However, in his work on secession, he does argue that state come to their territory through nefarious means. This is discussed in greater detail in the section below.

sovereignty. Sovereignty concerns a state's jurisdiction over a particular territory. As mentioned above, Buchanan argues that the concept of territory ought to be distinguished from that of property. 'Territorial sovereignty...signifies not a property right ascribed to the state, but, rather a complex relationship among the state (the agent), the territory, and the people (the principal), with the state acting on the people's behalf to preserve the territory not only for the present but for the future generations as well.'⁵⁸ The state acts on behalf of the people to ensure the viability of its territory. This is territory as jurisdiction. He continues, 'Territorial sovereignty is best understood as a set of jurisdictional powers over territory, conferred upon the state, not as a special kind of property right.' This gives us a particular understanding of a state's relationship to territorial boundaries, but several important connections are missing. It is not clear how people become connected to a territory. This is because Buchanan, like Rawls, presupposes a relationship between particular groups of people and particular bits of geography. Buchanan wants to provide practical guidance to political leaders.⁵⁹ Because of this he presupposes something approximating the current state system where the world is divided among various territorial political communities. In A Theory of Justice, Rawls ignores territory because his argument is intended to serve a different purpose and requires a particular starting point.

Secession

With the break-up of Yugoslavia in 1991 and the 1995 referendum on Quebec independence, a number of political theorists began seriously to investigate political theories of secession.⁶⁰ It is

⁵⁸ A. Buchanan, *Secession*, p. 108, note autonomy, not sovereignty for some minority groups, also see A. Buchanan, 'The Making and Unmaking of Boundaries: What liberalism has to say'

⁵⁹ See the introductions to A. Buchanan, *Secession* and A. Buchanan, *Justice, Legitimacy and Self-Determination*

⁶⁰ Although there was some discussion of secession in the 1980's, H. Beran, 'A liberal theory of secession', *Political Studies*, (32) 1984 the discussion did not really take off until political events of the 1990's made the topic more relevant to both theorists and political leaders, see A. Buchanan, *Secession* and P. Lehning, ed *Theories of Secession*, London Routledge 1998

not just leaving a political community. Rather secession is a special act; it is leaving and taking part of the state's land with you. This is an important distinction. Secession is about taking a particular bit of land.⁶¹ There ought to be some explanation as to why those seceding are taking this piece of land and not something else. Allen Buchanan and others seem to presuppose some such relationship, yet we still need an explanation of the original claim.

One possible argument to justify opposition to secession is to claim that secession is a wrongful takings. Here, those wanting to secede are accused of wrongfully taking land that rightly belongs to an existing state. Yet, this can only be a problem for political theory if the state has a just title to the land over which it holds jurisdiction. To rightly resist such a secession one must simply show that the state's title is just. Buchanan argues that 'the sobering truth is that even the most cursory 'title search' would in most cases reveal that at least some part of the area over which territorial sovereignty is now claimed were unjustly acquired by conquest, genocide or fraud.'⁶² However, from this, Buchanan argues, it does not follow that secessionists have a just claim to the territory. Secession, is a limited and remedial right, that is only justified if one of two conditions are met: 1) a special right to secession is established in a contract, such as a constitution or 2) some injustice has occurred where secession is the best remedy. These injustices might be either human rights violations or the earlier unjust taking of a territory.

The second of these concerns us here. The difficulty with Buchanan's position is that it does not get us as far along as we would like. This is clear for several reasons. In the case of injustice some remedy for a wrong might be required, but it is not clear why secession is the appropriate compensation. Second it is also not clear why the secessionist needs *this* territory as opposed to different land somewhere else. Buchanan's position commits him to accepting either

⁶¹ This is made clear in L. Brilmayer, 'Secession and Self-determination'

⁶² A. Buchanan, Secession, pp. 109-110

1) territory is always a matter of settlement or 2) secessionists already have a latent claim to land that only becomes conclusive upon the success of the secession.

When Chechens, for example, asserted independence, there was an implicit claim that Russia does not have a legitimate claim to Chechnya. In Buchanan's terms, the question is whether or not Russia ought to have jurisdiction control over Chechnya. The claim is legitimate if Russia met minimal human rights standard described above. If it did, then Chechnya had no legitimate claim to secede. However, this discussion begins by identifying a particular thing that is Chechnya. To the extent Chechnya can be identified as an area on a map that is in dispute, the issue of territory has been partially decided. Chechen territory is presupposed. The question is simply who should control it.

One might say that Chechens have property claims to land that is Chechnya, but Buchanan, like Rawls and others, would like to claim that property is an institution that presupposes some territorial jurisdiction. This, the Buchanan and Rawls argument, has some intuitive power. Domestic property disputes are reconciled with reference to legal titles that have their force because they are situated within a particular legal system. However, the argument turns circular. Geographic territory is about land and jurisdiction over a particular bit of land seems to presuppose some sort of relationship with that particular bit of land.

Buchanan argues that land is not the same as territory. Territory is an area circumscribed by boundaries of political units and is therefore a political/juridical concept. As mentioned earlier not all jurisdictions are geographical. Some for example, may be personal, as religious leaders have jurisdiction over their members. Or, they may be virtual. A patent court has authority over the legally protected expression of ideas. Land, on the other hand, is a geographical concept. The right to territory is not reducible to the right to property, because

although territories contain property regimes where individuals have property rights their authority is not based on the aggregation of these claims. But again, unless land (or real property) is prior to conceptions of territory it is difficult to see how one would get the idea of territory up and running in the first place. That said it could be that land/property is conceptually prior to territory, but that territory is empirically/politically prior to land/property.

Buchanan's argument for secession is a remedial group right. There are however other ways in which theorists attempt to justify secession. We saw one of these above with the consent theory of Henry Beran. He argues that states are merely collections of individuals who have consented to be governed by a central authority. Possessions and property rights are prior to and independent of political society. Such items are joined with others through the consent of their owners and may be withdrawn at anytime. While Buchanan's argument is a group remedial right, Beran's is different in two ways. Beran's argument is both individual and unilateral. In principle, individuals can remove themselves from the state and take their real estate with them. This can be without the consent of the state from which the individual wishes to withdraw.

One of the difficulties with Beran is that he has trouble explaining the ultimate source of claims to territory. As argued above in Part 1, Beran's solution is to push the question back to individuals. Yet, this does not answer the difficulty. It begs the question: how are individual claims to property justified? Beran fails to create an adequate solution to the problem. However, he is not unique. Like justice, secession is an important and challenging area of theoretical inquiry. To make a compelling argument about secession, contemporary theorists often presuppose the territorial relationship between the community looking to secede and the land it plans to take with them. At times, the issue is simply pushed back. Often this is pushed back to nationalism.

Nationalism

Some theorists look to ground territorial claims in the history of a political community.⁶³ At times such a claim is nothing more than that an intergenerational group of people has a special type of claim over the area that it inhabits. At other times these histories are informed by religious claims where a deity has given a land to a particular group of people. Alternatively, others argue that there are particular elements of culture that may secure claims to territory; this is prominent among indigenous peoples.

Nationalism makes claims about a particular type of historical community. Margaret Moore argues that ‘nation’ carries with it an idea of membership in the nation and the ownership of the territory or homeland of the nation. It is difficult to think of a nation without a homeland. Certainly the idea of a German nation, for example, carries with it the idea of Germany. Yet, a homeland is not the same thing as an existing or recognized state. Kurds, for example, feel an attachment not with the land of Iraq or Turkey, but with Kurdistan, a homeland that extends over several current sovereign states. Simply having a homeland, however, is not sufficient for providing an argument that nationality can justify claims to particular pieces of land.

One way to ground such claims is to say that a national community has a special set of characteristics, a shared history, a shared set of traditions, or an ethnic or religious commitment that are intimately tied to a particular land. Yet, as several commentators note, these justifications must be rejected because such claims are necessarily internal to the community and are therefore unlikely to be appealing to those outside of the community.⁶⁴ If I, as a deeply

⁶³ This includes nationalist theorists such as D. Miller, *On Nationality*, Oxford University Press, 1997 and M. Walzer, *Spheres of Justice*, Basic Books, 2006

⁶⁴ I acknowledge that this argument required one to accept that external argument and public reason are not only good things, but are the only things that can lead to a sound justification.

religious person, appeal to the word of God to support my claims to territory, I have done little to convince non-believers that my claims are worth accepting. To convince others I will need to either justify my claims in terms of the others authoritative sources (which is unlikely if there are conflicting claims to a particular piece of land) or provide reasons that are independent of either point of view. If one is insistent on using historical claims to justify claims to territory, it becomes impossible to adjudicate disputes. This is because history often becomes dependent on who is writing the history.⁶⁵ As Moore notes, at its best, history can be used to legitimate access to a particular bit of land, but cannot be used to legitimate sovereign control over a territory.⁶⁶

One might seek to ground historical claims in something more than national mythology. Indigenous peoples may base claims to territory on first occupancy. However, often such claims are factually wrong. In New Zealand, Maori are seen as an indigenous culture, yet the Maori did not see themselves as a single cultural entity prior to the arrival of European explorers.⁶⁷ In Sri Lanka the Sinhalese claim to be indigenous, yet there is strong evidence that Vedda preceded them. If this is correct, many claims are likely to be more complicated than they first appear. Evidence that dispute the claims of many so called indigenous peoples come from both anthropology⁶⁸ and genetic biology,⁶⁹ which makes clear that many seemingly indigenous populations are the second or third group to occupy a territory. These however are empirical questions, the truth of which presupposes that first occupancy is a principle by which one can justify a territorial claim.

The principle of first occupancy might be stated as: group G's claim to territory is

⁶⁵ Consider, for example, a Serbian telling of the history of Kosovo

⁶⁶ M. Moore, 'The territorial dimension of self-determination', National Self-Determination, Oxford University Press, 1988

⁶⁷ C. Brown, Sovereignty Rights and Justice, p. 20

⁶⁸ J. Diamond, Germs, Guns and Steel, New York, Norton, 1999

⁶⁹ S. Wells. Journey of Man, Princeton University Press, 2003

justified if and only if no group has occupied the land before. There are several contentious issues in this claim. I will focus on just one, 'occupancy.' The necessary and sufficient conditions to satisfy occupancy are far from easy to identify. Suppose N nation in state S claims first occupancy. Say we press the leaders of N to prove their position. They might be able to tell us several stories. One such tale might tell of an ancestor who wandered across state S after getting lost. It seems odd that simply walking across open land would qualify as ownership. For one, it is not clear what would become owned, all of what one sees or merely that beneath one's feet.

It seems that something more is needed. If the N ancestor had come to S, noticed no other people around, built a log cabin and began to hunt and fish, we might be more satisfied with the claim to ownership. There is something intuitive about justifying property claims by appealing to a notion of work. Locke, for one, argues that property claims are generated when one mixes labor with raw material provided by nature or when one takes and transforms what was not previously owned.

Yet, labor theories of property rights are often incomplete. One could imagine a society where a small group of bright and industrious citizens are able to mix their labor with a great many things to create an enormous amount of value. If one is able to do what he likes with their own property, it is easy to see, how over time property might become concentrated in the hands of a few. Any labor theory of property needs to be tempered with a theory of justice that informs one about the proper distribution of resources. But if this is required, then it is not clear how a theory of property rights could be anything other than a subset of a theory of justice. Nozick argues such criticisms point not to a problem with property, but to a problem with certain conceptions of justice.

One might expect theorists of nationalism to have an important contribution to debates about the normative claims to territory given that a number of theorists suggest that the idea of a homeland is a necessary part of the idea of a nation.⁷⁰ In other words, once we have gotten to the level of discussing nations, the territory issue is already settled, because nation presupposes territory.

David Miller is one thinker who makes clear one path to linking territory and nation. In distinguishing national identity from other forms of identity, Miller lists five core features. National identity, he argues, is distinguished from other identities in that members recognize each other as members, it is historically continuous, presently active, possesses an identifiable character and 'connects a group of people to a particular geographical place.'⁷¹ Miller does not argue that all nations ought to have their own state. He suggests that nations ought to have collective rights that may fall short of their own state or a substantial claim to self-determination.⁷² Nevertheless, he argues, nations have a good claim to form their own state because of the value nation-states have in forming and sustaining individual identities and because the cohesion of a nation seems to make states perform better.

Though never explicitly stated, Miller suggests that nation-states ought to be formed over the geographic area that is important to the particular nation's identity. This is essentially Gellner's conception of nationalism, 'a political principle, which holds that the political and the national unit should be congruent.'⁷³ The principle of nationalism and the idea of a nation seem to go hand in hand. It certainly seems that nations are nations because, among other things, they aspire to political independence. Walzer captures this sentiment nicely when he writes that

⁷⁰ A. Smith, Nationalism: Theory, Ideology, History, Polity Press, 2005, pp. 10-15

⁷¹ D. Miller, On Nationality, p. 24

⁷² D. Miller, On Nationality, pp.116-118

⁷³ E. Gellner, Nations and Nationalism, Cornell University Press, p. 1

‘nations look for countries because in some deep sense they already have countries: the link between people and land is a crucial feature of national identity.’⁷⁴ Furthermore, it is the particular character of the relationship between people and land that leads to this particular concept. He writes that ‘all national communities...came into existence, and were sustained over the centuries, on the basis of geographical coexistence. It isn’t any misunderstanding of their histories that leads nations newly freed from imperial rule to seek firm territorial status.’⁷⁵

The concept of a homeland is clearly important to the idea of nationalism, but it is not clear why the relationship between land and national identity ought to give a nation exclusive title to territory. If this identity relationship confers some right, why is this right not simply the right to access important bits of land? In the United States, Native American sacred sites are open allowing anyone to pay homage to the site as a place of importance. Although Mecca sits in Saudi Arabia, all Muslims, regardless of their nationality or citizenship are allowed to access the territory of this and other key religious sites.⁷⁶ However, it is not clear why the relationship between identity and land would give rise to more substantial claims. Part of the difficulty is that the concept of nation presupposes a homeland leaving the relationship between the two under-theorized.

Indigenous peoples

From the perspective of territory, claims pressed by indigenous populations are particularly interesting. Indigenous peoples are generally understood as those populations living in areas that

⁷⁴ M. Walzer, *Spheres of Justice*, Basic Books, p. 44

⁷⁵ M. Walzer, *Spheres of Justice*, p 345

⁷⁶ M. Moore, ‘The territorial dimension of self-determination’

were the subjects of colonization.⁷⁷ Colonization is characterized as the takings of land from local populations by an external power. One might distinguish between two types of colonization, external and internal. External colonization is when an external power takes over jurisdiction and administration of a particular area without establishing a settler population. Here one might think of the majority of colonies established in Africa. Internal colonization takes place when the colony is inundated with large numbers of individuals who make permanent settlements in the colony and then create a new state. This might be reminiscent of events that took place in what are now the United States, Canada, Australia and New Zealand.

This distinction is important because it points to two types of questions. The first, internal colonization brings questions about the placement of particular borders. One might reasonably argue that African borders are a legacy of colonialism and that they fail to correspond to the location of different national and ethnic groups. Many of the international legal principles with respect to territory developed out of African de-colonization. While this will be taken up in greater detail in the next chapter, it is important to note that the principle of *uti possidetis*, leaving borders where they are, became of prime importance here. This was emphasized with a push towards self-determination. As colonial powers disengaged with their colonies, local leaders began to articulate a need for self-determination. In this setting, self-determination meant the ability of local populations to determine who their rulers were to be. This however is an implicit acknowledgment of the existing colonial borders and by extension an acknowledgement of the territorial claims of the emerging African states. The second type, internal colonization, brings into question the legitimacy of the territorial claims of existing states. Here, indigenous populations were dispossessed of their lands and were given no

⁷⁷ There are several contentious disputes about the exact definition of 'indigenous', see J. Anaya, Indigenous Peoples in International Law, Oxford University Press, 2004 pp. 3-9 and P. Keal, European Conquest and the Rights Indigenous Peoples, Cambridge University Press, 2003, pp. 6-16

opportunity for self-determination. Self-determination is not an option for those who are internally colonized because a new political community has been created over the indigenous land claims. Self-determination is not possible because it would entail secession from or the destruction of an existing state.

This second type of claim is interesting to the discussion of territory for several reasons. First, it brings into question the ways in which original claims to territory are justified. In North America, for example, Europeans followed Locke in identifying sparsely populated land with vacant land.⁷⁸ European claims to land were therefore based on the doctrine of discovery. Indigenous peoples claim this is not only a wrongful taking, but also that the natives have a unique claim to the land. This is based on the relationship between the identity of the aboriginals and the way in which they perceive that their way of life requires control over a particular territory.⁷⁹ Indigenous peoples argue that the relationship between their cultural identity and the land that has historically sustained them is so deep as to confer a substantial claim to the land. This, combined with the unjust takings, seems to require some sort of solution.

For the present discussion indigenous claims bring territory alive in two ways. First, it is a helpful engagement with the past. The past helps one come to terms with and see the importance of original claims to territory. If European conquerors have an unjust claim because they wrongfully took the territory of others, then one has presupposed a legitimate claim on the part of the aboriginals. Furthermore, this engagement with the past suggests a direction for research. If Europeans were attempting to justify their takings by co-opting political theories of the day, then an investigation into some of these theories might help one to better understand the nature of original claims. Second, the indigenous claims are being pressed in the present. This

⁷⁸ See J. Tully, 'Rediscovering America: the Two treatises and aboriginal rights' An Approach to Political Philosophy: Locke in Contexts, Cambridge University Press. 1993

⁷⁹ See, for example P. Keal, European Conquest and the Rights of Indigenous Peoples, pp. 122-126

introduces a normative component to the discourse. If these claims are taken seriously they must be dealt with in some way and can be evaluated for better or worse. Finally, many of the theorists who engage seriously with indigenous concerns do so from a position that rejects Rawlsian ideal theory for a more nuanced engagement with the present world. Each of these helps to show how the dialogue with indigenous issues brings issues of territory, identity and ownership to the forefront. To tease these issues out we can consider the indigenous claims more carefully.

First nations claim that some sort of restitution is required for past wrongs inflicted upon them by colonizers and continued wrongs due to the presence of sovereign states on indigenous lands. The particular claims take several forms: wrongful takings of land and unjust interpretation of treaty commitments, both of which have a negative impact on indigenous people's way of life.

In the Americas and Australia, colonizers used two strategies to defend their claims to land. The first, the doctrine of discovery, asserts that much of the land in the New World was vacant, left unclaimed by the inhabitants, and therefore available to be claimed by European explorers. Much of the support for this seems to have come from Locke's conception of the State of Nature.⁸⁰ Following Locke, the argument asserts that much of the land in the new world was not simply vacant, but rather that it had never removed from the state of nature. This makes the land available for discovery, which is not simply identifying new land, but claiming it for one's self. Briefly, the argument attributed to Locke is that land remains in common until it is removed from the common stock through cultivation or enclosure. Although indigenous peoples used the land, they do so without removing it from the state of nature. As a result, the land

⁸⁰ See J. Tully, *Rediscovering America: the Two treatises and aboriginal rights*, for a stronger claim that this was the main purpose of Locke's writing see B. Arneil, *John Locke and America: The Defense of English Colonialism*, 1996

remained vacant, a *terra nullius*, free for the taking, which is exactly what colonizers did.

Conquest, no longer an acceptable international norm, was an additional justificatory scheme adopted by Europeans and other colonizing powers. Rarely was such conquest justified as a raw belligerent power. Early on, the work of natural law thinkers such as Grotius provided some guidance for conquerors through just war theory. Grotius, for example, contends that there is a universal natural law that applies to all humans across the globe. He argues that those who violate natural law offend all humans and it is therefore the responsibility of all humans to inflict punishment upon the transgressor. War is a just form of punishment and conquest can be a result. When Europeans saw indigenous peoples violate natural law, they gave the appropriate punishment, which often resulted in conquest.⁸¹ This became the civilizing mission of the later colonial period where the job of the great powers was to provide the institutional and social groundwork so that the indigenous populations might develop the capacities to govern themselves in a way acceptable to Western standards.⁸²

Indigenous peoples argue that both of these methods of acquiring territory are illegitimate and that some restitution is necessary. This of course presupposes that there was a legitimate claim to territory that could be wrongly taken.

Now, it is clear that not all Europeans acquired colonial territory through discovery or conquest. Nor did they co-opt political theories retroactively to justify their property takings. Rather, a number of Europeans, following Vitoria, acknowledged indigenous peoples as subject of international law and thus sought to acquire land through treaties or private land sales. This could serve as a benefit for both the indigenous population as well as the colonizers. For the indigenous people, treaties established a precedent to view the natives as full members of the

⁸¹ Such a claim is present in Grotius and is discussed in Chapter 3

⁸² See, G. Gong, Standard of 'Civilization' in International Society, Oxford, Clarendon Press, 1984

international community. During the 18th century, it was not unusual for British courts to interpret treaties this way.⁸³ In the United States the Cherokee Indians sued the state of Georgia, which had claimed that its laws had force over the native populations. In deciding the case in favor of the Cherokee, Chief Justice John Marshall argued that the Federal government had acknowledged the independence of the natives when negotiating treaties in good faith. As a result, the Cherokee 'is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force.'⁸⁴

However, the history of legal action on behalf of indigenous peoples is a history of disappointments. While there are early examples of western legal institutions siding with native peoples, these cases are few and far between and failed to gain enough traction to create a common law precedent protecting indigenous land rights. By the time the colonial period began to reach its end in North America, British courts has rejected treaties negotiated with natives on the grounds that many native peoples were not sovereign members of the community of nations and therefore not capable of entering treaties.⁸⁵ In the United States, prevailing public opinion was so antagonistic towards native peoples in general and the Cherokee in particular that President Andrew Jackson could effectively ignore the Supreme Court and forcibly remove the Cherokee from Georgia.⁸⁶

The immediate impact of these decisions was to take land away from native populations. At first, much of this was accomplished by moving the indigenous peoples elsewhere. Later, native lands were simply incorporated into the colonizing state. The loss of land appears

⁸³ This is described in J. Tully, 'Rediscovering America: the Two treatises and aboriginal rights'

⁸⁴ 1831. *WORCESTER v. STATE OF GEORGIA*. In *31 U.S. 515*: United States Supreme Court.

⁸⁵ See J.G.A Pocock, 'Waitangi as a Mystery of State: Consequences of the Ascription of Federative Capacity to the Maori', *Political Theory and the Rights of Indigenous Peoples*., Cambridge University Press 2000, p. 28. For a general discussion of the British court decisions see J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge University Press 1995, pp. 55-98

⁸⁶ For an overview of the case and events that followed, see, J. Burke, 'The Cherokee Cases: A Study in Law, Politics and Morality', *Stanford Law Review* (21) 1969, 500-531

especially important to indigenous peoples. Some thinkers argue that indigenous peoples and their way of life are more closely linked to the land than others. As Paul Keal claims, 'land and the rights over it are, for many indigenous peoples, an essential element in the recovery of both their identity and rights.'⁸⁷ This sentiment is reinforced in Australia's Aboriginal and Torres Strait Islander Social Justice Commission and complaints brought before the United Nations Human Rights Committee.

For indigenous peoples, the path towards recognition rests in regaining control of native lands. Self-determination is the primary means through which this is asserted. Note, here self-determination does not entail secession. It is important for indigenous peoples to reclaim their historical lands. These lands often lie in the center of existing states and do not necessarily correspond with the present location of indigenous peoples. Indigenous peoples push for self-determination within a larger federal system that includes the state under which they currently live. While efforts to obtain this political arrangement have been underway in Canada, Australia and New Zealand, there are preliminary efforts to have a right to self-determination more formally recognized in international law.⁸⁸ The importance of self determination is that it is believed to be necessary for control over native lands that were lost during colonization. These lands are in turn necessary for sustaining indigenous ways of life.

However, arguments of this form presuppose an original claim to territory. For indigenous peoples to have been harmed by losing their territory, the territory must have been theirs in the first place. There is however a difficulty in explaining the sufficient conditions for making it theirs. Several possibilities immediately present themselves. First, the doctrine of discovery may play a role here, but this only works if there the indigenous peoples were in fact

⁸⁷ P. Keal, European Conquest and the Rights of Indigenous Peoples, pp. 122-126

⁸⁸ J. Anaya, Indigenous Peoples in International Law, pp. 97-184

the original discoverers and first occupants of the territory. There are several factual and theoretical difficulties with such a position.

To make such a claim conclusive the claimant must establish the factual basis of the claim. There are however reasons to doubt that indigenous populations are able to do this. First, there are some epistemic difficulties. It is not clear that it is possible to know when indigenous peoples first inhabited the land they claim as theirs. This is important because there are some reasons to doubt that those indigenous peoples who first came into contact with future colonizers have a factual claim to the land via discovery and first occupation. There are anthropologic, linguistic and genetic reasons to support this belief.

Anthropology and archeology suggest that the caricature of indigenous peoples as more or less self-contained groups living in the same location for thousands of years is misguided. Rather, much like the inhabitants of Europe, indigenous peoples across the world were complex political organizations who engaged in wars, created empires, revolted against oppressive leaders, formed alliances and engaged in trade. As a result, the indigenous peoples who met potential conquerors were not necessarily those who could claim rights to the territory through the doctrine of discovery or original occupation.

This is supported by population genetics and historical linguistics. Population genetics uses mutations in the human genome to chart migratory human paths out of Africa and across the globe. Evidence suggests that there was not a single migration to the New World, but rather that there were many. The implication is that many of those occupying lands that were colonized were themselves often the second or third inhabitants of the land. Reconstruction of historical languages and their sources also support this conclusion. Many indigenous languages are of course quite old, but it is not clear that many of them can trace their roots to languages that

would correspond to the first migrations and earliest inhabitants.

If at least some of these facts are correct, then some interesting implications follow.

First, the facts dispute indigenous claims to territory can be based on discovery or original occupation. Second, if indigenous claims to territory were conclusive at the time of contact with future colonizers, then it is likely that these original claims became conclusive as a result of conquest as indigenous populations struggled with each other. At first glance, this appears to endorse conquest as a method of territorial acquisition. Yet, there is something troubling about conquest. As a mode of acquisition, conquest has been assailed by political theorists, statesmen and international lawyers. As a result, it is no longer acceptable. This however, begs the question. If conquest is illegitimate, what then can serve to ground original claims? Furthermore, what can ground the claims of present day states? The answers to these questions will be addressed in the sections to follow.

In the second half of this chapter I have considered several areas of political theory where one would most likely expect territory to play a fundamental role. However, in global justice, globalization, secession/nationalism and indigenous areas of concern, territory is often presupposed when it is not it is ignored. These theories all rely on an original claim to territory that remains unstated. The source of these original claims is far from clear.

The dissertation is organized into eight chapters. This chapter and the next introduce the main problem and themes that will be discussed throughout. The problem is that territory is under-theorized despite its seemingly fundamental role in a variety of questions. Decolonization and global justice, main themes of contemporary political theory, give rise to the concern over territory. Here, I argued that territory is an important part political debates and develops two claims: it shows the importance of territory and in doing so describes its complexity and

distinguishes territory from other related concepts and identifies several areas of contemporary theory, such as secession, self-determination and indigenous land rights, where one would expect territory to play a fundamental role. Yet, in these cases where one might expect the concept of territory to be well developed, it is either presupposed or ignored.

The next chapter turns to territory in international law to see if it provides a solution to the problem. Chapter 2 argues that two sets of issues underlie the development of modern international law: de-colonization and global justice. Debates surrounding these two issues show how the unraveling of colonialism is a return to the kind of thinking that underpinned the original justification for colonial acquisition. These colonial justifications and their legacy in international law can be discussed as three types of claims: territory as possession, as property and as jurisdiction. The next three chapters are critical engagements with key thinkers who developed these original justifications.

I move to Chapter 3 and consider territory as possession through a critical discussion of the role of territory in the political thought of Grotius and Hobbes. While there is an intuitive appeal to the idea that possession is the key feature of a claim to territory, possession based arguments are lacking because they fail to address several things that a theory of territory is reasonably expected to do.

In Chapter 4 I evaluate the argument for territory as property. This chapter discusses territory in the political theory of Locke and Pufendorf. Both view territory as a collection of the pre-political property claims of the state's original members. Such theories are compelling because they ground territory in natural rights. However, pre-political property claims cannot be sustained and the territory as property thesis is therefore difficult to accept.

For Kant, property claims play an important role in justifying obligation to the state.

Property plays an important role in his understanding of territory as well. Chapter 5 discusses the conception of territory in the political theory of Kant. His argument views territory as jurisdiction. As with arguments discussed in the two previous chapters, the territory as jurisdiction argument has some difficulties. In particular it has trouble explaining why a particular state has a claim to a particular bit of land.

Many of the cosmopolitans who played an important role in the development of international law take their start from Kant. The Kantian legacy continues through thinkers such as Barry, Beitz, Held and Pogge. However, unlike Kant, these contemporary cosmopolitans are skeptical towards any claims to territory. In their turn towards global justice, cosmopolitans develop a crude territory as property concept that they ultimately reject. In Chapter 6 these claims are considered and ultimately rejected. Not only do cosmopolitans reject several of Kant's central insights, but they also fail to appreciate the important role of territory within their own claims.

There are of course many who reject the foundations of cosmopolitanism. In Chapter 7 I consider the anti-cosmopolitan turn to identity as a way to ground territory. Following Hegel they argue that claims to territory are justified through the relationship between a group's identity and particular pieces of land. This solves a particular problem with the territory as jurisdiction argument. Although this identity claim is the only argument that appears to make any sense, it fails in the face of the criticism.

At first glance there seems to be good reasons for contemporary theory to presuppose or ignore territory. However, the answer, though skeptical, is more subtle. Following Rawls and others, contemporary theory is right to remain silent about territory and about property in territory. The main skepticism is about arguments for colonial restitution or global redistribution

of resources because contemporary theorists take a crude territory as property view – which when abandoned seems to leave the world un-owned and therefore subject to equal distribution. Yet skepticism is not the only alternative. Jurisdiction entails some elements of the territory as property view. This is a more sophisticated claim than the straight territory as property argument developed in Chapter 4. Here ownership is a secondary but important claim states make in the absence of a universal norm. As a result there is a prima facie but not indefeasible right to particular territory. As argued in Chapter 7, identity plays a role in linking peoples to places. It also raises the bar to colonial restitution and global resource redistribution. This legitimates the current view of territory in political theory and international law where territory is pre-supposed but not theorized. This partly converges with the ideas of Rawls' The Law of Peoples. With this outline in mind, I now turn to consider territory in international law.

Chapter 2: Territory in international law

The last chapter concluded that a serious discussion of territory is absent in those areas of political theory where one might expect it most. To determine if this is a problem, I consider how territory is dealt with in international law. This chapter argues that two sets of issues underlie the development of modern international law: de-colonization and global justice, both of which played an important role in the second half of the last chapter. Debates surrounding these two issues show how the unraveling of colonialism is a return to the kind of thinking that underpinned the original justification for the acquisition of colonies. The next three chapters are critical engagements with key thinkers who developed these original justifications.

This chapter will begin by highlighting several ways in which territory is relevant to international law. From here I offer an overview of developments in international law before turning to modes of acquisition codified in international law. This latter task will be accomplished in two steps. First I will look at the ways in which conquest was used to acquire lands. Second I will consider how contemporary law has moved beyond this concept. At the end of this chapter the final task will be to explain why a theory of original territorial acquisition is necessary and how considering the claims of several historical thinkers will be helpful in reaching this end.

Relevance of territory to international law

The introductory chapter concluded that territory ought to play a significant role in contemporary theory. Where territory does play a role, original claims are ignored or presupposed. This is not to say that territory is neglected across all areas of political inquiry. Certainly, territory is important to contemporary politics. This is perhaps seen most clearly in secession claims, such as

those that took place in the former Yugoslavia and to a lesser extent in Kurdish efforts towards independence. Leaders facing these and other political issues often look to international law for guidance. Understanding the source of original claims to territory also impacts the types of claims made by indigenous peoples, particularly those in Australia, New Zealand and North America.⁸⁹ This chapter outlines the ways in which international law is equipped to deal with claims to territory and explains why a political theory of territory is necessary.⁹⁰

This discussion has an important place in normative debates about territory. International law represents not simply what states do, but also expresses the ways some actors believe states ought to act in relation to one another in a non-ideal world. Furthermore, international law provides a background set of norms against which theorists might offer a constructive critique of the international system. This discussion also has an important role in the thesis. The last chapter ended with a discussion of territory and indigenous peoples. This chapter continues that dialogue by considering the relationship between territory and indigenous populations in international law. This is largely an outgrowth of de-colonization that followed the end of the Second World War, a claim with which this chapter concludes and the rest of the dissertation supports. The unraveling of colonialism is a return to the kind of thinking that underpinned the original ideological justification for colonial acquisition. This chapter connects the contemporary concerns with territory to thinkers such as Grotius, Locke and Pufendorf whose ideas are considered in chapters to follow.

Justifying claims to territory was a concern not only during the Age of Exploration, but

⁸⁹ I realize that there are a number of other areas of concern in Asia and Latin America.

⁹⁰ This chapter is not intended to be a full survey of territory in international law. Rather, it is intended to highlight the relationship between a political theory of territory and international law. More detailed descriptions of positive international law and territory are available in a wide variety of sources such as and

also remains so in the present.⁹¹ Before considering the contemporary claims of indigenous peoples, it will be useful to highlight three relatively recent instances where disputes over territory motivated political action. These are the independence of Kosovo, Russian claims to land under the Arctic Ocean and new land formations in the South Pacific.

On 17 February 2008 Kosovo declared independence from Serbia.⁹² The new state was quickly recognized by the United Kingdom, France, Germany and the United States.⁹³ Others, most notably Serbia and Russia rejected Kosovo's declaration of independence and the Peoples' Republic of China expressed concern over a precedent an independent Kosovo would set in international law. The present boundaries of Kosovo were established after the Second World War with the creation of Communist Yugoslavia. An autonomous province, Kosovo was formed to protect a concentrated minority of Albanians in the Serbian Republic. More formal autonomy was established in 1972 and until 1988 Kosovo had a significant responsibility for self-government. Starting in the mid-1980's, Serbian leaders sought to regain formal control over Kosovo. While there are undoubtedly domestic political reasons for Serbia to claim Kosovo, official reasons often refer to the historical relationship between the territory of Kosovo and the Serbian people. Kosovo was incorporated into the 12th Century Serbian kingdom. This land was lost in 1389 when the Ottomans defeated the Serbians in the Battle of Kosovo, a battle that went on to have an important impact on contemporary Serbian self-identity. Serbian calls for unification with Kosovo are often wrapped up with calls to reunite the historical home land. The territory, they argue, belongs to the Serbs because of its historical role in shaping Serbian identity. Alternatively, those calling for Kosovo's independence do so because of its former status as an autonomous region within Yugoslavia, its significant Albanian majority and the

⁹¹ We will see this in subsequent chapters with a study of thinkers such as Grotius, Hobbes, Pufendorf and Locke

⁹² For background on Kosovo see, N. Malcom, Kosovo, New York University Press, 2000

⁹³ N. Kulish and C.J. Chivers, 'Kosovo Is Recognized by Rebuked by Others,' New York Times, 19 February 2008

resulting cultural divide between large portions of Kosovo and its Serbian rulers. The dispute over Kosovo is primarily a dispute about territory. One side argues that the link between land and identity is sufficient for justifying a territorial claim, while the other asserts its recent jurisdiction over the area and principles of self-determination. The status of Kosovo has the potential to form an important precedent in international law. However, such claims to self-determination are not the only territorial claims relevant to international law.

On 1 August 2007 a Russian submarine planted a flag on the seabed of the North Pole. News reports suggested that this initiated a Russian claim to the territory on the sea floor and all the resources that might be underneath. At first glance it appeared as though Russia was making a claim on previously unclaimed land. International law makes it clear that planting a flag can only establish a claim to vacant and unclaimed land.⁹⁴ In actuality the Russian claim was rather different. They argue that a portion of the sea bed is actually a geographic formation that extends from mainland Russia under the seabed. There are however a number of states that dispute both the facts of the Russian claim and its merits.

In October 2004 volcanic forces created a new island in the South Pacific. This *terra nullius* was discovered by sailors traversing the area. It is unclear who has a justified claim to this new unoccupied territory. One might say that the sailors have a claim through a right of discovery. Alternatively, the island nation of Tonga, the nearest recognized state, may claim the island because of its proximity to Tongan territorial waters.⁹⁵

These three cases help to show the contemporary relevance of territory. Each highlights disputes between political communities. However, as the Kosovo case suggests, it will also be

⁹⁴ C.J. Chivers and A. Revkin, 'Eyeing Future Wealth, Russians Plant the Flag on the Arctic Seabed, Below the Polar Cap,' *New York Times*, 3 August 2007

⁹⁵ D. Hollis, 'New Island, New Nation?' *Opinio Juris*, 29 November 2006, <http://opiniojuris.powerblogs.com/posts/1164770041.shtml> Accessed 20 March 2008

important to consider issues within states. The intra-state concerns are important because they get to the heart of the way a state may justify claims to territory. International law has a long tradition of adjudicating territorial claims.⁹⁶ Many of the precepts with regard to territorial acquisition developed out of European colonization of the new world where states acquired previously 'unclaimed' land. As mentioned towards the end of the last chapter, elements of political theories of Grotius and Locke proved useful to colonizers seeking theoretical support for their takings. This includes the initial claim to land as well as the boundary disputes that followed. The arguments of such thinkers will be developed in chapters to follow. However, it is worth emphasizing that this was not simply the beginning of the role of territory in international law, but stands at the beginning of international law as a whole. Though precepts concerning the relationship between political communities are present at least as far back as Cicero,⁹⁷ codified international law recognizable to the modern eye as international law did not begin to develop until the seventeenth century.⁹⁸ From here until the Second World War, conquest was viewed as an appropriate means of acquiring and justifying territorial claims. From the mid twentieth century on, conquest became de-legitimized as a method of acquisition.⁹⁹

Territory and International Law

Early investigations into international law began as studies of just war. Built on the traditions

⁹⁶ As an explicit task, this tradition begins no later than Pope Alexander VI's papal bull on May 4, 1493 adjudicating Portuguese and Spanish claims to land in the new world

⁹⁷ See E. Keene, *International Political Thought: A Historical Introduction*, Polity Press, 2004, p. 45-67 and T. Pangle and P. Ahrens Dorf, *Justice Among Nations*, Lawrence, Kansas, University of Kansas Press, 1999, p. 51-72

⁹⁸ See, R. Tuck, *The Rights of War and Peace*, Oxford University Press, 2004 E. Keene *International Political Thought: A Historical Introduction*, p. 98-134 and T. Pangle and P. Ahrens Dorf, *Justice Among Nations*, p. 162-218

⁹⁹ Consider Chapter 1, Article 2 of the *United Nations Charter*, <http://www.un.org/aboutun/charter/>, accessed 2 June 2008

initiated in the Christian world by Augustine¹⁰⁰ and elsewhere by a number of Islamic theorists,¹⁰¹ Europeans scholastic such as St. Thomas and later Francisco de Vitoria began to layout a set of rules that were intended to regulate the relationship between princes. Alberico Gentili, a 16th Century professor of law at Oxford, was the first international legal theorist.¹⁰² He was followed by a succession of theorists who sought to catalogue and codify the rules of engagement between European states. This group includes Hugo Grotius, Samuel Pufendorf, Christian Wolff and Emerich de Vattel, of which the first two play an important role in the next several chapters.¹⁰³ International law theorists differ from the just war theorists in the scope of their concern and breadth of their legal argument. Whereas the just war theorists' focused on the justice of making wars and conduct in wars, later international lawyers expanded the scope of their inquiry to general relationships between states and between individuals and states. For example, Vitoria's work on just war in the 16th Century focuses on possible ways to justify Spanish conquest in the Americas.¹⁰⁴ Less than 200 years later, Vattel's writings in the 18th century consider a wider variety of topics and the three volume work itself reads much like a 20th century international law course text.¹⁰⁵ Here topics range from just war to diplomatic process and from the content of treaties and the obligation to obey these agreements to the structure of commercial relationships between states. Vattel's writing is intended to serve as a description of existing international law. This is remarkably different from the works of thinkers such as Vitoria, who were primarily concerned with defending just war theory.

Much of the focus from the 18th century through to the 1940's remained on legal

¹⁰⁰ T. Pangle and P. Ahrensdoerf, Justice Among Nations, p. 73-80

¹⁰¹ See, for example S. Siyar, The Islamic Law of Nations, Baltimore, MD: The Johns Hopkins University Press, 1966 and E. Keene International Political Thought: A Historical Introduction, p. 68-97 for the relationship between early Christian and Islamic theorists

¹⁰² R. Tuck, The Rights of War and Peace, p. 16-18

¹⁰³ Whose thought is explored in greater detail in chapter 4

¹⁰⁴ F. Vitoria, Victoria Political Writings, Cambridge University Press 1991, p. 231-292

¹⁰⁵ E. Vattel, The Law of Nations, London, Sweet, Stevens and Maxwell, 1834

relationships between states. Following the Second World War the scope of international law was once again enlarged. This time the purpose was to include obligations between states and individuals, both citizens and non-citizens, within the scope of public international law. From the perspective of territory, this development caused a number of significant changes. For many just war thinkers, ranging from Augustine through Vitoria, the territory of a state is presupposed. As international law developed, theorists began to consider the ways in which polities make claims to territory to explain and justify European acquisitions in the New World. The emphasis here was on acquisition and conquest. Later, after the Second World War, international law began to include the right of self-determination. Consider the development of independent African and South East Asian states and the way principles of self-determination are placed within international legal documents such as the United Nations Charter, the United Nations Declaration of Human Rights and the Geneva Conventions.¹⁰⁶ This is different from concerns over territory because during the colonial period claims were about acquisition, rather than separation through decolonization or secession.

Territory played an important, but limited role for just war thinkers such as Augustine and Aquinas. They were primarily concerned with what a conqueror is permitted to do with the territory of an enemy. With the development of more thoroughgoing international law, the importance of territory grew. Territory became viewed as a necessary feature of statehood and an object of desire for current states as they began to expand their holdings across the New World. After the Second World War, international law began more closely to connect territory with non-state political communities and cultural groups and became something that legitimated political communities as it expanded to cover the ways in which territory is acquired and

¹⁰⁶ On the increasing role of self-determination in international law, see S. Sharma, Territorial acquisition, disputes and international law, Boston, MA: Martinus Nijhoff Publishers 1997

recognized.

Territory was an interest for theorists during both the era of discovery and the period following the end of World War Two. Building on the argument presented in the last chapter, the cause for the revival of the interest in territory is clear. Decolonization and the retreat of empire led to a concern over who ought to control particular territories and why. This has the curious consequence of raising again the arguments for initial colonial acquisition of the sort we see in early modern thinkers.

Colonization and Decolonization in Africa

By the time the scramble for Africa began in the 19th century, European states were well acquainted with a number native kingdoms. The scramble was not pursued through acts of discovery because the continent was not considered a *terra nullius*, but populated with a variety of kingdoms and tribes. To acquire colonies, European powers sought out local African rulers with whom they could make deals. European titles to their territories were created out of cession arrangements with indigenous kingdoms.¹⁰⁷ This fits well within the principles of international law of the time. Even today, cession is one of the principle modes of territorial acquisition. Cession and other modes of acquisition are discussed in the latter half of this chapter. Here, it is worth mentioning that title to territory in Africa was often different from acquisition in the Americas. This is not that all, or even most transfers of title in Africa were worthy of enforcement. Many were the result of fraud and intimidation. The point is, however, that there was at least one recognized procedure among European states to confer legitimacy upon colonization.

¹⁰⁷ See for example T. Pakenham, The Scramble for Africa: White Man’s Conquest of the Dark Continent from 1876 to 1912. Avon Books, New York 1992

As the scramble for Africa neared completion, only Liberia and Ethiopia would remain independent, European states created administrative boundaries around various collections of cession acquisitions. Sometimes these were done to cohere with geographic boundaries such as rivers and mountains. Other times the particular boundaries of a state were determined by political expediency. For example, this might have included a set of boundaries selected to break a single ethnic group into several different political units.

By 1914 most of Africa had been divided into colonies that would eventually become independent states. The reasons for decolonization are varied. Some pressures were internal as a desire for independence rose. Others are external as the costs of empire rose for European colonizers. Still others might have been ideological. The Allied victory in the Second World War placed self-determination as a priority in post-war institutions. In fact, decolonization and self-determination were among the principles the United States and Great Britain agreed to in forming the 1941 Atlantic Charter.

By 1968, 42 of the 53 present day African states were independent. For self-determination to take place there must be a territorial unit which constitutes the self. In international law this was represented as the administrative unit created by the colonizers. Though this external imposition may seem unfair, the colonies were a relevant political units where self-determination could take place. This is the principle of *uti possidetis*, as you possess, which suggests that boundaries ought to remain where they are. Once self-determination turned colonies into states, no further self-determination was available for smaller entities. International law has a well established principle of territorial integrity, which generally disallows secession thereby making further self-determination impossible.

Law and indigenous peoples

To clarify the issues surrounding territory and indigenous peoples in international law, it will be important to outline three domestic cases: Mabo in Australia, the Maori in New Zealand and First Nations in Canada. Each of these cases is important because they provide the source of concern for indigenous peoples in international law.

At the outset, several things are worth noting. First each of the indigenous peoples in these cases makes explicit demand for territory that was previously implicit. Second, all three cases are ones of internal colonization whereby a new state was created by colonizers to which the native populations were excluded. This removed the possibility of self-determination in the way it was available to African nations during decolonization following the Second World War

Before briefly outlining the three cases, it is important emphasize the role of indigenous populations in this thesis. Many political issues of indigenous populations are issues about land. This has two aspects: the wrongful taking of the land itself and the link between the land and the social institutions of indigenous peoples. As James Anaya writes, ‘indigenous peoples have been deprived of vast landholdings and access to life sustaining resources, and they have suffered from the historical forces that have actively suppressed their political and cultural institutions.’¹⁰⁸ Many argue that these political and cultural traditions cannot be separated from indigenous claims to territory.¹⁰⁹

Maori in New Zealand

New Zealand has a unique history in its relationship with its indigenous population. This is partially because the indigenous population arrived in New Zealand relatively recently. The

¹⁰⁸ J. Anaya, *Indigenous Peoples in International Law*, 2004, p. 4
¹⁰⁹ This is perhaps the main contention of P. Keal, in *European Conquest and the Rights of Indigenous Peoples*

native Maori did not inhabit the islands until 1000CE, making it one of the last areas of human settlement. However, most interestingly, Maori natives and British settlers negotiated a treaty that was intended to settle sovereignty over the Islands and native title to lands. Over the last twenty years this document, the Treaty of Waitangi, has been highlighted as a model of relations between indigenous and settler populations. However, the treaty itself is not without controversy. It was written in both English and Maori and it seems clear that the meaning of certain key passages may differ in each language and it is therefore unclear whether the Maori agreed to what they thought they were agreeing to.

The treaty itself is broken down into three main sections.¹¹⁰ The first cedes Maori sovereignty to the United Kingdom. The second guarantees Maori's continued possession over the land they currently hold and if these lands are sold, they can only be sold to the British Crown. The latter part of this section was intended to keep unscrupulous colonials from acquiring Maori lands for little money. The final section extends to the Maori all the rights of and duties of a British subject.

For all of the treaty's symbolic force, it lacks the force of law. The treaty was never ratified by the Crown and some argue that the Maori chiefs were not leaders of a people, but served more as local administrators and therefore lacked the authority to alienate sovereignty. Nonetheless, the treaty serves as a focal point for Anglo and Maori relationships. Since 1975, New Zealand legislation regulating these relationships has the name of the treaty in their title.

Two theoretical issues appear to arise out of this. Pocock argues that part of the difficulty in understanding the meaning of the treaty is that each side approached the treaty with a different linguistic tradition, which led them to agree to the treaty commitments for different reasons and

¹¹⁰ The Treaty of Waitangi, #<http://www.immigration.govt.nz/migrant/settlementpack/treaty/WhatTheTreatySays/> Accessed May 1, 2007

interpret the treaty's words in different ways.¹¹¹ The British understood the first article of the treaty as a surrender of sovereignty. There are good reasons to believe that the Maori did not have a conception of sovereignty and therefore was not something that they agreed to give up. This is reinforced by the fact that the English and Maori portions of the treaty seem to be mismatched. The English version clearly states that Maori sovereignty is given up while the Maori version suggests that they agreed to give up not sovereignty in perpetuity, but limited government over the land.

There are perhaps a variety of ways to conceptualize possession. The physical dominance of the British, some argue, forced upon the Maori an alien conception of sovereignty and property ownership, stripping them of their title to land.¹¹² Yet, as Pocock argues, it may be better to recognize the Maori as a co-equal part of the constitutional regime whereby both have a valid claim to portions of New Zealand sovereignty.

There are however two difficulties with such a position. First, as it stands, little is done to describe the content of this dual sovereignty. Pocock suggests that this simply entails recognizing that the other has an equal claim to the territory that is New Zealand and sovereignty over it such that they must be included as participants in the political process. As we will see below with aboriginals in Australia, others argue that some degree of self-determination is required. Yet, all of this introduced a second issue. As with many of issues discussed in the previous chapter, Pocock's solution presupposes a justified claim to the territory. British settlers base their claim on the treaty with the Maori. What the Maori base their claim on is not exactly clear. Some like to stress the importance of long possession. Yet, this alone is often not enough to justify a claim in international law. 'Long possession' must be operationalized. Without doing so it is not clear

¹¹¹ J.G.A Pocock, 'Waitangi as a Mystery of State: Consequences of the Ascription of Federative Capacity to the Maori'

¹¹² P. Keal, European Conquest and the Rights of Indigenous Peoples, p. 51

what ‘long possession’ might mean. With this in mind, it will be helpful to look at Mabo and Australia, another major case dealing with the relationship between colonizers and indigenous claims to territory.

Australia and Mabo

Mabo v. Queensland was a landmark series of cases that helped to establish native land rights in Australia. A group of Meriam people from the Murray Islands in the Torres Strait off the northern coast of Australia led by Eddi Mabo, sought to recover native title to their historical homelands. The province of Queensland attempted to extinguish these native title claims in the 1985 Queensland Coast Islands Declaratory Act, which declared that the 1879 annexation of the islands removed any such indigenous claims.

The first Mabo case, decided in 1988, held that the 1985 Act was against Australian law. However, this did not include a positive judgment confirming indigenous titles. As a result, Mabo and the other plaintiffs sought second judgement to confirm their title claims. They argued that that the Meriam people were entitled to the Murray Islands and the court, in 1992, agreed. The decision stated that the Meriam people ‘as owners; as possessors; as occupiers; or as persons are entitled to use and enjoy the said islands’.

The plaintiffs’ argument, upon which this decision was based, sought to justify the indigenous title claims through long possession. To counter this, the defendants argued that when the territory of a settled colony became part of the British Crown, the law of the United Kingdom became the law of the colony and, by that law, the Crown acquired dominium of all land in the territory. By this they meant that the Crown had acquired rights of eminent domain and therefore was able to serve as the final arbiter in land disputes. Ultimately, the court accepted the

plaintiffs' claims. This was done by accepting that indigenous title is part of, but not created by, Australian common law. Furthermore it rejected two key contentions of the defendants' claims. First, the court rejected the idea that Australia was a *terra nullius* when Europeans arrived. Rather it determined that Australia was a territory settled by an existing population. Second, the Court rejected that the Crown obtained eminent domain, or 'absolute beneficial title' when Australia became a settled colony.

The court's decision was rooted within the common law tradition. As mentioned above the conclusion they came to is that native title is now part of Australian common law. The court did conclude that sovereignty passed from the natives to the Crown, but that this entailed an acknowledgement that indigenous peoples retain rights to their lands so long as they remain a distinct community. If that community gives up its traditions and moves into the Australian mainstream then the original rights to title are extinguished.¹¹³

The implications of this cross several different areas. First, Mabo appears to bring Australian law into line with the jurisprudence of other former British colonies like Canada and New Zealand. Before these cases indigenous peoples had little legal rights to native title. Now their claims to title are greatly enhanced.

The ruling appears to go further than what is offered in New Zealand. Whereas Pocock suggested New Zealanders view the Maori as an equal participant in sovereignty, Australian law actually recognizes two co-equal institutions, Australian property law and indigenous land law. These institutions exist as separate branches of an overarching Australian common law. Finally, the case confirms both native title to territory and the justified acquisition of territory by the Australian state. Australia is a territorially based political community with a single common law that recognizes title to territory by its native population.

¹¹³ Mabo v. Queensland, (1988) 166 CLR 186

First Nations in Canada

James Tully, among others, has called for Canada to include First Nations, recognized indigenous peoples, into its constitutional regime.¹¹⁴ Canadian policy towards indigenous peoples has been worked out through a series of court cases. This places it closer to Australia than New Zealand in its relationship with native peoples. However, unlike Australia, Canada has generally maintained friendly relations with First Nations. More recently, Canadian courts have endorsed the concept of Aboriginal Title as a distinct from common law ownership.

This was a sharp departure from earlier rulings. In one long-standing decision, *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), the Judicial Committee of the Privy Council held that the Crown had absolute sovereignty over Canada and that aboriginal title over land was allowed at the pleasure of the Crown. The decision was based on a 1763 Royal Proclamation which gave the native populations 'a personal and usufructuary right, dependent upon the good will of the Sovereign.'¹¹⁵

In 1969 a White Paper by Jean Chrétien, then minister for Indian Affairs, sought to eliminate the Indian Act of Canada, a series of acts from 1876 to the present that gave special group rights to members of First Nations. Removing the Act would have eliminated special status given to indigenous peoples and moved towards assimilating them into the Canadian mainstream. Land claims would have been treated the same as land disputes of any other ethnic minority. However, the White Paper was ultimately rejected. Not surprisingly it was contested by the First Nations and the Government shied away from the policy following several court decisions.

¹¹⁴ J. Tully, 'The struggles for indigenous peoples and of freedom', Political Theory and the Rights of Indigenous Peoples, Cambridge University Press, 2000

¹¹⁵ *Catherine's Milling and Lumber Co. v. The Queen* (1888) 14 App. Cas. 46 (J.C.P.C.)

The first of these decisions was *Calder v. British Columbia (Attorney General)*, which first acknowledged that aboriginal titles to land existed prior to colonization and their force did not derive from Canadian statutory law.¹¹⁶ Importantly, the court found that native title existed prior to the Royal Proclamation of 1763. However, the court was split on its final conclusion. Some argued that though native title did exist at one time, it had been extinguished by the Crown's government exercising control over the native lands. The other half of the court argued that more had to be done to show that native title had been extinguished.

This issue began to be clarified in *Guerin v. The Queen*, which held that aboriginal title is a right in and of itself, not derived from Canadian law and that the Canadian government therefore has a responsibility to protect indigenous claims.¹¹⁷ Furthermore, the Court concluded that if native title is alienated it can only be alienated to the Crown and not to private individuals. Legislative action was subsequently taken to enforce these rights.

This set up *Delgamuukw v. British Columbia*, the most definitive statement by the Canadian Supreme Court on aboriginal title.¹¹⁸ In a dispute over the ownership of more than 130 territories, totaling more than 58,000 square kilometers of northwestern British Columbia, the Province argued that all First Nations land rights in British Columbia were extinguished by the colonial government before it became part of Canada in 1871. Although The Supreme Court refused to make a decision on this particular land dispute, the majority held that native land rights are a set of rights distinct from Canadian common law. Rather indigenous title derives from and entails the ways in which native peoples traditionally used the land. This is different from common land ownership. It is a constitutional group right linked to Indigenous culture.

Each of these three cases provides some insight into the types of claims one can make

¹¹⁶ *Calder v. British Columbia (Attorney General)* [1973] S.C.R. 313, [1973] 4 W.W.R. 1

¹¹⁷ *Guerin v. The Queen* [1984] 2 S.C.R. 33

¹¹⁸ *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010

about territory. First, it is important to recognize that all three cases establish some sort of indigenous title. The Canadian cases conclude that there is an indigenous title independent of Canadian law. The Australian cases argue that indigenous title is a part of Australian common law. The New Zealand case suggests that two claims to territory can coexist in a complex constitutional arrangement. All three, however, presuppose that the indigenous population had some sort of original claim to territory. Second, all three cases claim that it is possible for territory to be acquired by a new political entity. Australia, Canada and New Zealand all make some claim to territory. The arguments made by each are varied. The point of mentioning them here is not to discuss them in detail, but rather to open the discussion towards considering the types of legitimate claims a state may utilize.

Original acquisition in international law

Territorial sovereignty stands at the core of the contemporary international legal conception of the state. States cannot be states without territory, though territorial entities need not be states. Here, sovereignty refers both to the powers and capacities a state has within its borders as well as its rights and privileges in relation to other states. From a legal perspective, it is important that these powers and privileges are exercised in relation to a particular piece of land. As Browline writes, ‘...the territory of a state...together with the government and population within its frontiers, comprise the physical and social manifestations of the primary type of international legal person, the state.’¹¹⁹ Having a territory is therefore a necessary, but not sufficient condition for an entity to be a state.

This, however, presupposes an important question with respect to the particular territory a state claims. At face value it is unclear how a state comes to acquire its territory. An organization

¹¹⁹ I. Browline, Principles of Public International Law, Oxford University Press,1999, pp. 107-08

cannot simply claim any land it desires and declare itself a state. Rather, the entity must have a justified claim to a particular bit of territory. Traditionally, international law provides five ways in which original claims to land are justified. These modes are cession, occupation, accretion, subjection and prescription.¹²⁰

Cession involves the transfer of territory from one state to another. The clearest sign of cession is a treaty between two states. There are a number of examples of this in history. The Louisiana Purchase is an example of this sort of transfer. France, the title holder of Louisiana agreed to transfer title of the territory to the United States in exchange for \$15 million. The agreement was not made to settle a dispute or negotiate the end of a war between the two parties. Rather, it was done to allow France to pursue an alternative set of political and military goals. However, cession treaties can be, and are perhaps often, part of a victor's peace where the losing side of a war is required to hand over a portion of territory to the victor. Generally, third parties are not considered to have veto power over cession agreements. Only interested parties have standing in the treaty discussions because cession involves the transfer not only of territory, but also of sovereignty. This may place hardships on parts of the population in the target land. New states therefore often employ a plebiscite to confirm the legitimacy to the territorial transfer. Additionally, inhabitants may be given an opportunity to retain their old citizenship and emigrate.

As seen here, cession is a derivative concept of territorial acquisition because it presupposes a prior claim by another state. A polity can only give territory away if it has territory in the first place. There must be some other, prior claim to the original territory. It would also seem that cession is committed to the territory as property view. Here, territory, like property,

¹²⁰ F. Oppenheim, Oppenheim's International Law 9th ed. Vol.1, Addison Wesley Publishing Company 1992, p. 679

can be alienated. An identity based conception of territory might reject the possibility of cession. If a claim to territory becomes conclusive because of its role in creating or sustaining a group's identity then it is perhaps not the sort of thing that can be alienated. Identity based conceptions of territory will be taken up in chapter 7. The four remaining modes of territorial acquisition are more clearly linked to original acquisition.

The agent of a state acquires land for that state by occupation when the piece of territory is vacant and not under the control of any sovereign authority. The land must be vacant in that it is not part of any other state, though it need not be absent from all inhabitants. The territory is vacant when the community of indigenous inhabitants is not considered a state. Two conditions must be met for occupation to constitute a claim to territory. First, the state must be in possession of the land. This traditionally involves some form of settlement accompanied by an announcement to the international community that the acquiring state intends to take possession of the land and subject the land to the acquiring state's sovereignty. Second, there must be some set of institutions over the area that indicates that the new territory is effectively governed by the acquiring state.

It is important to note that these two requirements, settlement and effective governance were not always sufficient conditions for making new territory one's own. Oppenheim argues that during the age of discovery, the discovery itself created a presumptive claim to title that could be shored up with public acts that fall short of settlement, such as exploration, surveying or cartography. It was not until the 19th century when international lawyers began to give weight to both real settlement and effective governance.¹²¹

This understanding of occupation begs two obvious questions: what counts as settlement and when is governance effective? It is suggested that the degree of settlement and governance

¹²¹ F. Oppenheim, Oppenheim's International Law. 689-90

required to make a claim conclusive is in relation to competing claims of other states. If a variety of states make claims to the land then large settlements and a substantial institutional government might be required. Alternatively, if no other state makes a claim to the land, little effort might be needed to make the claim conclusive.

Occupation has an intuitive appeal as a justification for original claims to territory. It certainly *seems* that occupation should play an important role in making a claim to land. For thinkers such as Grotius, Locke and Pufendorf occupation has an important role in generating original claims.

Accretion is an increase in land by human or natural forces. For a long time humans have used earth to extend the reach of towns and cities into the sea. Amsterdam is perhaps the best known example. Here land is extended into the sea with landfill. This extends the territory of the state in the same way that a river increases the size of its delta by depositing sediment at the river's head. Volcanic activity is another common way in which the area of land is increased. In all these cases, customary international law allows the state to claim land that has 'grown' off its existing territorial claim.

Subjection is the acquisition of territory by conquest. However, what might appear to be a case of acquisition by conquest is better thought of as cession. Subjugation occurs when a conquered state is not only occupied, but also annexed. Often, instead of annexation, parts of the losing state are ceded to the victor in a treaty. When this happens it is more properly a case of cession. Locke, for example, argues that territory cannot be acquired through conquest, but that a losing power may cede territory to the victor as part of a treaty settlement.¹²²

International law attempts to keep the distinction between these two modes clear. In one case the land is taken and in the other it is given away. Note that neither of these modes is

¹²² Locke's position is considered more carefully in chapter 4

synonymous with belligerent occupation. Following the Second World War, Germany was occupied jointly by the United States, Russia, Britain and France. While the state was occupied and its sovereignty suspended, German territory was never ceded to the Allied powers. Rather, one might think that the territory was held in trust for a future government after Germany regained its sovereignty.¹²³ The same might be said about the relationship between the Coalition Provisional Authority in Iraq and Iraqi territory. However, in neither of these cases did the occupying power have a desire to make claims on the territory. Yet, the distinction between cession and subjugation remains suspect. Though the final mechanism is different, the general method of acquisition is not. In all cases of subjugation and many of those of cession, peace is pursued by force. Both cases are the result of victor's justice. This is now recognized in international law and the principle of force as a means of acquisition is generally rejected. States cannot be forced to cede their territory under military threat. The Declaration of Friendly Relations states that 'the territory of a State shall not be the object of acquisition by another state resulting from the threat or use of force.'¹²⁴

One alternative, occupation, is mentioned above. However, it might not be clear why occupation is important. An explanation for this might be found in another mode of acquisition, prescription, which is similar to adverse possession in municipal law.¹²⁵

The principle of prescription asserts that when a state is in possession of land for an extended and uninterrupted period of time the land becomes part of that state. The emphasis here seems to be on history and the relationship between the state and its impact on the history of the land. An earlier edition of Oppenheim's international law text states that prescription is the:

¹²³ Such an example might be what Locke had in mind.

¹²⁴ Quoted in F. Oppenheim, *Oppenheim's International Law* p. 703

¹²⁵ For a brief overview of adverse possession see, R. Posner, *Economic Analysis of the Law*, Aspen Law & Business, 1998 with regard to territory see Lea Brilmayer, "Secession and Self-Determination: A Territorial Interpretation" 177-202

acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of this is in conformity with the international order.¹²⁶

The difficulty here is that any protest or dispute by a third party makes it clear that the sovereignty exercised over the territory is not uninterrupted. This makes it difficult to understand how such claims might become conclusive. One way to solve this problem is to consider this as a question of fact rather than one of law. The operative concept could be the way in which the state's claim to the territory fits within the international order. If it does, there seems to be little dispute because the claim is tacitly accepted by the international community.

The principle of *uti possidetis* is one way to overcome the problem of international recognition. Latin for 'as you possess,' *uti possidetis* has been taken to mean 'leave the borders where they are.' The principle was originally used by Spanish-American states in the early 19th century to settle border disputes. Central and South American polities attempted to demarcate their political communities based on principles of possession and preexisting administrative boundaries created by the Spanish.

In the era of decolonization, the Organization of African Unity passed a resolution endorsing the stability of borders and used *uti possidetis* as a guiding principle. The document states that 'all Member States pledge themselves to respect the existing borders on their

¹²⁶ F. Oppenheim, Oppenheim's International Law p. 706

achievement of national independence.’¹²⁷ The idea is that stable borders are of the utmost concern and ought to override any more parochial claims to self-determination. The result is a full endorsement of colonial administrative borders created by European powers. To focus on the justness of placement of particular boundary lines is to miss the point.¹²⁸ The assertion is that such placement may matter, but it is less important than the stability provided by endorsing the existing territorial arrangement. Furthermore, it has been fundamental to the particular border arrangements that have been agreed to following the separation of the former-Yugoslavia, where borders of the former-Yugoslav states closely follow administrative boundaries created prior to the separation.

This principle should immediately raise some problems. At least two difficulties are particularly important. First, self-determination is distinguished from decolonization. Because decolonization emphasized the stability of existing borders, self-identification with particular borders was de-emphasized. Political communities not represented in the colonial administrative scheme lose the opportunity to press their claims to independence. Self-determination suggests something more than decolonization. It asserts that distinct self-selecting groups ought to be able to assert political independence. This poses a problem because many contemporary theorists believe self-determination is a principle worth having. The United Nations Charter asserts a right to self-determination where it states that among the purposes of the UN is to ‘develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace’.¹²⁹ Yet, at the same time, the Charter asserts the importance of the sovereignty and territorial integrity of

¹²⁷ F. Oppenheim, *Oppenheim's International Law* 670

¹²⁸ This is a point Rawls emphasized and was discussed in chapter 1

¹²⁹ UN Charter, Chapter 1, Article 1, Section 2

member states.¹³⁰ To make these two aspects of the Charter consistent, self-determination must be equated to *uti possidetis* where the only candidates for self-determination are those determined by colonizing powers through administrative boundaries created through the process of colonization. There are however, good reasons to believe that decolonization is analytically distinct from self-determination. Decolonization may entail self-determination, but self-determination need not occur in a colony.

The second difficulty rests in the implied skepticism towards the possibility of conclusive claims to territory. The principle of *uti possidetis* asserts that the stability of present border arrangements ought to be privileged over other considerations. Here, the source of normativity lies in the value of stability itself. There is skepticism towards normative claims to territory because the relationship between particular political communities and their territory is epiphenomenal and secondary to stability. If there are normative claims to territory, it seems that the principle behind such claims ought to explain why a territory belongs to a political community even if the polity is not currently in possession of the territory.

A quick analogy to domestic property rights might be useful here. Suppose you have a justified property claim to object A. If I take A without your permission, the property ought to be returned to you or you deserve some compensation for his loss. Suppose, for some reason you are unable to recover A or compensation for A for some period of time. Over this period of time a stable system may develop with A wrongly in my possession.¹³¹ You may still be owed something because your property was wrongly taken from you. If this is the case, it must be because there is something of primary importance about the property right. Here, stability might be of some concern, but it is not the primary concern. Alternatively, if stability were the primary

¹³⁰ UN Charter, Chapter 1, Article 2, Sections 1, 4 and 7

¹³¹ Consider paintings taken from European Jew by Nazi's and later placed in museums. Under some conditions property rights may transfer due to adverse possession, but this need not be the case.

concern, it would be difficult for you to recover A or compensation for its loss. This would entail skepticism towards property claims because property would be used only as a tool for something else, the principle of stability.¹³²

The above norms recall arguments from the early period of modern international law and the claims colonizing states pressed to assert dominance over indigenous peoples. As argued earlier, there are reasons to believe that such an understanding of this justification for acquiring territory was not understood by native populations. Furthermore, native populations now recognize that defenses of territorial takings ought to be revisited. Recall the three cases of indigenous rights described above. In each of these cases indigenous peoples seek to justify claims over territory. In Australia, Canada and New Zealand this was done by an appeal to self-determination. At first this appears to be a truly domestic concern. However, as a group, indigenous peoples have begun to take self-determination to the level of international law and have been successful to a limited degree.

International Law and Indigenous Self-Determination

Three cases of indigenous rights discussed above involving Australia, Canada and New Zealand are all linked by the desire to assert native title to territory within an existing state. Native title is not a domestic property right. A domestic property right asserts a set of rights and obligations within an existing scheme of property law. Native title goes further to assert an independent set of rights and obligations. For this to be the case, the title must be independent of domestic property law. This is the claim that native title entails a right to determine the way in which the

¹³² In the next chapter I suggest that several arguments offered by Hume might be used to assert such skepticism towards territory. However, I am not sure the same can be said about his conception of property. While the right to private property is an artificial virtue for Hume, stability is important for property. My argument here is that skepticism towards territory is important only to the extent that it helps stability.

land ought to be used. The claim is therefore not simply about title to land, but about self-determination.

One approach is to take this as a domestic issue concerning the role of indigenous peoples within a state's larger constitutional scheme. This is Tully's suggestion.¹³³ However, one may argue that the principle of self-determination ought to apply more broadly to all indigenous peoples. The argument here moves from one about domestic constitutionalism to one about international law.¹³⁴ Self-determination, the argument goes, is a fundamental human right that ought to not only apply to indigenous peoples, but also enforced by states. States have an obligation to treat their indigenous populations in a particular way. What appeared to be an internal state issue can be viewed as a concern for international law. This in and of itself is cause to revisit the original claims to territory by settler populations who often refused to see indigenous peoples as subjects of international law.

Claims to self-determination might be viewed as an equivalent of secession. However, this need not be the case. Secession entails a complete break from a parent state and the creation of a new sovereign entity. Often this is not possible for indigenous peoples with well entwined settler populations. Furthermore, indigenous peoples may benefit from a particular arrangement with a sovereign state. Self-determination is intended to refer to two sets of norms, what Anaya refers to as constitutive and ongoing norms. The first is a claim that a group's governing order ought to have its sources in the will of those being governed. The second is that the will of the group governed ought to be responsible for any changes to the institutional arrangement.¹³⁵ This need not entail secession. Rather, there may be domestic alternatives that allow indigenous

¹³³ J. Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity

¹³⁴ This is the general thrust of those wishing to establish a place for indigenous peoples within public international law, see J. Anaya, Indigenous Peoples in International Law

¹³⁵ J. Anaya, Indigenous Peoples in International Law, p. 104-05

peoples to continue their way of life.

The source of this, many argue, is not in positive international law, but rather the international human rights regime, which argues that political communities have the right to determine their political fates. Because this option was not generally available to indigenous populations during periods of colonization, some remedy must now be made. This remedy has been a recognition of the right of indigenous peoples to self-determination *sui generis*. As a result, such principles have slowly migrated into customary and positive law of nations. Yet any actual self-determination must be exercised over a particular territory and this proves to be a difficulty. Here, as with the colonizers, claims to territory are treated as given. A theory of original claims to territory is required to uncover who gets to claim territory and why.

The need for a theory of territory

Thus far I have identified several modes of territorial acquisition utilized in international law. These included cession, occupation, accretion, subjection and prescription. To this a sixth, *uti possidetis*, was added. From the above, it should be clear that not all of these six modes of acquisition are compatible. In fact, several of them are incompatible. Subjection, in all its forms, seems to be contrary to principles such as *uti possidetis* and occupation that defend present settlement and stability. This analytical confusion calls for a political theory of territory. It does so because of the unraveling of colonialism and an obligation for social justice. These two concerns form the lens through which contemporary theorists view territory and from central concerns for the next six chapters.

A political theory of territory is needed to explain which principles of territorial acquisition ought to be privileged when two or more modes of acquisition come into conflict.

While it is certainly possible that all modes are equally convincing, this is not the way that international lawyers see it. After all, when conflicts arise disputes ought not to be settled with the flip of a coin, but with reasoned argument. One of the purposes of political theory is to explain why certain principles are worth defending over others. If, for example, *uti possidetis* is worth defending, it is because there are reasons that can be articulated that are worth doing so. This would explain why *uti possidetis* might be privileged over territorial acquisition by conquest.

However, it would seem that the job of theory is to do more than simply adjudicate disputes between competing principles. Rather, theory might be used to explain why the principles themselves are worth endorsing at all. Much of the discussion of international law above articulates principles that are or have been used by international lawyers. This is descriptive and it tells us what the law is. It does not tell us if this is also what the law ought to be. More is needed to explain not what principles are used, but whether the principles that are used are worth defending. Some international lawyers suggest that the traditional ways of thinking about territory are misguided.¹³⁶ Others argue that the traditional modes of acquisition are an outmoded legacy of legal education that does not reflect the realities of international practice.¹³⁷

It is important to distinguish different levels of responsibility. Practitioners of international law use positive law to press the concerns of their clients. Academic international lawyers often write descriptive works explaining what the law is and why the law is the way that

¹³⁶ For example, J. Goldsmith and E. Posner, *The Limits of International Law*, Oxford University Press 2005

¹³⁷ See I Brownlie, *Principles of Public International Law*

it is.¹³⁸ Of course others attempt to describe how the law ought to be.¹³⁹

As argued in Chapter 1, contemporary theory often presupposes original claims to territory. In the present chapter I argued that original claims to territory tend to involve indigenous peoples or relate to other disputes about the ways in which states acquired their territorial holdings. This has been seen most clearly in decolonization that followed the Second World War and demands for recognition by indigenous peoples across the globe. This in turn raises questions of global justice and resource distribution. If borders themselves cannot be defended, then neither can the distribution of resources that result from these territorial arrangements. Strangely, these disputes draw us back to the arguments used by thinkers from the early colonial period.

There are several reasons for this. First, territorial disputes today often involve questions of original claims to territory. These issues are often ignored today, but were of prime importance to early modern thinkers. Second, many of the current political justifications used in territorial disputes have a strong grounding in a number of thinkers who wrote from roughly 1600 to 1800. The next chapter introduces a series of three historical chapters that will consider different conceptions of territory from their early-modern sources. Chapter 3 looks at territory as possession through the writings of Hobbes and Grotius. A discussion of territory as property is reprised in Chapter 4 through Locke and Pufendorf. Finally, Kant's conception of territory as jurisdiction is evaluated in Chapter 5. Territory was important for each of these thinkers and engagement with their arguments, arguments that are now important for contemporary claims,

¹³⁸ Some examples are H. Lauterpacht, *Private Law Sources and Analogies of International Law* Archon Books, 1970, M. Shaw, *Title to Territory in Africa: International Legal Issues*, Oxford University Press 1986 and M. Shaw 'Territory'

¹³⁹ Some of the more well known discussions include H.L.A. Hart, *The Concept of Law*, Clarendon Press, 1994, Hart, H.L.A. *The Concept of Law*. H. Kelsen, *Principles of International Law*, Law Books Exchange 2003 and C. Schmidt, *The Concept of the Political*, University of Chicago Press, 1996

will facilitate a substantial reflection upon territory and inform solutions to present day problems. The next three chapters will provide analytical and theoretical depth to the contemporary concerns presented in Chapters 6 and 7.

This chapter is intended to highlight some of the ways in which international law explains claims to territory and to explain why a political theory of territory is necessary. Territory plays an important role in international politics. Political leaders and international lawyers turn to international law for guidance in adjudicating disputes about territory. While international law says quite a bit about territory, it nonetheless demands a theoretical framework to explain why some principles of territory ought to be privileged and why those that are privileged are worth endorsing. Perhaps the most widely endorsed conception is *uti possidetis*, which suggests that territory is fundamentally a collective possession. Grotius, writing in the 17th century, forcefully argued for an understanding of territory as possession. To better understand territory as possession and its implications, the next chapter is a critical engagement with Grotius' conception of territory.

Chapter 3: Territory as possession

The previous chapter argued that contemporary questions about territory take us back to the problems of colonization. It ended with a discussion of *uti possidetis*, the principle that borders ought to be left where they are. Resting behind *uti possidetis* is a conception of territory as possession. This brings us back to Grotius and Hobbes, who developed a strong argument for colonization and the taking of territory through a territory as possession argument. This critical engagement with these thinkers is not intended as merely an exercise in the history of political thought. Rather, it is intended to serve as a tool to engage a particular argument justifying colonization and the taking of territory through possession. The purpose of this chapter is to engage with Grotius and Hobbes' conception of territory as possession and to support the thesis by showing that this particular strategy of justifying claims to territory is misguided. Both were writing in the early stages of European global conquest. In some ways, their arguments justify colonial acquisition. This is certainly how some of their immediate posterity interpreted their conclusions.¹⁴⁰

This chapter is divided into two parts. While there is an intuitive appeal to the idea that possession is the key feature of a claim to territory, possession based arguments are lacking because they fail to address several things that a theory of territory is reasonably expected to do. This critique is weaved throughout the first part of the chapter which focuses on Grotius and the second half that turns to Hobbes.

Grotius' conception of territory as possession

The first part of this chapter will consider the role of territory in Grotius' political philosophy by

¹⁴⁰ E. Keene, Beyond the Anarchical Society, Cambridge University Press, 2002, p. 60 and R. Tuck, The Rights of War and Peace, chapters 3 and 4

reconstructing his argument for property and the physical boundaries of sovereign power. At the outset it is important to note that Grotius' property argument plays a large role in what he has to say about territory. As a result, a substantial amount of space will be dedicated to explaining his property argument. With this in place I will consider his territory as possession claim. Finally, the implications of the argument is considered and I will describe what a world of Grotian states might look like.

In 1602, Jacob van Heemskerck, a Dutch captain, captured a Portuguese ship carrying more than three million guilders in gold, silk and other treasures of East Indian trade. This was a huge prize, whose value exceeded the total annual expenditure of the English government at the time. The Dutch ship's authority was governed by a charter from the States of Holland, which was silent on the powers to make war. Yet, the seizure of this Portuguese ship represented a clear policy of the Dutch states to expand trade in East India, by force if necessary. The use of force, by private companies on behalf of an independent government against a sovereign state seemed to violate the most fundamental principles of 17th Century international relations. At face value this appears to have been a dispute between European states. However, the nature of the dispute is deeper and connects with the narrative developed in chapters 1 and 2. The dispute was between two European states, but it was with respect their relationship with East Indian peoples. Within this context of colonialism, the Dutch and Portuguese pressed their claims. With this as a background, Hugo Grotius, van Heemskerck's cousin, wrote a defense of the Dutch action.¹⁴¹

This defense was published in 1609 as Mare Liberum (The Free Sea).¹⁴² Here, Grotius argues that Portuguese claims to exclusive trading privileges in the East Indies were illegitimate.

¹⁴¹ R. Tuck, The Rights of War and Peace, pp. 79-81

¹⁴² H. Grotius, The Free Sea, Indianapolis, IN, Liberty Fund, 2004

The claim rests on two fundamental points. First, the sea is not the sort of thing that can be claimed as the territory of a state and second, the right of peoples to trade cannot be infringed. Any hindrance to the exercise of trade can be punished by acts of war. In making this claim, Grotius argues against the skepticism of many 17th century philosophers, such as Michel de Montaigne, who doubted the very existence of universally binding laws. It is also, as I will show below, a claim adopted by Europeans to justify conquest in the new world. In responding to these skeptics, Grotius created a new conception of natural law to ground his defense of Dutch conquest and the freedom of the seas.¹⁴³

Skeptics claimed that law is based on expediency and self-interest. Nature compels individuals to act towards ends that are self-interested and advantageous to private desires. Domestic laws often change and international laws are consistently broken. Furthermore, skeptics claim, one does violence to their own interests when the interests of others are consulted. Grotius argues that we know the skeptic's claims cannot be true. Humans are sociable by nature and this fact can be verified through experience. Thus, it is clear that we do not merely seek our own interests. These considerations form the basis of natural law from which both domestic and international law are derived.¹⁴⁴

The Free Sea itself is rather compact and many of its arguments are merely sketched out. The work is actually a single chapter of a much larger unpublished work, De Jure Praedae (The Law of Prizes)¹⁴⁵, which became the basis for Grotius' well-known De Jure Belli ac Pacis (The

¹⁴³ Perhaps Grotius is best thought of as the main Protestant to develop a concept of natural law as opposed to man who founded international law

¹⁴⁴ H. Grotius, The Rights of War and Peace, Indianapolis, Indianapolis, IN: The Liberty Fund, 2005 The Preliminary Discourse

¹⁴⁵ H. Grotius, De Jure Praedae: The Classics of International Law, Oxford, The Clarendon Press 1950 De Jure Praedae remained a manuscript until 1864 when it was discovered in a sale of Grotius' manuscripts. Mare Liberum comes from chapter 12.

Rights of War and Peace)¹⁴⁶. Like the Dutch action in the East Indies, the arguments Grotius employed proved to be a significant departure from the status quo. All three works, however, contain core components of Grotius' conception of natural law and the role of property and territory in extending natural law from an original, pre civil condition, to full civil society. His importance was identified by 17th and 18th century philosophers and 20th century international relations theorists.¹⁴⁷

The following section of this paper identifies Grotius' understanding of property as a historical creation, its basis in natural law and social life and its relationship to the boundaries of states. The third section considers the ways in which property may be alienated. The fourth section draws out the implications of Grotius' argument for international affairs and the world order. In considering Grotius' conceptions of property, sovereignty and territory, their relationship with each other will become clear.

Creating property

Grotius makes it clear that he views property as a human creation and not a strict requirement of the Law of Nature. God granted all humans a common right to use objects on the earth's surface to satisfy their basic needs. As the humans increased their knowledge of the world, created technologies, and developed new creations to satisfy dormant desires, a scheme of private property was developed to facilitate the natural sociability of men and women. In making this argument, Grotius establishes an original state of affairs where all individuals possess a common

¹⁴⁶ H. Grotius, The Rights of War and Peace
¹⁴⁷ See J.B. Schneewind, The Invention of Autonomy, Cambridge University Press, 1988 p. 67. For more detail on seventeenth and eighteenth praise of Grotius see S. Buckle, Natural Law and Theory of Property: Grotius to Hume, Oxford University Press, 1993 pp. 1-4 and for respect among international relations scholars H. Bull, 'The Importance of Grotius in the Study of International Relations ', Hugo Grotius and International Relations, Oxford, The Clarendon Press, 1992

right to use objects in the world to satisfy their needs before identifying several human capabilities that caused this original situation to end. The most significant fact about humans is their sociability, which, when combined with the departure from the original state of common use rights, led to the creation of private property.

In the mist of time past, Grotius argues, God gave humans a general dominion over things in the world. This occurred twice, first with Adam at the creation and again with Noah after the flood. In both cases, individuals were granted a common right to use whatever objects they would like to satisfy their wants and desires. To explain the details of this state of affairs, Grotius draws on Cicero, who uses an example of allocating seats in a public theater. Grotius offers a quotation from Cicero who writes ‘Tho’ the Theater is common for any Body that comes, yet the Place that everyone sits in is properly his own.’¹⁴⁸ The right to a theater seat is common to all citizens, yet I have exclusive rights to the seat only when I sit in it. This is simply a right to use the seat.¹⁴⁹ The seat itself is not an object of private property, but is common to all. There may not be enough seats at the theater for everybody to have a seat to watch a show at the same time, but there are enough seats such that no one is compelled to seize a seat and make it their private property.¹⁵⁰

This example helps to draw out a distinction between possession and property. When I pick up a newspaper from the train seat next to me, the paper is under my possession. I can be harmed if someone attempts to take the paper from me while I am reading or perhaps even if a jealous and bored patron next to me becomes bothersome while attempting to read over my

¹⁴⁸ H. Grotius, *The Rights of War and Peace*, II, II, 2

¹⁴⁹ Steven Buckle, among others, provides a more detailed explanation and defense of this common right as a use right. See his *Natural Law and Theory of Property*

¹⁵⁰ Interestingly, some American sports teams do just this. Season ticket holders are now often required to purchase a seat license which gives the license holder the right to purchase individual tickets to watch games from that particular seat.

shoulder. So long as I have the newspaper in my hands it is in my possession. However a claim to property seems to entail a broader set of rights, notably, rights to the object even if it is not in my possession. The newspaper I pickup on the train is not my property because I retain no rights to its exclusive use when I set it down on my seat when I leave the train and somebody else picks it up. At this point in the argument, Grotius is simply claiming that all individuals have a common right to possess and use their choice of the earth's resources. One can take things into their possession to satisfy their needs. Here, one does not have property rights, because individuals do not retain an exclusive right to use an object that is not in their possession. This provides an image of the earth filled with abundant resources and a small human population. No individual is motivated to seize something for their own because there are more than enough resources to meet the needs of everybody.¹⁵¹

This state of affairs, however, would not last. Humans possess a desire to expand their knowledge and an ambition to move throughout the globe. Grotius attributes the end of the original state of common use rights to these two capacities. Interestingly, not all peoples, some Native Americans in particular, exercised these capacities.¹⁵² We know property is a human creation and not a product of the natural world because there are people who continue to live in the original shared condition Grotius describes. It is a human creation designed so that we may live in accord with our drive for a peaceful and sociable world.

The first of these capacities, knowledge, led to technologies giving humans the ability to transform pieces of the natural world into objects of desire. This resulted in agriculture and animal husbandry, which in turn produced material differences initiating jealousy between parties. As a mostly negative influence, Grotius claims that “to this savage Sort of Life

¹⁵¹ One interpretation of Grotius' concept of a use right in the original state is seen in J. Slater, 'Hugo Grotius: Property and consent', *Political Theory* (29) 2001, pp. 537-555

¹⁵² H. Grotius, *The Rights of War and Peace*, II, II, 2

succeeded after the Deluge, an Attachment to Pleasures to which the Use of Wine newly invented did contribute; and from thence proceeded also abominable Lusts.”¹⁵³ This suggests that individuals were no longer happy merely using common objects to satisfy their basic needs for social life.

The second, ambition, Grotius agrees, is a much more positive characteristic, and it is ambition that led humans to spread throughout the globe to build great things. Importantly, Grotius attributes to ambition an initial division of the world into the territories of distinct nations and the final destruction of the original state of common use. This did not, however, create an immediate transition to private property. Land became the possession of peoples, not the private property of individuals. Within communities of peoples, common use rights remained. ‘There remained among Neighbors a Community’ Grotius argues when referring to peoples spreading across the globe,

not of Cattle but of Pastures; because the Extent of Grounds was as yet so great in Proportion to the small Number of Men, that it was sufficient to answer the Occasions of many without their incommoding one another.¹⁵⁴

This helps to explain how some Native Americans could live in a way similar to the original state of affairs while other communities, like Europeans for example, came to do otherwise. It is, however, the seeds placed by knowledge and ambition that eventually led to the empirical situation that compelled humans to create private property.

As long as there were relatively few humans living at any one time, the wants and needs

¹⁵³ H. Grotius, The Rights of War and Peace, II, II, II, 2

¹⁵⁴ H. Grotius, The Rights of War and Peace, II, II, II, 3

of everybody could be easily accommodated under a scheme of private use. It was growth in the human population that initiated radical changes in the ways in which humans lived their lives. The need to create private property is a result of two factors mentioned above. The first is the human compulsion to live in a peaceful society and it is the ‘maintenance of social order’ that is ‘the source of law properly called.’¹⁵⁵ The second is the fact that humans began to live with technology and ambition in an increasingly crowded world. These combined in a way that compelled humans to seize objects as their own. For Grotius, this is where property begins. He writes,

...the Number of Men, as well as of Cattle, being very much increased, it was thought proper to at last assign a Portion of Lands to each Family; whereas before they were only divided by Nations. And as the Wells of Water, a Thing very necessary in a dry Country, were insufficient to supply a Multitude, every one appropriated to himself those he could seize on.¹⁵⁶

It is scarcity, in light of our sociability, technology and ambition that compels humans to seize objects in the world and remove them from the common stock. The ‘well’ Grotius mentions in the quotation above becomes private property because it cannot serve the needs of all members of the community. Here, I take the well and make it mine; you have to find your own.

It is important to note the way in which the world was divided: first among nations and then among families and individuals. This helps to establish an empirical claim that a people may have to a land possession and will be dealt with in greater detail in a section below.

¹⁵⁵ H. Grotius, The Rights of War and Peace, Prolegomena to the First Edition, p. 1747

¹⁵⁶ H. Grotius, The Rights of War and Peace, II, II, II, 3

It is a set of empirical facts that led humans to create private property: the creation of non-natural objects and their subsequent role in uncovering or creating previously unknown desires. Furthermore, as communities spread throughout the globe it became physically impossible to consider a common use right to objects close to one community and far from another. It would mean nothing for an individual from an ancient South American civilization to claim a use right over resources available only in Northern Europe. For the ancient South American objects in Europe were literally inaccessible. A use right in this context would lose its meaning. As mentioned above, nations became the possessors of land and territory before individuals. The first bits of property, however, were not in land, but rather things that were movable. In a key passage, Grotius takes this idea and combines it with the human drive towards community and changes in empirical facts resulting from the application of technology. This passage provides us with an insight into the reasons for the creation of private property:

From hence we learn, upon what Account Men departed from the ancient Community, first of movable then of immoveable Things: Namely, because Men, being no longer contented with what the earth produced itself for their Nourishment...wanted to live in a more commodious and most agreeable Manner, to which End Labor and Industry was necessary, which some employed for one Thing, and for others another. And there was no possibility then of using Things in common; first by Reason of Distance of Places where each was settled; and afterwards because of Defect of Equity and Love, whereby a just Equality would not have been observed, either in Labor, or in the consumption of their Fruits and Revenues.¹⁵⁷

¹⁵⁷ H. Grotius, The Rights of War and Peace. II, II, II, 4

Humans are compelled to create the concept of property because we are beings that 1) want a peaceful social life yet 2) can use knowledge and technology to create new desires and things that satisfy them. Originally, nature provided an over abundance of items necessary to satisfy all of an individual's natural desires. Yet, nature also provided humans with a capacity for knowledge and the ambition to use it. This leads to the creation of new objects and the realization of desires that went unsatisfied in the original condition. Individuals can become creators of objects of desire and when they create things in conditions of scarcity they want to choose who can use them. Here there ceases to be a common right to use all the objects available in the world. However, there do remain some things that are common to all. Among these are objects not capable of being possessed, like the sea and the air, for example.¹⁵⁸ Additionally there are objects that are not currently possessed and some that are possessed but are not property. These objects remain the subject of the common use right and can under certain conditions become property. Each of these issues will be considered in more detail below.

Gaining property

Property is a human creation and property claims are based on either the division of a common asset or seizure. Grotius argues that original claims to property were not simply internal 'acts of the mind.' Rather, original property claims were the result of public acts expressed by either a division of assets or the seizure of particular objects. For Grotius the need to create property is so clear that any human ought to recognize it. He writes that 'as soon as living in common was no longer approved of, all Men were supposed, and ought to be supposed to have consented, that each should appropriate to himself, by Right of first Possession, what could not have been

¹⁵⁸ H. Grotius, The Free Sea, Ch 5

divided.’¹⁵⁹ Several important points follow from this. First, an act of appropriation must be external. There must be some sign to other individuals that one wants an object of desire as a piece of property. Desires alone simply cannot serve as the source of a property claim. Second, property is gained in one of two ways: either a common resource is divided among a people (e.g. people are given permanent theater seats by lot) or the object is seized by an individual (an individual who buys a theater owns all of the seats).

Objects created by an individual, however, are different than objects provided by nature. Yet, since something can not come from nothing, objects created by human hands become the property of whomever owned the original assets from which this new object was produced. Mixed ownership in the original resources results in a mixed property claim and if the object was created from bits of nature that were not subject to a prior property claim, the new object belongs to its creator.¹⁶⁰

One of the important points developed in this section is the way in which Grotius understands property rights to be a construction of the human will. Property rights were created to further the ends of nature, specifically the human drive for sociability. It would therefore be wrong to violate or ignore property claims. Grotius writes that “property for Instance, as now in use, was introduced by Man’s Will, and being once admitted, this Law of Nature informs us, that it is a wicked Thing to take away from any Man, against his Will, that which is properly his own.”¹⁶¹ Property rights themselves are written into domestic municipal law. They are not identifiable in a strict reading of natural law. He continues

...there are also some Things allowed by the Law of Nature, not absolutely, but

¹⁵⁹ H. Grotius, The Rights of War and Peace, II, II, II, 5

¹⁶⁰ H. Grotius, The Rights of War and Peace, II, III, III

¹⁶¹ H. Grotius, The Rights of War and Peace, I, I, X, 4

according to a certain State of Affairs. Thus, before Property was introduced, every Man had naturally a full Power to use whatever came his Way. And before Civil Laws were made, ever one was at Liberty to right himself by Force.¹⁶²

This is to say that some things are strictly part of the law of nature, other things, like property, are consistent with it.

The rules of possession and property

Although property is a historical creation of human reason, for Grotius the concept of property is not without limits. Some things are simply not objects that can be made one's property. Once something becomes property, its owner does not have an absolute right to do with it as they please. They are bound by limits established by natural law that include a prohibition against harmful use.

Remember, possession is chronologically prior to property claims. An object can be possessed if it can be divided or seized. Movable objects are seized when they are physically taken into one's custody, while immovable objects are seized by demarcating boundaries between what is one's property and what is not. In the case of land, this occurs through cultivation. Yet there remain important parts of the world which simply cannot be seized or demarcated. For Grotius, the most important of these is the sea.¹⁶³ He makes this argument as part of an effort to explain why Portuguese ships cannot restrict Dutch traders from entering the oceans of the East Indies. While one might be able to regulate travel over one's property, the sea simply cannot be owned. The important point, however, is that there are limits to what one can

¹⁶² H. Grotius, The Rights of War and Peace, I, I, X, 7

¹⁶³ H. Grotius, The Rights of War and Peace, II, II, III, 1-3 and H. Grotius, The Free Sea, Ch 1

claim as property. Things in the world that cannot be divided or seized cannot be claimed as property.

A second set of restrictions involves the ways in which one can restrict others from using his or her property. Grotius makes it quite clear that one can use the property of another in the case of absolute need. There are several caveats to this; one can take the property of another only if the original owner is not also in a case of absolute need and, if they are able to do so, one must replace what is taken. For example, this might include any lost profit the original owner would have made. The reason for this is clear when the original reasons for creating property are considered. The purpose of property is to further the sociability of humans in light of empirical facts. Grotius sees the right to use in a case of need as consistent with this end. The case of need, he suggests, seems strange at first glance. However, ‘we are to consider the Intention of those who first introduced the Property of Goods. There is all the Reason in the World to suppose that they designed to deviate as little as possible from the Rules of natural Equality...’¹⁶⁴ Interestingly, Grotius reinforces the point of property, to allow people to conform to the law of nature in light of technology, knowledge, scarcity and a crowded globe. Here, equality seems to refer to an equal ability to live a human life.

Furthermore, a property claim cannot be used to restrict trade. Free trade, Grotius argues, furthers the human end of sociability. To that extent, the use of land and waterways must remain open for travelers to engage in commerce with either the owner of the property they are traversing or those in an adjacent territory.¹⁶⁵ The use of land and rivers must be open to all purposes that enhance this sociability. Grotius identifies two additional particular needs: the right to traverse one’s property to fight a just war and the right to travel to migrate or

¹⁶⁴ H. Grotius, The Rights of War and Peace, II, II, VI, 1

¹⁶⁵ On trade explicitly, H. Grotius, The Rights of War and Peace, see II, II, XIII, 5

emigrate.¹⁶⁶

There are several other restrictions on the rights of possession and property that are exceedingly important to Grotius' conception of territory. First, it will be helpful to recall that Grotius claims the common right to use all of nature was broken down into nations first and then into families. This created claims of possession, not property. Property, as discussed above, entails a larger set of rights than possession. For Grotius, possession itself can lead to not only later claims of property, but also to claims of jurisdiction.¹⁶⁷ Here, property and jurisdiction are seen as two distinct concepts. Jurisdiction itself can take two forms. He writes that "jurisdiction is commonly exercised on two Subjects, the primary, viz. Persons, and that alone is sometimes sufficient, as in an Army of Men, Women and Children, that are going on quest of some new Plantations; the other secondary, viz. the Place, which is called Territory."¹⁶⁸ The important aspect for this investigation is the second form, jurisdiction over a place, or territory. Territory is a technical term in Grotius' argument; it is the right of a people to possession of a particular piece of land. This is not a group property right. Property rights and jurisdiction are different sorts of things. Jurisdiction is a claim to civil authority over an area. Territory is the exercise of power over a particular area and is no more than jurisdiction over land, rather than jurisdiction over people. It is a claim to possession not to property.¹⁶⁹

The distinction between territory and property is most easily seen in the ways in which they can be alienated. Although jurisdiction and property are normally acquired in similar ways through the division and seizure process that established possession, "they are in themselves really distinct; and therefore Property may be transferred, not only to those of the same State, but

¹⁶⁶ H. Grotius, The Rights of War and Peace, II, II, XI-XIII,

¹⁶⁷ H. Grotius, The Rights of War and Peace II, III, IV, 1

¹⁶⁸ H. Grotius, The Rights of War and Peace II, III, IV, 1

¹⁶⁹ Grotius does offer several possible derivations for 'territory', which help reinforce the disputed etymology mentioned in Chapter 1. For Grotius' comments see H. Grotius, The Rights of War and Peace III, VI, IV, 2

even to Foreigners too, the Jurisdiction remaining as it was before...”¹⁷⁰ Jurisdiction gives its claimant the ability to enact civil law within their territory. However, as with property, jurisdiction is limited by the law of nature. These limits have important implications for what a Grotian world might look like.

The implications for territory

For Grotius, a jurisdictional claim over an area is different from a property claim to the same land. It is possible that a jurisdiction claim entails a property claim, but ownership is not a necessary condition for jurisdiction to obtain. Often large countries have jurisdiction over vast lands to which no one has a Grotian property claim. Clearly his thinking was focused on areas of North America under the jurisdiction of Native Americans where large woodland areas were not seized as property.¹⁷¹ This immediately gives rise to questions of colonization. In such conditions, Grotius argues, foreigners have a set of rights including the right to pass through a jurisdiction or take up temporary settlement if it is of no harm to the holders of jurisdiction.¹⁷² Furthermore, a stranger should not be refused the right to settle in a jurisdiction, provided they ‘submit to the Laws of the State, and refrain from every Thing that might give Occasion to Sedition.’¹⁷³ If a European wants to settle in the New World, this is a good strategy to take.

This right to settlement is rather expansive. Grotius contends that a foreigner must be allowed to do those things that are necessary to sustain a human life. This includes not only the right to procure food by hunting and fishing on this new land, but also the right to take a wife (should there be sufficient numbers of women in the native community so that the stranger is not

¹⁷⁰ H. Grotius, *The Rights of War and Peace*, I, III, IV, 2

¹⁷¹ For his comments on Native Americans see H. Grotius, *On the origin of natives races of America*, Edinburgh, 1994

¹⁷² H. Grotius, *The Rights of War and Peace* II, II, XV, 1

¹⁷³ H. Grotius, *The Rights of War and Peace* II, II, XVI

inconveniencing the native male population).¹⁷⁴ Most importantly for this study, however, foreigners cannot be restricted from the acquisition of property. Grotius makes this clear when he states that

...if there be any waste or barren Land within our Dominions that also is to be given to Strangers, at their Request, or may be lawfully possessed by them, because whatever remains uncultivated, is not to be esteemed a Property, only so far as concerns Jurisdiction, which always continues the Right of the ancient People.¹⁷⁵

These rights granted to foreigners are natural rights and any violation of them is illegitimate because it is a violation of the law of nature.¹⁷⁶

This has important implications for the limits of a state's legitimate authority. A state itself is simply a common subject of sovereignty.¹⁷⁷ One can identify a state, as distinct from a sub-state administrative entity, by its sovereign power. These powers themselves consist in the authority effectively to coordinate civil power, which entails lawmaking, law enforcement and adjudication.¹⁷⁸ Grotius is not concerned with the actual mechanism through which sovereign power is exercised. He identifies a number of potential forms ranging from absolute monarchy to democratic governance.¹⁷⁹ The important point for him is that the holder of these powers is identified by the fact that sovereign power is supreme, its acts are 'not subject to another's

¹⁷⁴ H. Grotius, The Rights of War and Peace II, II, XVIII, strangely, Grotius also thinks it is important to hunt pearls as well

¹⁷⁵ H. Grotius, The Rights of War and Peace II, II, XVII

¹⁷⁶ H. Grotius, The Rights of War and Peace II, II, XXIII

¹⁷⁷ H. Grotius, The Rights of War and Peace I, III, VII

¹⁷⁸ H. Grotius, The Rights of War and Peace I, III, VI

¹⁷⁹ H. Grotius, The Rights of War and Peace I, III, XII through I, III, XXIV

Power, so that they cannot be made void by any other human Will.’¹⁸⁰ A sovereign power thus has a proper form (e.g. the 3 branches of government) and a proper content (a will that is subject to no other).

Sovereignty may take many different forms because there are a variety of ways in which the sovereign might gain power.¹⁸¹ Some kingdoms are ancient and have their sources in the original division of land as peoples spread throughout the globe. Other sovereigns gained power through conflict, while still others were invited by a people to rule. The content of the agreement between the people and the sovereign determines the limits a sovereign has over its people. Some of these agreements establish the sovereign as a property owner over their subjects’ land claims. Others simply give the sovereign possession over the land, establishing a jurisdictional claim only. There may be many reasons why a people would choose to alienate their own sovereignty. Grotius contends that some may simply be natural slaves,¹⁸² ‘while others might be upon the Brink of Ruin, and they can find no other Means to save themselves; or being great Want, they cannot otherwise be supported.’¹⁸³ It is this agreement, however, that determines the extent to which a people might retain possession over their land. Grotius rejects the view that the ultimate sources of political authority rest with the governed.¹⁸⁴ This means that once a sovereign has gained a possession, she has a right to use and transfer the possession as any one would use or transfer any other possession. Thus, if an absolute sovereign dies it will be her will

¹⁸⁰ H. Grotius, The Rights of War and Peace I, III, VII

¹⁸¹ H. Grotius, The Rights of War and Peace I, III, XI

¹⁸² Much of Book One focuses on the nature of sovereignty. Here (H. Grotius, The Rights of War and Peace I, III, VIII) Grotius argues “as Aristotle said, some Men are naturally Slaves, that is, turned for Slavery. And some Nations are also of such a Temper, that they know better how to obey than to command.” Tuck and others have been quick to identify several troubling conclusions from the argument that a people can alienate their sovereignty to another. Grotius makes it clear that some peoples are simply not well suited to rule themselves. The argument he uses is that some peoples are, like individuals, natural slaves. See R. Tuck, Natural Rights Theories, Cambridge University Press, 1979 and R. Tuck, The Rights of War and Peace

¹⁸³ H. Grotius, The Rights of War and Peace I, III, VIII

¹⁸⁴ H. Grotius, The Rights of War and Peace I, III, VIII

that determines who gains possession of her subjects.¹⁸⁵ If there is no directive or no person (or possible collection of people in the case of a mixed government) to take the possession, then the possession is up for grabs as any other possession that has been ‘quitted.’¹⁸⁶

Sovereign power is limited by natural law. Like property claims, sovereign power cannot be exercised to do certain things and, like the institution of property, the purpose of civil law and sovereign power is to assist humans in achieving sociable ends. Some violations of certain implications of natural law are so abhorrent that any party has the right to inflict punishment on the perpetrator. Grotius argues that respect for elders and prohibition against cannibalism and polygamy are so fundamental to the possibility of peaceful social existence that any sovereign power has the right to inflict punishment on a transgressor. Here, it does not matter whether the power inflicting the punishment was harmed directly in any way.¹⁸⁷ This is important to note, because it often served as motivating reasons for the establishment of European jurisdictional authority over parts of North America.

The implications of Grotius’ property argument are not always clear. There are a number of important aspects worth further elaboration. First, jurisdiction is not merely a power concept. Rather it is the exercise of a particular type of civil power based on a claim of possession. This helps to draw out some distinctions between jurisdiction, possession and property. Second, Grotius’ understanding of the limits of jurisdiction allows foreigners to acquire vast (perhaps unlimited) amounts of property outside of their native land. This helps to uncover the third implication: Grotian states bear little resemblance to a contemporary, Westphalian conception of the state. Finally, the Grotian concept of territory is itself about possession, not property.

¹⁸⁵ H. Grotius, The Rights of War and Peace II, V through II, VIII

¹⁸⁶ H. Grotius, The Rights of War and Peace II, IV and I, IX

¹⁸⁷ H. Grotius, The Rights of War and Peace II, XX, XL

Jurisdiction as a possession (not property)

Grotius' conception of jurisdiction is derived from possession. Recall his history of the creation of private property. The earth was originally held in common where each individual had a right to use all of the objects available on the earth's surface. As empirical facts changed and humans spread throughout the globe, the earth's resources were divided among peoples. Peoples gained possession over certain areas of the earth's surface. It is only at this point, after the globe is divided among peoples, that division among families occur.

Grotius provides another lengthy history to explain how one may gain authority over other people.¹⁸⁸ Fathers, he argues, have natural authority over their wives and children. Civil authority, and therefore sovereignty, was created when fathers came together to establish civil laws to regulate what became private property claims. Authority is limited by the group's prior claim to possession of part of the earth's surface. This is the essence of jurisdiction. It is civil authority bounded by the physical limits of a land possession. This power is not the same and neither derives from nor entails a property claim. For Grotius, property entails a set of rights different from those of possession and jurisdiction. Property rights are focused on the use of an object and prohibition against others doing so without prior permission. This becomes clear when one recalls that foreigners can make property claims in a jurisdiction where they were not originally a member.

This helps to establish distinctions between three separate concepts. Possession is a claim about what one had at hand and is silent on the use rights one has to an object when possession is lost.¹⁸⁹ Jurisdiction concerns sovereignty, the power to use civil authority within

¹⁸⁸ H. Grotius, *The Rights of War and Peace* II, V

¹⁸⁹ Does this mean that a people can lose possession to land if they leave the land? The answer seems to be yes, but is dependent on the original agreement of sovereignty. A people could give possession to a sovereign or retain it for

the bounds of a possession. Property, however, entails a much larger set of rights that gives the owner exclusive use of an object whether or not it is in possession.

Foreign ownership of domestic property

According to Grotius, property and jurisdiction are two distinct categories. He makes it clear that a jurisdictional authority cannot restrict an individual from making property claims to unused land. The end of humans is a peaceful sociable existence. This is the first law of nature. All other laws, both natural and voluntary, are designed to achieve this end. Grotius argues that foreigners must have rights to, among other things, unused land that may be claimed as property, because rights to such claims are not only consistent, but are also demanded by sociability.

Imagine a European arriving in North America in the early 17th century. This traveler might already be aware that the area where he landed is already inhabited by a group of Native Americans. A Grotian might recognize that this native population has a prior claim to the land they inhabit. The content of this claim, however, depends on the ways in which the natives use the natural resources. Suppose that the population does not cultivate land, but rather obtains their food through hunting, fishing and foraging. Grotius argues that simply living on the land makes it clear that the natives possess the territory and are able to exert sovereign power to make civil law. The natives might be said to have jurisdiction over the area. However, as mentioned above, this does not entail a property claim. The natives do have some property claims, but these are limited to what they acquire in their search for food. A fish, for example, that belongs to nobody in the sea becomes an object of property once it is caught. Importantly, though, because the natives have not farmed, built walls to enclose herds of animals or otherwise made an

themselves. Upon the sovereign's expiration, possession is transferred to a new sovereign according to the agreement through which sovereignty was originally acquired.

outward sign to seize pieces of land, they cannot be said to own property in the land. Crucially, natural law requires the native population to allow the European to make claims to the land. The foreigner must simply begin to farm the land or build a wall to mark off her acquisition. In fact, there is no limit to the amount of unclaimed land foreigners are allowed to take either as a single individual or as a group.

Recall that there are limits to what one can justly do with property. First, since the native population has jurisdiction over the territory as a whole, it may enact civil laws (voluntary human law) that the foreigner is compelled to accept. If the native population declares that no plaid shirts can be worn on Thursdays then the foreigner must refrain from plowing her fields in a plaid shirt on Thursdays, or face civil sanction. Second, natural law requires the foreigner to allow the native population to hunt, fish and forage on the foreigner's property. They would not be allowed to take crops the foreigner had cultivated nor any animals that are part of her herd, but the native population could take anything else that is not the subject of ownership.

This is an odd construction for at least two reasons. First, it suggests that a native population may have jurisdiction over a territory where all real estate is the property of foreigners. Certainly, Grotius makes it clear that sovereignty can be alienated or lost through the use of force. The point is, however, that given a situation where everybody plays by the same Grotian rules, you can have all of the land in one country owned by foreigners and have a native population as the jurisdictional authority over a possession where they own no property. Second, the argument suggests that there ought to be a symmetry in its application. If Europeans can make property claims on vacant land in North America as foreigners, Native Americans can make the same claims in vacant European lands.

States in the Grotian world

It should now be obvious that the political communities that Grotius' arguments demand are not Westphalian states,¹⁹⁰ but rather an overlapping construction of property claims, jurisdictional claims and state boundaries. Some argue that this is because the word 'state' did not develop its contemporary meaning until well after Grotius completed his work.¹⁹¹ To focus on such explanations misses the point. It is not merely that Grotius was unable to access the concept of such a Westphalian state, but rather that his arguments simply demand a type of political obligation that is quite a bit different from the contemporary conception of 'the state.' The international system he presents us with is one where there may be political boundaries, but where political communities have little control over who crosses their borders and for what purposes. Perhaps not surprisingly, this seems to resemble 17th and 18th century North America or late 19th century Africa where large amounts of land are owned by foreign parties, where some of these parties are individuals¹⁹², some corporations¹⁹³, and some sovereigns.¹⁹⁴ The state itself can be thought of as a corporate body that, once formed, develops something like a personality of its own. Such interpretations lend themselves to contemporary conceptions of inviolable sovereignty.¹⁹⁵ Grotius on the other hand places significant limits on the justified use of state power. As mentioned above, political communities *must* allow foreigners to use the territory of the community when such use helps to enhance the peaceful sociability.

When the above is taken into account, it becomes clear that Grotius' concept of territory is territory as jurisdiction by way of possession. Jurisdiction, in his argument, is a claim about

¹⁹⁰ For a discussion of the Westphalian state system and how it differs from other international systems in human history see A. Watson, The Evolution of International Society: A Comparative Historical Analysis, Routledge. 1992

¹⁹¹ See Q. Skinner, 'The state,' Political Innovation and Conceptual Change, Cambridge University Press, 1989

¹⁹² E.g. Pennsylvania

¹⁹³ E.g. Massachusetts and Virginia

¹⁹⁴ E.g. Belgian Congo

¹⁹⁵ See for example J. Rabkin, The Case for Sovereignty, Washington D.C., The AEI Press, 2004

possession and its source is chronologically prior to property. Peoples come to have possession of land. This establishes jurisdictional authority by peoples over the land where they have the just authority to make decisions about civil laws that have force within the boundaries of the possession.

It is clear that this conception of territory does not entail a property claim. Individuals, foreigners or members of the polity can make property claims within the territory. This is quite a bit different from several contemporary conceptions of territory as jurisdiction that subordinate property rights within a jurisdictional framework. Grotius' argument is different. For Grotius, property and jurisdiction are different categories of rights. Although jurisdiction was chronologically prior to property, the two concepts stand beside each other in other respects. One can make a claim to property of vacant land irrespective of the jurisdictional authority over the area. Similarly, jurisdictional claims cannot be trumped because of prior property claims. For Grotius, they are simply different sorts of things.

Grotius' conception of territory is historical and jurisdictional. Humans have a natural drive towards peaceful sociability. This is the root of all natural law and all voluntary law, both human and divine, must be consistent with this sociability. Originally all individuals had a right to use all parts of the earth. As a result of ambition and technological development humans began to spread throughout the globe and the right to use parts of the earth was divided into territorial possession. When conditions of scarcity developed, individuals began to make property claims within a particular territory. All of this was done to further the human ends of peaceful sociability.

Territory is developed out of group possession claims. Rightful possession establishes a jurisdictional claim over an area. Territory is simply the geographical bounds of jurisdiction

demarcated by a claim to possession over a particular piece of land.

The implications of Grotius' conception of territory

This is not to say that Grotius' conception of territory is without difficulties. At least three have become clear here. The first is a general difficulty with territory as possession. The next points to problems with original acquisition, while the final difficulty concerns the fragmented political communities that develop out of Grotius' political theory. Each of these presents substantial problems and will be considered in turn.

Property and possession are two distinct concepts. Grotius makes this clear in his discussion of territory. Territory, he argues, is about possession and jurisdiction. Property claims are something different and while property claims can generate territorial jurisdiction they are, for Grotius, neither necessary nor sufficient. Property claims are different from possession claims. Possession suggests that an object is under one's physical control. One's rights to that thing are grounded in the physical relationship between you and that thing. Alternatively, a property claim asserts that you have rights to a thing even when it is outside of your physical control. If territory is possession and not property, then it is impossible for a political community to be dispossessed of their territory. All that can be said is that they have lost their possession and therefore their territory. This opens the territory to others. When others take possession of the land, it becomes the territory of the others.

This leads to two separate problems. The first is that it seems like the job of a political theory of territory is to explain why dispossession is wrong. It could be that dispossession is wrong because the act that results in dispossession is wrong for other moral reasons. Yet, often, when a polity is dispossessed the desired remedy is repossession, suggesting that possession is

the central issue of concern. The second area of concern is the conservative nature of the possession argument. Much like Hegel's argument discussed in chapters 7, possession claims privilege whoever is in possession of the land now. The difficulty is that it brings up a possible moral hazard: do whatever you can to possess territory, because possession alone justifies one's claim to territory. Ultimately, this might be an unacceptable conclusion.

The second difficulty with Grotius' possession argument is that it is never clear how one comes to possess land in the first place. The argument is structured in a way that privileges original acquisition. The status of the original claim helps to establish the provenance of all subsequent claims. Yet, it is not clear what one must do in order to make one's possessions conclusive. Grotius argues that possession and property are created by agreement to facilitate obligations under the laws of nature, but the agreement is to the concepts, not the details. We all can accept the idea of property and still dispute particular property claims.

Now, Grotius might have the idea of political possession in mind. He might mean that territory is possessed by a political community when the jurisdiction of that community extends over the area. But this is a tautology and presumes what it attempts to explain. Yet, if possession is some act to take control of a territory, it is not clear what one comes to possess through that particular act. Is it all that one can see? All that the members of the polity can physically control? These concerns dovetail with difficulties concerning dispossession. Dispossession is difficult explain, because the original possession is problematic.

Finally, the politically fragmented nature of Grotius' world is as much of a problem as it is a benefit. Recall that Grotius' argument provides for a wide variety of actors in global politics. Individuals have standing by virtue of their natural rights. Political communities have standing through their jurisdiction over territory. These polities come in many forms republics,

monarchies, democracies and almost anything in between. Corporations have standing as well, as witnessed though the Dutch seizure of Portuguese ships that motivated much of Grotius' work. Such a conception can be seen as beneficial because it perhaps better reflects the reality of international politics than rival theories that privilege either states or individuals.

Yet, Grotius' complex conception of international politics might prove to be too much. There is virtually no limit to the size or number of entities in the international system. If all groups are potential members of the international community, then 'international community' loses its value as an explanatory category.

Many of these difficulties were identified by theorists who followed Grotius. Hobbes in particular provides a strong criticism of Grotius. While Grotius grounds natural law in sociability, Hobbes argues that its foundations rest in self-interest. This appears to introduce skepticism towards the possibility of moral theory, the very thing that Grotius' conception of natural law is constructed to ward against. Nonetheless, Hobbes' conclusions appear to answer some of the criticisms of Grotius' territory as possession thesis. Instead of grounding a normative conception of possession, Hobbes' argument is one of power. Possession is determined by the power to exclude others.

Hobbes' conception of territory

Hobbes offers no explicit theory of territory. There is however, by implication of his conception of sovereignty, an implicit skepticism toward any normative territorial claims. This interpretation is supported by the implications of his political theory. It is also supported by the fact that his ideas grew out of 'an English debate about war and colonization.'¹⁹⁶ In his three main works, Hobbes has little to say directly about international law and the relations between

¹⁹⁶ R. Tuck, The Rights of War and Peace p. 104

states.¹⁹⁷ The few comments he does make are indirect and mostly through analogy. This analogy is clear, but limited. States, in relation to each other, are like individuals in the state of nature. However, states and people are different sorts of entities and we can expect that they would not react to a particular stimulus in the same way. Individuals in the state of nature are motivated to create a Leviathan to protect their lives and their property. States, though in a similar anarchic relationship with each other, are motivated to retain their right of nature and reject any compact that may create a higher level of political authority. Before creating the Leviathan, individuals in the state of nature have a right to do anything in their power and utilize any material object to preserve their lives. This right of nature is alienated when one agrees to submit to a sovereign. Similarly, states have such a right of nature, but, because states are not motivated to submit to a sovereign, this right is never lost. States remain in a state of nature and retain a right to the whole of the earth's surface. This is the central argument in Hobbes' skepticism towards any state's normative claims to its territory.

Individuals in the state of nature

Hobbes argues that the state of nature is characterized by natural equality among persons. While there are certainly physical differences between individuals, these differences do not amount to much. In battle, the strong might be capable of physically dominating the weak.¹⁹⁸ Yet, even the strong must sleep and here they are vulnerable to the less powerful. He also argues that individuals are equal in their mental capabilities. Prudence, Hobbes writes, "is but experience, which in equal time equally bestows on all men in those things they equally apply themselves

¹⁹⁷ T. Hobbes, Leviathan, Indianapolis/Cambridge, Hackett Publishing Company, 1994, T. Hobbes, The Elements of the Law, Oxford University Press 1994, and T. Hobbes, On the citizen, Cambridge University Press, 1988

¹⁹⁸ T. Hobbes, Leviathan, p. 74, xiii, 1

unto.”¹⁹⁹ For Hobbes, the upshot of this natural equality is that individuals believe that they are able to obtain their chosen ends. Yet, under conditions of scarcity, the chosen ends of individuals will come into conflict. Where there is a single object that one or more individuals desires, the powerful or those who can organize others to assist with their protection will win the day. This creates a condition of fear where diffidence is king.

The greatest fear individuals have is of a violent death. Reason guides persons to do what they must to avoid this fate. The right of nature is the liberty individuals have to do whatever is necessary to avoid death at the hands of another. This grants a right to all material objects and includes the right to take the life of another. This is a right to everything, yet it is not the source of property claims. Because all individuals have this right of nature, each has an equal right to all the objects of choice on the earth’s surface. Yet, if everyone has a right to all of the earth, then nobody has the right to anything in particular. Property rights suggest that others cannot utilize an object of property without permission of the owner. But in the state of nature, the right of nature authorizes use without the consent of anyone. Although an individual might desire to make an object his own, other than the use of physical power to prohibit its use by another, there is nothing to oblige others to respect this claim.

To overcome these rather obvious inconveniences in the state of nature, individuals agree to lay down their right of nature and submit to the power of a sovereign, ensuring security that was unavailable in the state of nature. Therefore individuals have no property rights in the state of nature; there is no distinction between what is mine and what is yours.²⁰⁰ Post contract, the sovereign is absolute and has the power to determine not only the limits of one’s rights (through law) but also one’s positive property rights.

¹⁹⁹ T. Hobbes, *Leviathan*, p. 75, xiii 2

²⁰⁰ T. Hobbes, *Leviathan*, p. 78, xii, 13

The analogy between individuals and states

Hobbes makes a limited analogy between people and states: relations between individual states are like relations between individuals in the state of nature.²⁰¹ Like individuals, the state has a will and therefore can determine a course of action to obtain chosen ends. Individuals contract with each, they form a commonwealth. This commonwealth is an artificial person whose will acts like the will of an individual. These sovereign wills stand in a state of war with each other, as individuals with independent wills in the state of nature. With individuals, natural equality under conditions of scarcity obliges rational beings to give up their natural right and form the commonwealth. This is done to obtain security so that one is better able to obtain their chosen ends. States are like individuals in that they have a will and can determine their own ends. Furthermore the wills of states, like those of individuals are subject to the normative constraints of reason. For individuals, the laws of nature are the dictates of right reason, which provide a path toward security and self-preservation. For states, these normative constraints are the laws of nations.

The relationship between the law of nature and the law of nations is made clear in the following passage. Hobbes' writes:

Concerning the offices of one sovereign to another, which are comprehended in that law which is commonly called law of nations, I need not say anything in this place, because the law of nations and the law of nature is the same thing. And every sovereign hath the same right, in procuring the safety of his people, that any particular man can have, in procuring the safety of his own body. And that same law that directith men that have no

²⁰¹ T. Hobbes, *On the citizen*, p. 156

civil government, that they ought to do, and what to avoid in regard to one another, dictateth the same to commonwealths, that is, to the consciences of sovereign princes and sovereign assemblies, that there being no court of natural justice but in the conscience only where not man, but God reigneth whose laws...are *natural*... (emphasis original)²⁰²

There are several things to draw out of this quotation. First, the relations between sovereigns are governed by the law of nations. Second, the law of nations and the law of nature are the same, not different branches of one thing, but the same thing. Third, states have a right of nature that allows them to protect the security of the state and that is the same as the right of nature that allows individuals to protect their bodies. Finally it establishes that states are governed by the law that individuals were subject to prior to them establishing the commonwealth.

Taken together this forms a clear analogy between peoples and states. States, or more particularly sovereigns, are governed by the same rules that governed individuals in the state of nature. However, to say that states and individuals share similar characteristics is not to say that they are the same type of entity. Several conditions that apply to individuals fail to obtain for states. First, the conditions of equality seem rather different. Whereas individuals are close enough in size and strength to cause each other's destruction, this is not necessarily the case with states. The implication is that the way in which fear presents itself as a motivating force for individuals is absent in states.

States in relation to each other

A state's claim to territory is simply an indication of its power. This is territory as possession, because there is no global sovereign to enforce the claims of each state. In the state of nature

²⁰² T. Hobbes, *Leviathan* p. 233, xxx, 30 also see T. Hobbes, *On the citizen* p. 156

humans have no property claims. The right of nature grants each person the right to use any object to ensure their own security. Individuals can certainly make use of objects in the world and treat these objects *as if* it were their property. There is however, no obligation on others to refrain from acquiring and using these objects themselves. In fact, if one determines that an object controlled by another is necessary for one's own survival then they are obliged to seek to obtain it. States, in relation to each other, have this same right of nature. Like individuals, states can, and in some cases must, make use of objects in the world to ensure their security.

One might ask then what then is the source of the original claim. For individuals this question does not seem to pose much of a problem. While objects on the earth's surface are finite, and their scarcity is the ultimate cause of the war of all against all, individuals need not come into conflict over every object. States on the other hand are constituted in part by their territorial boundaries. Individuals can stand to lose their claims on objects and retain their life, but states cease to be states when their territory is seized. Thus, whereas for individuals the ultimate original source of a claim to an object is of little concern, it is of the utmost concern for states. A state's claim to its territory causes its existence and the loss of its territory, in totality, results in the death of the state.

Yet, for Hobbes, the source of a state's claim to territory is not clear. Because there are no pre-contract individual property rights, the boundaries of a polity cannot simply be the collected property claims of its people. Individuals have no property rights prior to the creation of the commonwealth. By analogy states have a natural right, a right to everything, to ensure their (or their citizens) preservation. Territory for states is like pre-contract property claims for people. Territory remains a claim that cannot, in principle, become conclusive. If the analogy between people and states is strong, then like people in the state of nature, a state cannot possess

rights of territory. In the state of nature, people certainly use objects in the world. These objects are one's own to the extent that others can be physically prohibited from making use of them without permission. This is possession, not property. States do not have property-like claims on their territory. Rather, state boundaries merely represent the physical extent of a state's power. That is the area in which one is able physically enforce possession. There are no moral claims to territory. Each individual state has a natural right to the entire earth's globe. They don't take it for prudential reasons. The law of nature, which here can be called the law of nations, counsels states, like it does individuals, to seek peace when possible and to avoid harm to oneself. Thus, though a state has a right to the earth's entire surface, it need not seek to possess it, especially if that endeavor is not necessary for state security.

There are at least two important implications to draw from this brief analysis. First, a state's territorial claims are really claims about power. Territorial boundaries are simply an indication of the geographic scope of a state's physical power. A state has its borders because it is able to physically stop others who have designs on their land. Yet, if this is so, then we might expect state boundaries to ebb and flow as state power increases or decreases relative to its neighbors. Since state boundaries are, for the most part, stable, one might question the coherence of Hobbes' theory and the claim by many international relations theorists that he is a paradigmatic realist thinker.

Second, when their security is in question states have a natural right, or in some cases even perhaps an obligation, to use the territory of another state. Hobbes suggests that this might be done to create a buffer zone between a state and its enemy or to make a state sufficiently large enough that it is able to maintain an independent existence. He writes:

[A]s small families did then, so now do cities and kingdoms (which are but greater families) for their own security enlarge their dominions upon all pretences of danger and fear of invasion or assistance then may be given to invaders [and] endeavor as much as they can to subdue or weaken their neighbors, by open force and secret arts for want of other caution, justly (and are remembered for it in after ages with honour).²⁰³

Additionally, one might conclude that a state may acquire the territory of another state in order to gain access to resources required for survival.²⁰⁴ In Hobbes' time, this might have been the need to have access to a seaport. In our own time this might relate more clearly to needs for fossil fuels or other energy sources.

The main point here, however, is to focus on the way in which power is used to create territorial boundaries. Hobbes' argument has an affinity with a number of streams of skepticism in contemporary political theory. Highlighting the different sources of skepticism towards territory will help to clarify possible avenues through which claims to territory might be justified. Some of these themes will be picked up in chapters to follow. The important concept to pull out of this discussion of Hobbes is territory as possession rooted in power. This is different from Grotius' natural law based conception of territory as possession. Nevertheless, there is some affinity between the two conceptions.

From the perspective of territory, the most interesting feature is that these theories make distinctions between possession and property. As argued above, property is something an agent has rights to whether or not it is in their possession. Possession as described can be taken from

²⁰³ T. Hobbes, *Leviathan*, p 106, XVII, 2

²⁰⁴ Here one might think of the Russian initiative to acquire first a northern port under Peter the Great and later the drive to secure a warm water port. While the motivation for these actions might have been predominantly rivalry, security concerns seem to have played a role.

someone, but not stolen. To say that an object is stolen means that it has been unjustly taken from an agent and that the agent has been wronged by its taking. The wrongness is not that the object is no longer in the possession of the agent, but rather that the object is being used by another without permission of the agent. Possession is different. Here, agents have rights to objects only when it is in their possession. When it is not, like a newspaper left on a train seat, the agent loses their claim.

Both Grotius and Hobbes make an argument about possession. For Grotius a state's claim to its territory relates to its possession as jurisdiction over a particular area of land. The form of this possession is distinguished from a property claim. While it is possible for a political community to be dispossessed from their land, Grotius describes a clear defense for those interested in colonizing new lands. Hobbes' argument for possession is different. Instead of an elaborate explanation as to how political communities come to claim their territory, Hobbes argues that sovereigns' claims become conclusive through the exercise of power to beat back competitors for the land.

One of the important aspects of territory is not only to explain how states come to acquire their territory, but to also explain what should be done in cases of dispossession. It is important to explain how dispossession is possible, under what conditions a state is unjustly dispossessed of its territory and what if any compensation is necessary. Both Grotius and Hobbes' arguments for territory as possession fail because they fail to explain how land can be disposed because the concept of territory as possession does not allow for the wrong of dispossession. Thus the colonizers can claim land through possession, but indigenous peoples are unable to claim any remedy as a result of dispossession.

To support the thesis, it will be important to consider the possibility of dispossession.

Locke's property argument was another tool with which colonizers justified claims to land in the new world. It is also an argument for a natural right to property that can be used to explain dispossession. Chapter 4 considers the argument for territory as property. This chapter discusses territory in the political theory of Locke and Pufendorf. Both view territory as a collection of the pre-political property claims of the state's original members. Such theories are compelling because they ground territory in natural rights. However, pre-political property claims cannot be sustained and the territory as property thesis is therefore difficult to sustain.

Chapter 4: Territory as property

This chapter addresses the territory as property claim, the second of three legacies of international law developed at the end of Chapter 2. The last chapter discussed territory as possession through the work of Grotius and Hobbes. This chapter is a critical engagement with the territory as a property claim as seen through the political philosophies of Locke and Pufendorf. The next chapter, Chapter 5, will consider territory as jurisdiction by looking at Kant's political philosophy.

The importance of turning towards Locke and Pufendorf arises out of several considerations. First, as established in Chapter 2, current disputes about territory share the curious feature of recalling arguments used by those colonizers who made claims to new territory. The previous chapter dealing with Grotius and Hobbes referenced their relationship to colonial takings of native lands. While these two thinkers influenced many a potential colonizer, the influence of Locke on those who took native lands is unparalleled. The first half of this chapter focuses on Locke. As James Tully argues, when British colonizers were called before British courts to defend their taking of native land, they turned to Locke to defend their claims.²⁰⁵ There are also reasons to believe that Locke's motivation for writing the Second Treatise of Government rested in his political relationship with English policymakers pursuing imperialism.²⁰⁶

Yet, there are also contemporary reasons for considering Locke. As argued in Chapter 2, present day indigenous populations press their claims to land by recalling Lockean type

²⁰⁵ J. Tully, 'Rediscovering America: the Two treatises and aboriginal rights', An Approach to Political Philosophy: Locke in Context, Cambridge University Press, 1993

²⁰⁶ B. Arneil, John Locke and America: The Defense of English Colonialism, Oxford University Press, 1996, chapter 8

arguments. Here, aboriginals posit an original claim to land that was unjustly taken by a foreign power. Though they are not conclusions that Locke himself might have endorsed, the Lockean-like sources of many indigenous claims is undeniable.

The second half of the chapter turns to Pufendorf, who offers a possible solution to several difficulties associated with Locke’s conception of territory as property. Like Locke, Pufendorf offers a territory as property thesis, but the implications are rather different from that of his English contemporary. Instead of lending support to colonization, Pufendorf’s arguments suggest that European conquest in the New World is not only misguided, but is in violation of natural law.²⁰⁷

There are therefore two reasons for this critical engagement with both Locke and Pufendorf. The two thinkers form a key component of the territory as property thesis, one of the three territory arguments that influenced international law. Second, the arguments of these thinkers are alive today in claims indigenous peoples make to territory.

This chapter begins by highlighting the territory as property thesis. From here, Locke’s argument for territorial acquisition will be considered in greater detail. The argument itself gives rise to charges of inconsistency with respect to territorial claims. This provides an opportunity to consider a set of arguments put forth by Locke’s contemporary, Samuel Pufendorf. Pufendorf helps to fill in several gaps that appear in Locke’s account. Yet, while the conclusions of both of these thinkers may be compelling, the structure of their arguments are found wanting. This supports the overall thesis by showing that the territory as property thesis ought to be rejected and that a skeptical position towards territory ought to remain in place.

²⁰⁷ B. Arneil, John Locke and America: The Defense of English Colonialism , pp. 54-60

Locke's territory as property argument

The territory as property argument is grounded in a set of claims traditionally associated with Locke's political philosophy, which has a strong connection to colonialism.²⁰⁸ The general idea is that a state's territory is formed by the collective property claims of its members.²⁰⁹ One way to formulate the argument is to say that inside the commonwealth individuals retain many of the same rights to their property that they enjoyed in the state of nature.²¹⁰ An alternative understanding conceives the contract to be transformative.²¹¹ Here the contract transforms individual property claims in the state of nature into a group property claim. This chapter argues that the former, more voluntary claim is not supported by either Locke or Pufendorf's political theories. Rather, each understands the social contract as something that alters the relationship between individuals and land.

The territory as property thesis requires several claims. First, the thesis asserts a conception of property rights that exists independent of and prior to any political claims. The nature of these property claims may be developed in a number of ways. Both Locke and Pufendorf base property claims in a labor theory of acquisition. The second claim asserts that once individuals agree to form a polity these property claims form the territorial boundaries of the political community. This is present in both Locke and Pufendorf. The value of looking at these two thinkers is that they provide paradigmatic arguments that inspire contemporary theorists and their arguments have strong relationship with colonialism and its legacy.

²⁰⁸ See J. Tully, 'Rediscovering America: the Two treatises and aboriginal rights', B. Arneil, John Locke and America: The Defense of English Colonialism and B. Arneil, 'John Locke, Natural Law and Colonialism, History of Political Thought, (13) 1992, pp. 587-603

²⁰⁹ Some authors take issue with this characterization, such as C. Nine, 'A Lockean Theory of Territory' Political Studies, (56) 2008, pp. 148-165. However, I argue that the territory as property thesis is the interpretation best supported by Locke's text

²¹⁰ Among others this is emphasized by H. Beran, 'A Liberal Theory of Secession' and H. Steiner, 'Territorial Justice'

²¹¹ Some who take this perspective include J. Tully, A Discourse on Property: John Locke and his Adversaries, Cambridge University Press, 1980

The territory as property argument can be used in a variety of ways. One might use this argument to assert the territorial claims of indigenous populations against existing states. Here, the indigenous peoples might argue that their original occupation of the land invalidates the current state's claim to some of its territory. This of course begs the question of the nature of the original claim. If such a claim is asserted on the basis of possession, then it falls afoul of the territory as possession arguments as described in the previous chapter. On the other hand, if they seek to establish original occupancy in more substantial use of the land, then the arguments presented by Locke and Pufendorf might be used to explain the source of this original claim.

The second claim is that the territory as property thesis might support colonization, in say North America, on what was deemed to be free land. This land, though inhabited, has not been claimed as property because, according to the argument, making a property claim entails some sort of special use that the native peoples have not exercised. Here, a labor or efficient use theory of property would be used to ground such claims.²¹² Again, both Locke and Pufendorf prove useful to those who want to make this type of claim.

Certainly at first glance these two arguments appear mutually exclusive. It would seem that an argument could not be used to buttress the claims of both indigenous peoples and colonizers. However, each argument has its source in a pre-political understanding of property claims and asserts an argument that attempts to establish property claims by linking ownership to labor and land use.

In the sections to follow, the territorial elements of Locke's argument will be considered

²¹² See, for example T. Meisles, *Territorial Rights*, Springer, 2005 also see T. Meisles, 'A Land without a People: an evaluation of nation's efficiency-based territorial claims,' *Political Studies* (50) 2002, pp. 959-973 and T. Meisles, 'Can corrective justice ground claims to territory?' *The Journal of Political Philosophy* (11) 2003, pp. 65-88 as well as C. Gans, 'Historical Rights: the evaluation of nationalist claims to sovereignty' *Political Theory* (29) 2001, pp. 58-79. One essay that questions the value of such historical arguments is J. Waldron, 'Superseding Historical Injustice,' *Ethics*, (103) 1992, pp. 4-28

as possible support for both of the positions described above. Locke has proven to be an important source of inspiration for those who wish to support both types of arguments as well as a foil for those who wish to dispute the respective original claims by native peoples and by colonizers.

Locke's property argument

Locke's political theory is an example of the territory as property thesis.²¹³ He argues that the right to individual property is a pre-social natural right that exists independent of any particular political scheme. A state's claim to territory rests on the collective property claims of its subjects. To clarify this interpretation, I will review Locke's argument concerning the purpose and foundation of politics and the creation of states.

The fundamental law of nature is the right of self-preservation, but Locke makes clear that this extends beyond the right to defend one's person. The use of things in the world, and the property claims that results from certain types of use are covered under Locke's conception of this right to preservation. Locke begins his discussion of property by making the claim that all of mankind was originally granted common possession over the earth.²¹⁴ Property claims arise from natural acts necessary for human preservation. In the process of human existence, individuals use objects in the world.²¹⁵ Locke argues that people have property in their own

²¹³ There is a great deal of controversy over Locke's purpose in writing the Second Treatise. Some argue that it was intended to bolster a particular political position while others contend that the Second Treatise was written to influence posterity. For an overview of Locke's life and the political events that may have shaped his views, see J.R. Milton, 'Locke's life and times' *The Cambridge Companion to Locke*, Cambridge University Press, 1994, P. Laslett, 'Two Treatises of Government and the Revolution of 1688,' *Two Treatises of Government*, Cambridge University Press, 2004 and J. Dunn, *The Political Thought of John Locke: a historical account of the argument of the 'Two treatises of government'* Cambridge University Press, 1969

²¹⁴ Compare Locke's conception of the earth in common with the positive community of Grotius and the negative community of Hobbes, Kant and Pufendorf.

²¹⁵ In fact it is nature that compels individuals to acquire property, see J. Locke, 'Second Treatise of Government', *Two Treatises of Government*, Cambridge University Press 2004 290

person. In using objects in the world, individuals mix their property, in the form of labor, with items from the common stock owned collectively by mankind. This action of mixing one's personal property with an object removes that object from the common stock. In Locke's words:

...every man has property in his own person. This nobody has any right to but himself.

The labor of his body and the work of his hands, we may say, are properly his.

Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labor with and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature places it in, it hath by his labor something annexed to it, that excludes the common right of other Men. For this Labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.²¹⁶

There are several points to be developed from this statement. The first item to note is the limits Locke places on the amount one can remove from the common stock and call their private possession. Since preservation is the fundamental law of nature, one must leave enough in the common stock to ensure that other persons may flourish. Individuals are allowed to take from nature only as much as they can enjoy.²¹⁷ Property claims do not allow one to hoard piles of goods or let perishable items spoil. Anything that is more than one can use reverts back to the

²¹⁶ J. Locke, 'Second Treatise of Government' p.287-88

²¹⁷ There are several interpretations of the Lockean proviso. Several of these are briefly critically discussed in J. Tully, 'Differences in the interpretation of Locke on property,' An approach to political philosophy: Locke in context, Cambridge University Press, 1993 For a different perspective see A.J. Simmons, A Lockean Theory of Rights, Princeton University Press, 1992, pp. 278-297 and R. Nozick, Anarchy, State and Utopia, USA, Basic Books, 1974

common stock and may be utilized by others.²¹⁸

Assuming that individuals have relatively similar needs with respect to the amount of goods they can use, the amount of wealth distributed among the human population would have been relatively similar. It is only with the invention of money, Locke argues, that wealth becomes radically unequal. Coins do not spoil and can be collected in large amounts with little problem. This upsets what might be thought of as a natural balance in the property an individual can justly acquire. Money is in some sense unnatural. It is not a product of the common stock available in nature. Rather, it is an artificial good whose value is created by the mutual consent of people.²¹⁹ Yet, nature retains a great deal of materials in the common stock and allows anyone who is willing to mix labor with the world an opportunity to create property of his own.²²⁰

Individuals are motivated to leave the state of nature to ease the burdens associated with protecting their property. Civil society allows individuals to get on with living their lives without the worry of acting as executive and legislative authority to enforce natural laws. Communities with distinct territories came into being when land became scarce in some areas and regulation was required to settle disputes between landowners. Such a community is created by agreement of individual property holders.²²¹

The second point developed from the large quotation above is the way in which property is acquired. Objects are removed from nature and become private possessions when individuals mix their labor (or other property) with particular objects.²²² To clarify this, Locke considers an

²¹⁸ J. Locke, 'Second Treatise of Government' 290

²¹⁹ J. Locke, 'Second Treatise of Government' 299-301,

²²⁰ To the contemporary eye, that sees little unclaimed land remaining in the world, this claim seems rather odd.

²²¹ J. Locke, 'Second Treatise of Government' 299

²²² For a discussion as to the difficulty of determining how much labor must be exercised to create a property claim, see R. Nozick, Anarchy, State and Utopia

acorn picked from under a tree. If I pick up an acorn and place it in my pocket, it is clear that I have done something to remove the acorn from its natural state underneath the tree. Any effort by another individual to take the acorn without my permission harms me. The acorn in my pocket is mine because I removed it from its natural state. An acorn in the grass, however, is part of the common stock and is the private possession of no one.²²³

Private ownership in land comes from improving the earth's surface through cultivation or building, for example. God commanded individuals to use the earth for their benefit.²²⁴ One is allowed to take as much as they can make use of because the world is large and, at least in Locke's time, there is more than enough land to satisfy the desires of everyone.²²⁵ Locke argues that mixing labor with land makes land itself more valuable. A field plowed and sown increases the amount of resources available for individuals to use. Locke contends that cultivated land produces nearly ten times as much food as uncultivated land.²²⁶ Property in general, and property in land in particular, is conceptually prior to and independent of any particular political community. Note, this is the first tenant of the territory as property thesis. The second, that territorial boundaries are formed by collective property claims, is what we turn to next.

From property to territory

Property in land appears to be the start of an argument for territory. It is worth noting that mixing labor with land is of fundamental importance for any land acquisition. For Locke, 17th

²²³ J. Locke, 'Second Treatise of Government' 288-89. Locke applies this logic of property claims to areas that are declared a commons by contract as well.

²²⁴ Several commentators note the importance of God in Locke's political theory, see for example J. Waldron, God, Locke and Equality, Cambridge University Press, 2002

²²⁵ J. Locke, 'Second Treatise of Government' 291

²²⁶ J. Locke, 'Second Treatise of Government' 295

century Europeans had property claims to land in a way that many Native Americans did not.²²⁷

While the English were quite successful at farming and finding fields for livestock, many Native Americans failed to mix labor with land and therefore failed to make clear property claims to the land on which they lived. After detailing the way in which labor may increase the value of land, Locke writes:

There cannot be a clearer demonstration of anything, than several Nations of the Americans are of this, who are rich in Land, and poor all the comforts of Life; whom Nature having furnished liberally as any other people, with the materials of Plenty, i.e. a fruitful Soil, apt to produce in abundance, what might serve for food, raiment and delight: yet for want of improving it by labour, have not one hundredth part of the Conveniences we enjoy: And a King of a large and fruitful Territory there feeds, lodges and is clad worse than a day Labourer in England.²²⁸

However, notice how the argument here shifts. It is not that Native Americans have failed to labor on the land, but rather they have done so poorly. We know this because Locke refers to the ‘territory’ of a Native American King. Earlier I argued that a polity’s claim to territory under the territory as property thesis presupposes a prior set of property claims. If a native King has a territory, then there must be some prior collection of property claims by the founders of the political community. The alternative is that Locke is loose with his words. However, even if that is the case, his argument here is a factual one concerning what the native peoples did or did not do with their land. The dispute is not conceptual.

²²⁷ Of course the truth of this claim us up for debate, see A. Kolers, Grounds of Global Justice, PhD Dissertation, University of Arizona, 2000

²²⁸ J. Locke, ‘Second Treatise of Government’ 296-97

Some argue that this introduces an efficiency condition to land claims: one can acquire land that belongs to another so long as the new claimant is more efficient in their use of the land.²²⁹ If this is true, then the argument begins to look utilitarian, which fits uneasily with Locke's doctrine of natural rights. If the efficiency claim is weak, as Locke seems to think it is, then efficiency is simply an indication of proper use.

Locke makes this initial argument linking property and territory when speaking about a civil society's initial territorial claim

...at the beginning, Cain might take as much Ground as he could till, and make it his own land, and yet leave enough to Able's sheep to feed on; a few Acres would serve for both their Possessions. But as families increased, and Industry enlarge their Stocks, their Possessions enlarged with the need of them but yet it was commonly without any fixed property in the ground; they made use of it till they incorporated, settled themselves together and built cities and then by consent they can in time to set out the boundaries of their distinct Territories, and agree on the limits between them and their Neighbors, and by Laws within themselves settled the property of those of the same society.²³⁰

Note what Locke is doing here. First, he is describing the creation of the boundaries of civil society, not the creation of political communities. We know this because Locke chose to place these comments in his chapter on property and not in the chapter on the creation of the commonwealth. Second, private ownership in land becomes significant only under conditions of scarcity. When resources are abundant, it is easy for one to take from the common stock for their

²²⁹ See T. Meisels, Territorial Rights chapter 5 who takes Locke's argument and extends it. For a critique see M. Moore, 'The Territorial Dimension of Self-Determination'

²³⁰ J. Locke, 'Second Treatise of Government' p. 295

own use. Finally, that creation of territorial boundaries is a result of consent. The voluntary nature of territory is important at this stage in the argument. However, this will change as Locke moves from civil to political society.

Locke's conception of the state of nature is one of perfect freedom and equality where individuals are free from the constraints of positive law.²³¹ They are not, however, free to do anything that they choose. In the state of nature one has a broad set of liberties but not a license to do whatever he chooses.²³² Liberties are constrained and governed by natural law whose tenants can be discovered by reason. The lessons here are simple: since all individuals are equal in the state of nature, 'no one ought to harm another in his Life, Health, Liberty or Possession'.²³³ Humans are the workmanship and property of God. Just as it is illegitimate to destroy another person's property without her permission, it is wrong to destroy another person, who is God's property.

In this pre-social state, each person has a right to enforce the laws of nature. This can be exercised in one of two ways. First, an individual has the right to punish an offender to a degree that will keep others from committing a similar crime in the future. A person violating natural laws by destroying God's property has removed himself from the community of mankind and the protection of natural law. Homicide is an obvious example. As Locke makes clear, if an individual attempts to kill another, the assailant can be treated as a beast and be killed himself.²³⁴

²³¹ Note that some commentators, such as Peter Laslett (P. Laslett, 'Two Treatises of Government and the Revolution of 1688,' page 269 note 11) believe that Locke means to say that the state of nature ought to be one of perfect freedom and equality but that Locke does not believe that is necessarily an accurate description of how the state of nature is. Compare with Hobbes' description of the state of nature. Hobbes, *The Elements of the Law*, 16, 4 and T. Hobbes, *Leviathan*, Chapter 13. For a comprehensive study of equality in Locke's political thought, see J. Waldron, *God, Locke and Equality*

²³² J. Locke, 'Second Treatise of Government' 270

²³³ J. Locke, 'Second Treatise of Government' 271

²³⁴ J. Locke, 'Second Treatise of Government' 274

Alternatively, one injured by another's violation of natural law can seek reparations.²³⁵

In the state of nature individuals take on the executive and judicial roles normally reserved for governments. There is no legislative authority in the state of nature because the laws of nature are given. They are discovered, but not created, by rational reflection. Yet, this places a large burden on each individual and here one can begin to see reasons why individuals might bind together in civil society and form a government. At their most limited, governments centralize executive and judicial authority removing from each particular individual the burden of executing laws and judging violators.

Self-preservation is the fundamental law of nature. This endows individuals with a natural liberty that can only be alienated when individuals agree to join civil society. Individuals are motivated to give up this natural liberty because civil society is less burdensome than the state of nature and it is in society where people can gain security in their own property and enjoy the property of others through trade.

Locke notes that one might object in one of two ways to this characterization of the foundations of social life. A critic might argue that there is nothing in the historical record to indicate that individuals actually agreed to give up their natural freedom to form civil society. Locke claims that this is no argument at all. We can infer such a historical moment from the current existence of civil society. Such inferences are made all the time. One can infer that a person without a birth certificate still has a birthday. Although the exact date of this person's birth may never be known, it is clear that she was born on some day. Individuals live in civil society and it can be inferred from the existence of civil society that there was a moment in the past when individuals gave up their natural liberty to join together. Others may object that only the original contractors can be said to have chosen to join civil society. All subsequent

²³⁵ J. Locke, 'Second Treatise of Government' 273

generations are born into a particular civil society and do not get a choice. Yet, as Locke notes, states are set up and destroyed all of the time. Furthermore, individuals born into a state express a tacit consent when they enjoy the benefits of the community and profit from social membership.²³⁶

When one unites to form a commonwealth or joins an existing society, one's property is united with the property of others. Locke argues that it makes no sense for one to bring only his body to society and not his property as well. He writes:

For it would be a contradiction for any one to enter into Society with another for the securing and regulating of property: and yet to suppose his Land, whose property is to be regulated by the Laws of Society, should be exempt from the Jurisdiction of that Government, to which he himself the proprietor of the land is a Subject. By the same Act therefore whereby any one unites his Person, which was born free, to any Commonwealth; by the same he unites his Possessions, which were free before, to it also, and they become, both of them, Person and Possession, subject to the Government and Dominion of that Commonwealth.²³⁷

Here, one's possessions refer to both land and other things that might be one's own. However, it is important to note that possession and land are joined together. The jurisdiction of a political community extends over the land of its members. In explaining the rights a state has over individuals, he writes that 'the Government has a direct Jurisdiction only over the Land, and reaches the possessor of it...only as he dwells upon and enjoys that.'²³⁸

²³⁶ J. Locke, 'Second Treatise of Government' 347-348

²³⁷ J. Locke, 'Second Treatise of Government' 348

²³⁸ J. Locke, 'Second Treatise of Government' 349

This union is absolute and irrevocable. Individuals may choose to leave a particular civil society, but when doing so, they may leave with their personal possessions, but not their land. The property in the form of land becomes part of the commonwealth and no longer belongs solely to the individual as it did prior to the formation of the political community. One's obligation to the state is voluntary and an individual can choose to leave the commonwealth at anytime. However, one's immovable property, that is property in land, remains part of the state. Locke clearly states that

...the obligation anyone is under by Virtue of such enjoyment to submit to the Government, begins and ends with the Enjoyment; so that whenever the owner, who has given nothing but tacit consent to the government, will, by Donation, Sale, or otherwise quit the said possession he is at liberty to go and incorporate himself into any other Commonwealth or to agree with others to gain a new one, in *vacuis locis*, in any part of the world, they can find free and unpossessed.²³⁹

This sets up the jurisdictional authority governments have over land. One can still be a foreigner, a member of a community that has authority over land other than that where one lives. A foreigner or alien can respect and follow the laws of the commonwealth in which they live without becoming a member of the society.

Relationship between territorial political communities

Looking at the ways in which territorial communities interact in the Lockean world can help to

²³⁹ J. Locke, 'Second Treatise of Government' 349, note that one can only leave the commonwealth if consent was tacit. Express consent obliges one to remain part of the commonwealth permanently

clarify some of the rights and duties of territorial states. For Locke, the world became divided into territories when closely clustered groups of people formed separate political communities. As noted above, territory is a collection of individual land property claims. Only individuals with property in land can come together to form civil societies with clear territorial jurisdiction. European communities have territories because individuals mixed their labor with land to create property claims and then joined together to form civil society. Native Americans, Locke argues, do not have claims to territory because they do not mix their labor with land in a way that creates a property claim. Native Americans use the land on which they live - they hunt, fish and forage. They do not cultivate the land or use it in a way to increase its value. Without land property claims, a collection of persons is unable to create a territorial community.

There are many types of contracts individuals might make that do not take them out of the state of nature. One could imagine a compact between neighbors to exchange goods or services between themselves or a contract between families for mutual security. These contracts need not remove one from the state of nature. Individuals exit the state of nature only when a particular contract is made, a contract to form a 'body politic.' One may make other types of contracts and remain in the state of nature.²⁴⁰ Political bodies, here meaning governments themselves, exist in a state of nature with respect to other communities. Governments can make contracts with each other to form alliances or facilitate trade, but these do not lead governments down a road out of the state of nature.

Governments are collections of individual claims and are intended to serve the needs of individuals by protecting their property. A political community and its government are founded through the consent of its members. This is the only way in which people leave the state of nature. In Locke's words, 'all men are naturally in a state [of nature], and remain so, till by their

²⁴⁰ J. Locke, 'Second Treatise of Government' 276-77

own consent they make themselves members of some political society.’²⁴¹ Political societies act as individuals act with each other. Just as individuals are governed by natural law in the state of nature, governments are rule bound in relation to each other.²⁴² Natural law limits the ways in which both individuals and states may act in the state of nature. The fundamental law of nature is the preservation of property. Just as individuals in the state of nature must refrain from taking another’s property without permission, states must refrain from taking the property of individuals living in other states. Such an interpretation suggests that Locke’s conception of a state’s territory is analogous to that of an individual’s property.

The strong version of this suggests a tight relationship between a state and its territory.²⁴³ Here, states begin to look like individuals. It is not that states are like people, but that they are individuals of a different sort. A weaker version claims that states are merely agents of individuals and that territory is no more than a convenient short-hand for the collection of individual property claims.²⁴⁴

For Locke, a state is created when individuals make a compact to create a political community with the purpose of securing their individual property claims. This suggests that those without property claims cannot create a political community. Political communities are limited in their scope. Individuals make land their property by cultivating and otherwise improving the land. To secure their property, both in land and in their person, individuals are motivated to join together to create a civil society and government. The authority of the government, however, is physically limited by the property claims of its members. ‘[T]he

²⁴¹ J. Locke, ‘Second Treatise of Government’ 278

²⁴² J. Locke, ‘Second Treatise of Government’ 365

²⁴³ See for example G. Gale, ‘Locke on Territoriality,’ *Political Theory* (4) 1973, pp. 472-485

²⁴⁴ This seems to be the interpretation of D. Boucher, *Political Theories of International Relations*, Oxford University Press, 1998, p. 260, also see H. Steiner, ‘Territorial Justice’ and H. Beran, ‘A democratic theory of political self-determination’

Government has direct Jurisdiction only over the land.²⁴⁵ From this, however, it is not clear what jurisdiction entails.

Locke makes a distinction between members of a polity and aliens or foreigners. Living under the protection and enjoying the benefits of a political community does not make one a member of the community. One can only become a member of a commonwealth 'by actually entering into it by positive engagement and express promise and compact.'²⁴⁶ Foreigners, though not members of the community, are obliged to follow the laws of the commonwealth in which they reside. Similarly, any government is obliged to protect any foreigner who resides within its borders, so long as the foreigner pays appropriate respect to the commonwealth's jurisdictional authority. 'This is only a local Protection and Homage due to, and from all those, who, not being in a state of War, come within the Territories belonging to any Government, to all parts whereof the force of its Law extends.'²⁴⁷ Since a government can only have jurisdiction over land, the law can extend no further than the collective property claims of its members.

One comes to own property in land by mixing one's labor with land. As mentioned above, Locke argues that Europeans have claims to the land of Europe because they mix their labor with the land to improve its output. This allowed Europeans to form political communities. Foreigners entering these communities must respect the laws that govern these commonwealths. It is illegitimate for one commonwealth to forcibly take the land from another without just cause.²⁴⁸ Unlike their European counterparts, many Native Americans lack jurisdiction over the land which they inhabit. Governments have jurisdiction over territory because their members

²⁴⁵ J. Locke, 'Second Treatise of Government' 349. For a similar interpretation see R. Tuck, The Rights of War and Peace, p. 176

²⁴⁶ J. Locke, 'Second Treatise of Government' p. 349

²⁴⁷ J. Locke, 'Second Treatise of Government', p.349

²⁴⁸ For a full study of Locke's just war theory see R. Cox, Locke on War and Peace, Washington D.C., University Press of America, 1982 especially part 4, for a brief overview see D. Boucher, Political Theories of International Relations, pp. 259-261

have property claims over land. Locke believes Native Americans, as discussed above, simply fail to do what is required to make their land their property. Although native peoples hunt, fish and forage over a wide area, none of these activities improve the land and none create property claims. Without property in land, Native Americans are unable to create political communities and without that, they are unable to have jurisdiction over the land where they live.²⁴⁹

Native Americans visiting Europe are obliged to follow the laws of European governments, but this relationship is not reciprocal. Because, according to Locke, American lands have not been acquired by native peoples, Europeans visiting America are under no obligation to follow the laws of the natives. For the natives do not properly have laws at all. Positive laws are created by governments for the preservation of property, but because they have no property, natives cannot form governments. Furthermore, Europeans are free to mix their own labor with land to create European property claims in America. This extends jurisdictional control not only over seas, but over the native peoples in their native lands. Certainly when acquiring new lands Europeans are obliged to follow natural law, but this does not require them to treat Native Americans as anything more than aliens under European jurisdiction.²⁵⁰ Tully argues that this is because of an obvious justifications for English settlers in the new world to adopt in their relations with native peoples.

Difficulties with Locke

There are several difficulties that become apparent in Locke's argument. The first applies generally to arguments that assert the possibility of pre-political property rights grounded in the exercise of one's labor. Locke argues that one gains claims to land by exercising one's labor.

²⁴⁹ J. Locke, 'Second Treatise of Government' 335

²⁵⁰ For a similar view see J. Waldron, God Locke and Equality, p. 125 and briefly D. Boucher, Political Theories of International Relations, p. 256

The difficulty with such a position is that it highlights a relationship between the individual and the object of property. This appears to identify property claims as an obligation between people and things. The obvious thing is that no amount of effort can place inanimate objects under an obligation. People can have obligations to each other and to each other with respect to things, but not to things alone. This is a critique that will be picked up in the next chapter.

Property claims cannot be pre-political. The nature of property claims places obligations on others not to disturb with another's things without permission. Territorial claims are similar. Both sorts of claims place obligations on all others. These are public, and by their nature political obligations. The property relationship, that is the relationship that gives one rights (and duties) over objects and obliges others to respect the property claims of others, is explicitly a political claim. Later in the dissertation this claim will be explored in greater detail.²⁵¹

However, there is another set of difficulties that make Locke's argument difficult to interpret. It is clear that Locke believes that the political community as a whole has a set of rights over all of the community's territory, but it is not clear what this entails. It seems that there are at least two different ways to interpret the argument. One could focus on the role of consent in Locke's contract.²⁵² This stresses the voluntary nature of the political community. If the community is voluntary, and the act of joining the community involves joining both yourself and your property to the community, then it seems odd that Locke would argue that the land you bring to the community cannot be taken back if you choose to leave. Such an argument would seem to entail skepticism towards any state's claim to territory. In essence, the state would have no claims to territory. To claim otherwise, such a position would seem to assert, is to locate territorial claims in the wrong place. States cannot have territorial claims. People however have

²⁵¹ It is also explored in the context of taxation, in L. Murphy and T. Nagel, The Myth of Ownership, Oxford University Press, 2002

²⁵² A strong presentation of this view is available in A.J. Simmons, The Lockean Theory of Rights

property claims, and that is where the discussion ends. Yet, for reasons to be discussed in chapters to follow, such skepticism is unjustified and such pre-political conceptions of property are problematic.

The alternative is a collectivist interpretation of the implications that Locke seems to think holds for his contract. Recall two important features in the contract. First, when one joins with the commonwealth, one consents to accept the will of the majority, limited by natural law. Such a requirement appears to place at least some restrictions on what one may do with their property. Whereas in the state of nature one could use their property for whatever they wanted, so long as natural law held, now the majority can require your compliance so long as natural law is not broken. Furthermore, there is no reason that a state must allow individuals the same rights to their property that they had in the state of nature.

Second, the land that one brings to the commonwealth is irrevocably bound to the political community. One may leave the commonwealth whenever they choose, but they can never take their property with them. Something changes when one joins the commonwealth. It is not clear what this is or why it happens. This is some sort of transformation that occurs at the moment of contract. Property in land ceases to be one's own. Instead, it becomes part of the community. This certainly makes sense with the way in which we think about states. States have the right to determine the form and scope of land contracts within their borders. The difficulty is how this squares with Locke's conception of consent. This is where the political philosophy of Samuel Pufendorf may provide some assistance. Pufendorf, like Locke, presents a contract model of the state where the boundaries of the state are formed from the collective property claims of its inhabitants. However, unlike Locke, Pufendorf provides a detailed argument to explain how, through the transformative social contract, the property claims of

individuals are transformed to property claims of the political community.

As explained at the start of the chapter, Pufendorf was writing in the context of colonialism. He conceived of his own arguments as responses to arguments for colonial takings. While he did not write explicitly against Locke, Pufendorf's argument provides a possible answer to several of the problems central to Locke's thesis.

The next section will introduce Pufendorf's conception of territory. Because Pufendorf's political theory is not well known to many readers, it will be important to take some space to describe the moral and political philosophy from which the territorial claim springs.

Pufendorf on Territory

By way of introduction it will be helpful to present Pufendorf in his relationship to Grotius and Hobbes. Pufendorf saw himself as a middle way between the two thinkers. As detailed earlier, Grotius distinguishes between conceptions of property, possession, jurisdiction and sovereignty. A state may have possession of a territory. While this entails a set of jurisdictional and sovereign rights, it does not entail a property claim to all of the land within the territory. Property is something that is used. Though vacant land may be under the jurisdiction of a state, the land is not the property of anyone.

Pufendorf saw himself as defending Grotius' project against Hobbes' critique, yet, Pufendorf's political philosophy generates something quite different from that of his mentor. The Pufendorf-state is a contract made by humans for their mutual defense. This state is a moral being, with moral powers and duties. While individual members of the state may have particular property claims, any vacant land within the state's boundaries becomes the collective property of members of the state as a whole. The state acts as a super-property owner and has the right to

limit the contracts individuals make. The implication for potential colonizers is that if native peoples are organized into political communities, it is wrong to annex their land without their permission.

Pufendorf argues that self-preservation is the primary law of nature. Unfortunately, the human body is unable to preserve itself independently. Humans rely on objects in the natural world for their survival. They also rely on other human beings. This sociability forms a second precept of natural law. Humans are required actively to promote sociability. This, in part, explains the normative force of both the family and the state. The concept of property is one means of ensuring peaceful sociability in conditions of material scarcity and overcrowding. A state's territory is simply the collective property claims of the individual contractors. These property claims are pooled and the state becomes a moral entity. The first part of the discussion of Pufendorf describes his conception of moral philosophy. He is a complicated and systemic thinker whose moral theory is fundamental to his political conception of territory. After his moral philosophy is described it will be possible to engage with Pufendorf's conception of territory.

A brief overview of Pufendorf's moral philosophy

Pufendorf argues that morality is an imposition humans place on objects in the world. Morality is not a property of objects themselves.²⁵³ He begins his argument by making a distinction between physical and moral entities.²⁵⁴ Physical entities have a causal power that is independent of any intellect. Both inanimate objects, such as rocks and automobiles, and animate objects,

²⁵³ J.B. Schneewind has two good overviews of Pufendorf's moral ontology, J.B. Schneewind, 'Pufendorf's Place in the history of ethics,' *Synthese* (72) 1987 and *The Invention of Autonomy*, pp. 118-140

²⁵⁴ Several authors note that Pufendorf most likely learned this distinction from Ernst Weigl, his tutor at Jena, see J.B. Schneewind, *The Invention of Autonomy*, p. 120

like dogs and antelopes, cause things to happen without intellectual faculties of understanding and reflection. A falling rock may initiate an avalanche and a dog may chase a car down the street. Although each causes something to happen, neither the rock nor the dog can be said to want to cause events to happen. Though physical in form, humans are not only physical entities. Human beings possess intelligence and understanding that allows them to will events to happen. As opposed to merely being the subject of the physical processes of nature, individuals can choose a direction or an end for their actions. Humans are moral entities, moral beings, because they can make judgments about their relationships with other objects and defend those judgments with reasoned argument.

A moral entity is an imposition humans make on the physical world. Moral entities therefore presuppose the existence of physical objects. This realm of moral reasoning describes a set of non-physical relationships humans have with physical objects. God imposed a set of moral entities on human beings. These are natural in the sense that they are independent of human judgment. Humans themselves impose an additional set of moral entities on each other, which are natural because they arise prior to social organization. Human society is organized by a set of social relationships, some political and others private. When we create titles of political office, and labels such as mother and father for roles within the family, we impose moral entities on physical beings.²⁵⁵

Pufendorf's conception of morality is clearly anti-realist.²⁵⁶ Something is deemed morally good or bad not because of its physical properties, but rather because of our moral impositions upon it. While something may be naturally good, its natural goodness does not

²⁵⁵ J.B. Schneewind, *The Invention of Autonomy* 121-22

²⁵⁶ A. Dufour, 'Pufendorf', *The Cambridge History of Political Thought*, Cambridge University Press, 1991, pp. 567-570

entail its moral goodness.²⁵⁷ One can easily distinguish between a good car and a bad car based on its physical characteristics. The same cannot be said for a good politician or a good father. The latter two are moral impositions on the physical object of a person. Moral worth, according to Pufendorf, is judged according to a law, which is simply the bidding of a superior.²⁵⁸ Laws are precepts given by a superior to an inferior.²⁵⁹ The foundation of morality is the set of laws God imposed on human beings. These are natural laws and create moral entities from which all other moral concepts derive. The existence of these and other laws gives rise to duties to conform to the law by either performing actions required by law or refraining from those that are restricted by law. The result is a set of rules whereby one can determine the ‘nobleness or baseness’ of a moral action.

This, however begs, questions about our knowledge of natural law and its content. For Pufendorf moral truths are discovered by reflection.²⁶⁰ Yet, the basic concept of natural law and a sense of obligation that natural law imposes are obvious to all humans just as a general sense of the law gravity is obvious to anyone who drops a penny.²⁶¹ Detailing the precepts of natural law may require special study in a way similar to that of a physicist who works out the rate at which a dropped penny accelerates towards the earth. Much as we can trust the physicist as an expert, we can trust natural lawyers to work out the details of natural law for the rest of us. However, unlike knowledge in the natural sciences, knowledge in moral sciences is necessarily imperfect. We can come up with a working understanding of the rules we are obliged to follow, but we can

²⁵⁷ S. Pufendorf, De Jure Naturae et Gentium, Oxford, The Clarendon Press, 1934, I, ii, 6, p. 27, and S. Pufendorf, Elementorum Jurisprudentiae Universalis Oxford, The Clarendon Press, 1931 I, ii, p 7

²⁵⁸ S. Pufendorf, De Jure Naturae et Gentium I, vii, 3, p. 114

²⁵⁹ S. Pufendorf, The Whole Duty of Man, According to the Law of Nature, Indianapolis, Liberty Fund, 2003, I, ii, 2, p. 43.

²⁶⁰ Stephen Buckle takes issue with this. He suggests that reason is much more instrumental for Pufendorf and that morality cannot be discovered by reason. Rather, reason is a faculty that allows for the possibility of ‘moral sensing’ S. Buckle, Natural Law and Theory of Property: Grotius to Hume, pp. 64-69

²⁶¹ S. Pufendorf, The Whole Duty of Man, According to the Law of Nature I, iii, 1, p 52 and S. Pufendorf, De Jure Naturae et Gentium II, iii, 13

never be certain that we have a perfect understanding of our moral obligations.²⁶² Pufendorf is an empiricist and makes it clear that we can derive natural law from a set of premises based on empirical observation. He is unambiguous when he states that ‘the dictates of right reason are true principles that are in accordance with the properly observed and examined nature of things, and are deduced by logical sequence from prime and true principles.’²⁶³ One might notice, in this statement, a similarity with Grotius and Hobbes. All three thinkers attempt to derive the principles of natural law from premises that cannot be doubted, yet each has a different conception of what these principles are.

Human duties may arise from three sources, natural law, civil law and Christian duties to God. Recall that duties come about when a superior places a legal obligation on an inferior. Duties that arise out of one’s Christian relationship with God can be known through natural theology, the study of divine revelation. Civil laws are a product of rational reflection, but are also particular to individual political communities and therefore have no binding force on humanity as a whole. Natural law, however, is both a product of reason, distinguishing it from theology, and is binding to all rational beings, which differentiates it from civil law.²⁶⁴ Humans are unique among animals in their capacity to reason and choose their own ends. This freedom however is not absolute. Free exercise of the plurality of human ends would be destructive to human nature. Simply put, we need some set of rules to make sure we do not do bad things to each other. Our selection of ends must therefore be limited by law.

In trying to discover a middle way between Hobbes and Grotius, Pufendorf takes elements of each as his first two principles. Pufendorf endorses the Hobbesian claim that men are selfish by nature and interested primarily in self-preservation. However, instead of reaching

²⁶² S. Pufendorf, *De Jure Naturae et Gentium* I, iii

²⁶³ S. Pufendorf, *De Jure Naturae et Gentium* II, iii, 13, p. 203

²⁶⁴ S. Pufendorf, *The Whole Duty of Man, According to the Law of Nature*, preface, pp 16-20.

Hobbes' conclusion that men are therefore motivated to form the state out of this premise alone, Pufendorf derives a Grotian-like conception of sociability from this selfishness.

Where it may seem as though natural theology (faith) is in fundamental conflict with natural law (reason), Pufendorf sees natural law as an abstraction from certain theological dogmas. He writes that 'our savior reduced the sum of the law to two principles: love God and love thy neighbor. The whole of natural law may be derived from these principles in man's corrupt as well as in his uncorrupted state.'²⁶⁵ In loving God one comes to know the authority of the law God imposed on human beings and loving thy neighbor speaks to our obligation of sociability.

Pufendorf distinguishes between an idealized hypothetical state of nature and a historical pre-political state of nature in which humans actually lived. Both can be used to uncover natural law. In the hypothetical state of nature, Pufendorf, like Hobbes, conceives of humans as solitary beings. Here, humans have two rights, the positive right of self-preservation and the negative right to be free from the coercive force of another. 'For it follows from the former (the right to self preservation) that those laced into a natural state may use and enjoy any item of the common stock and employ or do whatever contributes to their own preservation, so long as the right of others is not hurt.'²⁶⁶ This seems to presuppose a world of abundant resources where no individual is substantially inconvenienced by other individuals who use objects from the common stock. Only under conditions of scarcity would it seem that an individual taking items from the common stock might harm the rights of another. This arises out of the second precept, the negative freedom from the coercive force of another. It is this right that established the fact

²⁶⁵ S. Pufendorf, The Whole Duty of Man, According to the Law of Nature p 11

²⁶⁶ S. Pufendorf, De Jure Naturae et Gentium II, ii, 3. p. 142. Grotius, as discussed in the previous chapter, employs a similar conception to develop his conception of property. Pufendorf does the same and will be discussed in greater detail below.

that one may ‘defend and preserve themselves by using not only their own strength but also their own judgment and choice...’²⁶⁷ Notice how similar these powers are to those of the state. In preserving oneself, an individual has the right to create their own personal ‘civil law’ and enforce it with his own strength.

The primary reason that no one exercises this right is that humans never actually existed in such a state of nature.²⁶⁸ The empirical features of human bodies simply do not allow us to preserve ourselves without the assistance of others. This help comes from two sources, the natural environment and social interaction. The natural world provides us with necessary goods (food, water, shelter) and the social world provides us with parents, guardians and families, without which we as individuals would not survive into adulthood. Simply put, humans must help each other in order to survive and this requires actively promoting a peaceful society.²⁶⁹ As a whole, Pufendorf’s argument is as follows:

1. Humans care most about their own self-preservation²⁷⁰
2. Empirical facts about the human body mean that humans cannot preserve themselves by themselves
3. Humans require assistance from other humans to survive
4. Only in a persistent and stable society can humans be in a position to assist each other
5. Therefore, humans are compelled to promote society²⁷¹

The fundamental law of nature is to do what you can to preserve and promote society. ‘It follows that all such actions that tend generally and are absolutely necessary to the preservation of this (human) society are commanded by the law of nature, and on the contrary, these that

²⁶⁷ S. Pufendorf, De Jure Naturae et Gentium II, ii, 3

²⁶⁸ S. Pufendorf, De Jure Naturae et Gentium II, ii, 4

²⁶⁹ S. Pufendorf, The Whole Duty of Man, According to the Law of Nature p. 53-54

²⁷⁰ S. Pufendorf, The Whole Duty of Man, According to the Law of Nature p. 53

²⁷¹ S. Pufendorf, The Whole Duty of Man, According to the Law of Nature p. 53

disturb and dissolve it are forbidden by the same.’²⁷² However, as mentioned above, law requires a law giver, a superior who has the right to punish, the power to punish and just reasons for possessing power. For Pufendorf the natural law not only requires, but presupposes God, a being to impose natural law on human.²⁷³

From these natural laws, humans have an obligation to promote civil society, which this is distinguished from political society and the sovereign state. Obligations to create the sovereign state and private property do not derive from natural law. Rather empirical circumstances led to their creation. Though not derived from natural law, natural law requires us to recognize the sovereign rights of political communities and private property rights of individuals. With these preliminaries complete we can move onto Pufendorf’s conception of the territorial state and identify the way in which he is able to extend Locke’s project.

Creating private property

As with Locke the boundaries of Pufendorf’s territorial state are initially created by the property claims of the state’s original contracting members. However, unlike Locke, Pufendorf’s property claims do not derive from natural law. Yet property claims must be consistent with the laws of nature.²⁷⁴ For Pufendorf, property claims are merely one way of dealing with a particular set of social circumstances while maintaining the first law of nature: to promote and preserve society. The creation of property keeps the peace in conditions of scarcity and overcrowding.

Humans are unable to preserve themselves without external assistance. With God’s

²⁷² S. Pufendorf, The Whole Duty of Man, According to the Law of Nature p. 56

²⁷³ S. Pufendorf, The Whole Duty of Man, According to the Law of Nature p. 44. In Book 1, chapter 3 and Book 2 chapter 1, Pufendorf goes on to distinguish three ways in which we can understand the duties imposed by natural law: in relation to God, ourselves and to other men.

²⁷⁴ S. Pufendorf, De Jure Naturae et Gentium 4,4,10 and 4,4,14

consent, individuals are allowed to use the products of the earth's surface. This initial grant is not without limits. Remember, the first two precepts of natural law limit one's takings in two ways. First self-preservation provides the only justification for removing objects from the common stock and this is limited by a reciprocal right held by all other humans. Second, the idea that one is not subject to the sovereignty of another individual suggests that each individual is responsible for interpreting the law of nature and preserving their ability to exercise their right to self-preservation. Pufendorf argues that, although this may lead to conflict, such factors do not entail a war of all against all. Rather, individuals need the help of others to grow from childhood to adult hood and this requires the creation of society. This has clear implications for the way in which Pufendorf believes one can utilize objects from the common stock and create territorially based political communities.

The Earth in common is best understood as a negative community among humans. Unlike a positive communion, where each owns a piece or a portion of the whole, in a negative community ownership is absent.²⁷⁵ Claims to possession are established by seizure and Pufendorf acknowledges that humans must have agreed to refrain from taking what another seized.²⁷⁶ Stephen Buckle suggests that one might gain a better understanding of Pufendorf's intention by considering an analogous situation at a buffet dinner.²⁷⁷

There is an over abundance of food spread out on a long table. The food on the table belongs to no one and each individual is free to claim enough food to be satisfied. One acquires food by the public act of spooning food onto one's plate. I am limited in the amount of food I can take. I can fill my plate with as many mashed potatoes I can eat, but am restricted from acquiring all the mashed potatoes by seizing the serving dish from the table. The food on my

²⁷⁵ S. Pufendorf, De Jure Naturae et Gentium. Book 4 Ch3

²⁷⁶ S. Pufendorf, De Jure Naturae et Gentium 4, 4, 5

²⁷⁷ S. Buckle, Natural Law and Theory of Property: Grotius to Hume

plate becomes *mine* and it is illegitimate for anyone to take food off my plate when I leave it at a table while I refresh my drink. These rules are a result of a primitive agreement among people at the dinner. The first establishes a public display of acquisition as a condition for removing food from the common stock. The second limits my ability to acquire all of the food by seizure. The third is primitive ownership of the food that sits on my plate. It is important to reinforce that these rules are based on an agreement among individuals at the buffet. For Pufendorf, there is an analogous agreement among individuals living in the primitive state of nature. However, such a conception of the state of nature is hypothetical and simply allows us to clarify our conceptual tools. He argues that humans never existed as solitary individuals. We are beings that require care in childhood and some minimum community during our adult lives. It is for this reason that Pufendorf begins a discussion of an actual state of nature with families. Families sit in this primitive relationship with each other and when humans establish property claims they are claimed by families, not individuals.

Property is not a precept of natural law, but rather a creation of human will to assist in making good on the first precept of natural law: the protection and promotion of society. Families leave the initial negative community as required to maintain peace and sociability. Conditions of scarcity and the uneven distribution created by consumable products require steps towards private property. This becomes clear when we consider each of these in turn. First, scarcity, in the absence of a private property scheme, threatens peace and endangers society. The primitive condition of the original negative community works because resources are overly abundant. In an overstocked buffet it does not matter that I take a healthy quantity of mashed potatoes, because there is more than enough remaining for everybody in line behind me. Conflicts only arise when, in the absence of a principle to determine who has a claim to the

scarce resource, there are not enough potatoes for everybody who would like some. Second, once humans begin to produce consumable products, it becomes difficult to keep the peace if unequal contributions are not recognized.²⁷⁸ As with Grotius and different from Locke, private property is not required by natural law, rather it is a human creation designed to promote natural law in response to particular empirical conditions.

If such conditions are absent, then private property need not come into existence.

Pufendorf makes it clear that not all social communities require a conception of private property.²⁷⁹ Presumably he is referring to what were for him recently discovered primitive communities in Africa, Asia and North America. Recall, that Locke seems to make a similar point, though his argument arises from different sources. The point of both, however, is that all communities need not make property claims.

This of course begs the question: what happens when a society with a conception of property comes into contact with a society that has no such conception? There are at least two possible places to look for an answer. The first is in Pufendorf's comments on international law and just war theory. However, there is a problem because both seem to presuppose a state. As we shall see below, a state presupposes property claims. Rather, one might simply look back to the reasons for the invention of property in the first place: to promote sociability in a particular set of empirical circumstances. Here, one might conclude that through an encounter with Europeans the empirical circumstances of the property-less peoples have changed and that natural law compels them to accept the invention of property.

There is however a third possibility: nobody lives in the primitive condition and therefore

²⁷⁸ Note that Pufendorf seems to presuppose something like a labor theory of claims to ownership. Stephen Buckle argues that in Pufendorf there is an embryo of Locke's theory of property, S. Buckle, Natural Law and Theory of Property: Grotius to Hume Chapter 2. But Buckle might be wrong here. Locke seems to think that ownership is a relationship between people and things, Pufendorf and Kant think they are relationships between people

²⁷⁹ S. Pufendorf, De Jure Naturae et Gentium 4, 4, 6

all humans are compelled to accept some conception of property. To see this we must first understand how property came to be divided in the first place. The hypothetical state of nature treats humans as solitary individuals. Pufendorf rejects this as a basis for our actual understanding of property. Humans necessarily live in families and the first division of the common stock into bits of property was done by families. The first claims to property were established by agreement whereby movable objects were divided by possession, like food I have placed on my plate at a buffet. Later, as changes in empirical facts required, land was divided. Pufendorf suggests that the division of land first happened as Adam's children became old enough to establish families themselves.²⁸⁰ This is important for two reasons. First, it reinforces the primary role played by families in the state of nature and second it makes clear that property claims to land are claims by families as a whole. This also suggests that separate societies were created so we could increase in size and preserve the peace, providing the embryonic basis for normative reasons for a plurality of territories²⁸¹

These first acquisitions came about through a division of land based on first occupancy as the result of agreement.²⁸² Un-owned land can be acquired in this way as well, although Pufendorf does place several limits on what can be acquired. Like Grotius, he restricts one from acquiring the sea or the air. Pufendorf also makes clear that simply looking at a stretch of land or walking across a field is not sufficient to establish a property claim. One must make use of the land or create a boundary to make one's intentions public. It is the relationship between the land and the labor of an individual that creates the claim. Pufendorf leaves no room for one to stake claims to vacant or unused land within another's possession. It is worth noting that vacant

²⁸⁰ S. Pufendorf, De Jure Naturae et Gentium.4, 4, 11

²⁸¹ S. Pufendorf, De Jure Naturae et Gentium 2, 2, 7

²⁸² S. Pufendorf, The Whole Duty of Man, According to the Law of Nature pp. 128-131, S. Pufendorf, De Jure Naturae et Gentium Book 4, Ch 6

land within a group property claim is not up for grabs. Rather the group as a whole alone has rights to it. This also points to a distinction between individual property claims and those of groups. Furthermore, it explains Pufendorf's skepticism towards colonization. If indigenous peoples live in political communities then un-owned land within the boundaries of their jurisdiction cannot be claimed by others and is therefore unavailable for colonization. Of course there are other ways to acquire property in land, through trade and inheritance for example, but each of these is derivative and presupposes some prior, original claim.

Property is a human creation and therefore a moral relationship. It cannot be a physical relationship because it requires the imposition of individuals.²⁸³ Property relationships are relationships between people with regard to things, not relationships between people and physical objects. The force of property claims does not derive from a precept of natural law, but natural law requires its obligation. It appears that the first division of property claims was among families.²⁸⁴ Thus, when two peoples, one property owning the other not, come into conflict both must be playing the property game, though some may be more sophisticated than the other. However, the conclusion remains the same even if one does not accept the premise that all families contain some conception of property from the first division. This is because the interaction between the two communities changes the empirical facts and requires the property-less society to begin the property game whether they like it or not. As with Locke, property is a pre-political concept that is independent of and prior to the commonwealth.

Creating the territorial sovereign state

Recall, at this stage in the argument families exist as independent entities in a state of nature.

²⁸³ S. Pufendorf, De Jure Naturae et Gentium Book 4, Ch 4, similar to Kant's critique of Locke's labor theory of property

²⁸⁴ S. Pufendorf, De Jure Naturae et Gentium Book 2, chapter 3

Property rights are the result of an agreement among families living close together with a particular set of empirical circumstances. Claiming one's own private property requires the reciprocal recognition of similar claims by others. This alone might seem to create the initial bonds of civil society. Pufendorf however does not make this clear. It is difficult to determine if the creation of property is a primary step in the development of civil society or if it is wholly independent from civil society. One clue that helps to distinguish the creation of property from the creation of society might be in the factors that lie behind the motivations humans have in developing each. The idea of property cannot be derived from natural law. It is a human response to empirical facts that is consistent with natural law. Alternatively, nature provides humans with an urge to join a political community that is reinforced through instruction.²⁸⁵ Because there are different motivations for the creation of each, it seems that neither property nor society is logically dependent on one another.

What is common between them, however, is that each arises out of the inconveniences implicit in the state of nature. Note the similarity with Locke. Individuals leave the state of nature because it is inconvenient. For Pufendorf the move out of the state of nature to political community is a two step process. In the first step, groups of families form a social community to assist in the fulfillment of human drives to sociability. Political communities, in the second step, are formed by families in these primitive social communities through a contract motivated by concerns over security, which arise from two parts of human nature that make the primitive state of nature problematic.²⁸⁶ First, humans have a wide variety of ends that they, as individuals and collectives, would like to pursue and a stubbornness and refusal to alter those ends. Second, humans are morally lazy and are generally disinclined to do what is required by natural law

²⁸⁵ S. Pufendorf, De Jure Naturae et Gentium 7, 1, 3 Note the similarity with Hobbes and the implicit critique of Aristotle

²⁸⁶ S. Pufendorf, De Jure Naturae et Gentium 7,1,7

unless an outside force compels us to do so.²⁸⁷ These two facts simply make it difficult to carry on an adequately human life in the state of nature because they impede the ability of humans to do what they can to promote and preserve sociability. Divergent ends often result in significant conflicts among individuals and the lack of fortitude in doing what is right means that these conflicts are often physical and violent. Recognizing that this is a suboptimal arrangement, heads of families are motivated to form a contract among themselves where they obtain security in exchange for freedom. The sovereign state is the result of this agreement. The territorial boundaries of the community are formed by the property claims of its founding families.

David Boucher, among others, is quick to point out that Pufendorf distinguished society from political society.²⁸⁸ Humans do not live in the state of nature as isolated, solitary individuals. Nature obliges us to preserve ourselves, yet we are unable to do so without the assistance of others. This does not require us to form political society. We could satisfy our needs for self preservation in small communities. However, humans would still be subject to the inconveniences of the state of nature and threatened by communities that were driven by the more depraved elements of our natural characters. Political communities are therefore formed to ensure that the obligations resident in simple communities are realized. Political society therefore protects us against our enemies, both externally, with armies, and internally, with laws and courts.

The contract to form the state is completed in two parts. The first is an agreement to submit to the sovereign's will.²⁸⁹ This means that parties to the contract are obliged not only to follow the sovereign's pronouncements, but also ensure that others do so as well. One is willing

²⁸⁷ S. Pufendorf, *The Whole Duty of Man, According to the Law of Nature* 2, 6,4 p. 193-94. For more substantial discussion, see D. Boucher, *Political Theories of International Relations*, pp. 232-34

²⁸⁸ D. Boucher, *Political Theories of International Relations*, p. 233

²⁸⁹ S. Pufendorf, *De Jure Naturae et Gentium* 7,2,5

to agree to the contract to escape the inconveniences of the state of nature. Those who fail to submit to the sovereign's will after the contract is made are either stupid or sluggish. These morally deprived persons can be compelled to perform the sovereign's commands by fear or punishment or other external compulsion. Good citizens will lend their power to help the sovereign coerce bad citizens.

The second stage of the contract determines the particular form of government to take. Here, a person, or persons are constituted to run the state. The sovereign promises to promote peace and security and citizens promise to obey.²⁹⁰ The defining characteristic of this particular political contract is the creation of the sovereign as a single moral person.²⁹¹ Recall Pufendorf's distinction between physical and moral entities. A moral entity is an imposition upon a physical object. The sovereignty is a characteristic imposed on a particular person or group of people complete with a will, understanding and agency.²⁹² We know this must be true because we can distinguish between a monarch acting as the sovereign, when for example approving legislation, and when acting as a human being, when eating or using the toilet. The sovereign makes law and adjudicates disputes because she has no co-equal and is above the law.²⁹³

This state is more than a union of wills; it is a union of property. As with Locke, states boundaries are demarcated by the property claims of its members. This forms the geographical limits of the sovereign's jurisdiction. Often there is unclaimed or vacant land within the boundaries of a state. In contrast with the negative community of the state of nature, Pufendorf conceives of the state as a positive community grounded in the union of wills. Here, unlike

²⁹⁰ S. Pufendorf, De Jure Naturae et Gentium 7,2,8. Pufendorf does not appear, here, to state any partially strong feeling as to which form of government is best. However, he is skeptical that democracies can adequately be formed in the second stage. In democracy, sovereignty rests with the people. In the second state then, the people acting at the same time as citizens and sovereigns would be contracting with themselves. To Pufendorf this makes little sense.

²⁹¹ S. Pufendorf, De Jure Naturae et Gentium. 7,2,6

²⁹² S. Pufendorf, De Jure Naturae et Gentium. 7,2,13

²⁹³ S. Pufendorf, De Jure Naturae et Gentium. 7,2,14

Grotius, land that does not belong to a particular individual or family, belongs to the state collectively.²⁹⁴ Foreigners therefore do not have the natural right to acquire unused land by simply exercising their labor.²⁹⁵

Although Grotius appears to be the first thinker to use the phrase ‘*eminent dominium*’²⁹⁶, Pufendorf’s conception of the state endorses it in a way that Grotius’ does not. Remember, Grotius distinguishes between individual and group property claims, as well as group possession, jurisdiction and sovereignty. This allows foreigners to claim land that is possessed by a people, but not claimed as property. Alternatively, Pufendorf makes no distinction between sovereignty and jurisdiction and no distinction between group possession and group property claims.

This is clear in two areas of Pufendorf’s political philosophy: property and the state. As detailed above, a property claim is made by a public act. This is generally in the form of seizure or by marking the boundaries of the property claim in a clear way. It matters whether the claim is made by an individual or a group. What is important here is the fact that a group claim is a sort of positive community where each individual has some claim to the land as a whole, not merely a claim to a part of the whole. Thus, the alienation of a group claim must be done by the group as a whole. One way land may be alienated is through waste and neglect. For individuals this is a sign that one has chosen to give up their property claims. However, land that has gone to waste in a group claim is not alienated; rather, it retains its relationship with the people as a whole.²⁹⁷

The territory of a state is a particular group property claim. This is a more explicit group claim than that presented by Locke. Furthermore, Pufendorf does not distinguish between

²⁹⁴ S. Pufendorf, *De Jure Naturae et Gentium*, 4,6,3-4

²⁹⁵ S. Pufendorf, *De Jure Naturae et Gentium* 7,2,20

²⁹⁶ See OED entry on ‘*eminent domain*,’ and H. Grotius, *The Rights of War and Peace*, 1,3,6

²⁹⁷ S. Pufendorf, *De Jure Naturae et Gentium*, 4, 6, 4-4, for more on this interpretation of Pufendorf’s argument see R. Tuck, *The Rights of War and Peace*, pp. 155-58

jurisdiction and property. We can think of the basis for the state's claim to territory in two ways. First, one could conceive of it as the geographical limits of the state's jurisdiction, that is, the space over which it has the power to compel both citizens and foreigners to comply with the sovereign's will. In this case, territory is established by jurisdiction over individuals in possession of land. This is a group property claim because jurisdiction is rooted in a union of wills contractually obliged to accept the sovereign's authority.²⁹⁸ Alternatively, one could argue that the boundary of a state is created by the property claims of its original members. Heads of families give up their natural freedom, jurisdiction over their own lands, to the state in return for security. Here, the claim to territory is based on property first, but again, since Pufendorf does not distinguish between property and jurisdiction, the state must be treated as a 'super-property owner.' Both of these possible interpretations lead to the same conclusion: the state has jurisdictional authority over all of its territory and can determine through positive law who may own property within the territory.²⁹⁹

Law is an obligation placed by a superior on an inferior that can be enforced with coercive force. Relations between states are like those between individuals in the state of nature. State sovereignty is supreme, just as an individual in the state of nature is not subject to the sovereignty of any other. There is simply no superior higher than the sovereign.³⁰⁰ However, this is not a Hobbesian war of all against all. For Pufendorf individuals in the state of nature are still subject to natural law. Although, like individuals, states often have divergent ends and are not reliable in their ability to do what natural law requires, there must be some way for states to make agreements with each other. This would not be strictly law, because there is no superior to

²⁹⁸ For a more detailed analysis on the role of obligation, see M. Nutkiewicz, 'Samuel Pufendorf: Obligation on the Basis of the State' *Journal of the History of Philosophy* (21) 1983, pp. 15-29

²⁹⁹ S. Pufendorf, *The Whole Duty of Man, According to the Law of Nature*, 2,15, p. 236-38

³⁰⁰ S. Pufendorf, *De Jure Naturae et Gentium* 7,6

enforce compliance with the agreements. The important fact is that states do make agreement and that there are good reasons to keep them, namely peace and sociability. The difficulty is simply that they cannot be enforced as law.

Conclusions

There are at least three reasons to value Pufendorf's conception of the territorial state. First, his conception offers a different path than Locke, but leads to similar conclusions. Both thinkers direct us towards a territorial state that is formed by the prior property claims of the members. However, instead of insisting on the natural right to property, Pufendorf conceives of property as a social construction that is simply consistent with natural law. The value of this is that we can understand and accept some of the conclusions of Locke's contract without accepting his entire political theory.

Second, Pufendorf provides a more straightforward argument for explaining why the contract that forms the political community might transform the collection of individual private property into a single property claim of the political community as a whole. The transformative nature of the contract is more clearly expressed in Pufendorf's argument than it is in Locke's.

Finally, Pufendorf and Locke together highlight a number of important features of the territory as property thesis. First, they both have an understanding of pre-political property rights the protection of which gives rise to the territorial state. The boundaries of the state are formed by the collective property claims of the polity's original contractors. Second, one can see how the two 'territory as property' claims discussed at the beginning of the essay might arise from the positions of each of these thinkers. From this perspective, indigenous populations can claim territorial possession. The dispute is simply a factual matter of use. If the indigenous peoples

can claim use, then they have a justified territorial claim against the wrongful acquisition of many existing states. However, if these facts cannot be maintained then there is reason to support colonization.

Yet, Pufendorf is not without his difficulties. As David Boucher notes, it is not clear why Pufendorf's contract leads to a plurality of states rather than a world state.³⁰¹ One might suppose that family groups would come together under an agreement to form political communities with those whom they were in close geographic proximity. Yet, it is not clear why this must be the case.

Second, Pufendorf conflates sovereignty and jurisdiction. The problem here is not that the two concepts geographically do not correspond, but that there is no conceptual distinction between the two. This becomes a problem because sovereignty refers to a set of powers that a polity may or may not possess, while jurisdiction is the area over which these powers are exercised. The importance of distinguishing between these two was examined in Chapter 1.

There are some more substantial difficulties with the territory as property thesis. First, as mentioned above, both Locke and Pufendorf place an emphasis on the use of labor to make property claims conclusive. This is important because it provides an explanation for the way in which the use of land can be transformed into the more substantial claim asserting title to land. Locke offers a relatively well developed explanation of what sort of labor might be required to initiate a property claim.³⁰² The content of labor in Pufendorf's claim is less clear, but nonetheless holds an important place in his argument. Any claim of original ownership begs questions to explain the source of that ownership. Labor is important for these two thinkers because it is used to explain how original ownership might be obtained. It is clear that the labor

³⁰¹ D. Boucher, Political Theories of International Relations, chapter 10

³⁰² Although Locke's success is certainly up for debate, see, the famous tomato soup comment by R. Nozick, Anarchy, State and Utopia, p. 175

is used to indicate not only an individual's desire to obtain an object as property, but also serves as a sufficient condition for making it theirs. Unfortunately, such a conception of property misplaces the nature of obligation in property claims. As mentioned above, the labor theory places the obligation between people and things. But things cannot be obliged to do anything. The obligation is properly placed between people. If labor is simply meant to indicate why there ought to be a particular obligation between people, then it is not clear what work labor is actually doing in the argument. After all, there are many ways that one might indicate to another that they have a desire to make an object theirs, like simply stating one's desires.

These difficulties indict the central claim of the territory as property thesis. First, it now appears that that pre-social property claims are not sustainable. Property claims are fundamentally claims between peoples and this necessitates some sort of explanation as to why investing labor in land creates an obligation on others to respect one's land claims. Second, the labor theory of property is itself problematic and fails to do what it claims to do.

In concluding this chapter it should be clear that the 'territory as property' thesis fails to provide adequate grounding for a state's claim to territory. Both Locke and Pufendorf provide forceful and intuitively appealing arguments in support of this position. These arguments inspire and inform a variety of diverse claims currently used in contemporary theory. However, all of these claims ultimately fail. This is because many of its key claims fail in their endeavors. First, property claims in land ought not be understood as pre-social and prior to the state. Second, it is unclear why this transformative contract provides a suitable obligation to respect a particular state's territorial claims.

Nonetheless, there are reasons to believe that a territorial claim does have some sort of property-like elements. The next chapter will utilize Kant's political philosophy to develop an

alternative effort to ground territory in jurisdiction, a property-like claim that aims to avoid many of the difficulties present here.

This chapter considered the second of three legacies of international law, the territory as property thesis. Chapter 3 discussed the territory as possession thesis. The next chapter, Chapter 5, will evaluate the territory as jurisdiction claim as presented in Kant's political philosophy. Kant's political theory is an important part of my thesis. He represents the last of the three historical discussion of territory. Many contemporary cosmopolitans take Kant as their starting point. He therefore serves as a link between the historical discussions and contemporary concerns. Kant as a historical thinker is critically discussed in the next chapter. Two chapters hence consider his legacy, cosmopolitanism in contemporary political theory.

Chapter 5: Territory as jurisdiction Kant

This chapter is the last of the three historical chapters. The first, Chapter 3, considered territory as possession through Grotius and Hobbes. The next chapter turned to Locke and Pufendorf to better understand territory as property. This chapter is a critical discussion of territory as jurisdiction through the political theory of Immanuel Kant.

Locke and Pufendorf argue that territory is a direct relationship between people and land. An alternative conception of property grounds claims to territory in a relationship between peoples with respect to land. This is a substantial difference that allows for a more defensible claim to territory. It will be labeled ‘territory as jurisdiction’ to distinguish it from the prior property claims and to highlight differences between the two.

For Kant, property claims play an important role in justifying obligation to the state. In addition, property plays an important role in his understanding of territory. This chapter discusses the conception of territory in the political theory of Kant. His argument views territory as a jurisdiction. As with arguments discussed in the two previous chapters, the territory as jurisdiction argument has some difficulties. In particular it has trouble explaining why a particular state has a claim to a particular bit of land.

Kant grounds his political theory in the type of property claim discussed here. For him, a claim to make external objects one’s own follows from the categorical imperative. In this argument, Kant offers normative reasons for a plurality of political communities and an implicit conception of territory. While this may explain why there ought to be multiple political communities, it does not directly provide a framework for understanding how particular peoples have a claim to particular bits of land.

This chapter presents Kant's argument and identifies several possible difficulties with using his argument as a political theory of territory. At first glance, the work of Allen Buchanan appears to overcome some of the difficulties in Kant's theory. Buchanan does two things in particular. He provides a decision rule by which one can distinguish between legitimate territorial claims of states and those claims that ought not to be respected. This has the additional advantage of linking states directly with the particular territory each control.

Before taking a serious look at territory as jurisdiction, it will be valuable to recall alternative conceptions and their faults. In doing so we can help to frame the current discussion and identify those problems that seem to have been overcome.

Alternative conceptions and their faults

Territory as possession

One such claim might be that territory is not only important to a group's identity, but also that the group is in possession of territory. Here, current occupation is used to justify the territorial claim. States would therefore justify their present claims by simply pointing to the fact that they do possess the land. This might serve to buttress the identity claim. The territory belongs to a people because it is important to their identity and they live there. This, however, presents at least one strong objection. If claims are justified through possession then there can be no dispossessed peoples. Dispossessed peoples claim that territory is theirs even though they are not in possession. Such claims are titled property claims because the essence of property is that the claim remains viable in absence of physical possession.

Territory as property

One might justify claims to territory by arguing that territory is a property claim established when individuals, or groups, exercise labor on land to claim it as theirs. This might initiate a property claim in one of two ways. In one interpretation property claims are prior to the creation of the state. The state is a collection of prior property claims and this establishes the state's territorial boundaries. Alternatively, one could argue that territorial claims are established by a group exercising its labor on land. Here, both of the claims are justified by the ways in which the claimant uses the land. Such arguments however fail because they misunderstand the nature of a property claim. Property claims are not relationships between people(s) and things but between people(s) with respect to things. Property claims must explain not why the territory has an obligation to a people but why peoples ought to respect each other's territorial claims.

There is a set of property arguments that does respect the fact that property claims are relationships between people with respect to things. Here, these will be titled jurisdiction claims because the important idea embedded in these claims is that others have an obligation to respect the authority a people have over land rather than respect anything about the land itself. Respect for the civil society inhabiting the land is a primary obligation while respect for the particular land is merely a derivative obligation.

Kant articulates a conception of territory that is like those of Locke and Pufendorf in that property plays a fundamental role. Yet this is a superficial similarity. For Kant, the right to claim things as private property initiates a duty to form the state. The concept of property is a relationship between peoples, not between peoples and things. This distinguishes Kant's property argument and by implication his conception of territory. Territory becomes a claim

about jurisdiction and initiates a distinct set of arguments by which a people may justify claims to territory.

Kant's conception of territory

At the start of the Third Definitive Article of a Perpetual Peace, Kant argues for a limited right to universal hospitality. He writes that here 'hospitality means the right of a stranger not to be treated with hostility when he arrives on someone else's territory.'³⁰³ What I would like to draw attention to is not the limited right to hospitality itself, but rather that the right to hospitality requires a conception of territory, which entails a plurality of states. A right to hospitality is the right to be treated fairly when one leaves her own territory and enters another's territory. This presupposes multiple territories. Some argue that in Perpetual Peace, Kant meant no such thing and that his call for a federation of states is actually an endorsement of a world state.³⁰⁴ Others claim that Kant's federation is a plurality of states and a second best alternative to a desirable, yet unpractical world state.³⁰⁵ Both of these interpretations are misguided. Kant provides moral reasons for a plurality of states and in doing so develops an implicit conception of territory.

Kant argues that the state is necessary for individuals to make property claims. The moral necessity of property rights is derived from the supreme law of morality, the categorical imperative. This section therefore begins with a look at the way such a claim is developed before attention is directed to an analogy between property and individuals on one hand and territory and states on the other. The final portion of this section examines the relationship

³⁰³ I. Kant, 'Perpetual Peace,' Kant: Political Writings, Cambridge University Press, 2003, p 105. Kant also speaks about territorial boundaries in at least two sections of I. Kant, The Metaphysics of Morals, Cambridge University Press, 1996 AK 265-267 and AK 338.

³⁰⁴ See for example H. Bull, The Anarchical Society, Basingstoke, Palgrave 2002

³⁰⁵ See M. Luz-Bachmann, 'Kant's Idea of Peace and the Philosophical Conception of a World Republic' Perpetual Peace: Essays on Kant's Cosmopolitan Idea, Cambridge, MA, MIT Press, 1997, p 73

between property, territory and jurisdiction in Kant's political thought. The property/individual and territory/states analogy will help to clarify not only the federal structure of an organization of states in Perpetual Peace and the boundaries of different jurisdictional schemes but also the territorial claims of states excluded from the federation. At this point we will be able to address the difficulties that may have developed out of Kant's conception of territory.

Kant's property argument

For Kant, the categorical imperative is the supreme moral law from which all rights, including property rights, are justified. There is no *prima facie* reason to believe that the actions of two people would not conflict even when both act on maxims that are in accordance with the categorical imperative.³⁰⁶ A positive argument must be made to explain how one individual's exercise of external freedom can coexist with the freedom of another. The argument for the Categorical Imperative is an argument for limiting one's freedom. In endorsing a maxim as a universal law, an individual takes others into consideration by asking if a particular maxim could be endorsed by all. The test of universality, Kant argues, ensures that one's own freedom is only limited in a way that respects the freedom of others. In *The Metaphysics of Morals*, Kant draws this out and identifies the Universal Principle of Right as the governing principle of external freedom, derived analytically from the categorical imperative.

The Universal Principle of Right states that an action is *right* if it can coexist with everyone's freedom in accordance with a universal law.³⁰⁷ As Kant states it, 'freedom *is* limited to those conditions in conformity with the idea of it (freedom) and that it (freedom) may also be

³⁰⁶ For a more detailed investigation into the ways in which moral principles and rules are not as ridged in the way normally thought, see O. O'Neill, 'Principles, practical judgment and institutions', Bounds of Justice, Cambridge University Press, 2000

³⁰⁷ I. Kant, The Metaphysics of Morals 230

actively limited by others.’³⁰⁸ By implication, Kant sets up a test to identify if candidates for right action are in fact right: an action is right if and only if its execution does not interfere with the freedom of others.

Put this way, the Universal Principle of Right begins to look a lot like the Categorical Imperative. Consider the third formulation of the Categorical Imperative: ‘act as if your maxims should serve at the same time as a universal law (for all rational beings).’³⁰⁹ Candidates for right and morally permissible actions must act consistently with the freedom of others. This places limits on those actions one chooses to perform and these limits take the form of a universal law, because a universal law is, by definition, one that is consistent with the freedom of others. When I act, I do so from a maxim that is acceptable if and only if it can be considered a universal law, a law that is endorsed by all rational beings. The assertion is that rational beings would only endorse a limit to their freedom if that limitation were required for the sake of exercising one’s own freedom.

This is, not surprisingly, a difficult move to make. For humans, making a free choice in the physical world requires contact with physical objects of choice.³¹⁰ The exercise of some choices may require the exclusive use of physical objects. My taking food to help a person in need excludes others from using that food to do the same thing. My use of a physical object in the exercise of my freedom restricts others in the exercise of their freedom, if only because I

³⁰⁸ I. Kant, The Metaphysics of Morals 231

³⁰⁹ I. Kant, Foundations of the Metaphysics of Morals, The Library of the Liberal Arts, Uppers Saddle River, NJ, Prentice Hall, 438

³¹⁰ Kant presents a distinction between an a priori metaphysics of morals and the empirical generalization of moral anthropology, see both I. Kant, Foundations of the Metaphysics of Morals, AK 388-389, and The Metaphysics of Morals, AK 215-219. The fact that humans need to use objects of choice seems to derive from empirical generalizations rather than a priori reasoning. If this is the case, then The Metaphysics of Morals seems less about metaphysics and more about anthropology. However, there is reason to believe that Kant intends a metaphysics of moral to be a priori based on some features of human nature, for example, the ability to communicate, and the need to procreate and live in communities. For an elaboration of this general idea, see C.M. Schmidt, ‘The Anthropological Dimension of Kant’s Metaphysics of Morals’ Kant-Studien (96) 66-84 2005

remove from them the possibility of using that object. This suggests that the Universal Principle of Right might be used to endorse an absolute prohibition against using any physical object, but this is absurd. Humans need to use objects in the world, if only to satisfy physical needs for survival. Kant argues that property rights, the rights to use external objects of choice, are obtained through the Universal Principle of Right. This deduction is rather complicated and is perhaps the most difficult section of *The Metaphysics of Morals*. To ease the journey over this difficult terrain, it will be helpful to first consider Kant's understanding of the concept of property.

If an object is in my physical possession, another person cannot make use of that object without my consent. I am harmed, physically assaulted to be specific, when someone attempts to remove an object from my physical possession without my permission. As Kant explains, if I hold an apple in my hand, it becomes like a part of my physical body as though it were an extension of my hand. A person trying to tear the apple out of my hand harms me in the same way I am harmed by a physical assault. Kant calls this empirical or internal possession and it is derived analytically from the Universal Principle of Right.³¹¹ A rational being could never endorse a maxim, as a universal law, that would allow an individual to forcibly remove an object from one's possession whenever they desired that object.

However, one may be tempted to say that possession entails something more than physically holding an object. To say that an apple is *mine* suggests that I have a claim to its exclusive use whether or not it is in my hand, resting on the ground or in my lunch bag waiting to be eaten. Kant used the words 'intelligible' or 'external possession' to describe those objects that are mine but outside of my immediate or empirical possession.³¹² This is closer to our

³¹¹ I. Kant, *The Metaphysics of Morals* AK 250

³¹² I. Kant, *The Metaphysics of Morals* 245-249

contemporary conception of property rights and ownership.³¹³ To say that something is mine means that other people are obliged not to use the object without my permission. The important part of the relationship is not between me and the thing I claim as mine, but between me and those who are obliged to respect my property claim. This is the essence of a property right and this is what Kant believes possession is all about. To say that I have rightful possession of an object means that I have a right to the object even when I am not in physical control of it.³¹⁴ Intelligible (or external) possession is therefore a rational form of possession.

Yet, as suggested earlier, the idea of intelligible possession seems to cause at least one difficulty. In exercising my external freedom and claiming an object as mine, I restrict you from using that object in the exercise of your freedom. This appears to violate the Universal Principle of Right, and therefore the third formulation of the Categorical Imperative, because the exercise of my freedom directly interferes with the exercise of yours. Before looking for a way to determine what is rightfully mine or yours, Kant must determine how ‘merely rightful (intelligible) possession is possible.’³¹⁵

The Universal Principle of Right entails the right to exercise my freedom externally. To do so, I must make use of object’s of choice in the world. Again, this seems to restrict the freedom of others and would therefore be prohibited. However, this cannot be the case because the exercise of my freedom is a direct implication of the Universal Principle of Right. The result is an antinomy of right, an apparent irresolvable conflict between intelligible possession and equal freedom in the Universal Principle of Right.³¹⁶ Both staking an intelligible claim to

³¹³ When we say that a state has a scheme of ownership, we suggest that the state protects certain activities, see A.M. Honore, ‘Ownership’

³¹⁴ See I. Kant, *The Metaphysics of Morals*, AK 249 and AK 269 where Kant appears to distinguish his conception of property from that of Locke. Also, compare to Chapter 5 above

³¹⁵ I. Kant, *The Metaphysics of Morals* AK 249, which gives rise to how a synthetic a priori proposition is possible.

³¹⁶ K. Flikschuh, *Kant and Modern Political Philosophy*, Cambridge University Press, chapter 3

objects of one's choice and denying the freedom to claim objects of one's choice seem to be contrary to Right. Kant's answer to this dilemma rests in the Postulate of Pure Practical Reason with Regard to Right.

The Universal Principle of Right allows one to make free choices in the external world that may require the use or acquisition of external objects. Freedom as pure practical reason must take the form of a law that is abstracted from the constraints of the natural world.³¹⁷ If there is a law that concerns objects that can be mine or yours, then this law must refer to objects of choice in general. There are two candidate formulations that may follow from this: either it is possible for me or you to possess any object of choice or all external objects of choice belong to no one.³¹⁸ We know that the second option is not a possibility because it conflicts with the Universal Principle of Right: There can be no general law against possession.³¹⁹

What we end up with is the Postulate of Pure Practical Reason³²⁰ concerning mine and yours: 'that it is a duty of right to act towards others so that what is external (usable) could also become someone's.'³²¹ Kant states that the Postulate of Pure Practical Reason can be thought of as a permissive law that allows one to do something that is generally prohibited.³²² It gives one authorization to 'put all others under an obligation, which they would not otherwise have, to refrain from using certain objects of our choice because we have been the first to take them

³¹⁷ M. Gregor, 'Kant's Theory of Property' Review of Metaphysics (41) 1988, p. 777

³¹⁸ Some contend that Kant misunderstands his own argument, for example E. Ellis, Kant's Politics: provisional theory for an uncertain world New Haven, Yale University Press, 2005

³¹⁹ B. Kudwig, 'Whence Public Right? The Role of Theoretical and Practical Reasoning in Kant's Doctrine of Right,' Kant's Metaphysics of Morals: Interpretative Essays, Oxford University Press 2002, p. 175-76

³²⁰ Note, this restatement become clear with Ludwig's reconstruction of the text by moving the 'Postulate of Practical Reason with Regard to Rights' from paragraph 2 to paragraph 6 of Part 1 in the Doctrine of Right, reasons for this are given in the Mary Gregor's 'Translators notes on the text' to I. Kant, The Metaphysics of Morals xxxii-xxxvi and footnotes i, j, and 18 on page 40

³²¹ I. Kant, The Metaphysics of Morals, 252

³²² For details on the context in which Kant used 'permissive law,' see J. Hruschka, 'The Permissive Law of Practical Reason in Kant's Metaphysics of Morals', Law and Philosophy, (23) 2004, pp. 42-72

under possession.’³²³ This, however, does not really get us out of our problem. We are still stuck with the difficulty that the Postulate seems to conflict with the Universal Principle of Right, because it authorizes something that is otherwise prohibited.

One solution to this problem is proposed by Reinhard Brandt, and others who argue that the Postulate, as a permissive law, allows us to make preliminary judgments that determine or bring to conclusion a practical judgment. He states that:

Every determinate judgment is based on a dark, preliminary judgment which we reach beforehand. The latter guides us in our search for something determinate.

Someone in search of undiscovered shores, for example, will not simply sail into the seas. Before embarking, he will already have formed a preliminary judgment about his likely destination. Preliminary judgments precede determinate judgments.³²⁴

The upshot is that, as rational beings, our preliminary judgments require justification. If I take a piece of property and place you under obligation not to use it without my permission, then you can ask me to justify my claim. To do so, I can refer to the Principle of Universal Right, which allows me to exercise my freedom in the physical world. You can then counter my argument by pointing out that the exercise of my freedom has restricted your freedom, which I have already compromised through my actions. What is important here is reciprocal recognition. My violation of your freedom is a consequence of exercising my freedom. This cannot be avoided. Any argument that explains how I can place you under an obligation not to use my property without my permission leads me to recognize that I am under a similar obligation to

³²³ I. Kant, The Metaphysics of Morals, 247

³²⁴ Brandt, ‘Das Erlaubnisgesetz’ quoted in K. Flikschuh, Kant and Modern Moral Philosophy 243

you.³²⁵

But such possession is only provisional. When I make something an object of my choice it restricts the freedom of others by making this particular object one that they cannot use. In the pre-civil condition, my unilateral will can make an object mine, but it cannot serve as a coercive law for everyone. My will cannot oblige others to respect my property claims ‘since that would infringe upon freedom in accordance with universal laws.’ However, this unilateral will does oblige others to join me in a civil condition. Exercising freedom and making an external object an object of my choice cannot be ensured in the state of nature.³²⁶ Civil society is structured in a way to allow the coercive use of force to ensure that not only is my freedom respected, but also that the freedom of others is respected. Unilateral possession compels others to join me in the civil condition to sort out the procedures with which particular claims to property can be made and enforced.³²⁷ Where freedom is restricted, coercive force may be used to ensure the exercise of free choices. This acts as a ‘hindering to a hindrance to freedom.’³²⁸ The first act of acquisition is merely provisional because it takes place in a pre-civil condition. A conclusive right to property can only arise in civil society because civil society is the only location where a general and collective will is combined with coercive authority, which is needed to compel those who fail to accept what right requires of them.³²⁹

This line of argument is only possible when the Postulate is conceived of as a permissive law. At first glance, the Postulate allows one to take objects of their choice under possession and make a claim on others not to interfere with one’s possessions without permission. This appears

³²⁵ I am indebted to Katrin Flikschuh for her assistance in helping me understand this line of reasoning

³²⁶ Kant’s use of the state of nature brings Hobbes to mind. On the relationship between Hobbes and Kant see H. Williams, *Kant’s Critique of Hobbes*, Cardiff, University of Wales Press 2003

³²⁷ I. Kant, *The Metaphysics of Morals*, 256

³²⁸ I. Kant, *The Metaphysics of Morals*, 231

³²⁹ I. Kant, *The Metaphysics of Morals*, 256

to be in conflict with the Universal Principle of Right which allows for any action to be right, so long as it is consistent with the freedom of others. But the Postulate allows me to place you under an obligation without your consent. The conflict is clear: an action is right if and only if it is consistent with the freedom of others, but when I bring an object into my possession I place an obligation on others without their permission. But, if the Postulate is seen as a permissive law, then we are allowed to do things that might normally be prohibited. Being ‘allowed’ to do something does not justify the action that is allowed. For Kant, justification and full duties of justice can only exist in the civil condition because such duties and justificatory frameworks are the product of a general will, not the coercive will of another individual. The Postulate, however, allows for two crucial moves. First, it provides permission for one to act unilaterally, which gets the concept of civil society up and running. Second, it provides an opportunity to recognize reciprocal obligations to each other. As Brandt notes, ‘the reflective judgments made possible by the *lex permissiva* [permissive law] is not that it confirms me in my claim of your obligations towards me, but that it alerts me to the fact of my prior obligations to you. In this way, my obligations of justice towards you follow directly as a corollary of my exercise of my freedom of choice and action.’³³⁰ This mutual recognition forms the foundation of civil society and full and conclusive property rights.

The earth is a globe, rather than an infinite plane and this fact forces individuals to come in contact with each other. Because humans are randomly distributed around the globe, and a particular individual’s location of birth is not a matter of choice, original possession of the

³³⁰ K. Flikschuh, *Kant and Modern Political Philosophy* 141-142, additionally note that it is this fact that leads some commentators to reject a contractarian interpretation of Kant, see K. Flikschuh, *Kant and Modern Moral Philosophy* chapter 4, for an alternative see K. Dobson, ‘Autonomy and Authority in Kant’s *Rechtslehre*’ *Political Theory* (25) 1997, pp. 93-111 The key element here is the role of agreement. For the contract interpretation, people are bound by those principles to which they do or ought to agree. However, it is not clear what work agreement is doing here. Kant suggests that principles of Right ought to be obeyed because they *are* right, to add an additional level of contract, under an alternative interpretation, adds nothing.

globe's surface was shared among all the earth's inhabitants. For Kant, this moment is not a historical moment which one could, in principle, identify in time.³³¹ 'Original possession in common is...a practical rational concept which contains *a priori* principles in accordance with which alone people can use a place on the earth in accordance with principles of right.'³³² From this, however, at least one question follows: how is an individual to make and justify a claim to a particular piece of the earth's surface?

It is clear from the above that one can provisionally acquire an object by a unilateral act of an individual will. 'To acquire something is to make it one's own, to put oneself in rightful possession of it by an empirical act of taking control of it.'³³³ This control need not be literal, physical control over an object. The concept of intelligible possession shows that it is possible to be in possession of an object whether or not it is in our actual physical control. Full acquisition, however, requires a civil society. Yet it is the initial claim of possession that compels rational beings to enter civil society. Civil society is required to confirm rightful possession of objects of choice. 'For a civil constitution is just the rightful condition, by which what belongs to each is only secured, but not settled and determined.'³³⁴ While the right to property exists in the state of nature, it can only be enforced in a civil condition. A rational being can deduce a right to property, but can only coerce others who fail to recognize this right with the apparatus of the state. As Kant explains:

³³¹ In this sense, Kant differs from some natural law theorists, such as Groitius, who appear to conceive of original possession and first acquisition as an actual historical event, see Chapter 4 above, M. Gregor 'Kant's Theory of Property' and M. Gregor, 'Kant on Natural Rights' *Kant and Political Philosophy*, New Haven, Yale University Press 1993. For an account of natural law theories and their relationship with Kant's political philosophy, see R. Tuck *Rights of War and Peace* chapter 7.

³³² I. Kant, *The Metaphysics of Morals* 262, a similar statement is given at 315

³³³ I. Kant, *The Metaphysics of Morals* 179

³³⁴ I. Kant, *The Metaphysics of Morals*, 256, this is an emphasis on the determination of property claims that is absent in Locke

Prior to a civil constitution...external objects that are mine or yours must...be assumed to be possible, and with them a right to constrain everyone with whom we could have any dealings to enter with us into a constitution in which external objects can be secured as mine or yours. – Possession in anticipation of and preparation for the civil condition, which can be based only on a law of a common will, possession which therefore accords with the *possibility* of such a condition, is *provisionally rightful* possession, whereas possession found in an *actual* civil condition would be *conclusive* possession.³³⁵ (emphasis original)

Yet, prior to any unilateral act of an individual making a claim to possession, the entire surface of the earth was possessed in common by all inhabitants. When an individual first made a property claim, this claim was only provisional. Such provisional claims are justified by the Universal Principle of Right, which states that one is able to act in a way that can coexist with the freedom of others so long as the act is in accordance with a universal law. This unilateral act of an individual will compels others to enter into civil society. Although this duty appears to violate what freedom requires, this duty is justified by the Postulate of Pure Practical Reason with Regard to Rights, which itself acts as a permissive law. Property claims are possible in a pre-civil condition. These claims, however, are provisional and only become preemptory in civil society.

Interestingly, this places few limits on the amount of things, land, goods and alike, one may acquire. The Universal Principle of Right, where an action is limited by the freedom of others, is the only explicit limit Kant places on the distribution of objects of choice. This is far short of the distributive paradigm prevalent in contemporary political thought and provides little

³³⁵ I. Kant, The Metaphysics of Morals, 256-57

guidance for the social welfare state.³³⁶ Kant's state is required to sustain itself in perpetuity and may tax itself to ensure that this is the case,³³⁷ but this is far short of a progressive tax scheme for large scale wealth distribution. For Kant, there is no problem if a large amount of property is consolidated in the hands of a few so long as others are able to exercise their own freedom and the political community is able to ensure its continued existence. Note, at this point Kant has only shown a duty to enter civil society. This falls short of a conception of territory because any serious claim to territory endorses a plurality of states. We next turn to the analogy between people's claims to property and state's claims to territory and the justification of a plurality of states. However, before doing so it may be fruitful to briefly consider the ways in which Kant's argument for property rights differs from that of other justificatory property schemes.

Differences with alternative conceptions of property rights

Kant's conception of property rights differs from that of two alternatives exemplified by John Locke and Thomas Hobbes, respectively.³³⁸ Recall that Locke's theory centers on the claim that conclusive property rights are conceptually prior to civil society and are created when an individual mixes his or her labor with part of the stock of common resources available in nature. Under this conception property is acquired when one mixes their labor with nature. The product of this mixture become something like an extension of one's body and a violation of property is a violation of one's rights as a result of this analogy. By now it should be clear that Kant conceives of property rights as a relationship between people, not things.³³⁹ Kant suggests that Locke's conception of property rights fails to capture exactly what rights are. Mixing one's

³³⁶ Contrast Kant's thin conception of distribution with thick conceptions of justice that follow from J. Rawls, A Theory of Justice

³³⁷ I. Kant, The Metaphysics of Morals 323 - 338

³³⁸ J. Locke, 'Second Treatise of Government' 25-51 and T. Hobbes, Leviathan, chapters 10-16

³³⁹ I. Kant, The Metaphysics of Morals 260-61

labor with an object may signify that one has chosen to make a particular object an object of one's choice, but this does not create a right. Rights are still a relationship between people, not people and objects. For Kant, it is as though Locke and others held to a 'tacit prevalent deception of personifying things and thinking of a right to things as being directly against them, as if someone could, by the work he expends upon them, put things under an obligation to serve him and no one else.'³⁴⁰ Although there are certainly some elements of Kant's property theory are natural in the sense of being pre-social, they are in a way that is different from Locke's theory.

Yet, Kant's theory is not one of socially constructed property rights either, as might be attributed to Hobbes. An all powerful sovereign, the Leviathan state is Hobbes' solution to the problem of politics. All powerful in the full sense of the phrase, this sovereign not only determines what, if anything, counts a property rights, but also the content of morality. Individuals submit to the authority of the sovereign in exchange for security and the possibility of avoiding a violent death at the hands of another.

However, for Kant, it is absurd that one would ever agree to such a contract. He writes, 'one cannot say: the human being in the state has sacrificed a part of his innate outer freedom for the sake of an end, but rather has relinquished entirely wild, lawless freedom in order to find his freedom as such undiminished.'³⁴¹ Kant suggests that such an understanding of property rights is misguided because property is not something that a sovereign in civil society can give away. Rather, property, as detailed above, is a constitutive feature of society. One may make pre-civil, provisional claims to property and it is this act that compels others to join the civil condition.

³⁴⁰ I. Kant, The Metaphysics of Morals 269, for a more detailed exposition on Kant's argument against the Lockean position, see K. Baynes, 'Kant on Property Rights and the Social Contract' The Monist, (72) 1989 442-444 and K. Flikschuh, Kant and Modern Political Philosophy, chapter 5 for the differences between Kant, Hobbes and Locke.

³⁴¹ I. Kant, The Metaphysics of Morals 316

With these lengthy preliminaries complete, it is now possible to consider the relationship between Kant's justification of property rights of individuals and territorial claims of states.

Analogy between peoples and states

Kant makes an analogy between people and states.³⁴² It appears that this analogy can be extended to the claims each make to land as an object of their choice. Territory, like property, is provisional in a pre-civil condition and can become fully realized only in a rightful social condition where states come to a reciprocal understanding about each others claims.³⁴³ For individuals, the state is the civil condition. For states it is a federation of republican states.³⁴⁴ States are collections of people and 'peoples who have grouped themselves into nation states may be judged in the same way as individual men living in the state of nature, independent of external laws.' Individuals in the state of nature can make provisional claims to property by exercising a unilateral will over an object of choice. This compels others to join them in the civil condition where property is secured. The same goes for states. 'Each nation, for the sake of its own security, can and ought to demand of the others that they should enter along with it into a constitution, similar to the civil one, within which rights of each could be secured. This would mean establishing a *federation of peoples*.'³⁴⁵ Without such a federation, a state's claim to territory, like an individual's claim to property, is provisional. Definitive rights to territory can only exist in a condition of right where states recognize their claims in light of the fact that other

³⁴² See I Kant, 'On the common saying: 'This may be true in theory, but it does not apply in practice' Kant Political Writings, Cambridge University Press 199, p. 90 and I. Kant 'Perpetual Peace' p. 102. On the dangers of taking this analogy too seriously, see C. Bottici, 'The Domestic Analogy and the Kantian Project of Perpetual Peace' The Journal of Political Philosophy, (11) 2003

³⁴³ A similar interpretation is in B.S. Byrd and J. Hruschka, 'Duty to recognize private ownership: Kant's theory of property in his doctrine of right' University of Toronto Law Journal, (56) 2006, pp. 217-282

³⁴⁴ This is famously detailed in I. Kant, 'Perpetual Peace' but is also noted in I. Kant, The Metaphysics of Morals

350

³⁴⁵ I. Kant, 'Perpetual Peace' 102, also I. Kant, Metaphysics of Morals 350-51

states can make similar claims.³⁴⁶

There are, however, several differences between the people/property relationship and the state/territory relationship. First, people without property are still people, while states could not be states without territory. Although both people and states are moral agents,³⁴⁷ they are constituted differently and therefore do not necessarily function in the same ways. Second, for individuals, public right entails coercion, while for states a condition of right cannot be secured by force.³⁴⁸ States, Kant explains, have internal constitutional schemes and are justified to use coercive force against its citizens. In a wider constitution, between states in accordance with right, coercion is unnecessary because all individuals in this wider arrangement are already part of a coercive arrangement.³⁴⁹ This is evident in the fact that the Kantian federation is not a world state, but rather a federal structure. Kant explicitly states that this federation between individual states is not equivalent to a world state. A world state, a state of states, is contrary to right 'since every state involves a relationship between a superior (the legislator) and an inferior (the people obeying the laws), whereas a number of nations forming one state would constitute a single nation.'³⁵⁰ States would cease to be states if they were subordinate to a greater sovereign. This suggests that Kant presupposes a world of independent states. There may be several explanations for this.

The need for a plurality of states

First, Kant provides a number of practical reasons why a plurality of states would be favored to a world state. A federation of states is 'preferred to an amalgamation of the separate nations under

³⁴⁶ There are some interesting parallels with this interpretation and some variants of constructivism in international relations theory, notably A. Wendt, *Social Theory of International Politics*, Cambridge University Press, 1999

³⁴⁷ I. Kant, *The Metaphysics of Morals* 343-344

³⁴⁸ I. Kant I. Kant, *The Metaphysics of Morals* 231

³⁴⁹ I. Kant, 'Perpetual Peace' 104

³⁵⁰ I. Kant, 'Perpetual Peace' 102

a single power which has overruled the rest and created a universal monarchy. For the laws progressively lose their impact as the government increases its range, and a soulless despotism, after crushing the germs of goodness will finally lapse into anarchy.’³⁵¹ These however are mere practical concerns rooted in human experience. Such explanations seem rather un-Kantian for at least two reasons. First, it would be odd for Kant to conclude that duties of right can arise from knowledge rooted in experience. Second, this suggests that a federation of states is a second best solution, as if a world state is preferred except for some contingent factors. One could easily imagine how technological developments, particularly in the ability to communicate over large distances, might make these practical and contingent concerns less relevant.

However, one may turn to a second set of arguments that provides more principled reasons for multiple states, which Kant suggests immediately after he presents the practical reasons above. He states that it is not merely that a world state is unpractical, but that ‘nature wills it otherwise, and uses two means to separate the nations and prevent them from intermingling – *linguistic* and *religious* differences.’³⁵² These are not mere practical concerns that make it difficult to get a world state up and running. Rather Kant is here referring to the empirical character of human beings. Simply put, humans are not the type of beings that will develop a homogenous culture and, as a result, are destined to live in a plurality of states.

Although experience may not provide knowledge of right, empirical circumstances do however determine the ways in which right is cashed out. Right cannot be determined by experience. For Kant, ‘natural Right is the *a priori* knowledgeable provisions of a constitution, which may not be violated by whatever statutory provisions are added on the basis of

³⁵¹ I. Kant, ‘Perpetual Peace’ 113, contrast with Hobbes

³⁵² I. Kant, ‘Perpetual Peace’ 113-14

experience.’³⁵³ But this does not exclude the possibility that Right may be realized in multiple ways. We know, *a priori*, that $2+2=4$. Yet, there are a wide variety of ways in which this can be expressed, $(1+1)+(1+1)=4$, $(16/8)+(8/4)=4$, for example. The mathematical relationship here remains the same, but it can be expressed in different ways. The different expressions of $2+2=4$ might be analogous to different empirical facts. If the world contained no groupings of 2, it would be difficult to show $2+2=4$ with objects from the world. But if there were groupings of 4, we could express the same relationship as $(8/4)+(8/4)=4$. The *a priori* relationship is the same in each case. The difference is simply in the ways in which the relationship is expressed. At least one commentator suggests that this is the whole point of The Metaphysics of Morals. ‘A metaphysics of morals is bounded, on the empirical end, only by the fact that it limits itself to duties that can be derived from the pure principles as applied to human nature in general, leaving more broadly empirical moral philosophy all duties that involve reference to particular conditions of people and special human relationships.’³⁵⁴ It must be clear, however, that Right, as a product of pure practical reason, is primary to any experience and absolute in its command. Empirical concerns simply determine the ways in which Right is applied in the world.

One might use a possible worlds argument as a tool to help explain how this might work. Imagine two different worlds, each inhabited with rational beings. One is like ours with beings who are scattered across the globe, predisposed to an ‘unsocial sociability.’³⁵⁵ The other is a world where exceptionally social beings are closely grouped in a land with limited physical space. As rational beings each world will come to discover what is required by right. While the empirical facts of the first world might tend towards a plurality of states, those of the second world might

³⁵³ M. Gregor, ‘Kant on Natural Rights’ 69

³⁵⁴ A. Wood, ‘The Final Form of Kant’s Practical Philosophy’, Kant’s Metaphysics of Morals, Oxford University Press, 2002 3

³⁵⁵ I. Kant, ‘Idea for a Universal History from a Cosmopolitan Point of View’, On History, New York, Macmillan, 1963

tend toward a single state. If in the first world, a plurality of states begins to appear, the creation of a world state would be redundant. It is possible for both worlds to meet the requirements of Right. An individual in each world might use a unilateral will to claim an object of choice. This claim would be provisional in the state of nature, yet the claim itself would compel other rational beings to enter civil society. The difference is simply the form of the social relationship. Candidate forms are acceptable so long as they meet the test of right and conform to the Universal Principle of Right. The exercise of one's freedom is right so long as it is consistent with the freedom of others.

Kant makes it clear that he, like Hume, believes that actual states themselves may have developed out of contingent historical forces.³⁵⁶ This may be analogous to the way in which a unilateral will of an individual makes an initial acquisition of property. The fact that certain states happen to be here, while others happen to be there is of no importance. The relationship between a state and its territory may be a fact of history, but a state's claim to its territory rests on the acknowledgement of the territory by others and the fact that the principle of right is consistent with more than one state. A plurality of states is the result of applying a moral duty to finite rational beings who are biologically constituted like us: unsocial sociable beings are spread across the globe. We start with right and then apply principles of right to the facts of our world.³⁵⁷

Further support for a plurality of states might be found in Kant's distinction between

³⁵⁶ I. Kant, Metaphysics of Morals 318-319 and more forcefully 339, 'It is futile to inquire into the historical warrant of the mechanism of government that is, one cannot reach back to the time at which civil society began (for savages draw up no record of their submission to law; besides, we can already gather from the nature of uncivilized men that they were originally subjected to it by force).' For similar comments from Hume, see D. Hume, 'Of the original contract', Essays, moral, political and literary, Indianapolis, Liberty Fund, 1985, p. 471

³⁵⁷ I believe that phrasing the question this way is an extension of the Copernican Turn began in the Critique of Pure Reason

individual right, international right and cosmopolitan right.³⁵⁸ As mentioned above, coercion may be used to enforce individual right in a civil condition. However as one moves towards international right and cosmopolitan right coercion plays less and less of a role. For Kant, individual right and the civil condition can only be fully realized in a system of cosmopolitan right.³⁵⁹ If there were only a single world state, there would be no room to move beyond the civil condition and no way to move beyond coercion. International right concerns relations between states and finds its full form in an organization of states. Unlike domestic civil society, coercion is not to be used between states. In fact, Kant makes it clear that this congress of states is ‘a voluntary coalition of different states which can be dissolved at any time, not a federation (like that of the American states)...and can therefore not be dissolved.’³⁶⁰

Recall that for individuals there are few limits on the amount of property an individual can acquire. The Universal Principle of Right provides the only limit to acquisition and this limit is thin. A similar statement can be made about the limits of a state’s territorial claim. Inequalities between the size and content of territorial claims are not terribly important. A state’s claim to territory begins with a unilateral will, similar to an individual’s original acquisition of property. This initial claim, though important, is provisional. Full territorial claims are only possible in a society of states where each state recognizes the claims of others, similar to the way in which an individual’s claim to property becomes confirmed only after civil society is entered. This is a thin conception of global rights. States have obligations to each other, but these obligations concern the right relationship of actions between states, not the distribution of resources between peoples.

³⁵⁸ For the distinction between the three see G.W. Brown, ‘State Sovereignty, Federation and Kantian Cosmopolitanism’, *European Journal of International Relations*, (11) 2005, pp. 495-522

³⁵⁹ This is clearly seen in the second appendix to ‘Perpetual Peace,’ entitled ‘On the agreement between politics and morality according to the transcendental concept of public right,’ I. Kant, ‘Perpetual Peace’ p. 125-130

³⁶⁰ I. Kant, *The Metaphysics of Morals* 351

Relations between peoples are regulated in other ways. The first, and most basic is between people in a domestic setting. Peoples, as collections of individuals, deal with each other collectively, in inter-state relations. Finally, individuals from different states have obligations towards each other, but these are limited to hospitality.³⁶¹ The first set of relationships is formalized in domestic law, the second in international law and the third in cosmopolitan law. Because each of these legal structures deals with a distinct set of individuals or groups clear jurisdictional boundaries are formed. The geographic jurisdiction of domestic law is limited by land property claims of those in the polity. International jurisdiction is limited by the territorial claims of relevant states. Cosmopolitan law seems to have no boundaries and it is the thinnest of the three legal concepts.

There are at least three items to note from the relationships between property, territory and jurisdiction that arise from this interpretation. First, as mentioned above, it is quite thin in the limits it places on individuals and states on the amount of property they may acquire and how property is to be distributed. This stands in stark contrast to thick theories of distributive justice in contemporary philosophy. Second, Kant's political theory is deeply metaphysical. Contemporary thinkers have tried hard to avoid deep metaphysical commitments, yet, Kantian metaphysics may work well to get a thin cosmopolitan global justice up and running.³⁶²

Finally, Kant argues that the sovereign of a state is outside of domestic Right. The sovereign's job is to enforce public law and this authority cannot be questioned by the citizens of the state.³⁶³ Sovereigns may act poorly; they may enforce poor laws or poorly enforce laws worth having. But there can be no authority higher than the sovereign, because to have a higher

³⁶¹ I. Kant, The Metaphysics of Morals 351 – 354 and I. Kant, 'Perpetual Peace' p. 105-108

³⁶² B. Shaw, 'Rawls, Kant's Doctrine of Right and Global Distributive Justice', The Journal of Politics (67) 2005, pp. 220-249

³⁶³ I. Kant, The Metaphysics of Morals 323-326, 338-342

authority would contradict with sovereign's claim to ultimate authority. Sovereigns, however, can be in a relationship of Right amongst themselves. The international congress Kant advocates in 'Perpetual Peace' does just this. A world state cannot do so. In a world state, there is a single sovereign that sits outside the bounds of any scheme of right. With a plurality of states, sovereigns are in a relationship of right between each other. This is not the same relationship individuals have with each other under domestic right, but here, a sovereign is bound in some way.

Kant's political philosophy contains a conception of territory that develops out of his property argument. His entire political philosophy is derived from the Categorical Imperative and its incarnation as the Universal Principle of Right. The use of objects external to one's self is fundamental for beings like us to exercise our freedom. The exercise of this freedom initiates a duty to form civil society.

Kant makes an analogy between people and states. In doing so he endorses a plurality of states, whose territorial claims are analogous to the property claims of individuals. Kant's conception of territory is neither rooted in identity, possession, nor popular conceptions of property. For him, territory is analogous to a property concept of a particular type: one that is established between individuals and made conclusive through the common will available only in civil society. There are at least three arguments to be found in Kant's writings that endorse this interpretation. First, Kant offers practical reasons why a world state would either fail or become despotic and undesirable. Second, he suggests that beings like us need a plurality of states to fulfill our moral duties. Finally, multiple states allow sovereigns to be in a relationship of right with each other. The first set of reasons is based on generalizations from experience and therefore cannot provide moral reasons for a plurality of states. The second and third reasons are

applications of the Categorical Imperative and the Universal Principle of Right to the human condition and provide a moral grounding for a plurality of states.

Kant's conception of territory brings to mind some obvious concerns. First, there is no theory of settlement or an explanation why particular peoples are attached to their specific territories or sovereigns. Second, the emphasis on the idea of civil society, as opposed to particular polities, seems to give preference to existing states. This, when combined with Kant's famous argument against revolution, suggests a rather conservative theory that reinforces the status quo.

As argued above, Kant argues that property claims are an important part of exercising one's freedom. Because of the nature of Kant's claim, making external objects one's own initiates a duty to join civil society and form the state. There is not an obvious moral reason why a plurality of states is required. However, as argued above there are several arguments that may be used to explain why a world state is unjustified for more than just practical reasons. Still, there is little to explain what might attach particular people to particular places.

One might argue that the important part of the theory is that people are in states and it is less important in which particular state they happen to live. Yet, this matters for obvious practical reasons. Being born on one side of a border rather than another can significantly affect one's life chance. Kant does suggest that the boundaries of present states are contingent and the product of an often violent history.³⁶⁴ Perhaps, a focus on the actual boundaries of states is a bit misguided and obscures the importance that Kant places on the state in securing the possibility of individual external freedom. This is perhaps the point Rawls is trying to push through when he writes that 'to fix on their (state boundaries) is to fix on the wrong thing. In the absence of a world state, there must be boundaries of some kind, which when viewed in isolation will seem

³⁶⁴ See note 56 above

arbitrary, and depend to some degree on historical circumstance.³⁶⁵ Rawls would ask us to focus on the Law of Peoples, a set of principles of group interaction to which independent political communities of peoples concerned with justice would agree. As discussed in Chapter 1, there is wide dissatisfaction with Rawls' understanding of relations between states. However, what concerns us here are not broad issues of justice between states, but a more narrow focus on the ways in which territorial claims can be justified. As described earlier, such a discussion of territory is problematic for Rawls because he presupposes that states and people have claims to their territory. He does this to simplify and focus his argument on a separate concern: justice.

One of Rawls' critics, Allen Buchanan, offers a test by which particular territorial claims might be justified. This appears to develop from two related concerns, a philosophical interest in secession and a critique of Rawls' The Law of Peoples. In his discussion of unilateral secession, Buchanan argues that sub-state units have a limited right to secede that is initiated only in the face of gross injustice. While there may be a number of ways to justify multi-lateral secession, unilateral secession, he argues, is a last resort. It is a 'remedial right only' based on a comprehensive claim about justice.³⁶⁶ Buchanan's claims about transnational and international distributive justice develop not only out of a critique of Rawls' Law of Peoples,³⁶⁷ but also a larger debate between ideal and non-ideal theories of justice.³⁶⁸ The upshot is that a state's claim to its particular territory ought to be respected only when the state meets certain minimal standards of justice. When it fails to meet these standards, the state's claim to its territory need not be respected. For this reason, sub-state units can secede by staking territorial claims of their

³⁶⁵ J. Rawls, The Law of Peoples, p 39

³⁶⁶ See A. Buchanan, Secession and A. Buchanan, Justice, Legitimacy and Self-Determination chapter 8

³⁶⁷ A. Buchanan, 'Rawls' Law of Peoples: Rules for a Vanished Westphalian World', Ethics (110) 2000, pp. 697-

721

³⁶⁸ A. Buchanan, Justice, Legitimacy and Self-Determination, chapter 4

own.³⁶⁹

This is explicitly a territory as jurisdiction argument. Buchanan strongly asserts that territorial claims are conceptually distinct from property claims. He writes that territorial sovereignty is not a property right ascribed to the state ‘but, rather a complex relationship among the state (the agent), the territory, and the people (the principal), with the state acting on the peoples’ behalf to preserve the territory not only for the present but for future generations as well.’ This guardianship role appears to make property claims to territory misguided. Rather, ‘territorial sovereignty is best understood as a set of jurisdictional powers over territory, conferred upon the state, not as a special kind of property right.’³⁷⁰ These jurisdictional powers are respected by other states when they are exercised within limits established by precepts of transnational justice.

At first glance, this seems to solve an obvious problem in Kant’s conception of territory. Recall that Kant provides an argument for why there must be a plurality of states. He also offers an argument that grounds justified territorial claims in the reciprocal recognition of territorial claims by other states in the international community. However, Kant failed to provide explicit reasons a state would be justified in recognizing territorial claims, of some states but not all. In short, there were no decision criteria to determine which territorial claims were legitimate and which were pretenders. Buchanan provides a method to understand the difference between the two. Claims to territory are justified when the jurisdictional authority over the territory acts in accordance with principles of justice.

However, this still leaves the territory as jurisdiction vulnerable. One might reasonably point out that this has done nothing to explain why a people might be connected to a particular

³⁶⁹ A. Buchanan, Justice, Legitimacy and Self-Determination, p. 3, 6

³⁷⁰ A. Buchanan, Secession, p. 108

piece of land. Although political communities seeking secession aspire territorial sovereignty, they are generally not interested in sovereignty over just any land, but a particular piece of land.³⁷¹ Similarly, states do not desire sovereignty over any territory, but a particular one.

Secession is an affront to states because it removes control states believe they have a claim to. In one sense sovereignty is not the issue but rather it is sovereignty over a particular piece of the earth's surface that matters.

Buchanan, like Rawls, presupposes a relationship between particular groups of people and particular bits of geography. This becomes clear when one considers the type of contemporary disputes over territorial control that Buchanan believes important. When Chechens, for example, assert claims to independence, there is an implicit claim that Russia does not have a legitimate territorial claim to Chechnya. In Buchanan's terms, the question is whether or not Russia ought to have jurisdiction control over Chechnya. The claim is legitimate if Russia meets some set of minimum standards of transnational justice. If it does, then Chechnya has no legitimate claim to secede. However, this discussion seems to have relevance exactly because there is a group of people that make a claim to a particular territory. The dispute between the two parties is possible because there is already a recognized area of the earth's surface that can be referred to by the name 'Chechnya.' It would then seem that Chechen territory is presupposed. The question is simply who should control it.

One might say that Chechens have property claims to land that is Chechnya, but Buchanan, like Rawls and others, would like to claim that property is a scheme that presupposes some territorial jurisdiction. This, the Buchanan and Rawls argument, has some intuitive power. Domestic property disputes are reconciled with reference to legal titles that have their force

³⁷¹ Uganda offered part of its territory to European Jews to establish a Jewish homeland. Not surprisingly this offer was rejected because Uganda was not the object of desire.

because they are situated within a particular legal system. However, the argument turns circular. Geographic territory is about land and jurisdiction over a particular bit of land seems to presuppose some sort of relationship with that particular bit of land.

Buchanan suggests that land is not the same as territory. Territory, he argues, is an area circumscribed by boundaries of political units and is therefore a political/juridical concept. This conception of territory as jurisdiction offers a number of advantages over several alternatives. Kant stands at the beginning of the territory as jurisdiction tradition. Buchanan is able to overcome several difficulties in Kant's argument. He does so by providing decision criteria by which legitimate claims to territory can be distinguished from illegitimate ones. However, this highlights the fact that territory as jurisdiction cannot explain why particular people are attached to particular territories.

Conclusions from Territory as Jurisdiction

As with territory as possession or property, territory as jurisdiction fails to capture exactly what a theory of territory ought to do, which is to provide an understanding of how territorial claims are justified and how political communities are tied to particular pieces of land. Territory as jurisdiction improves upon answers to the former, but at the expense of the latter.

In arguing that territorial relationships are relationships between peoples with respect to land, the jurisdiction thesis avoids the absurdity of grounding a claim to land in an obligation land has to a people (or person). Reciprocal recognition plays a fundamental role in justifying claims to territory, but the implications of this are not clear. While it is important to know the form in which this justification takes place, it is important to know how those justifying a claim do so with reference to a particular piece of land. After all, claimants do not assert, 'we want

some territory,' they assert 'we want this territory.'

In short, territory as jurisdiction does not explain why a people make a claim to a particular piece of land. Many contemporary cosmopolitans look to Kant for inspiration. Instead of taking on board all of Kant's political theory, most contemporary thinkers pick and choose. Most often they take on his moral theory and abandon the territory implications of his argument. These contemporary thinkers argue that territory claims are property claims that are inconsistent with our moral obligations. The next chapter takes up these claims within the context of de-colonization and global justice. This begins the transition that links contemporary concerns with those of self-determination and the legacy of colonialism.

Chapter 6: Cosmopolitanism and territory

Many of the cosmopolitans who played important roles in the development of international law take their start from Kant. The Kantian legacy continues through the political theories of thinkers such as Charles Beitz, David Held and Thomas Pogge.³⁷² However, unlike Kant, these contemporary cosmopolitans are skeptical towards any claims to territory. In their repudiation of colonialism and turn towards global justice cosmopolitans develop a crude territory as property concept. Not only do they reject several of Kant's central insights, but they also fail to appreciate the important role of territory within their own claims.

The previous chapter presented the final of three critical studies of historical conceptions of territory initiated by the legacy of international law. Since the end of the Second World War, international law has been shaped by the unraveling of colonialism. This has brought considerable attention to issues such as self-determination, indigenous land rights and resource redistribution. Territory plays an important role in each of these areas of concern. Strangely, these issues have brought us back to the arguments originally used to justify colonization.

Chapters 3, 4 and 5 discussed three arguments used to justify claims to territory. The first considered territory as possession. Support for this was found in Grotius and Hobbes. The second argument, territory as property, was evaluated through the political theories of Locke and Pufendorf. Kant was used to consider the final strategy, territory as jurisdiction. Many contemporary cosmopolitans take their inspiration from Kant. They draw on his moral

³⁷² Consider B. Barry, *Justice as Impartiality*, Oxford University Press, 1995; C. Beitz, *Political Theory and International Relations* (2nd edition), Princeton University Press, 1999; D. Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus*, Polity, 2004 and T. Pogge, *Realizing Rawls*, Cornell University Press, 1988. Others include S. Caney, *Justice Beyond Borders: A Global Political Theory*, Oxford University Press, 2005; K. Tan, *Justice without Borders: Cosmopolitanism, Nationalism and Patriotism*, Cambridge University Press, 2004, L. Wenar, "We all own stolen goods" *Cato Unbound*, <http://www.cato-unbound.org/2008/05/12/leif-wenar/we-all-own-stolen-goods/> accessed June 2008

universalism. However, unlike the historical thinkers whose main concern is colonization, contemporary thinkers are motivated by a concern for the just distribution of the earth's natural resources. This chapter therefore plays an important role in linking the two central territorial debates of my thesis: colonization and resource distribution.

This conception of morality is universal in the sense that it applies equally to all individuals. No one is morally privileged because they are members of a particular class, family or political community. The implication is that moral commitments do not end at territorial borders. Several influential cosmopolitan thinkers such as Charles Beitz, David Held and Thomas Pogge argue that this moral universalism has important implications for the justification of territorial borders. They argue that if borders are justified they must be so through the territory as property conception. Yet, they reject this perspective in order to account for the necessary redistribution of natural resources.

The main claim of this chapter is that cosmopolitans who followed in Kant's legacy argue that claims to territory are property claims that must ultimately be rejected. Territorial borders, they argue, are historically contingent, unjust and morally arbitrary. Nothing that is historically contingent, unjust and morally arbitrary can be claimed as property. There are no territory as property claims and therefore there are no claims to territory. This a crude territory as property perspective, leaving the world un-owned. However, the arguments put forth by cosmopolitans seem to require some argument about territory. This suggests that a more complex understanding of territory is necessary.

This chapter is divided into five sections. The first is an overview of cosmopolitanism and territory. Here I argue that much of contemporary cosmopolitanism receives Kant via Rawls. I then place several thinkers within this larger movement. Three thinkers receive a more

detailed treatment. Pogge, Held and Beitz are given their section that draws out key areas of their own work and, by extension, of cosmopolitanism in general. The final section brings together my critique of these three thinkers and provides a link to the chapters to follow.

Cosmopolitanism and territory

Contemporary versions of these deontological theories arose out of a critical engagement with John Rawls work on justice.³⁷³ A good deal of this work centers on global justice and identifying difficulties with traditional forms of international relations theory that focuses on sovereignty, state autonomy and the norm of non-intervention. Each of these issues takes a clear position on territory. Global justice theorists argue that territory is a property claim and that this property ought to be subject to redistribution.

Cosmopolitan theories reject arguments that favor weighing the scope of moral concern towards one's compatriots. At first glance cosmopolitanism might appear to reject the possibility of any normative claims to territory. Many cosmopolitans argue that particular state institutions, those associated with sovereignty in particular, ought to be subordinated to moral concerns.

Often, these moral concerns take the form of human rights. The principle of sovereignty traditionally grants states absolute authority over what takes place within the borders of their territory. In contrast, cosmopolitans argue that states ought not to violate the human rights of their citizens and that if they do, that state's claim of authority over its territory ought not to be respected. Additionally, some argue that given the structure of global economic interaction, the global poor can make claims against the rich and demand a redistribution of the earth's resources. Traditional conceptions of territorial sovereignty argue that states have an unlimited right to the resources within their borders. Some cosmopolitans, such as Charles Beitz and Thomas Pogge

³⁷³ See, the works cited above in note 1.

argue that a global resources tax is necessary.³⁷⁴ They do so because they believe that both alignment of state borders and the allocation of the earth's resources are morally arbitrary. The natural resources that happened to be inside the borders of a state are largely a matter of luck. Cosmopolitans argue that state control over the exclusive use of these resources leads to great disparities in the wealth of states that happen to be rich or poor in particularly valuable resources. Justice seems to require that all individuals have the same access to the means of economic and personal success regardless of where they happen to be located. However, in the world in which we find ourselves it matters greatly if one is born in a rich country rather than a poor one. Beitz and Pogge, for example, suggest that a tax on global resources is necessary to meet the demands of global justice. This challenges claims to territory because it rejects out of hand the scope of control a state has over the resources under its jurisdiction.

Cosmopolitans like Beitz, Held and Pogge are deontological theorists and give normative reasons to respect political institutions and offer strong arguments for justifying those institutions. Yet, they are also skeptical towards claims to territory. One might have reasons to respect institutions without at the same time pushing the claim that these institutions ought to be located in a particular place. This would mean that the general form of the institution is worthy of respect. So long as they meet a set of minimum requirements, the institutions should be respected no matter where their boundaries happen to reside. A theory of territory would suggest one of two things: either that the institution is worth of respect because it resides in a particular place or an institution that is justified has a right to a particular place. Neither of these defenses of territory is acceptable to thinkers like Beitz, Held and Pogge. They claim that if there is a claim to territory it must be a property like claim. Such a conception, they argue, is misguided

³⁷⁴ C. Beitz, Political Theory of International Relations, T. Pogge 'An Egalitarian Law of Peoples', Philosophy and Public Affairs, (23) 1994, pp. 198-99

because it fails to meet the demands of global justice. As a result they reject all claims to territory in favor of a world that is un-owned. To tease out these issues, I will consider the role territory plays within the larger thinking of these prominent deontological cosmopolitans. I begin with Pogge and his idea of a resource tax. From here I turn to Held who has a more thorough rejection of territory. I end by considering the role of territory in Beitz's theory which offers perspective that sits in the middle of the two. With this complete I draw several critical conclusions about the cosmopolitan approach to territory.

Pogge's conception of territory

Thomas Pogge argues that territory is a property claim that ought to be rejected to facilitate obligations of international justice. He is explicit in his conception of territory and claims that a property based conception of territory is a necessary part a sovereign state system that he ultimately rejects. The argument he presents is cosmopolitan in character and is concerned with individuals as the ultimate source of moral worth. Pogge contends that present borders are morally problematic because they lead to radical inequalities in material resources. Partly following from the horrors of colonialism, some states are rich in resources, while others are poor. Those which are rich in resources cannot be said to deserve those resources. State boundaries, he argues, come to where they are through force and fraud. It is through a combination of conquest and luck that some states have many resources and others have few.

Pogge takes Rawls as his starting point for thinking about justice. He argues that Rawls' argument for justice within political societies ought to be extended to justice between political societies. Rawls does not ignore relations between states. In A Theory of Justice, he suggests that a second original position, without the veil of ignorance, would be appropriate when

representatives of states meet.³⁷⁵ He makes this explicit in Law of Peoples. Here Rawls argues that representatives from liberal and acceptable non-liberal political communities would agree to something that looks very much like traditional international law.³⁷⁶ Pogge contends that this argument is misguided because it fails to rectify gross inequalities that result from the distribution of the earth's resources across state boundaries.

The traditional understanding of international law takes state sovereignty as a fundamental precept. Tied to this is an argument about territory. The argument is that states have a justified claim to their respective territory and that they have exclusive access to the resources inside that territory. Pogge argues that this is wrong for several reasons. First, because title to territory is often the result of subterfuge, the claims themselves are morally unacceptable. This is the basis of his critique of colonialism. Second, the exclusive right to the resources in one's territory is a principle that representatives would reject in Pogge's second original position. Pogge argues that representatives of states should meet under conditions similar to individuals in Rawls' domestic original position. He contends that representatives, not knowing where their state is or which resources they control, would choose a scheme to redistribute the earth's resources. Pogge suggests a global resource tax to facilitate this redistribution. In making this argument, he takes a crude territory as property view and distinguishes himself from Rawls.

The purpose of Pogge's argument is to provide support for a larger argument regarding international distributive justice. He begins by arguing that it matters a great deal what side of a border one lives on. For example, the fortunes of those on the Mexican side of the US-Mexico border are radically different from those on the American side. Pogge argues that we need to:

³⁷⁵ J. Rawls, A Theory of Justice, pp. 331-335

³⁷⁶ J. Rawls, The Law of Peoples, pp. 30-35.

justify to a Mexican why we [those in the United States] should be entitled to life prospects that are so much superior to hers merely because we were born on the other side of some line—a difference that, on the face of it, is no less morally arbitrary than differences in sex, in skin color, or in the affluence of one's parents. Justifying this is more difficult when national borders are historically arbitrary or, to put it more descriptively, when the present distribution of national territories is indelibly tainted with past unjust conquest, genocide, colonialism, and enslavement.³⁷⁷

From this we gain insight into two central features of Pogge's understanding of resource redistribution and its relationship to territory. First, it is clear that he believes that borders cannot be morally defended. It is not just some, but all territorial boundaries that were determined in ways that cannot be morally justified. This is one reason why he believes that redistribution of the earth's resources is a fundamental part of global justice. Second, the bad luck of being born on one side of a border or another ought to be evened out. One way to do this, he argues, is through resource redistribution.

These two ideas help to explain Pogge's understanding of territory as property. He argues that contemporary state-centered theorists prioritize the territorially bounded sovereign state. Such a conception ought to be rejected because the borders that underlie sovereign states are illegitimate. This brings Pogge to the central problem of territory. He asks: "How can he justify that boundaries are, and would continue to be, associated with ownership of, full control over, and exclusive entitlement to all benefits from, land, natural resources, and capital

³⁷⁷ Pogge, Thomas, 'An Egalitarian Law of Peoples', p. 198-99

stock?”³⁷⁸ With this, the idea of territory is associated with ownership. Pogge’s argument is at the same time an acceptance of the territory as property view and a rejection. He accepts territory as property as *the* concept of territory.

This understanding of territory helps one to understand his conception of global justice and his solution to the problem of resource distribution. Being born in one state as opposed to another has a great impact on one’s life chances. This is a matter of luck for which no individual should be held responsible. States are territorially bounded entities that have exclusive rights to resources within their borders. The boundaries between these states are illegitimate and cannot be morally defended. The answer Pogge proposes is two-fold. First, he argues that states ought to redistribute resources to even out the luck of individuals being born on one side of a border as opposed to another. He suggests a global resource tax to do this. Second, he claims that state sovereignty needs to be viewed from a cosmopolitan perspective, which will facilitate people and states in meeting their obligations of justice.

Unlike Rawls, Pogge argues that representatives in the global original position ought to go under the veil of ignorance like representatives in the domestic situation. Here, Pogge contends that global representatives should not know the size and strength of their state nor should they be aware of the natural resources in their territory. He, like Rawls, is willing to assume a plurality of states. Both contend that it is wrong to focus on the distribution of borders per se. As mentioned above, Rawls believes that it is wrong to focus on the arbitrary location of borders. Pogge has no interest in changing borders. Rather, he is concerned with what the borders mean. He argues that in the global original position not knowing which state is yours and which resources lie in each state, representatives would be as risk averse as those in the

³⁷⁸ Pogge, Thomas, “An Egalitarian Law of Peoples”, Philosophy and Public Affairs, Vol. 23, No. 3, (Summer, 1994) p. 198

domestic original position and chooses a scheme of redistribution.

Territory is a resource owned by states, the distribution of which is largely the result of accident and fraud. Pogge treats territory like Rawls treats property in the domestic situation. It is something that is subject to the two principles of justice. Pogge makes it clear that territory is something that states own. However, unlike movable property in the domestic situation, territory cannot be redistributed because Pogge presupposes an existing relationship between states and their territory. He suggests a tax on the extraction and use of territorially bound resources the proceeds of which are distributed to those lacking access to the resources. This is an obligation placed on states from the outside. It is a moral obligation that they must meet without respect for their desire to do so. This is at odds with the international relations realist conception of sovereignty. Pogge offers a critique of sovereignty to facilitate the resource tax.

Pogge is interested in looking at the ideas of sovereignty, and the role of property and territory within it, with an eye towards understanding what forms of these concepts can be defended from his particular cosmopolitan perspective. Contemporary realist conceptions of sovereignty prevalent in international relations theory conceive of sovereignty vertically where there is a single ultimate authority over each piece of territory.³⁷⁹ From the perspective of cosmopolitan morality this understanding of sovereignty is not appropriate. The alternative is not a world state. Pogge rejects 'any variant of the preeminent state idea', in favor of a conception of sovereignty where authority is distributed among a number levels. This retains some aspects of territory and property, but limits them within a larger scheme of social justice. Sovereignty needs to be centralized in cases such as environmental controls, which are coordinated at a global level, and decentralized in others, like those relating to the political rights of minorities, that dispersed among a number of bodies.

³⁷⁹ T. Pogge, 'Cosmopolitanism and Sovereignty', p. 58

For questions of territory the most important part of Pogge's work is a discussion of shaping and reshaping political bodies. Overall he characterizes this as a series of nested political units and believes that this will 'strengthen political units above and below the level of the state'.³⁸⁰ Pogge devises two guiding principles for dealing with this 'multilayered scheme.' The first principle is one of confederation. Inhabitants of any contiguous territory of sufficient size may decide, through some sort of majority procedure, to merge with an adjacent territory that is willing to accept them as members. The second principle is one of secession. Groups of sufficient size may form themselves into appropriate political units.³⁸¹ Pogge believes that these principles will help to alleviate the intensity of border disputes. Yet this presupposes a more substantial position on territory and the nature of territorial claims.

Pogge's two principles suggest different things. The first appears to presuppose some sort of prior division of territorial units. The language he uses, 'the inhabitants of any contiguous territory of reasonable shape...' suggests an identifiable group of people. This might be something like Québec, a recognized sub-state unit within an existing state, or Kurdistan, an unorganized territory spread across several sovereign states and everything in between. This might suggest that the territorial issue is already settled and there ought to be no disputes with regard to claims to territory, rather only disputes over who has ultimate control over a territory.

However, the second principle that Pogge presents offers a much more skeptical interpretation of territory. Recall the secession principle: inhabitants of a territory... 'may decide to form themselves into a political unit.' At first glance, this again suggests that territorial units have already been demarcated. However, Pogge places several restrictions on the right to secession. The upshot of these restrictions is that subgroups may reject membership in this new

³⁸⁰ T. Pogge, 'Cosmopolitanism and Sovereignty' p.206 69

³⁸¹ Pogge give a more detailed formulation of each, T. Pogge, 'Cosmopolitanism and Sovereignty' 206 pp.69-70

political entity and, more importantly from my perspective, may separate from the initial group and create two political units. Presumably, any subgroup may do this so long as it can remain a viable political unit. Pogge understands viability as contiguous territory and a sufficient population size.

This excludes the possibility of normative claims to territory for several reasons. First, it fails to explain how an individual or group of individuals becomes linked to a territory. One need not be a member of a particular community, political or otherwise, or have any particular ties to other individuals living in the same area. The only requirement is that one be an inhabitant. Perhaps because he is concerned about other issues, Pogge does nothing to show how habitation is sufficient to justify a claim to territory. Second, there are no restrictions on why a group may choose to separate other than the desire to reconfigure political arrangements. There may be an obligation to separate as a result of human rights concerns, but there is no reason not to separate if a group simply wants to. The problem from the perspective of territory is that no claims to territory are normatively justified, which for Pogge is territory as property. Rather territory is always contingent on other factors.

Consider a pie chart. Assume that this represents a single political unit. Say, in accordance with the secession principle, the right half of the pie chooses to secede. After a number of years, part of the right half decides to secede from the larger portion of the right half. Again, according to the second principle there is no problem with this. Now, let us say this most recent political unit chooses to merge with the left side of the pie, in accordance with the first principle. The territories of these states have shifted; no political unit has claims to the other territory. The question is who has claims to what and why. For Pogge, habitation is the only refuge, but for reasons described above, this is unsatisfactory.

Pogge argues that territory is land owned by a political community. This is a property based conception of territory that Pogge contends must be overcome through a redistribution scheme. However, this is not an abandonment of territory. Rather, it is an accommodation that Pogge makes in moving away from ideal theory. Yet, not all thinkers who aspire to offer practical solutions make such accommodations. David Held attempts to meet demands of global justice by de-territorializing global governance.

Held's conception of territory

David Held takes a different tack on territory. Held is sympathetic with the global governance articulated by Pogge, but argues more strongly that global governance needs to be de-territorialized. Facts about globalization and world trade require world-wide social democratic features to justify their impact on individuals. He rejects the possibility of any normative claims to territory and his argument helps to connect justice and decolonization. Territorial claims that now correspond to nation states outside of Europe were created through the illegitimate use of power. Held writes that:

It was not enough for the colonials to say 'first come, first served' when it came to claims to territory, for there were usually other people living in the colonies first! Instead, the principle of effective power was devised. It asserted that if you possess a territory and can demonstrate the continuous presence of your flag, then you have a right to it in international law. This claim legitimized the seizure of over half the world's territories for colonial purposes.³⁸²

³⁸² D. Held, Global Covenant p. 119

This appears to echo the sentiments of Pogge and Rawls who reject the normative basis of present day states' territorial claims. However, if we probe deeper into Held's argument and its presuppositions, it is not clear exactly what sort of argument Held actually has about territory. He could be arguing that there is a way to justify claims to territory, but that states simply failed to acquire their colonies in an appropriate manner. Here, it is the way in which the colonies were established that is the problem. States used the illegitimate effective power principle instead of some other, unspecified, more defensible claim. Held seems to suggest that the 'first come first served' principle is at work. The problem with colonization is that an outside power illegitimately takes territory that belongs to someone else. This presupposes that the original inhabitants have some prior claim to territory. The source of this claim, however, is left unstated.

Alternatively, Held could be arguing that, in principle, claims to territory cannot be justified at all. A clue to this line of argument rests in his larger concerns about global governance. Claims to territory, Held believes, are intimately tied with claims to sovereignty.³⁸³ European nation states gained their legitimacy through a series of contingent events that tied sovereignty, identity and territory together. Here, territorial claims are a fact of history, but cannot be justified on a normative basis because no political community ought to be able to restrict others from the benefits available from particular areas of the earth's surface. Held and others argue that the facts of social interaction have changed since the nation-state model was created and this helps to explain why the exclusive right to use the resources in one's territory is no longer legitimate.³⁸⁴ This changes the ways in which political obligation ought to be distributed throughout the globe. He writes that

³⁸³ D. Held and A. McGrew, *Globalization/Anti-Globalization*, Oxford, Blackwell 2002, p. 7, 10-11

³⁸⁴ D. Held, et. Al. *Global Transformations*, Stanford University Press, 1999

It seemed compelling that political power, sovereignty, democracy and citizenship were simply and appropriately bounded by a delimited territorial space. These links were by and large taken for granted and generally un-explicated. But this can no longer be. Globalization, global governance and global challenges raise issues concerning the proper scope of democracy and of a democracy's jurisdiction, given that the relationship between decision-makers and decision-takers were not necessarily symmetrical or congruent with respect to territory.³⁸⁵

In response, Held suggests we adopt a multi-level conception of political membership where citizenship is not based on exclusive membership in a territorially based community, but rather on rules and principles which can be entrenched and drawn out in diverse settings. This is different from Pogge who appears less concerned about membership than with authority. For Held, the upshot is that

the meaning of citizenship shifts from membership in a community which bestows, for those who qualify, particular rights and duties, to an alternative principle of world order in which all persons have equivalent rights and duties in the cross-cutting spheres of decision making which affect their vital needs and interests.³⁸⁶

This global civil society replaces the domestic civil society that bound individuals to the authority of their particular nation states. Recall that Held closely ties territorial claims to

³⁸⁵ D. Held, Global Covenant, p. 98

³⁸⁶ D. Held, Global Covenant p. 114

sovereignty. In the past, territorial claims were made conclusive with the exercise of sovereign power. Now the facts of globalization have changed, requiring a new form of global citizenship. Here, powers of sovereignty are, or perhaps more properly ought to be, decoupled from territory and distributed among the various levels of citizenship. However, since territorial claims were about sovereignty to begin with, the absence of sovereignty removes the possibility of territorial claims.

At least this is what the argument seems to be. Yet, as with Pogge, a deep look at Held's argument suggests that there is some unspecified background theory of territory. Recall that one of the problems with colonization was that the colonizing powers asserted claims to territory over an area that was already claimed by native inhabitants. If this is true, then there is some way to justify claims to territory. If this is wrong, then Held's critique of colonization is mitigated. Charles Beitz offers a possible alternative. He takes more seriously the role of territory in international politics and tries to present a middle way between Held and Pogge.

Beitz's conception of territory

Beitz notes that the status quo conception of territory from the perspective of international law is rooted in a property claim. Like Pogge, he argues peoples or their governments have ownership claims on the lands in which they inhabit. This includes not only an inviolability of borders, but associated rights to natural resources. A state's right to territory is derived from a conception of group property rights promulgated under international law. He writes that

international property rights assign exclusive ownership and control of a territory and its

natural resources to the recognized government of the society established on it, or reserve partial or total control of common areas (the sea and outer space) to the international community.³⁸⁷

States are therefore able to treat their territory as you or I would treat our own personal property. The state accrues benefits from the wise use of its resources and bears the burden of the loss when the property is destroyed.

Beitz offers a substantial critique of the status quo position. He argues that a state's exclusive claim to its territory is not viable from the perspective of international political theory. For the most part, this claim is rooted in a substantial argument for global distributive justice. Like Pogge, Beitz would like to extend Rawls's difference principle globally.³⁸⁸ This would require that, among other things, states rich in natural resources transfer those resources to states that lack them. This is intended to even out the luck associated with the vast disparity in the distribution of resources around the globe. This removes the possibility of any normative claims to territory. In this view, states might make claims to particular bits of land, but this claim is relatively weak because states would lack the ability to determine the way in which their territory is used. This serves as a clear attack on the position in international law holding that states ought to have exclusive ownership over their territory.

However, Beitz cautions that his indictment of state autonomy is not as straightforward as it might first seem. He cautions that although state autonomy is neither 'fundamental, nor adequate as a justification' for self-determination and non-intervention...this is not to say that

³⁸⁷ C. Beitz, Political Theory and International Relations, p. 149

³⁸⁸ C. Beitz, Political Theory and International Relations, p. 129-177

there are never cases in which a right of state autonomy ought to be respected.’³⁸⁹ The right to state autonomy, instead of being thought of as a core principle, ought to be derived from principles of justice. This places clear boundaries around state autonomy and by extension what states are allowed to do with their territory. The easy cases for Beitz are negative, when state autonomy ought not to be respected, in cases of colonialism or imperialism for example. This in turn suggests that communities subjected to external domination have a right to autonomy, which ties together the central themes of de-colonization and global justice.

However, Beitz wants to be careful not to suggest that *all* forms of association are covered under this limited right of political autonomy. Voluntary associations, for example, may be geographically consolidated, but they need not be.³⁹⁰ Such associations might be clubs with local chapters yet have international membership or be virtually connected over the Internet with no physical interaction. Beitz extends this and argues simply that

voluntary associations are not territorial groups: they do not normally have to live together on a separate territory or to deprive others of the territory they inhabit previously. While the creation of a voluntary association involves a partitioning of some population, it does not involve a partitioning of territory.

This creates a narrow definition around ‘voluntary association’ that excludes the possibility that political communities are voluntary associations. By definition, voluntary associations are not the sort of things that make territorial claims. Political communities must therefore be another type of entity. He writes that

³⁸⁹ C. Beitz, Political Theory and International Relations, p. 69

³⁹⁰ This is why some argue that nations ought to be the unit of self-determination, see J. Raz and A. Margalit, ‘National Self-Determination’ Journal of Philosophy (87) 1990, pp. 439-61 and D. Miller, On Nationalism

typical cases of self-determination, on the other hand, have an essential territorial component. A group's claim to be recognized as an independent political community is accompanied by a claim that boundaries be redrawn to afford a separate territory to the independent group.³⁹¹

The basis of such claims, Beitz argues, arise from justice and morality. Domination in the form of colonialism is unacceptable not because it is a violation of state autonomy, but rather because it is a morally indefensible act against people. It might be the case that state sovereignty ought to be restricted in some way and that the autonomy of states ought to be drastically curtailed. Colonialism is wrong not because it impinges on the autonomy of political communities, but rather because it creates and perpetuates political and material inequalities among individuals. This is an argument against colonialism from the perspective of cosmopolitan global justice.

However, the difficulty with this argument, from the perspective of territory, is that it remains unclear how political communities become attached to particular portions of the earth's surface. For Beitz, there are at least two alternatives. There is either a prior and unstated argument that explains how political communities come to have claims to territory or it is impossible to justify any particular claims to territory. From Beitz's description of the sovereign state it is clear that he understands the former to be the territory as property argument accepted by Pogge. The latter is a rejection of any normative claims to territory. Beitz seems to intend the latter. After all, the global difference principle is intended to even out any distribution of resources that unfairly disadvantages those who are unlucky to inhabit resource poor territory. Yet this it is not clear. In his discussion of the possible grounds for political autonomy, Beitz

³⁹¹ C. Beitz, Political Theory and International Relations, p. 109

suggests that some identity forming features bind individuals together into territorially distinct groups. Yet often this is not the case. Cultural and other group identities are often distributed in geographically challenging ways. Although it might be desirable to draw boundary lines in a way that corresponds to cultural identities, he suggests that it is practically impossible to make political boundaries match identity groups.³⁹² This says something important about the way boundaries may be drawn, but it fails to establish why a particular political community ought to be located in this place as opposed to that place.

Beitz, Held and Pogge were each self-consciously inspired by Kant's cosmopolitanism. Yet, whereas Kant acknowledges the importance of territorial boundaries the thinkers discussed in this chapter argue that territory is something to be overcome. Contemporary cosmopolitans take a great deal from Kant, but it seems that they ignore important parts of his political philosophy. Remember, for Kant, territory is a necessary feature of perpetual peace and is conceived of as jurisdiction, not property.

Contemporary cosmopolitans argue that territory is a property concept. When states claim territory, the argument goes, they are making a claim to the exclusive use of the land and resources within their borders. This sort of thinking, Beitz, Held and Pogge argue underpinned colonization and led to large inequalities in the material and social resources available to individuals in different political communities. As a result, cosmopolitans reject any conception of territory as illegitimate. Held appears to want to do away with territory all together while Beitz and Pogge accept it as a concession to the real world so that we can meet our obligations of global justice. This connects the two main themes of my thesis: colonialism and global justice. There are however several difficulties with the territory as property thesis. While identifying these may not eliminate the need for resource redistribution, problems with the territory as

³⁹² C. Beitz, Political Theory and International Relations. p. 111

property thesis may raise the bar for such redistribution. The final section of the chapter considers some of the implications of the territory as property view adopted by these cosmopolitans.

Difficulties with the cosmopolitan position

The position on territory taken by the thinkers discussed here is a result of their collective interest in decolonization and global justice. Their conception of territory as property and the subsequent rejection of normative claims to territory serve as an anchor that links decolonization and resource distribution. If territory is property then colonization can be addressed as a wrongful taking. At the same time, these thinkers argue, such a conception should be rejected because it inhibits the ability of individuals and groups to meet their obligations of global justice.

One problem is that such a view is a crude, territory as property thesis, similar to that considered in chapter 3. Earlier chapters discussed two alternatives to territory as property. One is grounded in possession and the other is in jurisdiction. The next chapter introduces the role of identity in territory claims. If any of these alternatives are viable, then the argument for resource distribution must change. This would raise the bar for resource distribution because the obligation to redistribute resources would be initiated at a higher level of inequality. The reason for this is that if territory is not property, but something else, then individuals as members of states have a competing claim for the resources within their territory. Recall, the resource redistribution argument is compelling when one accepts that all individuals have a claim on the earth's resources, no matter where they lie. The global resource tax is a method of working this out. Now, if it turns out that a claim to territory is a special type of claim to a particular part of the earth's surface, this might serve as a countervailing claim against resource redistribution.

A further difficulty with the arguments for redistribution is that proponents presuppose a positive community of universal ownership. Remember, resources need to be redistributed because the inequality in access to resources leads to larger social inequalities. Resources must be redistributed because each individual has a claim to all the earth's resources. Consider two individuals living on opposite sides of a border. Suppose there is a great difference in the resources available to each country and that this leaves the person living in the resource poor state with a worse set of life chances. The solution that Pogge and Beitz suggest is that resources should be moved from the resource rich to the resource poor. This is because they argue that every individual has a claim to the earth's surface. In the words of some of our earlier thinkers, this is a positive community. This can be distinguished from a negative community where the earth's surface is un-owned. For Beitz and Pogge territory is a property conception. Only, instead of a plurality of territories belonging to states there is a single territory, the surface of the earth, which collectively belongs to all humans. Yet it is not clear why this inference is made. As several thinkers in earlier chapters made clear, there are good reasons to conceptualize the earth's surface as a negative community. If this is the case, then cosmopolitans must look elsewhere to ground the argument for redistribution.

None of the cosmopolitans described above is a world state theorist. Each of them is willing to concede that the world is divided into territorial states. As each thinker made clear there is a background territory as property thesis. They ultimately reject this because the source of these property claims is illegitimate. It is important to note that it is not simply the idea that property claims were made illegitimately, but rather that territory as property itself is indefensible. However, the problem with leaving out territorial claims, it is difficult to tell who

is harmed and why by wrongful takings of land.³⁹³ Colonialism may be wrong for a number of reasons. It may be wrong a wrongful taking of land. It may be wrong to impose rule on a people without their permission. The land may have been up for the taking, but was acquired through force, fraud or other illegitimate means. A conception of territory is required in order to explain the wrong and point to a possible means of compensation. Here, distributive justice links up with compensatory justice. The present distribution is problematic because it is the result of a past wrong.

The next chapter turns to critics of cosmopolitanism. There is a wide variety of anti-cosmopolitans. They reject universalism for a number of different reasons. In Chapter 7 I focus on those who link group identity with claims to territory. Many follow Hegel in arguing claims to territory are justified through the relationship between a group's identity and particular pieces of land. This appears to solve a particular problem with the territory as jurisdiction argument, namely the difficulty in linking the institutions of the state with a particular place.

³⁹³ This difficulty is mentioned by a number of thinkers including, C Nine, 'The Moral Arbitrariness of State Borders: Against Beitz', Contemporary Political Theory (forthcoming)

Chapter 7: Anti-cosmopolitanism

In the previous chapter I argued that contemporary cosmopolitans believe that if there are claims to territory they must be property claims. Because such property claims are rejected there can be no conclusive claims to territory. Such a position, however, leaves the world un-owned and proves problematic for the cosmopolitan's own position. In this chapter I consider an argument that arises from those who critique cosmopolitan foundations. These anti-cosmopolitans reject the moral universalism championed by Kant in favor of particularism where membership in a political community privileges moral relationships. Community membership shapes one's identity. This offers a tight link between the wrongs of colonialism and justified compensation. It is also a critique of cosmopolitan global justice because states have a privileged right to resources within their territory.

Some theorists argue that some group identities are intimately tied to particular pieces of land. We saw this in Chapter 2 with the relationship between Native American identity and territorial rights. In the chapter on Kant, I argued that territory as jurisdiction has problems linking political communities with particular territories. With the identity claim political communities are linked to particular places. Here, I consider the possibility that the relationship between a political community's identity and a particular piece of land can be used to justify an exclusive claim to that territory.

It is important to note exactly what is at stake here. This chapter is concerned with what I will call the identity inference. The inference may be stated as:

Group (G) has an exclusive claim to territory (T) when (T) plays an important role in creating or sustaining (G)'s identity (I)

At the end of this chapter it will be clear why this inference is invalid and why it alone cannot be used to justify claims to territory. This, however, says nothing about the importance of a particular territory. Furthermore, it says little about a group's identity in general. The argument against the identity inference is agnostic towards other questions regarding the relationship between territory and identity with regard to these more psychological or sociological questions.³⁹⁴ Such queries may be formally bracketed off from the present discussion. The only question this chapter is concerned with is whether or not the relationship between territory and identity (whatever it may be) justifies a sufficient exclusive right to that territory.

The identity argument is perhaps as old as political philosophy itself. Plato argues that a polity must believe that all of its members are born from the land on which they live. I detail this argument to frame contemporary claims about the territory/identity relationship. This takes a variety of forms, two of which are looked at in greater depth. These are national/religious claims, and historical claims. In between discussing these I take time to review the importance of publically accessible territorial claims. Both national/religious and historical claims are problematic for identity theorists. One alternative is to turn to Hegel who offers a more thoroughgoing justification for the territory/identity relationship. Assessing these identity claims will complete the main portion of the thesis and will put me in a position to offer some conclusions about the problem of territory introduced in the introductory chapter. These conclusions will form the final chapter of the thesis.

³⁹⁴ Some of these issues are considered in L. Bishai, Forgetting Ourselves: Secession and the (Im)possibility of Territorial Identity, Lexington Books, 2004

Plato, territory and identity

Some thinkers ground claims to territory in the relationship between territory and a group's identity. The argument asserts that individuals or groups of individuals have a claim to particular bits of the earth's surface when that land plays a fundamental role creating or sustaining the group's identity. Such an argument is well entrenched in political theory. In describing the foundation of his political community, Plato speaks of a noble lie. The lie comes in two parts. The best known part of the lie is the myth of the metals. Here Plato councils the city's founders to tell its citizens that their bodies contain souls imbued with gold, silver or bronze. These metals help to determine each citizen's position in the political community. However, this essay's concern is the relationship between territory and identity, so we must turn to the second part of the noble lie. Plato writes:

I'll attempt to persuade first the rulers and the soldiers, then the rest of the city, that the rearing and education we gave them were like dreams; they only thought they were undergoing all that was happening to them, while, in turn, at that time they were under the earth within, being fashioned and reared themselves, and their arms and other tools being crafted. When the job has been completely finished, then the earth, which is their mother, sent them up. And now, as though the land they are in were a mother and nurse,

they must plan for and defend it, if anyone attacks, and they must think of the other citizens as brothers born of the earth.³⁹⁵

Plato situates the relationship between territory and identity in the founding myth of a people. The relationship between people is created through familial bonds. Members of the political community are born of the earth. They defend each other as siblings because they see the earth as a common parent.³⁹⁶ Furthermore, members of the polis defend the ground on which they were born as though it were their parent. Their claim to the land rests in the fact that they believe that the land itself gave birth to them as a people. The myth establishes the land as a constitutive feature of their sense of self. It is quite simply impossible, the myth counsels the community, to conceive of themselves as a political community in the absence of their particular territory and polis.

Such sentiments continue to play an important role in political theory and contemporary politics. In politics it seems that many individuals and groups believe that particular pieces of the earth's surface are important in creating and sustaining group identity. Several cases seem obvious. Jewish claims to the land that became Israel are well rooted in a greater sense of Jewish identity. Some Kurdish peoples assert that their relationship with land in the Middle East and Persia helps to justify the creation of a new state within the current borders of Iran, Iraq, Turkey and Syria. Some political theorists and theorists of nationalism make arguments that dovetail nicely with the claims of political nationalists. A number of theories of nationalism stress that

³⁹⁵ Plato, *The Republic of Plato*, trans A. Bloom, Basic Books, 1968, 414d-415a

³⁹⁶ One might note the gender transmutation where Plato's mother became the fatherland.

nationalism is primarily a concept about land.³⁹⁷ Nations, as suggested by Plato, have homelands. Other theorists present a less direct, but nonetheless important relationship between identity and land. The focus of this essay is not on those relationships between territory and identity, but rather the inference that identity can justify an exclusive claim to territory. In the next section I discuss how identity fits within national and religious claims to territory. These two claims fit together because their arguments take a similar form. Furthermore, national self-determination plays an important role in the legacy of decolonization. This idea was first introduced in Chapter 2 and is picked up here.

Territory and National and Religious Claims

There are two types of identity based territorial claims that I am interested in highlighting here, religious claims and national claims. While it is clear that the two sorts of claims may overlap, it will be useful to separate secular and non-secular claims in order to understand why similar claims with different sources are doomed to fail.

Each of the three great Western religions has something substantial to say about territorial claims. Most famously, many Jews believe that the land of Israel belongs to the Jewish people by virtue of a divine grant. Jewish identity is created out of many sources. This might include ancient sources such as the covenant between God and Abraham, modern shared experience in a largely world-wide Diaspora or the more contemporary experience of the Holocaust. However, in addition to these features, the idea of land and a return to Israel seems

³⁹⁷ Consider several nation theorists such as B Anderson, *Imagined Communities*, Verso, 1991; E. Gellner, *Nations and Nationalism*, Blackwell Publishing 1983; E. Hobsbawm, *Nations and Nationalism since 1780*, Cambridge University Press 1992 and A. Smith, *National Identity*, University of Nevada Press, 1993.

fundamental.³⁹⁸ While there may be a number of ways in which the details of this claim is cashed out in reality,³⁹⁹ it is difficult to dispute that Jewish-ness is somehow related to the land that is now the state of Israel.

While Islamic claims to territory might be initially wrapped up with Jewish claims, the substance is rather different. Although Jewish doctrine distinguished Jewish peoples from others, Islam is a universal religion that knows no superficial boundaries. Islam suggests that its faith should appeal to all persons. Humans, it argues, are in the same earthly circumstances and ought to understand Islam as the only path to eternal salvation. To some, this suggests that Islam knows no territorial boundaries.⁴⁰⁰ Here, the world is divided into land that is ruled by Islamic law and land that ought to be.

The role of territory in the Christian tradition is less clear. Christ's injunction to 'render unto Caesar Caesar's and unto God God's' suggests a separation between the role of civil authorities on one hand and religious authority on the other.⁴⁰¹ This matches up well with much of Europe's Christian history where Christian rulers could make property claims over land (and to some extent people). Although the Catholic Church long claimed universal jurisdiction over all of Christendom, this universality as a political doctrine did not hold sway over all of medieval Europe and was formally rejected in the treaties that became the Peace of Westphalia.⁴⁰²

³⁹⁸ On the complexities involved in this claim and its relationship with Christian scholarship see W.D. Davies, The Territorial Dimension of Judaism, University of California Press, 1982

³⁹⁹ Many of these are discussed in M. Lorberbaum, 'Making and Unmaking Boundaries of the Holy Land' States Nations and Borders,

⁴⁰⁰ S. Hashmi, 'Political Boundaries and Moral Communities: Islamic Perspectives and Landscapes' States Nations and Borders

⁴⁰¹ Mark 12:17, The Holy Bible also note St. Augustine, City of God Against the Pagans, Cambridge University Press, 1998, Book 11

⁴⁰² For insight on some of the issues surround Christianity and territory see O. O'Donovan, 'Christianity and Territorial Right', States Nations and Borders and A. Pagden, 'The Christian Tradition', States, Nations and Borders

That said, what concerns me is not the particular aspect of any individual claim to territory rooted in religious identity, but rather the form of the claim. Any religious claim is religious because claims are justified by an appeal to religious authority. Such claims are closed to those who fail to accept the authority of a particular conception of the divine. This has a certain affinity with some claims to territory traditionally associated with nationalism.

Many forms of nationalism make the case that the nation is rooted in a sense of shared history. Often this takes the form of a foundation myth that explains how the nation came into being. While this may relate explicitly to land, as Plato's noble lie, it need not. Nevertheless, nationalism is often associated with some conception of a homeland, an area of the earth's surface that the nation may call its own. This is often expressed in one of two ways. Either the nation occupies the land or the land is occupied by someone else and it becomes an object of desire.

When the homeland is occupied the nation may claim not only territorial rights over the land, but sovereign rights as well. The conception of the homeland is valuable because it provides natural limits on what belongs to the nation and what belongs to the other. Such an idea seems to have helped Hegel distinguish between natural and unnatural German territorial claims. Natural claims are those where the homeland and territorial claims are congruent. Unnatural claims are those where territorial claims somehow extend beyond the homeland into either otherwise empty land or land that is claimed as a homeland by another nation.

Alternatively, a nation may occupy its homeland but lack sovereignty over the territory. In such cases there may be a call for secession or national self-determination, many of which arose with 20th century de-colonization. The crucial question here is the status of the claim for

political independence. Yet, this begs the question as to what can justify a claim to a particular bit of land. True, this bit of earth may be the homeland of a nation, but it is simply an alternative form of the identity inference: that because a piece of land is important to a group's identity they should have a larger claim to the land. Saying that secession is justified because it is a nation's homeland asserts the identity inference, but does little to show that it is true. Below, I argue that there are reasons to reject the inference if it is not bolstered by additional arguments.

Finally, nations may be separated from their homeland. When a group has neither sovereignty nor possession of the homeland, it may be difficult for the nation to press its claims. However, this category is not without members. Such a claim may assert that current occupants of the homeland are there illegitimately in which case the dispossessed nation may seek compensation. The claim is not that this is a property or possession that was wrongly taken. That would be the territory as property or territory as possession argument. Rather, the claim is that the land belongs to the community because of its role in creating or sustaining the group's identity.

What connects these types of national identity claims with religious claims is the method of justification. Religious claims are justified by appealing to religious authorities. Questions of national histories may gain their status by referencing the same national mythology.⁴⁰³ Both forms of argument are internal to the particular group and require the acceptance of preexisting convictions. To be useful in a dispute a claim to territory must be based in arguments that can be, in principle, accepted by outsiders. Thus, while these claims may be useful for motivating

⁴⁰³ This forms the basis of Margaret Moore's critique of historical claims to territory, M. Moore, 'The territorial dimension of self-determination'. For an alternative perspective see T. Meisles, Territorial Rights, Springer, 2005

internal constituencies they do little for outsiders other than showing that the group has an interest in the land.

Having an interest in land is not the same thing as having a claim right to it. Interests are curious creatures. Used here interest need not rise to the same level as an interest based right.⁴⁰⁴ Here ‘interest’ is used to identify something that is an object of desire while other things are not. In short, this is a want; it is something, in this case a territory, which a people want to be theirs. This language makes sense for groups that do not possess their homeland or holy land. It also makes sense for those who want sovereign control over the territory. At face value this language might make less sense to those who are already in control of their homeland. Yet, even here the sense of want and desire remain.

Note that desiring or having an interest in an object is not the same thing as making it one’s own. For example, I may desire a new computer with the latest technology that will let me type papers, search the Internet and play high end video games. Let’s suppose that I fancy myself a highly skilled paper writing, Internet searching, video game playing individual. This in fact may not be true, but I may still believe it to be true. Let’s suppose this new computer will let me do things I have dreamed about doing and think myself capable of, but have been unable to do because of the limitations of my old computer. I desire this new computer not simply because of what it will let me do, but because doing those things is important to my sense of self, it is important to my identity.

Simply desiring or having an interest in this new computer is clearly not sufficient to make it mine; something else has to take place. Presently, I must do something, like exchanging

⁴⁰⁴ See J. Raz, The Morality of Freedom, Oxford University Press 1988, for an example of interest based rights.

money in return for the computer, to make it mine. Rules, such as exchanging money, are conventions independent of my particular want or desire to acquire the object. Note, however, that this desire need not disappear when the computer becomes mine. There may be times when I must use someone else's computer, when I am doing non-computer related tasks or simply using the computer for a purpose I did not intend, like completing my taxes. Likewise I may have an interest in the computer after I have sold it to someone else because I might believe that this computer allowed me to do things that I cannot replicate on another computer. Property ownership is simply not the same thing as desiring or having an interest in an object.

In the same way territory need not be an object of property. A variety of scholars have suggested that territory is better conceived of as a possession or a jurisdiction. Some of these possibilities will be mentioned later. The point here is simply that having an interest in land is not sufficient for making it yours. As with the computer that I have an interest in, something else must be done to make it mine. An interest is simply an indication that I would like to make it mine. It is not a sufficient condition, or even a necessary condition, for making it mine.

Public criteria and making something mine

When groups, either religious or national, make claims to territory it is possible that two types of claims are being made. The first is directed internally and is intended to motivate group members or facilitate group cohesion. This is what some theorists of nationalism label as a myth making property.⁴⁰⁵ Sources of authority and justification can be internal to the constituency and

⁴⁰⁵ B. Anderson, Imagined Communities, is perhaps the obvious source, but also see E. Hobsbawm and T. Ranger, The Invention of Tradition, Cambridge University Press 1983 and E. Gellner, Nations and Nationalism. 44-45

exclude non-group members. Examples of this, as mentioned above, include appeals to religious sources or to pre-existing national mythologies or conceptions of shared history.

However, these are not really legitimate claims at all. Any serious claim of this sort is public in nature. To say that a territory is ours is to say not only that it is ours, but also that others should respect our claim and not claim the territory as their own. In other words, as both Kant and Hegel note, any claim to territory makes demands on others. The very nature of such claims is public and is intended to appeal to both internal members of a group as well as individuals and groups that are external to the claimant.

Asserting territory as one's own does not merely create a relationship between the group and the land. Again, a property analogy might be useful. Returning to my new computer, my claim to the computer says something about my relationship with the particular object, but it also says something about what I expect others to do or refrain from doing. As I argued in Chapter 5, to talk about property as a relationship between people and things is to miss the point. Property is a relationship between people with respect to the thing. The public nature of claims to things in general and claims to territory in particular must be public, that is, they must appeal to those who are outside of the particular group claiming the land. The reasons for this should be clear. Any claim to territory places demands on outsiders and should therefore appeal to considerations that the outsiders can, in principle, find convincing. But these cannot depend on subjective claims about identity.

Now, it is certainly possible that outsiders can recognize the importance of an internal claim. A Muslim can certainly see that a claim to the Holy Land is important to a Jew and vice versa. That is not the issue. Some proponents of public reason argue that such claims are rooted

in deep metaphysical commitments ought to be allowed to carry weight within public discourse. These claims, they argue, are public because one can recognize that these are claims that would be pressed by those with this metaphysical commitment. However, we can also recognize that these claims are not binding upon us.⁴⁰⁶

The validity of the claim is at issue and if it is to be accepted by both parties, the claim must be of the sort that each side can identify its truth. Others may recognize that a territory is important to an identity, but this is not the claim that some nationalist or religious arguments make. The claim they make is that because the territory is important to their identity, the territory should be theirs. This is an unreasonable claim to make and ought to be rejected.

This leads to three specific criticisms against territory claims rooted in identity. Identity often appeals to sources of authority that are accepted only by those who are already members of the group making the claim. When claims are structured in this way they cannot be, in principle, acceptable to outsiders. Yet, even within groups this may be difficult. While there are often a number a points of agreements that help to define group membership, there are often disagreements within groups. Hegel, as we will see, assumes homogeneity in his explanation, but there are good reasons to believe this is often not the case.

Second, simply because something is important to a group's identity is not sufficient for making it theirs. After all, there are lots of things that are important to our individual identities that we don't have a claim to. The computer example above helped to explain this, but another example might work as well. A number of Americans identify with the nationality of their forefathers. There are Italian-American, Irish-American, and Chinese-American, to name a few.

⁴⁰⁶ See for example A. Gutmann and A. Thompson, Why Deliberative Democracy?. Princeton University Press 2004

While Italian-ness, Irish-ness or Chinese-ness is clearly important to the identity of many individuals who otherwise consider themselves American, they hold no claims against those who otherwise consider themselves Italian, Irish or Chinese.⁴⁰⁷ This is not to say that no claims are possible, but rather to say that if there are claims, they are not the result of identity alone. If they exist, the claims will be juridical and not identity based.

Finally, identity claims are not exclusive because there is, in principle, no limit to the number of individuals or groups who might rightly claim that a territory is important to their identity. Here, the trouble is not that many groups claim the same thing, but that at least some groups claim exclusive rights to the territory. Such claims are simply incompatible. This is practically important for those who are making a claim to territory as part of a broader argument for self-determination. If identity is the sole criterion for determining claims to territory then there is little to stop additional groups from making claims to the land. The dispute in Northern Ireland between Irish Republicans and Unionists might be an example of this. Both make incompatible claims on the basis of identity. As a result, it is difficult to sustain the identity argument alone as justification for de-colonization or global justice. One alternative is to turn to more formal historical appeals.

Historical appeals

As said above, claims to territory may take the form of appeals to cultural history. Like the case of Plato, these arguments can take a mythological form. However, they need not do this.

⁴⁰⁷ This might not be strictly true. The right of return to Israel and ethnic citizenship in some European countries appear to contradict this position. However, these policies might be more about increasing population while excluding certain types of outsiders.

Groups may look to a more objective history to justify their territorial claims. To convince others of the validity of a territorial claim, groups need to either justify their claims in terms of authoritative sources, which are unlikely to succeed if there are conflicting claims to a particular piece of land, or provide neutral and objective reasons that are independent of either point of view. If one is insistent on using historical claims to justify claims to territory, it remains difficult to adjudicate disputes. This is because history often becomes dependent on who is telling the history. As some commentators note, this is another version of the identity claim referred to above and at its best these cultural histories can be used to legitimate access to a particular bit of land, but cannot be used to legitimate sovereign control over a territory.⁴⁰⁸

As I argue in Chapter 1, it may be possible to ground historical claims in more objective or scientific anthropological history. For example, indigenous peoples may base claims to territory on rightful ownership based on first occupancy. Yet, there are at least two reasons to be skeptical towards such arguments. First, with respect to first occupancy, the claims of indigenous populations are often factually wrong. In New Zealand, Maori are seen as an indigenous culture, yet the Maori did not see themselves as a single cultural entity prior to the arrival of European explorers.⁴⁰⁹ In Sri Lanka the Sinhalese claim to be indigenous, yet there is strong evidence that Vedda preceded them. Many North American indigenous peoples were often not part of an original migration to the continent.⁴¹⁰ If this is correct, many claims are likely to be more complicated than they appear.⁴¹¹ Evidence that dispute the claims of many so called indigenous peoples come from both anthropology and molecular biology, which makes

⁴⁰⁸ M. Moore, 'The territorial dimension of self-determination'

⁴⁰⁹ C. Brown, *Sovereignty, Rights and Justice*, p. 20

⁴¹⁰ A growing field of population genetics that is able to use small mutations in DNA to identify human migrations out of Africa. Much of this work is summarized in S. Wells, *The Journey of Man: A Generic Odyssey*, Princeton University Press 2002

⁴¹¹ Occupancy might well give a title but not first occupancy – as we see with non identity arguments even occupancy can only claim an exclusive right claim against a just base-line

clear that many seemingly indigenous populations are often the second or third group to occupy a territory.⁴¹² These however, are empirical questions, the truth of which presupposes that first occupancy is a principle by which one can justify a territorial claim.

There is a second set of normative arguments that must be made to explain why first occupancy results in a title to territory, yet this begs the question as to what counts as occupancy. Perhaps, for us here, the importance of identifying such considerations helps to identify what is doing the work in the argument. If something else is being done to establish the occupancy, then it is not really the occupancy that is doing the work at all. There may be a number of ways to establish occupancy. Following Locke, some may seek to obtain occupancy by exercising their labor upon the land.⁴¹³ Others, following Grotius, equate occupation with possession,⁴¹⁴ while still others see territory as a jurisdiction over a group.⁴¹⁵

These three types of claims to territory, possession, property and jurisdiction present three possibilities for justifying claims to territory. The possession argument attempts to justify territory by asserting that present occupation and control are the important features in justifying claims. This, like Hegel's argument, tends to be conservative in its emphasis on current occupation. One problem with the possession argument is that it has difficulty explaining how a people can be dispossessed from their territory.

Property claims can be distinguished from possession claims. Sitting at a Starbucks, a coffee mug is in your possession when the barista gives you your drink and the mug is sitting at your table. While we can say that the mug is in your possession, it is not your property.

⁴¹² One popular writings that speak to these concerns is J. Diamond, *Germes, Guns and Steel*, W.W. Norton, 1999

⁴¹³ See, for example, A.J. Simmons, 'On the territorial rights of states' *Philosophical Issues* (11) 2001

⁴¹⁴ Michael Walzer seems to assert this sort of possession, M. Walzer, *Spheres of Justice* and M. Walzer, *Just and Unjust Wars* David Miller also says something similar in D. Miller, *On Nationality*

⁴¹⁵ See A. Buchanan, *Justice, Legitimacy and Self-Determination*

Property claims include a set of rights that extend beyond possession. Perhaps the clearest distinction is that property remains yours even when it is outside of possession. A property claim to territory suggests that the territory belongs to a people even when they are not in possession.

One might use a Locke-like property argument to establish the initial claim. This grounds property claims in labor and establishes a relationship between people and land. However, this has some well known difficulties. Those inspired by Kant might note that property claims ought to be conceived not as a relationship between people and things, but rather between people with respect to things. Thus, one might conceive of territory claims under a territory as jurisdiction concept where the claimant asserts jurisdiction over land as opposed to a relationship between the people and the land.

The difficulties with all of the identity claims discussed above are that they fail to justify the identity inference introduced at the start of this chapter. Hegel offers one possible way to overcome these difficulties while retaining an emphasis on identity. His argument is important to consider for two reasons. First, it is a foundational argument that gave inspiration to many identity thinkers. Second, Hegel gives a substantial political theory that links identity with a broad array of political concerns.

Hegel and the relationship between identity and acquisition

Hegel's property argument is a useful starting point for considering the relationship between identity and territory.⁴¹⁶ He claims to establish a general right to property which provides the foundation for individuals to exercise their wills in the physical world and identify themselves as objects in the world as opposed to merely being the subject of experiences. Hegel offers a limited analogy between peoples and states. This analogy can be used to explain the relationship between a people's collective identity and the state's claim to territory. The implications of this can then be clarified through Hegel's limited comments on the territorial claims of an actual state, Prussian Germany.

Hegel views history as the progressive unfolding of freedom.⁴¹⁷ His account of world history identifies some individuals and groups as key movers whose energies serve the purpose of this unfolding by moving humans from one stage of history to another. This history charts various forms of political organization and ends with the state. These larger political movements help one come to terms with his moral philosophy. The gradual unfolding, or recognition of reason, begins when individuals understand themselves as beings with a self-directed will. A self-directed will is one that is also free. Hegel recognizes that the exercise of freedom is conditioned by our social circumstances. Thus, the social and political community in which we live plays an important role in the exercise of freedom. History is the unfolding of reason, which is expressed as freedom and is manifest in particular socio-political structures. The state is the

⁴¹⁶ Taking a cue from Charles Taylor, I will ignore Hegel's contentious metaphysics, while acknowledging that Hegel's political philosophy is strongly rooted in his larger philosophical claims, C. Taylor, Hegel and Modern Society, Cambridge University Press, 1979, pp. 66-72

⁴¹⁷ G.W.F. Hegel, Hegel's Philosophy of Right, trans. T.M. Knox, Oxford, Clarendon Press, 1967, 341-360. Also see S. Avineri, Hegel's Theory of the Modern State, Cambridge University Press, 1972, pp. 221-238

end of history in that it achieves the final form of social organization allowing freedom to flourish.⁴¹⁸

Freedom is closely tied to the ability to acquire external possessions. Hegel argues that we have a duty to respect others and ourselves.⁴¹⁹ The first is a negative duty not to interfere with others in the exercise of another individual's freedom. The latter is a positive duty to assert one's own personality. The two go together. When humans exercise their own freedom by acquiring property we come to recognize ourselves as rational beings capable of directing our own wills and exercising our capacities in the external world.⁴²⁰ By extension we recognize that other beings may have similar wills, but only because others demand that of us. The process of recognition is not voluntary but dialectical. This is important as it explains the process of recognition between states or political communities. We respect the rational wills of others because we understand that their wills have demands similar to our own. The exercise of one's own will is necessary if we are to understand our own personality and the possibility of personality in others.

Hegel writes that 'it is a duty to possess things as a property, i.e. to be as a person.'⁴²¹ This raises an obvious question: why? Why is it a duty to possess things and why is possession necessary for one to be a person? The command itself sets up, however, a clear relationship: that persons are the type of things that are capable of possession. Hegel's argument rests on an argument about freedom. Freedom requires separating the straightforward desires that arise

⁴¹⁸ Note, there is some ambiguity with exactly what Hegel means here. From one perspective it appears as though the state is the end of history. However, we might recall that the owl of Minerva flies at dusk and conclude that the state is simply reason has unfolded thus far.

⁴¹⁹ A. Wood, Hegel's Ethical Thought, Cambridge University Press, 1990, pp. 94-95

⁴²⁰ As Jeremy Waldron notes, it may be controversial to argue that Hegel's concept of property is private property. I hope to alleviate this concern in the process of this essay, J. Waldron, The Right to Private Property, p. 343

⁴²¹ G.W.F. Hegel, Hegel's Philosophy of Mind 486

within us from conceptions and beliefs we have about those desires. Only free beings can see themselves as an object in the world and not simply the subject of experiences. 'A person by distinguishing himself from himself relates himself to another person, and it is only as owners that identity is realized though the transference of property from one to the other in conformity with a common will and without detriment to the rights of either.'⁴²² For Hegel this sets forth a relationship between possession and personality. It is through possessions that individuals are able to create and project their identities.

The first object of ownership is possession of one's self. A person takes possession of himself when he is able to will ends of his own choosing. Exercising these choices requires a physical body. This presupposes a personality, a self to form ends and direct the body to obtain them. This also presupposes a will, something that can direct the self to acquire possessions. To say that one has a property claim in one's self is to assert that others may not make claims to one's self without permission. My claim to my self-possession places a duty on others. From this arises the reciprocal recognition that other rational beings can place a similar duty on me. In asserting possession over one's self, personality is developed and individuals are able to distinguish themselves as members of the world with distinct and separate wills. Humans can evaluate and make self directed choices. This is what makes it possible for rational beings to also be moral beings.

Rational beings appropriate objects by putting their will into the object of their choice.⁴²³ This works with one's own person as well objects external to one's self. Obtaining things, beginning with one's own body, is how persons express their freedom. This makes sense, in

⁴²² G.W.F. Hegel, Hegel's Philosophy of Right, 40

⁴²³ G.W.F. Hegel, Hegel's Philosophy of Right, 44

Hegel's thinking, for at least two reasons. First, as mentioned, freedom requires a will that can make self directed choices and this requires one to recognize them as an object in the world. In taking possession of things, one distinguishes themselves from other objects in the external world. Individuals are collectors of objects. Second, the human will is situated in a physical body that requires the possession of things in order to sustain itself. In short, freedom places a duty on individuals to acquire possessions, beginning with one's self. This forms a general right to property. The upshot is that each rational being has a particular right to possession of his own person and a general right to external property.⁴²⁴

From the above it is clear that people gain possession of their own persons through an act of the will. In a similar way people gain property in external objects. Hegel writes that 'a person has as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself derives its destiny and soul from his will.'⁴²⁵ However, it is not sufficient to simply direct your will at something. Hegel argues that in land, occupation is a sufficient indication that one has put their will into the land. While more than one person can occupy adjacent pieces of land, or pieces of land that are exceptionally close to one another, no two people can occupy the exact same piece of land. Physical possession, Hegel argues, is a sufficient indication that one has invested their will in movable objects.⁴²⁶ Identifying the property of others is a game of identifying where others have put their will into things. One easy way to do this is to look for the person who first attempted to acquire the thing.

Recall, that in Hegel's conception of history, history itself is the story of the self-actualization of freedom. This story is progressive. Some social and political structures assist in

⁴²⁴ J. Waldron, The Right to Private Property, Chapter 10

⁴²⁵ G.W.F. Hegel, Hegel's Philosophy of Right, 44

⁴²⁶ G.W.F. Hegel, Hegel's Philosophy of Right, 51

achieving this end and in some cases are necessary. For Hegel, the territorial state allows for the highest possible actualization of freedom. He writes that ‘the nation state is mind in its substantive rationality and immediate actuality and is therefore the absolute power on earth...’⁴²⁷ By this he means that only through the state is reason revealed in its totality. Within Hegel’s political philosophy there is an important argument linking the state and the possibility of individual freedom.⁴²⁸ This chapter is concerned with the inference that a group can have a claim to territory if the territory plays an important role in the group’s identity.

Above we saw that for Hegel property claims are fundamental to individual identity. I argue that Hegel makes an analogy between people and states. Just as people have a duty to make a property claim in their personality; a state has a duty to claim its territory as an essential part of its self identity. Hegel makes the analogy clear enough when he writes that:

a state is as little an actual individual without relations to other states as an individual is actually a person without rapport with other persons. The legitimate authority of a state and, more particularly, so far as its foreign relations are concerned, of its monarch also, is partly a purely domestic matter (one state should not meddle with the domestic affairs of another). On the other hand, however, it is no less essential that this authority should receive its full and final legitimation through its recognition by other states, although this recognition requires to be safeguarded by the proviso that where a state is to be

⁴²⁷ G.W.F. Hegel, Hegel’s Philosophy of Right, 331

⁴²⁸ This is developed in part three ‘Ethical Life’ of *Ibid*. Here Hegel offers his tripartite division of ethical life with discussions of family, civil society and the state. The relationship between these parts and the individual are beyond the scope of this paper. For more on this see K. Westphal, ‘The basic context and structure of Hegel’s Philosophy of Right’, Cambridge Companion to Hegel, Cambridge University Press, 1993, Z.A. Pelczynski, ‘The people and the state’, Hegel’s Political Writings, Oxford University Press, 1964 and D. Boucher, Political Theories of International Relations p. 333-335

recognized by others, it shall likewise recognize them, i.e. respect their autonomy; and so it comes out that they cannot be indifferent to each other.⁴²⁹

There are several things to be drawn from this. First, just as individuals need to distinguish themselves from others before they can claim to be a full person, states need to distinguish themselves from other states before they can claim full statehood. Second, this is achieved through the reciprocal recognition of each other as similar entities. Individuals recognize other beings with wills as persons and therefore as bearers of rights and duties. Similarly, states recognize each other as states and therefore as sovereign entities. Finally, the source of a state's will, that is the particular structure of legitimate authority within the state, ought to have no bearing on recognizing the state as a state.

The purpose of an analogy is to use existing knowledge about one thing and to obtain new knowledge about something else. Here, Hegel seems to argue that by knowing something about a person we can infer information about a state. He argues that states are individuals, even if they are not persons.⁴³⁰ Individuals are distinct entities in the physical world. They are 'the actuality of the ethical Idea.'⁴³¹ Like persons, states see their individuality in distinguishing themselves from other entities in the world and by gaining the recognition of other similar entities. While individuals may have their end in an abstract ethical life, states need to be actualized and concrete in the world. Yet, like persons, states must distinguish themselves as objects in the world.

⁴²⁹ G.W.F Hegel, Hegel's Philosophy of Right 331(R)

⁴³⁰ D. Boucher, Political Theories of International Relations, p. 345, G.W.F Hegel, Hegel's Philosophy of Right 322

⁴³¹ G.W.F Hegel, Hegel's Philosophy of Right 257

One way to do this is through war. Hegel famously argues that armed conflict is rational in the sense that it can be explained. States, like persons, have wills. War occurs when the particular wills of states ‘cannot be harmonized’ in some higher relationship, in the absence of international law, for example.⁴³² Yet, for Hegel, war is not simply a product of miscommunication or a lack of coordinated wills. Rather, war is an ethical necessity. Through the act of war states assert themselves as states. They also implicitly recognize others as states through the physical act of conflict. Although war might be necessary for Hegel, it is not the only way in which states recognize each other. There is room for such reciprocal recognition in claims to territory. While Hegel does not do this directly, his analogy leaves room to extend its claim to the concept of self-ownership.

In the same way that persons require self-ownership to develop their identity, states require something akin to self-ownership to develop their identities. The reasons for this appear clear enough. The importance of the state in Hegel’s philosophy rests in its actuality and particularity. The state must be a thing that is here, in a particular location as opposed to an abstract entity that could be anywhere. The state is not merely the possibility of a relationship between persons, but an actual entity and one feature of an actual state is its location. The state has a personality like a person and this is the basis of the territorial claim. It is not that this state could be ‘anywhere’, but that it is a particular state that is ‘here’.

Here, Hegel’s few direct comments on territory are helpful. These comments appear in his wider commentary on the German constitution. His main concern is to explain how the Holy Roman Empire lost many of its territorial claims to places like Hungary, Poland, Prussia and

⁴³² G.W.F Hegel, Hegel’s Philosophy of Right 334

Naples. In doing so, Hegel provides some insight into the relationship between territory and a people.

Hegel makes a distinction between natural and unnatural territorial claims. He asserts that unnatural claims are those where geographies are discontinuous and populations contain a diversity of peoples.⁴³³ Natural claims are therefore geographically contiguous and inhabitants are homogenous. The territorial claims of the Holy Roman Empire included lands that were separated from core German territory inhabited by non-German populations. However, this begs two questions: what makes Germans 'German' and what makes some territory 'Germany'? Answers to these questions are embedded in Hegel's conception of history, the details of which need not be discussed here. What is helpful is to recall the analogy between individuals and their property claims and states and territorial claims. Though not persons, states are individuals and have identities. This identity originates with the members of the state, but it is a complex relationship because identities are also socially constituted. A state comes to solidify its identity through its territory in the same way that individuals develop their identities through property.

The upshot of this is that a state's claim to its territory is grounded in an identity claim. The territory belongs to the state because without it, the state would not be a state. Hegel suggests that if you ask the representatives of a state to justify its claim to territory they would say the state is co-constitutive with the territorial claim. Without the territory, the state would cease to be a state. The territory comes to belong to the state because the state's sense of self comes into being with recognition of itself as a territorial entity. This in turn requires that the state recognize similar claims of others and it is this recognition by others that grounds a sufficient claim to title.

⁴³³ G.W.F. Hegel, 'The German Constitution' Political Writings, Cambridge University Press, 1999, p. 36

Recall the inference that this chapter is concerned with, that if a piece of territory is important to the identity of a people, the people therefore have an exclusive claim to the territory. Hegel's argument provides a powerful and well developed defense of the inference, which has proved useful to a number of political theorists interested in the relations between states.⁴³⁴ However, as it stands, the argument has several difficulties. While many of these reside in the internal structure of the argument, I would like to focus on what the argument fails to explain.

There are several things that we might want a political theory of territory to do that Hegel's argument fails to do. The argument itself is conservative in that it appears to always defend the status quo. As all justifications must be ex post facto Hegel makes it impossible to conceptualize a state without its particular territory. It is the claim of territory and its defense that cause an entity to be recognized as a state.⁴³⁵ For Hegel, states must always exist in the present. This conservatism itself may not be problematic, but it leads to two conclusions that appear difficult to accept.

First, Hegel's argument makes it difficult to justify any secession and many claims to self-determination. Arguments for secession and self-determination generally entail a prior claim to territory, 'we want to establish a state over this land because the land is ours.' Hegel excludes such an argument because the existing state represents the end of historical movement. The state makes ethics possible and once this is achieved there is simply no reason to seek political independence.

⁴³⁴ See M. Frost, Ethics in International Relations: A Constitutive Theory, Cambridge University Press, 1996 and A. Linklater, Men and Citizens in the Theory of International Relations, London, Macmillan, 1990

⁴³⁵ There are of course others, more structural elements that are necessary for statehood. It is for this reason that Hegel does not believe the Germany of 1810 can be properly called a state, G.W.F. Hegel, 'The German Constitution'

Second, Hegel's argument removes the possibility of recognizing dispossessed peoples.

Because a territorial claim is linked to the political form of the state, there is no reason to accept the notion that a people could have a claim to territory independent of a political form. For these and other reasons some have sought to disassociate the link between a state and territory by focusing on the link between identity and territory. At least two of these forms arise in contemporary debates, the links between territory and national identity on one hand and religious identity on the other.

There are several conclusions that might be drawn from this discussion. First, the territory inference has a long history. One version can be found in Plato's noble lie. Hegel offers a version of the argument as part of his larger political theory. Neither of these efforts, however, is satisfactory. Hegel, in particular, seems unable to give us what we want in a theory of territory. With his argument, we are unable to explain how new territorial claims develop, how self-determination and secession are possible and how peoples can become dispossessed of their territory.

One strategy is to more fully connect a people and their territory with arguments emanating from religious or national historical sources. Unfortunately, such claims often appeal to justificatory mechanisms that have force only with internal constituencies. They not only say something about the relationship between a people and land, but also place an injunction on other peoples not to do things with the territory. The identity inference, however, is poorly equipped to ground such claims. It fails because its authority is necessarily internal, its claims are not exclusive and trades on additional arguments which do the real work.

There is a set of arguments that might possibly do the work to provide a better foundation for territorial claims. These include arguments that conceive of territory as a possession, as a property or as a jurisdiction. All of these have deep historical roots and are not without their problems, but provide possible avenues to more substantially grounded territorial claims. The final chapter, Chapter 8, will utilize the conclusion of these core chapters to develop an understanding of what a political theory of territory can be expected to do.

Chapter 8: Conclusion

This thesis began by setting out the problem of territory. In the first chapter I argued that although it is clearly important to political theory, territory is under-theorized by contemporary political philosophers. In places where one would expect it to play a prominent role, territory is either presupposed or ignored. This thesis provides an original contribution to the literature in at least two ways. First, unlike much of writing in political theory it addresses territory head on. Second, the method of investigation is a unique approach to the study of territory.

Contemporary theory presupposes territory. Many of the concerns of contemporary theory, such as de-colonization and global justice, arise through the unraveling of colonialism. Because contemporary theory has little to say about territory directly, we are brought back to the arguments originally used to justify colonialism. For this reason, the thesis included three substantial middle chapters where I critically evaluated three conceptions of territory, as possession, property and jurisdiction, which were prevalent during the development of the early state period.

The preceding discussion showed several strategies for dealing with territorial claims and difficulties associated with each. We are now in a position to draw some substantive conclusions. This chapter will do this in several ways. First, I will review the key arguments from each chapter. I next argue that despite some reason for skepticism there are nonetheless good reasons for a theory of territory. With this established I provide two sets of conclusions. One is skeptical and provides an outline for what a theory of territory is expected to do. The

others are more limited positive conclusions that provide some tentative content to the form an adequate theory of territory must take.

Reviewing previous conclusions

The job of the first chapter was to establish territory as an important part of contemporary political debates and show that there is a curious silence about the concept of territory in political theory. The chapter did this through two arguments. First, it showed the importance of territory and described its complexity by distinguishing territory from other related concepts. Second, the chapter identified several areas of contemporary theory, such as secession, self-determination and indigenous land rights, where one would expect territory to play a fundamental role. Yet, in these cases where one might expect the concept of territory to be well developed, it is either presupposed or ignored.

In Chapter 2 I turned to international law to determine if this neglect is a problem. Here I argued that two sets of issues underlie the development of modern international law: decolonization and global justice. Debates surrounding these two issues show how the disentanglement of colonialism is, somewhat surprisingly, a return to the kind of thinking that underpinned the original justification for colonial acquisition. These colonial justifications and their legacy in international law can be viewed as three types of claims: territory as possession, as property and as jurisdiction. The next three chapters were critical engagements with key thinkers who developed these original justifications. Because of the absence of serious discussions of the theoretical underpinning of territory in contemporary theory, it was necessary to engage with these historical thinkers and their arguments about territory. This exercise was

not intended as an exercise in the history of political thought, but rather it was intended to say something about the nature of territory through the history of political thought.

Chapter 3 considered territory as possession through a critical discussion of the role of territory in the political thought of Grotius and Hobbes. While there is an intuitive appeal to the idea that possession is the key feature of a claim to territory, possession based arguments are weak because they fail to address several things that a theory of territory is reasonably expected to do. The possession argument fails to explain why dispossession is wrong.

The next chapter considered the argument for territory as property. Here I discussed territory in the political theory of Locke and Pufendorf. Both view territory as a collection of the pre-political property claims of the state's original members. Such theories are compelling because they ground territory in natural rights. However, pre-political property claims cannot be sustained and the territory as property thesis is therefore difficult to defend.

For Kant, property claims play an important role in justifying obligation to the state and in his understanding of territory as well. Chapter 5 discusses the conception of territory in the political theory Kant. His argument views territory as a jurisdictional matter. As with arguments discussed in the two previous chapters, the territory as jurisdiction argument has some difficulties. In particular it has trouble explaining why a particular state has a claim to a particular bit of land.

Many of the cosmopolitans who played an important role in the development of international law take their start from Kant. The Kantian legacy continues through thinkers such as Beitz, Held and Pogge. However, unlike Kant, these contemporary cosmopolitans are skeptical towards any claims to territory. In their turn towards global justice and self-

determination, cosmopolitans develop a crude territory as property concept that they ultimately reject. In doing so they not only reject several of Kant's central insights, but also fail to appreciate the important role of territory within their own claims.

There are of course many who reject the foundations of cosmopolitanism. Many of these anti-cosmopolitans turn to the concept of identity, in an effort to ground territorial claims. Several of these concerns were addressed in the previous chapter. Following Hegel, anti-cosmopolitans argue that claims to territory are justified through the relationship between a group's identity and particular pieces of land. This solves a particular problem with the territory as jurisdiction argument. Although this identity claim appears to make sense, it fails in the face of criticism.

Here, in the last chapter, I bring together the arguments addressed earlier and draw several conclusions. At first glance there seems to be good reasons for contemporary theory to presuppose or ignore territory. However, the answer I propose to give, though skeptical, is more subtle. Following Rawls and others, contemporary theory is right to remain silent about territory and about property in territory. This connects the main grounds for skepticism about territory to arguments for colonial restitution or global redistribution of resources because they both offer a crude 'territory as property' view – which when abandoned seems to leave the world un-owned and therefore subject to equal distribution. Yet skepticism is not the only alternative. Jurisdiction entails some elements of the territory as property view. This is a more sophisticated claim than the straight territory as property argument developed in Chapter 5. Here ownership is a secondary but important claim states make in the absence of a universal norm. As a result there is a *prima facie* but not indefeasible right to territory. As argued in Chapter 7, identity plays a role in linking 'peoples' to places. In the end this raises the bar to colonial restitution and global

resource redistribution and legitimates the current view of territory in political theory and international law where territory is presupposed but not theorized.

Cosmopolitans, and others, are justified in their skeptical attitude towards territory. Individually the main justifications for territory are less than compelling and together they appear to form a circular argument. Each chapter builds on problems presented in earlier ones. Where possession is dismissed property takes its place. When property proves inadequate jurisdiction is more compelling. Jurisdiction is shown to be unable to explain what connects particular peoples to particular places. This difficulty appears to be solved by looking to identity, but identity itself depends upon conceptions of property or possession.

From one perspective this story is circular. The problem with jurisdiction is that it fails to tie a particular political community to a particular piece of land. Of course, this is the very thing that the argument from identity does best. This suggests that the story of territory is more complicated than first imagined. Individually each of the core arguments is problematic. Yet elements of each argument might prove useful in constructing a more complex understanding of territory. Here, each aspect might form part of a full theory. It would seem that the particular elements that are helpful must not be contradictory. If a political theory of territory is to be successful, it must be internally consistent. One can not simply pick and choose what one likes, but must rather construct a theory from what works or can be justified.

Good reasons to have territory

Despite this initial skepticism there are good reasons to take territory seriously and to develop an adequate political theory of territory. Any theory of territory would have to accomplish at least

three tasks. It ought to explain original acquisition, just transfer and alienation of territory and specify a minimal set of institutions associated with territory. The first two, acquisition and transfer, are similar to the main concerns of a theory of property. This is for good reason. In a strong sense, questions of territory are about title, which should not be surprising given the analogy between property and territory that is adopted by a number of thinkers discussed in earlier chapters. It is important to note that an analogy suggests that two things are similar. It does not assert that they are the same thing. Property and territory may be analogous, but they are not equivalent. Several differences are obvious. For example, territory is a group claim by nature, while property can be an individual claim. Territory is necessarily over land, while property could be, but does not have to be about land.

Any theory of territory must articulate a theory of original acquisition. There are several strategies that one might take to accomplish this. Following Locke one could establish original claims in the relationship between the exercise of one's labor on vacant land. Others, perhaps cosmopolitans, might attempt to use an egalitarian principle to explain why original acquisition needs to be amended with some sort of just redistribution. A utilitarian, echoing Hume, might choose to explain why original acquisition ought to be replaced by an original starting point from where institutions might be built. Some of these arguments might prove to be better than others. However, the important point is that a theory of territory must explain where it is starting from and why it is starting from that particular point. If a theory denies that this is possible, then it denies that any political theory of territory is possible.

Next, it is important to understand that that a political theory of territory must be able to explain the acceptable ways in which territory can be alienated. This is important because territorial boundaries change over time and it is useful to know which of these changes are

legitimate and which are not and therefore should be resisted. Borders change not only through wars, colonization and de-colonization, but also through secession and claims of self-determination by those within existing states. Some of these claims are asserted as original acquisitions that have been long ignored. Others simply seek to alter an existing political structure. Regardless of the particular change, a theory of territory needs to explain which changes are justified and which are not.

Finally, a theory of territory must show what minimum set of institutions is entailed in a territorial claim. This may be a small set of institutions, but it cannot be a null set. If territory did not entail *any* power over land, then it is unclear what territory would be about. Territory is a useful analytic category because it seeks to explain something about the relationship between political communities and particular pieces of land. Territory must say something about the nature of this relationship. If it does not then territory is not anything in particular, but rather a vessel to describe *a* relationship between people and land. People do things with land; they use it, transform it, and make it theirs. To say that a people have a territory suggests that they have a set of rights that allows them to do things with the land. By analogy, to say that something belongs to you or me suggests that there are certain use rights associated with that property claim. These rights may be limited, but it would be strange to say that something is mine or yours if there were *no* use rights that went along with it being mine or yours.

As discussed in the first chapter, there is no reason to believe that this power *must* entail sovereignty as has been suggested by the phrase ‘territorial sovereignty’ utilized by international relations realists.⁴³⁶ Perhaps all territory entails is the right to do things with the territory within

⁴³⁶ For different forms of the same argument consider, J. Mearsheimer, The Tragedy of Great Power Politics, W.W. Norton, 2001, H. Morgenthau, Politics Among Nations, 7th edition, Boston, McGraw-Hill Higher Education, 2006,

a robust set of side constraints. Robert Nozick suggests this is exactly what territory is all about.⁴³⁷ In considering the limits of ownership, he notes that it is obvious that one cannot do whatever one pleases with a knife.⁴³⁸ While it is true that the knife's owner can choose when it is to be used, the owner cannot bury the knife in another person's chest. The right to property, here the knife, entails the power to use it at the owner discretion. The reason one is restricted from placing the knife in my chest has nothing to do with property or the concept of ownership. Rather it has to do with a different set of moral constraints that prohibit harm.⁴³⁹ By analogy, one can argue that a theory of territory must describe and explain what one can do with territory, but it need not entail all of the things one may or may not do with the territory.

There are good reasons to have a theory of territory. Cosmopolitans argue that if there are claims to territory, then they must be property claims. For reasons discussed in Chapter 4, territory as property is unacceptable. As a result, the cosmopolitans discussed in Chapter 6 reject all claims to territory. However, this is not the only alternative. I have argued that territory as property is not the only way to view territorial claims. The crude territory as property view can be rejected. This leaves a more sophisticated perspective on territory, which is not the same as a property claims but retains some elements of ownership.

These three aspects of any theory of territory, acquisition, transfer and powers, are necessary components of any theoretical investigation of territory. Many of the arguments in previous chapters focused on the first two, how territory is originally acquired by polities and

J. Rabkin, Law Without Nations?, Princeton University Press, 2005 and K. Waltz, Man, the State and War, Columbia University Press, 2001

⁴³⁷ R. Nozick, Anarchy, State and Utopia, Chapter 1

⁴³⁸ R. Nozick, Anarchy, State and Utopia, Chapter 7

⁴³⁹ See J. Waldron, The Right to Private Property, Chapter 1

how it might become part of another political community. All of this presupposes a reason to have territory.

There are both primary and tangential reasons to have territory. There are two clear primary benefits of such a theory: it is a necessary component of a right to self-determination and it is consistent with the liberal right to emigration. Neither of those would be necessary if there were no territory. As the earlier discussion on colonialism and global justice made clear, the right to self-determination must entail some sort of territorial claim. Consider the claims of thinkers such as Tully, Pocock and Ivison who argue that a claim to self-determination entails some sort of claim about land.⁴⁴⁰ On this, liberals agree. Critics may disagree with the particulars of each of their arguments. One might dispute the ways in which First Nations should be included in Canadian politics, the role of the Maori in the New Zealand constitutions or Aborigines in Australia. But it is difficult to see how one could take self-determination seriously without providing a fundamental link to territory. Scholars such as Brilmayer argue that self-determination is fundamentally a claim about doing things with land.⁴⁴¹ Others contend that self-determination is about a group making its own political choices.⁴⁴² But even here, it is recognized that this claim can only be made over a particular territory.

It should be clear that a theory of territory is a necessary component of any understanding of political self-determination. Self-determination suggests that groups, however they are formed, have the right, under certain conditions, to form their own political communities. But of course every political community has to be in some place. It has to occupy a physical location. Now, it is possible that the self-determining community could be located in one of several

⁴⁴⁰ J. Tully, 'The struggles for indigenous peoples and of freedom', J.G.A Pocock, 'Waitangi as a Mystery of State: Consequences of the Ascription of Federative Capacity to the Maori' and D. Ivison, Postcolonial Liberalism

⁴⁴¹ For example, L. Brilmayer, 'Secession and Self-determination: A Territorial Interpretation'

⁴⁴² See H. Beran, A Liberal Theory of Secession, and a critique of this argument in Chapter 1

places, but it can actually exist in only one place.⁴⁴³ When the community takes this place, it seems to exclude the possibility that other political communities can occupy the same place at the same time. While it is certainly possible for two to co-occupy the same piece of land, they cannot do so as distinct political communities. I suppose it is possible that some sort of federal structure might be arranged with different institutions concerned with each of the groups, but this would only shift the level where one identifies the claim to territory. Nevertheless, self-determination requires a political community located in a particular place. A conception of territory is necessary for understanding that this entails excluding others. This in turn requires something to explain why the polity is located on the place that it is and not another.

This demands an answer to a prior question: what is the source of the political community's claim to the territory over which they aim to control their political destiny? One might turn to property and argue that territory is based in a pre-political property claim. But, as argued earlier, this fails in the face of criticism. Property rights cannot be defended in the absence of a political community. Jurisdiction is the alternative. As Brilmayer argues, when a group claims self-determination it is claiming jurisdiction over an area. It is asserting that its political institutions hold jurisdiction over a specified area.

It is possible for two distinct political communities to make a claim to the same piece of land. As I mention above one might be tempted to say that only one can have a legitimate claim and that the other must be forced to concede. Yet, as argued in Chapter 7, land can play an important role in creating and sustaining group identities. There is no reason to believe that a single piece of land could not be important to multiple groups. It would seem that both Israelis and Palestinians have identity claims to the same piece of land. However, the argument need not

⁴⁴³ This is not to say that a territory must be contagious, rather that the entity constitutes a single thing.

stop here. Certainly, over time, colonizers create a relationship with the conquered without necessarily taking away the relationship between the land and its native peoples. While this interest in land cannot make a claim conclusive, it is an indication that a group has a provisional claim. However, this may be the wrong way to consider territory. Remember, this dissertation is concerned with the concept of territory. It may therefore be easier to consider what argument a political community is making when it asserts a claim to territory. Doing so may help to explain how competing groups make such claims, which cases of condominium ought to be taken seriously and which should be rejected.

With these competing claims, the identity forming or sustaining features of the territory can be conceded up to a point. Identity based claims show an interest in having a particular territory, but this is not conclusive. Furthermore, property and possession need not be the issue. It is not enough for the competing parties to gain possession. A focus on possession may only encourage the competing claimant to do what they must to gain possession. The identity claim must be combined with something more substantial.

Second, a political theory of territory is a necessary component of the liberal right to emigration. Emigration may be justified in a number of ways.⁴⁴⁴ Consent theories allow one to withdraw their consent from the state. Other theories of political obligation may grant a right to emigration after one has completed or satisfied obligations to others. While it is clear that not all political theories provide a defense of emigration, those that do require a theory of jurisdictional boundaries, which entails a theory of territory. A right to emigration suggests that one does more than remove themselves from political participation. Rather, it is divorcing oneself from one

⁴⁴⁴ For issues for and against see B. Barry and R. Goodin, Free Movement: Ethical Issues and the transnational migration of people and money, Penn State University Press, 1992

community and joining with another. This requires moving from one place to another and therefore presupposes a plurality of communities. As mentioned above, it is important that these communities are located here as opposed to there. Once you get to this point territory is presupposed. This in turn requires an explanation and justification as to why the community *is* placed here as opposed to there.

A political theory of territory is needed because it is a necessary precondition for other political theories. I call these primary reasons because they are necessary if these other theories are to make sense. In addition, there are a number of secondary benefits to having a theory of territory. These benefits are not necessary conditions of other theories success or persuasiveness, but rather provide some additional reasons to have a theory of territory.

A political theory of territory that provides justification for a plurality of territorially based polities can help to encourage both political and social diversity. It might do so in several ways. First, it seems that cultural and linguistic diversity develops when groups create a distinction between the self and other. When one group carves themselves off from another, distinct cultural and linguist traditions seem to develop. Now, this might confuse the cause with the effect. It could be that groups predisposed to these differences create separate political communities so that this difference might flourish. Either story might be true. The point is that differences are allowed to develop because of a plurality of different claims to different territory.⁴⁴⁵ However, territory is neither a sufficient nor a necessary condition for diversity. Certainly there is a great deal of diversity within territorial borders. In some places these differences are linguistic. In others they are cultural. In some there is great economic diversity,

⁴⁴⁵ This seems to be the main contention in J. Williams, The Ethics of Territorial Borders, New York, Palgrave, 2006

and some may be a combination. Thus, while territory could not be the ultimate cause of diversity, it might be the proximate cause because it helps to facilitate some of these differences.⁴⁴⁶

Some thinkers, such as Hobbes and Kant, extend the benefits of diversity and include them within their larger political theories. Both thinkers argue that a plurality of states is necessary. For Hobbes, this is for the practical reason that a sovereign cannot effectively govern over large distances. Power, Hobbes argues, loses its strength the further it is projected. This is one of the reasons that there will never be a global Leviathan.⁴⁴⁷ No sovereign would be able to effectively exercise power over such a large distance. As noted in Chapter 3, this may be something that could be overcome with technology. Near instantaneous global communication and the ability to project power over increasingly greater distance is something which Hobbes could not have conceived. And although we might conceive it, it seems unlikely that technology will be mustered to this end.

Kant appears to acknowledge Hobbes' conclusion and identifies a further value to a plurality of states. In Kant's political theory, practical reason demands that states adopt republican constitutions. Yet, it is clear that individuals in some states ignore this duty. Some states are despotic tyrannies, while others not. A world state, Kant argues, would be bad because of the possibility that it could fall into a global tyranny. In such a world there would be no state where individuals might seek refuge from despotism. A plurality of states leaves open the

⁴⁴⁶ Some thinkers do not believe this diversity if any great benefit and suggest that it might in fact be detrimental. I do not take a position on the issue. To the extent diversity of this sort is valued, territory facilitates it. If it is not valuable, there may be other institutional structure that can combat it.

⁴⁴⁷ As noted in Chapter 3, there are several reasons why Hobbes' Leviathan does not follow at the global level. Many of these reasons are discussed in D. Boucher, Political Theories of International Relations and N. Malcolm, 'Hobbes's Theory of International Relations'

possibility that those living under a despot could flee to a state with just political institutions.⁴⁴⁸ Contemporary cosmopolitans, discussed in Chapter 6, pick up on much of this, yet remain committed to the Lockean-type conception of territory as property. It is this idea that animates claims of resource redistribution.

A theory of territory encourages political, social and cultural diversity while providing the possibility for a refuge from despots. Additionally, it provides a location where local institutions might be based. A political theory of territory is needed to accomplish this task. It tells us why we ought to respect not simply the power of a political community, but its location as well.

Finally, at a more concrete practical level, there may be some institutions that best function within territories.⁴⁴⁹ One might argue that there are a number of problems shared by all states and that these problems are structured in a way that global institutions are best equipped to deal with such difficulties. Global warming and other environmental problems are a good examples of this. To the extent that there are moral imperatives to act, cosmopolitans argue that state boundaries are irrelevant where these issues are concerned. However, particularists or communitarians can certainly argue that territorially demarcated communities have good reasons to join together to solve these problems. Of course such problems need not be environmental. They could certainly be economic or perhaps even military.

Yet, even if there are good reasons for global institutions, this does not entail a rejection of territorial boundaries. There may remain some institutions that are best located in particular political communities and particular tasks that are best performed at the domestic level. Though

⁴⁴⁸ See I. Kant, *Perpetual Peace* and I. Kant, *Metaphysics of Morals*

⁴⁴⁹ This is one way for justifying boundaries proposed in O. O'Neill, 'Identities, boundaries and states,' *Bounds of Justice*, Cambridge University Press, 2000

all states might share a common concern over global warming, they need not share the same concerns over building codes, architectural commissions, public subsidies for the arts and public utility standards. If one takes the right to self-determination seriously, then there must be something left over for the polity to make determinations about. Once this is accepted, one has started to use a conception of territory.

A political theory of territory is a necessary part of both a serious theory of self-determination and a right to emigration. However, in light of my discussion of territory as possession, property and jurisdiction, contemporary thinkers are right to be skeptical towards territory. There are two reasons for this. First, the main strategies for defending territory face difficulties. Second, when considered collectively, the strategies are circular. Cosmopolitans focus on one strategy, territory as property. They argue that it is the only plausible way to ground claims to territory. If territory as property is rejected, then, cosmopolitans argue, there can be no conclusive claims to territory. Because it is rejected, they are left with skepticism.

This cosmopolitan skepticism is based on a crude territory as property view. In this thesis I presented a number of alternatives. This claim was defended in the discussion of Kant in Chapter 5. He argues that property plays an important role in the creation of the state, but does not come to the conclusion that territory *is* property. Rather, property itself is more complicated than what is found in the theories of Locke and Pufendorf. Kant's argument retains elements of the labor theory of property, but transforms it from a relationship between people and things to a principle that necessitates the creation of the state.

Similarly, Kant's conception of territory as jurisdiction suggests that territory is more complicated than the crude territory as property view adopted by cosmopolitans. Territory is not

the same thing as ownership, but it has some elements of ownership. Like a person with property, a group can expect a level of freedom to do things with its territory. Several of these issues are discussed in the section to follow. Here, it is important to recognize that territory may have property-like elements without being synonymous with it.

The upshot of this is that polities have a *prima facie*, but not indefeasible right to territory. As a result, the bar for resource redistribution is raised. If resources are not subject to common ownership then they are not subject to the same principles of redistribution. Finally, in a strange way, this legitimates the way in which territory is presupposed in contemporary political theory. The next section outlines two sets of tentative conclusion about territory: necessary tasks for a theory of territory and necessary content for a theory of territory.

Tasks for a theory of territory

Several skeptical conclusions can be drawn about a political theory of territory. Each of these is developed from the substantial chapters of the dissertation. These conclusions are skeptical in the sense that they outline a theory of territory without providing substantial content. There are at least four skeptical conclusions that can be drawn from the preceding discussion. Each of these arose from arguments presented in one or more of the previous seven chapters. First, a theory of territory must be compatible with other central concepts that play an important role in a fully defensible political theory. Second, to be a useful analytic tool, a theory of territory must be limited in scope. Third, the theory must avoid being self-referential and should appeal not only to those who are making the claim, but should be, in principle, compelling to all those who

hear the claim. Finally, a theory of territory must be capable of linking people and places. If a theory is unable to do this then it cannot be an adequate theory of territory.

First, like any compelling political theory, a theory of territory cannot work in isolation, but rather must work together within a framework of other political theories. I argued this above where I showed that territory is a necessary feature of other political arguments. It would certainly be odd if a theory of territory could only work at the expense of other well developed theoretical arguments. For example, territory ought to be compatible with the demands self-determination and emigration as well as justice and broader moral philosophy. If it proves that a theory of territory contradicts other substantial theories, then the theory of territory must be capable of explaining why other theories are misguided and how they can be altered or why they must be abandoned.

Recall that James Tully and Duncan Ivison argue that justice demands the inclusion of indigenous peoples in the constitutions that rule over them. This should be accomplished by incorporating the traditional modes of governance present in indigenous practices with Western constitutionalism. The result is a mixed constitutional regime that respects native traditions of governance within the framework of an existing system of government. Both Tully and Ivison argue that justice requires the inclusion of native peoples in a way that respects their own traditions.⁴⁵⁰ It is, they argue, important not to impose external conceptions of governance upon the native peoples because this would reinforce the wrongs of European conquerors. This is undeniably a complicated procedure, especially as states begin to include a number of different indigenous populations each with their own traditions of political community. The purpose of this dialogue is to negotiate competing demands of justice and redress harms inflicted upon

⁴⁵⁰ D. Ivison, Postcolonial Liberalism, pp. 140-162 and J. Tully, Strange Multiplicity, pp.183-212

indigenous populations during European conquest. Natives had their territory wrongly taken from them and this deserves compensation. However, land cannot simply be returned. European colonizers created new states on the land belonging to indigenous peoples. After several generations, the descendents of the colonizers created a life of their own based on the existing constitution.⁴⁵¹ There are thus two distinct groups with a claim to the same territory. Ivison and Tully argue that justice demands that each group come together to accept each other's conception of the correct form of political association.

Tully contrasts contemporary constitutionalism with his practice based constitutionalism. Contemporary constitutionalism attempts to fit a constitution to a single conception of justice. This is impossible, he argues, because different cultural groups are unable to agree on such a conception. Furthermore, contemporary constitutionalism fails to accurately reflect the discursive nature of actual constitutional processes. As an alternative, Tully suggests that parties should be understood to 'submit partial claims [of justice] to just negotiation and mediation.'⁴⁵² This presupposes a desire for mutual recognition and cultural diversity where parties are motivated to begin a constitutional dialogue. Tully's aim is to show that this is a more accurate reflection of the way in which constitutions are actually made and a better way of achieving a just peace. Practice-based constitutionalism should be accepted because a just peace with a single conception of justice is not possible. Rather it must be a settlement in accord with the three conventions of justice described above.

Ivison's post-colonial liberalism makes both a descriptive and a normative claim.⁴⁵³ Each of these is intended to explain why the aboriginal demand for recognition ought to be accepted.

⁴⁵¹ This is the upshot of J. Waldron, 'Superseding Historical Injustice'

⁴⁵² J. Tully, *Strange Multiplicity*, p. 209

⁴⁵³ D. Ivison, *Postcolonial Liberalism*, pp. 151-152

The descriptive claim points to the large body of law on the relationship between aboriginal peoples and settler populations. As I discussed in Chapters 1 and 2, recent legal decisions in Australia, Canada and New Zealand establish a coordinated sovereignty between aboriginal peoples and the Crown. Though the meaning of these documents may have been recently confirmed, their origin dates to the early interaction between the two populations. The agreement between the aboriginal peoples and the Crown established this co-sovereignty through treaties between natives and settlers. Ivison argues that respecting these documents requires recognition of this co-sovereignty.⁴⁵⁴ However, he goes further to offer a set of normative reasons to explain why this set of affairs ought to be respected.

Co-sovereignty and the associated self-government, Ivison argues, are important to the interests of aboriginal peoples in at least three ways. First, it acknowledges the standing of indigenous nations as peoples equal to European settlers. Co-sovereignty necessarily places both parties on equal footing. Neither is subordinate to the other. Second, self-government provide a means for protection of indigenous cultures by allowing a mechanism to ensure that important aspects of their traditional way of life are not destroyed by external forces. Finally, it is a means of promoting and securing indigenous perspectives into the larger political system. By including the voices of aboriginal peoples into political dialogue, the availability of alternative perspectives is expanded. For Ivison, justice demands the inclusion of indigenous peoples within a larger system of sovereignty.

Such an understanding though has several difficulties, which help to explain what a political theory of territory is obliged to do. Either the demands of justice apply to all groups or they do not. If this is the case for Ivison and Tully, the principle of justice acted upon must be something

⁴⁵⁴ D. Ivison, Postcolonial Liberalism, pp. 144-150

such as: 'each political community should act according to its own conception of governance'. Individually settlers are expected to act in accordance with a modern constitution while indigenous peoples are expected to live according to their own conceptions. When the two come into conflict each is expected to make room for the other. This is a particularistic conception of justice, which does not square with claims to territory that are necessarily universal. A claim to territory demands respect from all others. The difficulty is that this particularism fits poorly with other important political arguments. This is partially the case because the Tully and Ivison's arguments are self-contradictory. Both argue that justice demands the inclusion of indigenous forms of government because each political community has its own standards of political life that developed slowly over time. The difficulty is with the source of authority. If the source is in local traditions then it seems unreasonable to impose any external standard of inclusion. Alternatively, if the source of authority is external then there is no philosophical reason why a group's standards ought to be accepted simply because they are the standards of the group. Now, there may be good reasons to accept the internal standards of a group. These may be psychological reasons that ease accommodation or peaceable co-existence. But that does not mean that they should be defended as a political theory. A good theory of territory must fit together with other political theories. They must reinforce each other and fit well within a matrix of other theoretical principles.

To this end, a theory of territory must be limited in scope. It need not entail all there is to be said about relations between political communities or relationships about the nature of political communities or political obligation. One difficulty with discussions of territory is that territory is often conflated with concepts such as sovereignty and self-determination. A theory of territory ought to be limited and well defined. It ought to be able to explain what it does and

what it does not. At times this is easier said than done. Any theory of justice is intended to be a subset of moral and political theory. There are many features of political theory that a theory of justice does not cover. If justice covered the whole of moral and political theory then justice would be synonymous with the other two and would fail to provide any analytical clarity.

Third, a theory of territory should not allow private or self-referential claims. A claim to territory places obligation on other states and should therefore be formed in a way to allow others to recognize an obligation not to infringe the territory of a polity without permission. This means that a theory, and the claims associated with it, ought not to be based on private group languages, religious claims or cultural histories that are fundamentally inaccessible to those living outside the polity.

In Strange Multiplicity, Tully argues that the language of modern constitutionalism is particularly Western in character and fails to capture essential elements of aboriginal conceptions of self-determination and self-governance. For Tully this is fundamentally a language issue suggesting relativism where standards of self-governance and territorial control are limited by the languages in which they are expressed. There appears to be an incommensurability between languages, which makes it impossible for aboriginals to express their conceptions in Western terms. Tully recognizes this as a problem and provides a solution.

His solution is to create a new language through which both indigenous peoples and Westerners can communicate their conceptions of self-determination and territorial control. This new language is created through the practice of interaction. The strange multiplicity of cultural diversity is not a plurality of discrete groups, but rather the chorus of cultural voices that demand

recognition in ‘the constitution of modern political associations.’⁴⁵⁵ Tully argues that three conventions arose out of this interaction: mutual recognition, continuity and consent.⁴⁵⁶ This allows the participants to overcome the incommensurability of their parochial languages. The cross-cultural dialogue through which the three conventions arise is an attempt to ensure that cultural claims are pressed in a way that is acceptable to others. This is intended to be used internally by a multicultural state. Yet, it provides a general framework that can be applied between states. Regardless of the context of the dispute, domestic or international, Tully’s point remains the same. Even if certain concepts can only be addressed in a particular language, it is important to present those concepts in a mutual language of recognition that is accessible to all parties.

Finally, the theory must not simply explain that there is territory, but must be able to link peoples and places. A theory justifying a plurality of states is simply a theory of borders. This would say that there are good reasons to have a variety of states. Kant makes such an argument in Perpetual Peace. Some cosmopolitans, like Beitz, argue for the importance of self-determination. Neither of these can be said to be a theory of territory because they both fail to explain why a state is located in one place and not another. Such an explanation is not causal, but justificatory.

A causal explanation would show the contingent factors that led to present territorial claims. This might show a history of a people and how they came to live in the area they now claim as their own. Alternatively it could chart the cause and effect relationships that brought a particular area under control. Such explanations would be insufficient. This is not to say that

⁴⁵⁵ J. Tully, Strange Multiplicity, p. 3
⁴⁵⁶ J. Tully, Strange Multiplicity, p. 116

contingency plays no role. There of course may be, and in fact there often are, contingent reasons for a particular claim to territory. But this does not mean that claims to territory cannot be justified. Contingency plays a role in the way a particular automobile becomes mine. There is however, a separate set of criteria for justifying the car as mine. The same could be said for territory. It is one thing to give the history of the way a state came to have its territory and another to explain why it ought to have that particular territory.

However, this is not intended to place limits on the way in which the link between people and place is made. One alternative is territory as a primary claim where a part of the earth's surface is claimed and borders are made around it. This is perhaps the idea behind territory as possession. Alternatively borders could come first, perhaps if they are forcibly imposed. Territory might then be created through some identity forming features of the land and the subsequent imprint that the group makes upon the land. Borders may come before territory or territory may come before borders. It may be often difficult to tell which comes first. However, this does not mean that theories of territory and borders are the same thing. One might think of this as a distinction between a general right to a state and a particular right to territory.

In the last chapter I discussed the examples of various late nineteenth and early twentieth century plans to set up Jewish states outside the Middle East. Many who supported these plans had a clear understanding that there ought to be some state for the Jewish people. There was agreement here about self-determination. Among supporters there was disagreement as to where this sovereignty should be exercised. A theory of self-determination may say that a particular group ought to be self-determining, but it takes a theory of territory to explain why this can only be exercised in a particular place. With these skeptical conclusions set out, it is possible to identify a limited and tentative set of conclusions about the content of a theory of territory.

Content of a theory of territory

While it may be difficult to discover the conditions sufficient for justified claims to territory it is possible to identify some necessary conditions. These arise from the discussions of the central chapters of the thesis. The reader may recall that each of the chapters presented strategies for defending claims to territory. Each of these proved to be deficient in some fundamental way.

Chapter 7 considered using identity as a way to make territorial claims. Here the identity inference was considered. The inference asserts that because territory T is important to creating or sustaining the identity of group G, G ought to have a claim to the exclusive use of T. This strategy was shown to be lacking because identity forming features may show a relationship to a particular thing, but are insufficient for grounding title.

That said, something like the identity forming feature is not simply useful, but is perhaps a necessary feature of territorial claims. An analogy to domestic property claims might be useful here. Honoré suggests that ownership is ‘the greatest interest in a thing that a mature system of law recognizes.’⁴⁵⁷ By this he means that we might have interests in many things. That interest might vary in its intensity. Those things that we claim as ours, those things that we own, are those with which we have the greatest interest *and* which is recognized by law. This sets forth two necessary conditions for ownership. The first is internal. One must have an interest in a thing for it to become an object of ownership. Something in which I have no interest cannot become my property.

⁴⁵⁷ A.M.Honoré 'Ownership' p. 108

Not surprisingly for Honoré, English common law recognizes this principle. One example of this principle in action is adverse possession. Say you have a large tract of land in the wilderness that you inherited from a relative. You never visit this property and do not send others to take care of it. If I see this uninhabited land and decide to make it my home, in many common law traditions it can become mine if you fail to contest my presence. Here, over a sufficient amount of time, the property becomes mine without any compensation to you. You have failed to contest my presence and have shown no other interest in the land. I however have built a house and created a life and an identity around the property. The law recognizes a transfer of title from you to me. This is because you have shown no interest in the property and I have shown a great deal. I have acquired the property through adverse possession. Interest is a necessary condition, but is only confirmed by a legal authority. While interest is internal, it is something each of us determines for ourselves, the legal determination is separate and external. This external sanction is also a necessary condition and together the internal determination and the external sanction become necessary conditions of ownership.

Simply having an interest in something alone cannot confer ownership. An external determination must have some relationship to a thing that I have an interest in. If either is absent, then it is difficult to understand why I would say that the particular object is owned by me. Certainly legal systems make determinations that place me in a relationship with objects that I have no interest in. A court may confine me to a particular place as punishment for violation of the law. I may develop an interest in my prison cell, but that certainly does not make the cell my property.

An interest with respect to property is a particular type of interest, it is the highest level of interest one can have in relation to objects. As part of this interest I demand that others refrain from interfering with this object of my interest unless I have given them permission to do so.

A claim to territory entails similar internal and external characteristics. Politics claim their territory because they have an interest in it. Of course not all interests are territory interests. One state may have an interest in the natural resources of another state. Territory interests are identity interests. Not all interests are identity forming or sustaining. Wanting resources of another state may be an interest, but it need not be an identity interest. Often one can tell if an interest is an identity interest because of the influence the land had on a people's sense of self. However, this display of interest can go in the other direction. Peoples show their interest in a piece of land by augmenting it and marking it in particular ways. Who does not notice different architecture and a different feel when entering a foreign country? Not only are signs written in other languages, but building and monuments on the land display great differences.

This interest is not simply a desire to be associated with the land. Rather it is something more substantial. When political communities mark the land they inhabit as theirs they do so not by simply making markers indicating this land is theirs. The markers are created as part of collective life plans. Politics don't simply enclose areas, they build infrastructure, plan cities, create agriculture, augment the landscape and protect natural elements.

If these internal features are straightforward, the external ones are not. The external features are important, but it is not clear what they are. For domestic property rights there is positive law to create a procedure to make property claims conclusive. Not only is the source of these laws unclear, but so is the analogy itself between the external conditions for conclusive

property claims and political territory. Positive law may have normative sources, but its functional authority comes from the beliefs individuals have about it. Territory claims impose obligations on others and therefore, cannot merely be the subject of agreement. They are intended to impose obligations on others even if they do not agree to them.

Second, territorial claims are public in nature because they impose obligations on others. When a polity makes a claim to territory it establishes at least two sets of relationships. First, it asserts that territory T belongs to polity P in some sort of way. It also asserts that, within yet unspecified limits, all other polities ought not to interfere with P's relationship to T and that P ought to respect the claims that other polities make with respect to other territories. Territorial claims, like property claims, are universal and place obligations on others to respect the object of the claim. This conclusion comes from the arguments presented in Chapter 5, which considered Kant's argument for territory as jurisdiction and Chapter 7, which focused on the role of identity. Territory is not simply about land. It is also about others in relation to our land. We expect others to recognize what we claim to be ours as ours.

Kant argues that claims to things like territory are coercive. When you make a claim to territory, you place an obligation on me to respect your territory. I argued that this argument is made by an analogy with property. Territory, like property claims, imposes an obligation on others. There are good reasons to respect these claims whether one wants to or not. For Kant, one ignores their duty when they ignore justified property claims. The same is true for territory.

Third because claims to territory place obligations on others, the claims themselves must be public in nature. By this I mean that the claims must, in principle be acceptable to others, both co-nationals and members of outside political communities. Again, an analogy to private

property might be useful. You may make a claim to object A. I can recognize this claim, but I am only willing to accept it under certain circumstances. If I also believe object A is mine, I may be unconvinced by your claim if you simply assert that you want A because it is important to you. However, there may be reasons why I would recognize your claim to A even though I presently believe it to be mine. If I acquired A illegitimately and you can show me that, then I am more likely to believe (and possibly accept) your claim to A. This is a normative claim, not a psychological one. If you can show me that my claim to A is wrong then I ought to endorse your claim whether I want to or not. The motivation for giving up A is not a possibly deeply moving story that you might tell. This would be psychological persuasion, which might be important but could fade over time. Rather if you can show that I acquired the object illegitimately and that you are the rightful owner, then I would return A to you because the illegitimacy of unjust takings might be a principle I have an interest in endorsing.

Claims that are merely self-referential are in principle unconvincing to outsiders.

Consider the case of religious claims discussed in Chapter 7. Here I entertained the idea that a claim to territory could be rooted in religious conviction. In one version of this, religious doctrine appeals to co-nationals using self-referential language. The difficulty with such language is that it is, in principle, convincing only to those who have a prior commitment to the particular religious justification. The publicity doctrine requires that claims to territory ought to be posed in a way that is, in principle, compelling to others. Religious claims were shown to be illegitimate because they violate the publicity principle. One version of the religious conviction asserts that this territory is ours because our religious tradition tells us so. If you attempt to take my territory and I resist, you might ask what rights I have to the territory. If I respond, 'God granted us this land' then, at first glance, you are unlikely to be convinced that my claim is worth

respecting. This is because you reject the basic authority of my claim. You simply do not accept my God, whom I am using as a legitimating authority. Some supporters of indigenous claims, such as Tully and Ivison, reject this form of argument. These critics argue that such exclusive claims are unreasonable and that justified claims, even from the indigenous side, require some form of dialogue with whom they are either sharing a territorial claim or pressing the claim against.

Now, curiously, this claim can transform itself. You might recognize my claim to the land not because you accept my religious claim, but rather because my religious claim serves as indication of something else. Here it serves as an indication that I believe this land is important to me. In this formulation the argument goes from one that was internal and self-referential to one that is public and universal. Anybody who encounters me can understand that I believe my claim to the land is important. If interest in land is the principle responsible for legitimating such claims to territory then all one needs to do is to determine if these conditions obtain. The source of such sentiments is irrelevant. One may come to identify such a relationship through land from religion, family, labor, or a wide variety of such options. The upshot is that there may be a variety of reasons why a polity comes to desire a territory that are irrelevant in determining whether or not the polity has a claim to that territory. Any claim to the territory must be grounded in arguments that are public and objective because in principle these claims must be acceptable to everyone. This is not to say that politics is necessarily homogenous. Many problems arise when two polities make similar, but exclusive claims to the same plot of land. This suggests that such claims are sufficient only when there is no counter veiling claim. When two or more polities claim the same territory then the argument above is insufficient, even if it is necessary.

Of course this begs the question of the content of the public claims. Just because a claim is public does not mean that it is also legitimate. Public claims may be either legitimate or illegitimate. What sort of claims ought to be taken as legitimate and conclusive? This is perhaps where recalling the substantial chapters of the thesis will be helpful. Certainly an identity claim or an interest in a territory is important. However, this cannot be conclusive. Settlement or possession appears to play an important role as a *prima facie* condition for recognizing claims. However, it seems difficult to accept that possession is the primary criterion for determining territorial claims, because this would fail to explain dispossession. It is possible that original possession grounds claims to territory. This is problematic for at least two reasons. First, it is difficult to determine what possession is and how far it extends. Second, it proves problematic for evaluating present day claims where historical proof of first possession is often lacking.

All of this suggests that any viable approach to territory must be one that combines various elements of the arguments covered in the substantive chapters. First, there must be something that links groups with particular bits of the earth's surface.⁴⁵⁸ This suggests an approach that combines the various lessons learned in the previous seven chapters. There appear to be three principles that must be enshrined in any theory of territory. A claim to territory must show an interest in a particular bit of land. This might be shown through an identity claim, but it need not be. There may be a number of ways to show an interest in land. Just as Kant and Hegel argue that Locke's concept of work is simply an indication of one's desire to instill their will into

⁴⁵⁸ I am not sure that it is important here to distinguish between primary group rights that belong to the group as a whole and derivative group rights that derive from rights of individual group members.

an object, an identity claim towards land is simply an indication that a group has a strong interest in the land.

Second, there must be some period of settlement for a claim to territory to become conclusive. This does not mean that a group must be in possession of the land now, but rather that it has had possession of the land for a significant period of time. This helps to disqualify claims to land that a group has never possessed. Just as a child might have an interest in a holiday toy, the toy does not become his or hers until it comes into his or her possession. While sitting in a store window, the toy is simply an object of desire, not an object of property.

Finally, because claims to territory place an obligation on others, there must be some mutual recognition. That is there must be a capacity for others to recognize your group's claim to territory and for you to recognize theirs. This is perhaps where more substantial concerns of morality and justice come into play. Just as property claims and the use of property are limited by ethics, claims to territory may be limited by the demands of justice and morality.

In the first chapter I argued that territory is both presupposed and ignored by contemporary political theory. I proposed that this was a problem because of the important role the concept of territory plays in political disputes and in grounding political theories. The emphasis political theory places on global justice and self-determination through the legacy of de-colonialism begs for a broader investigation into the concept of territory. Because of the limited contemporary literature on territory and the direction of contemporary debates, I have attempted to address territory by returning to some of the arguments originally used to justify colonial acquisition.

In this final chapter I concluded with two contributions to political theory. First, by looking towards the history of political thought I was able to create a strategy for investigating territory despite a dearth of contemporary literature. This involved a critical discussion of the concept of territory within the political theory of selected thinkers who lived between 1600 and 1800. Second, I was able to use this discussion to build some preliminary conclusions about a theory of territory. The conclusions above are intended to serve as an outline for future work. They do not show sufficient conditions for a theory of territory. Rather, they offer an outline and some necessary conditions for a theory of territory and may serve as a starting point for further study, but they also show that those building blocks for an adequate theory of territory are pre-figured in many of the theories discussed in this dissertation.

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