9 Territory, Resource Rights, and Rivers: A Philosophical Case for Overlapping Jurisdiction

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Territory (*terra*-tory) is about politically controlling a region of earth. Sociologists and political geographers look at territory as a historical feature of our political landscape. They investigate how actual territories are formed, of what they consist, and how they are maintained. Philosophical inquiries have a different target. They question the normative features of territory, asking about the moral justification of territorial rights. Who has moral standing to hold a territorial right? What morally justifies political control over resources? If a group has a territorial right, over which exact objects is that right held?

The latter question motivates this essay. One might wonder how high into the atmosphere a territorial right should extend, how deep underground, or how far out across the seas. One might also wonder whether territorial rights should include vast uninhabited areas, such as much of the Sahara Desert. A particularly tricky question probes the nature of territorial rights over rivers. Rivers create two puzzles for territorial rights. The first is metaphysical – a river is constant and yet is constantly changing. Far from merely a poetic muse, the river’s nature as both moving and geo-stationary causes numerous tensions between riparian states. The second puzzle is normative – given a river’s complex nature, can jurisdictional authority over it be divided coherently?

The traditional concept of territorial rights entails two assumptions about their object. First, the object of territorial rights – what a group has a claim to – is defined by what lies between political lines on a map. Second, overlap of territorial jurisdictions is prohibited. Together these elements produce simple, bilateral borders. After a philosophical assessment of the appropriate object of territorial rights, it seems difficult to adopt either of these assumptions in the case of rivers. To describe a river as an object of territorial rights, it is useful to adopt an account of a river as a functional organism. As a functional organism, the moving and geo-stationary qualities of rivers are coherently understood as performing functions inherent to the river itself. On this account, however, jurisdictional authority over the river...
cannot be bilaterally divided between riparian states. A conclusion to draw is that incidents of territorial rights should extend over whole riparian regions; in circumstances where the riparian region falls between two or more states, these states should share jurisdictional authority over that region. Overlapping territorial jurisdictions are theoretically coherent and, perhaps, a practical improvement.

WHY NOT OVERLAPPING BORDERS?

Modern territorial states emerged from the Peace of Westphalia (1648), born from a motivation to diminish ethnic and religious struggles for power within Europe. The treaties politically aligned people with a sovereign territory, rather than with a religion (or some other personal allegiance), preventing those living in close proximity from perpetual political conflict. This shift departed from a feudal, property owner-to-tenant conception of territory towards a state-to-citizen relationship. State borders were solidified around territories, making them less subject to frequent ‘property swaps’ between lords, and because political powers were prone to fight over control of people and resources, distinct borders were considered necessary to avoid conflict.

In the twentieth century, the territorial state transformed. Marked by the end of colonialism after World War II, statehood became a matter of collective self-determination, rather than of rule by a sovereign. As is true of many historical political shifts, this one was supported by weighty normative considerations. From principles of equal respect for personal autonomy, the international community endorsed a strong right to self-rule. People within a territory should govern themselves, and, importantly, they should not be governed by a foreign power. Thus, knowing who has a legitimate say in political decisions within a territory is a prerequisite for exercising self-determination. To distinguish the foreign from the domestic, states reinforce the bilateral conception of borders.

Territorial rights in rivers are justified along similar lines, yet encounter unique constraints and tensions. In order to maintain the cartographic stability of territories, rights over rivers derive from rights over river banks. If a state has rights over the banks abutting the river, then the state owns (enjoys the right to use) the water that is between those banks. In contrast with rights over land, rights over freshwater resources are subject to specific international constraints. As rivers are used as essential routes of travel and commerce, and because river water is often essential to the survival of surrounding communities, international law endorses an ‘equitable use’ principle. Under this principle, river-sharing states have a duty to recognize each other’s equitable claims to the use of river resources. Interpreting the equitable use principle involves the balancing of different use interests in the resource, while the ensuing obligations remain anchored in territorial
sovereignty. Predictably, each state weighs its own interests more heavily than its neighbours, even to the point of declaring its interests matters of national security. This approach is ‘inherently confrontational and does little to promote cooperation in the common environmental interests of States’.

State borders should not overlap, it is argued, because bilateral borders prevent conflict over resources and support the independence of self-determining groups. Nevertheless, bilateral territorial division over shared resources can create predictable conflict, especially over riparian systems. The arguments below suggest that clearly defined regions of shared territories, rather than bilateral borders, may be more consistent with the spirit of peace and self-determination over territory.

### ADDING LAND TO POLITICAL LEGITIMACY: LOCKEAN THEORY APPLIED TO TERRITORIAL RIGHTS

Even as ‘territory’ is a political construction regarding authority over people, it is also constituted in part by natural non-human objects. John Locke’s theory of property is often used in territorial rights literature to explain political authority over natural resources, because his ideas provide a pre-institutional theory of claims to goods. That is, in Lockean theory, claims to territory can be understood in the absence of political institutions that sanction those claims. This allows for the theory to criticize the politically sanctioned system of territorial rights and to give an account of rights that don’t merely appeal to political treaties.

A justification of territorial rights must explain why a group has the right to self-rule over non-human objects, and Lockean principles provide a generalized, adaptable theory to this end. Unfortunately theories of territorial rights based on Lockean principles tend to amplify the importance and confusion surrounding the object of territorial rights. Since Lockean theory requires the agent and the object to be distinct entities, an account of the object is necessary, and it must be distinct from an account of the people.

John Locke argued that persons could acquire rights over goods by having certain interactions with those goods. Not just any interaction will do – the interaction has to be value-generating. When a person invests her labor in the land, the land becomes more valuable. The owner of the labor deserves the product of her labour, because it is her labour that made the product valuable. Applied to territory: if a territory is made more valuable by a group, then that group has a claim to the territory. A group acquires a territorial right by mixing itself with particular resources, including agricultural land, aquifers, mountains, valleys and minerals. The geographical location of these resources fixes the territorial right on the map; the group claims territory over those specific lands, aquifers and minerals, and not over similar resources in a different location.
Of central concern in the evaluation of this principle is the definition of value. Which values give rise to a territorial right? Three options are defended: material value, symbolic value, and the value of justice.

David Miller convincingly defends territorial rights as based on material and symbolic values. A group can be a unique author of territory’s material value in several ways. The governance of land use creates stable systems of agriculture and other forms of production, producing value from resources. Much of the value of the land is due to the coordinated efforts under the guidance of social and political institutions, such as cross-generational technological advances and conservation efforts coordinated by communities and enforced by rule of law. These actions engender beneficial material results ranging from real estate value to the fundamental values of providing food, clothing and shelter to individuals.

Symbolic value, by contrast, picks out the cultural, religious, or social meanings that a group attributes to certain places or features. The site of a historical battle, the sacred river and the mythological skyline illustrate the symbolic meaning of territory. Symbolic value emerges out of deep connections—the group’s values and ways of life are shaped by the territory, and the territory, in concord, reflects them. Through these connections, the territory becomes an emblem of the group itself, representing its identity and culture.

Taken together, material and symbolic values support a group’s claim to certain resources. Territorial rights are primarily jurisdictional rights to enforce the rule of law within and over a region. These jurisdictional rights necessarily include powers to legislate, adjudicate and enforce rights over resources (land, water, minerals, etc), because the coordination of activities over these resources is the key task for creating the rule of law. Although material and symbolic value do not directly justify a claim to jurisdictional authority, they may indirectly do so.

If a group has added value to territory, its continued enjoyment of the value it has created will always be insecure unless the territory is controlled by political institutions that represent the group. Rights of private property alone will not serve because (1) such rights are always susceptible to being redrawn by whoever holds rights of jurisdiction and (2) much of the embodied value that the group has created is likely to be located in public space. The group needs to maintain overall control over the territory in order to secure that value over time.

On Miller’s theory, territorial rights can be justified indirectly over particular resources, because jurisdictional authority is necessary to secure group claims to the material and symbolic values embodied there.

The third conception of value—the value of justice—directly justifies territorial rights. On this view, territorial rights are functional rights; a group acquires a territorial right if and only if they demonstrate the capacity to achieve just rule of law. When the group uses the resources within that
territory to achieve the value of justice, a right is acquired over a particular
territory. Understanding the function of territorial rights highlights a
counterargument against the above account based on material and
symbolic value. An unjust nation may create symbolic and material value
through jurisdictional control over a territory. In fact, great injustice often
embeds heightened symbolic value in the place of that injustice. Granting a
group the right to rule a region because it has created symbolic value
through unjust acts subverts the function of territorial rights, that is, to rule
justly. By contrast, the value of justice is created only by those groups that
use the resources within a region to rule legitimately. The function of a
territorial right is the establishment of the legitimate rule of law, so when a
group interacts with territorial resources to create just institutions, it comes
to deserve a territorial right over those resources.6

On each of these accounts of value, the theory emphasizes that an agent
works on an object creating value. What exactly this object is remains
unspecified. Two immediate, interconnected problems arise: geographical
dispersion and overlap. Geographical dispersion occurs when a group
interacts with more and less than is marked between lines on a map. National
forest cultivation projects, for example, purify air that spreads beyond
national borders. Overlap occurs when two or more groups simultaneously
create value in the same object. Border towns, for example, create areas
of dense multi-group interaction with their environment. A combination of
dispersion and overlap is found in rivers. Rivers disperse the objects of
labour through flow and erosion, and they also mix the objects of down-
and cross-stream labour. It seems that, on Lockeian accounts, the object of
territorial rights might not be ‘territorial’ – it might not be containable
within a geographical region.

A better understanding the object of territorial rights may ameliorate
c confusion about the application of territorial rights theory in these cases. If
the object of territorial rights is not susceptible to dispersion or to overlap,
then theories have a ready solution for these problems.

THE OBJECT OF TERRITORIAL RIGHTS

Territory, by definition, refers to a geographical region. Consequently,
‘geographical region’ provides a starting point for this investigation. If the
key object of a territorial right is some conception a geographical region,
then the investigation of this object requires us to answer two questions:
what is a ‘region’? and, what justifies a territorial right over a region? In a
successful account, the conception of ‘region’ in both answers should be
identical to each other; territorial rights should be held over a region as
identified by the answer to the first question. Second, the answer to each
question should be, to a certain extent, forthcoming without reference to
the answer to the other question. In order for our conception of the region
to help us better understand the pre-institutional contours of territorial rights, the region should be independently identifiable.

On the traditional account of the object of territorial rights, the ‘region’, refers to what lies between political lines on a map. This account fails the second test – the account of the ‘region’ is not distinct from the account of the territorial right. Rather, the account of the region is defined by the right. This answer only provides a circular definition of the object of territorial rights, and one that does not provide any traction to analyse the territorial object itself.

A second attempt may refer to the particular resources that lie within a region, defining a ‘region’ as an aggregation of those resources. On Lockean theory, an agent acquires a special right to an object by labouring on that object, producing from it greater value. And in fact, people labour on particular resources rather than on an abstract region. As Lockean theory grants rights over what is actually worked on, defining a region as an aggregate of worked-on resources is appealing. The geographical location of these resources fixes the territorial right on the map; the group claims territorial rights over specifically located soil, aquifers and minerals, and not over similar resources in a different location.

We tend to think of resources as stationary. Rocks, land, forests and water aquifers lie within a territory – they do not pick up and wander off. Or do they? Many essential resources migrate, such as soil, minerals, water, pollen and animals. They are washed downstream, transported by wind, or move of their own accord. According to traditional Lockean property theory, labour gives rise to rights in non-stationary goods, such as animals and wind-swept pollen. Thus a consistent application of Lockean territorial rights over particular resources is worrying, because territorial rights in non-stationary objects disperses sovereignty. Rather than supporting neat geographical borders, it mixes territories like pollen in the wind.

To put it simply, because Lockean rights are launched from interaction with particular resources, reducing the account of a ‘region’ to the aggregate of material resources within that region is susceptible to a *reductio ad absurdum* (the principles’ generalized implementation yields a result that effectively destroys those principles). Since Lockean claims are derived from interactions with particular objects, and because the same interactions that ground claims to stationary objects also ground claims to non-stationary objects, Lockean principles support claims of jurisdictional authority over non-stationary objects. As a result, defining ‘region’ as an aggregate of resources cannot sufficiently explain territory as a region with contiguous geographical coordinates. As this reductive understanding of ‘region’ undermines the territorial right itself, it seems insufficient to explain the object of territorial rights.

Alternatively, perhaps we can identify a ‘region’ not by aggregating resources, but rather by the way that resources are used. A territorial region can refer to something more than merely the set of resources, namely the
mutual and affective relationships that agents have with those resources.

Literally place makers, we make a place into the kind of thing that it is, and
our actions, practices and institutions greatly affect the material world and
our experiences of that material world. A territorial region therefore refers
to the complex relationship that agents have with each other within a
certain place as well as to the stuff that one finds in that place (such as land,
air, oil, roads, houses, ecosystems, etc). So understood, a ‘region’ is a
compound object, not an aggregation. The region is identifiable as a site
where interactions with resources are dense and mutually-affecting. For
example, the extraction of a valuable mineral resource influences the
adjacent employment structure, political institutions, location of settle-
ments, use of land (away from agriculture towards mining), and overall
environmental quality. On this compound object understanding, a group’s
way of using a resource can include its subjective, non-instrumental use,
including symbolic use as a national symbol or sacred religious site.

On the compound object conception, valuable interactions are not only
with a set of particular objects. The group also interacts with a region
holistically, and because a holistically considered region is a geo-stationary
object, this account avoids the *reductio*. By interweaving these resources
and created values, group interactions reveal a whole – a territory – with
characteristics and values that are not reducible to its individual parts.
Through the creation of value in the whole region, a group acquires
territorial rights over the whole.

Despite the switch in focus to compound – as opposed to individual –
objects, Lockean principles of territorial rights continue to confuse the
assumptions that territories do not overlap, because the object of territorial
rights does not obey cartographic lines. Examples are found in overlapping
transborder and layered ‘regions’. First, border towns are ubiquitous
examples of transborder sites of dense, mutually-affecting resource use.
Since value-creating groups acquire territorial rights over a whole region,
multiple groups acquire overlapping territorial rights over whole regions
like border towns. Second, pockets of geographically thick non-nationals
undermine traditional territorial claims by creating internal layered regions.
Places like ‘German Town’, ‘China Town’, and ‘Little Havana’ can be found
in almost every US city, many with unique economic, symbolic and
institutional features. Dramatic examples of foreign involvement in
developing countries seem to create new ‘regions’ inside of foreign states.
China has built whole villages as well as environmentally-intense
industries (such as mining and agriculture), social and economic
infrastructure, and political institutions in many poor countries. These
relations influence most of the areas’ environmental interactions,
producing Chinese regions inside developing states. Third, groups that
track a migrating resource, such as fish or deer, create a roaming, layered
region, following the path of the primary resource. Using the compound
account of ‘region’, these examples of layered and overlapping regions
seriously complicate unilateral territorial claims, because the object of territorial rights crosses traditional boundaries.

The problem is that according to the compound object account of a region, groups interacting with a whole region acquire rights over the whole. When multiple groups interact with the whole, these groups share claims to the same whole region. Dividing the region between the groups is not initially warranted. To explain away this worry, a territorial rights theorist can appeal again to the analogy between territory and property. A person can hold property rights over parts of an object without owning the whole object. Two parties may each own half of a block of wood, for instance, without each owning the whole. The division of property rights between parties is often a matter of negotiation or is based on other secondary considerations. Likewise, territorial claims can be coherently divided between the various claimants, explaining how a territorial right can be held over half of a border town but not over the whole border town. It is common practice for states to divide rights over a whole region so that each state has a claim to only part of the whole. Regions may be artificially and legitimately divided between states for pragmatic reasons.

RIVERS

Rights over rivers are difficult to explain using the compound-object account of a ‘region’. Basically, a river is not divisible. To be clear: the river as a natural object is not divisible, and rights over a river are not coherently divisible between geographical river segments. A river cannot be physically divided like a wood block can be divided, and rights over a river cannot be divided between geographical segments like rights over wood can be divided into rights over its left and right halves. To see why, we should revisit the problems facing attempts to identify the object of territorial rights raised above: that defining a ‘region’ as an aggregate of resources cannot sufficiently explain territory as having contiguous geographical coordinates, and that attempts to identify the object of territorial rights often reveal geographically overlapping objects.

The reductio made us wary of assigning territorial rights over non-stationary objects. Responding to the reductio forced us to widen the concept of the object of territorial rights to compound objects of dense, mutually-affecting resource use. A river counts as a compound object in this sense because its constitutive materials and supporting structures are, by their nature, mutually affecting, and in their variety they are used expansively to multiple ends. Examples of mutually-affecting resource use in rivers include how fishing affects the plant growth and chemical balance of the water, how water use affects fish populations, and how different uses of riparian soils change river water quality and volume. Acknowledging the ways in which river use is mutually-affecting highlights the variety of
riparian resource use. Fishing, riparian farming, mining, energy creation (dams), drinking, navigating, crossing, irrigating... each river affords robust, various use and each use affects the others.

This brings us back to the reductio ad absurdum (the principles' generalized implementation yields a result that effectively destroys those principles). River resources are not geo-stationary, and a river counts as an object of dense, mutually-affecting resource use. One group’s use of the river has intimate causal connections to numerous uses by other states across, down, and up stream. Yet in contrast with geo-stationary regions, rivers constantly move. A river heightens worries that territorial rights over a kind of region cannot be contained within a particular set of geographical coordinates, even if we think of a region as a compound object. Rights over an object will follow it as long as the object continues to have extensive causal connections with other resource use, as long as it still counts as the same ‘region’ under the compound object account. Effectively, given the non-stationary, intimate causal connections in disparate river use, territorial rights at any point on the river extend out to sea. Not only are we faced with the problem of dividing rights over a shared object, but also, in the case of rivers, we must figure out how to locate the object.

One way to respond to this puzzle is to explain how a river can be geo-stationary. In fact, elements of rivers are geo-stationary. Rivers are drawn on maps, and the geographical path of a river does not change significantly over time. The challenge is to capture the features of a constantly moving object in these geo-stationary terms. Such a description is outlined below. Alas, the geo-stationary description of a river continues to resist the possibility of physically or politically dividing the river between states.

The metaphysical question

For a Lockean to give an adequate account of the object of territorial rights over rivers, there are two tasks: i) to explain how the object is geo-stationary (an account must describe how the object can persist in one place through time even though its constitutive elements move and are continually replaced); and ii) to explain how shared territorial rights over this object should be divided.

In taking up the first task, it is productive to turn to Locke’s metaphysical philosophy in An Essay Concerning Human Understanding. Locke asks a similar question regarding the persistence of an object’s identity through time. How can a thing continue to be the same thing, even after its parts have changed? How can a particular tree continue to be that tree when its cells are continually shed and replaced? For Locke, persistent identity is explained by functional organization. A tree differs from its mass of matter, because the mass of matter changes – its parts constantly shed and are replaced. Yet the tree remains the same tree – it persists despite its changing composition, because its mass is constantly organized to maintain
the life of the tree. The plant has ‘such an Organization of Parts in one coherent Body, partaking of one Common Life, it continues to be the same Plant, as long as it partakes of the same Life, though that Life be communicated to new Particles of Matter vitally united to the living Plant’. The same rationalization explains the continuity of identity in animals and in functional objects like watches. A watch, says Locke, is a ‘Construction of Parts, to a certain end’, and even when those parts are ‘repair’d, increas’d, or diminish’d, by a constant Addition or Separation of insensible Parts’, the watch persists as the same object. The parts constitute the object, and the object is identifiable because of its parts. The parts comprise the object if and only if they exist together as a working organism, maintaining the function of the object. Replacement parts do not alter the identity of the whole as long as the new parts work towards its functional organization.

This analysis explains how a river is geo-stationary. The water and its banks are part of an organized whole that maintains the river’s organizational function. Even though the river and river bank’s constitutive parts change (through soil erosion and the passage of water molecules), the functional organization of the mass remains the same. The river continues to feed, water and purify its surrounding environment because its banks and water flow have a set geographical location and path. In fact its geo-stationary features are what define its functions – it cannot water a surrounding environment without existing within that environment. As the river’s organization is geostationary, claims to the river are claims to a geostationary object. As further evidence that a river is a geo-stationary organism, for Locke, ‘existing’ refers not only to the object, but also to the idea of the object. We cannot have an idea of a river without banks, and vice versa. The river cannot exist without its geo-stationary banks, and the river banks cannot exist without the river. Additionally, our idea of this river, the Snake River, is inconceivable without placing it in its environmental/geographical context. The idea of the Snake River is not an idea of the Snake River if it omits this geo-stationary content.

Although Locke’s account of persistent identity in objects allows us to describe a river as geo-stationary, it also makes the job of territorial rights theorists more difficult by defining the object of a river as whole organization. So far we have described the river as necessarily including an account of both the banks of the river and the water flowing through those banks. This, however, is not a sufficient account of its functional parts. The river not only has banks, but it also has length. It runs from inland out to sea. It has an approximate depth, speed, and unique chemical composition (in water, soil and minerals). So, although a river can be described as a geo-stationary object, it is not amenable to physical division. That is, dividing a river into three parts does not create three rivers identical to three parts of the original whole. Dividing a river separates essential elements of the functional organism from the organism itself. Like stripping branches from
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a tree, the alienated parts contain qualities of the organism, but the branches are not trees themselves. Sever enough branches from the tree, and the tree ceases to exist. By contrast, an object without an organizational structure can be divided. A litre of water can be divided without loss of identity or of function – half a litre put in one glass and half in another. Rivers, however, are not identical to a volume of water. Upstream and a downstream are analogous to the higher and lower parts of a tree trunk. By extension, an upstream state and a downstream state should not consider the object of their territorial rights in the river to be amenable to natural division from the river’s other parts. An account of an appropriate division of rights over a river, then, must tell how states can hold unilateral territorial rights over only a part of a whole functional organism. The analogous task in property rights would be to explain how and why two people can each hold exclusive property rights over only half of a living object.

The political question

The concept of a river as a whole, functional organism complicates a traditional account of territory in two ways. First, it brings to the fore the problem of territorial overlap; multiple states may acquire territorial rights over the same whole river. Consequently, claimants must produce reasons for bilaterally dividing the river into territorial segments. Second, the nature of a river produces a new puzzle for the division of rights. Since a river is more like a living organism than a divisible mass, the interconnected functions of disparate parts of the river resist artificial division. Still, current wisdom holds that we should divide territorial rights over rivers bilaterally in order to preserve the self-determination of states and to avoid conflict over river resources.

As justifications for bilateral borders are generally grounded in the importance of self-determination, it is useful to consider what is meant by self-determination. In order for a group to be self-determining, that group must be able to exercise a significant amount of autonomous authority over its members and territory. Yet while states are assumed to be capable of autonomous acts, they are also deeply engaged in interdependent relationships with foreign agents. Participation in global markets and in a global ecosystem creates circumstances of interdependence between all states, not to mention numerous other ways (cultural, political, etc) in which states depend upon each other. These interdependent relationships are ubiquitous, unavoidable elements of global politics. Self-determination under these circumstances cannot be described as complete freedom from interference, because foreign factors inevitably influence domestic affairs.

Instead, self-determination can be described helpfully as non-domination, where a group is not subject to the arbitrary will of another. Understood as
non-domination, self-determination acknowledges that states operate under conditions of interdependence, and autonomy is defined in terms of the structuring of these interdependent relationships. States are self-determining if they do not stand in a relation with other states where one state has the authority to interfere arbitrarily with the actions of the others. To make self-determination possible, international institutions must articulate and support a system of rights where states are protected from subjection to the arbitrary will of another. Obviously, this system cannot guarantee that domination will not occur; the system of rights is best if it supports the maximal pursuit of an agent’s ends without domination, even if that system cannot guarantee it. A system of territorial rights, therefore, is best if it supports the maximal pursuit of individual state’s ends, while that pursuit is maximally protected from arbitrary domination by other states. We have reason to prefer an alternative system of territorial rights over the traditional system if the former performs these functions better than the latter.

As mentioned previously, traditional territorial and property rights over rivers derive from rights over the river banks and are subject to ‘fair usage’ constraints. These accounts of river property can be explained through an analogy to a water bucket. When you own a bucket (or property in river banks), the water in the bucket is yours because it is inside of your bucket. When it is not in the bucket, it is no longer yours. Qualifications are attached to this property right in water. Suppose that the water in my bucket comes directly from the overflow of water from your bucket. The water in the bucket is yours because it is inside of your bucket. Given that your water use affects mine, your water rights are legitimately constrained: you can do whatever you want to your water when it is in your bucket, as long as your use does not eliminate overflow into my bucket (or cause similar significant harm).10

The water bucket conception of river rights is common practice; it is used in international law and to articulate domestic property rights in rivers. The Colorado River Compact, for example, divides the Colorado River into two divisions (upper and lower) within the United States, and each division has a the right to control independently a 7.5 million acre-feet of river water annually – a large ‘bucket’ share of water.11 Despite its general use, this conception continually leads to confusion and conflict. Frequently an upstream state will claim that its interests (in state or national security for example) outweigh the interests of any downstream state. On this reasoning, upstream states argue that they can use their river resources without constraint, as long as those resources are in their ‘bucket’. Predictably, these unilateral assertions lead to conflict. Fortunately, these tensions can be attributed to failures in the water bucket conception, and the metaphysical analysis developed above can be used to reconstruct an account of rights over rivers avoiding the water bucket analogy.
Given the foregoing metaphysical account of rivers and the compound object account of a territorial ‘region’, the water bucket conception misconstrues the nature of rivers as an object of territorial rights. As we have seen, the object of territorial rights is best understood as a geostationary region. A compound region is something more than its aggregate parts and is constituted by its dense, mutually-affecting use. The water bucket conception, by contrast, sees a river as an aggregate of its various geographical segments, with each group’s way of using the resource distinct from the others.

This error in metaphysics confuses rights. With the water bucket conception, agents assume that they can exercise control over the water in their bucket, as long as it is there. But this is not the case. Down- or cross-stream states cannot exercise unilateral jurisdictional control over their river segments. Jurisdictional control over a territory includes the powers to determine property rights in that region, including the power to designate zoning rights and to mark certain resources for special use (or preservation). A state may, for example, legislate the zoning of a section of riparian lands for agricultural development. As crops depend on specific chemical and water quantity and quality in the riparian soil, up- and cross-stream use of the riparian region could make this agricultural development impossible. Successfully legislating property rights and zoning will depend on constant cooperation with other up and cross-stream states.

Moreover, the nature of a river makes numerous unilateral state powers incoherent. The articulation of property rights in resources frequently depends on environmental factors. Property rights in land are often placed into different categories, including lands with river access and those without. Each category of property is subject to different legislation, such as conditions on sale and on use. If river use by other states changes the direction or flow of a river, for example, then a category of property may be made incoherent. Similarly, a state’s environmental protection legislation may allow for a one-time pollution ‘dumping’ into the river as long as the pollutant materials do not exceed a certain amount. If this amount of pollutant is already present in the water when it travels into the state, then the legislation is nullified. Similar examples can be found in legislation over fishing and other resource use. Fishing rights may be articulated in terms of equity – a commercial vessel has rights to no more than X amount of fish and no less than Y amount. The Y minimal condition is to prevent other vessels from taking more than a fair share during times of scarcity. Obviously the coherency of this legislation depends on the fish population not falling below the equitable threshold. The point is that down- and cross-stream states cannot exercise vital unilateral jurisdictional authority over the riparian region without constant cooperation from up and cross-stream states.

Now we can articulate why the water bucket conception of territorial rights over resources is flawed: it assumes that states can exercise their
basic functions, exercising unilateral jurisdictional authority, over their ‘bucket’, their section of the river. In fact, states do not possess this power over their segment of a river. The water bucket system of rights does not acknowledge that rivers are compound regions identifiable as an object of territorial rights only as functional organisms. Riparian states cannot exercise their rights without the constant cooperation of other states. Without this cooperation, states are subject to the arbitrary will of other states. As this constitutes a system of rights that supports domination, it prevents the self-determination of down and cross-stream states.

A better system of rights starts by acknowledging the nature of the river as a compound region and functional organism. Rather than existing as an aggregate of ‘buckets’, a whole riparian environment is instead like an animal. Perhaps, then, owning the southern half of a river is like owning the left half of a horse. Even though we cannot physically separate the halves of the horse, just as we cannot physically separate the halves of a river, we can articulate the division of particular rights over parts of the horse. I can plait my half of the horse’s mane however I choose. If the horse wins a race, we split the winnings equally. Certain rights, such as the right to a percentage of the profit received from the horse’s use, to access, and to make cosmetic changes to the horse can be coherently divided into rights that either party can unilaterally exercise. Nevertheless, key rights cannot be divided in this way. Importantly, it is impossible for each owner to unilaterally manage half of the horse. I cannot feed and train only the left half of the horse. If I want to train it as a racehorse, then I have to convince the other owners to do it with me, and we have to coordinate our efforts to this end. In this analogy, shared management is the only way for an agent to exercise its right to manage a portion of the horse. Similarly, shared jurisdictional authority is the best means for states to have the capacity to exercise jurisdictional powers over rivers.

In summary, the nature of shared rivers makes it inevitable that one state’s resource use will have continuous, profound impacts on the capacity of down- and cross-stream states to exercise jurisdictional authority over river resources. This creates circumstances of domination, so river resources should be under shared jurisdictional authority in order for states to continue to be self-determining.

This conclusion matches nicely with accounts of the Lockean values of territorial rights. Valuable interactions with a river can neither be achieved nor enjoyed with only unilateral control of one part of the river. To create material or symbolic value, the group needs to be able to exercise jurisdictional authority over the full riparian environment. Likewise, to use the river’s resources to secure justice in the area requires similar control. Thus territorial claims on Lockean theory should extend over the full river. The territorial claim – the claim to jurisdictional authority – is a claim to the entire riparian environment. Rather than thinking of these claims as conflicting, we should embrace them as claims to shared jurisdictional authority over the relevant object.
REVISITING THE PROBLEM OF OVERLAP

State borders should not overlap, it is traditionally held, because bilateral borders prevent conflict over resources and support the independence of self-determining groups. The above arguments suggest that the latter claim is not true. Taking the nature of a river and the interconnected relationships of river sharers into account, shared jurisdictional authority over rivers promotes self-determination better than its bilateral alternative.

Still, the claim that bilateral borders prevent conflict over resources remains. There are three reasons to question this claim. First, bilateral borders over rivers may exacerbate conflict more than shared authority. Especially with the increased environmental vulnerability of states, rivers are crucial for fundamental state interests. The motivation to exploit river resources while they are within the state territory has in many areas become overwhelming. Several damming projects are already under way in Asia — threatening to eradicate downstream resources altogether, resources that states are willing to fight for. Emerging conflict from bilateral borders currently presents a significant threat to international security. Conflict may be initially avoided if states jointly rule riparian regions. At the very least a conversation about shared interests will take place between states, and unilateral decisions weighting of one state’s interests will not be allowed as part of the political procedure. Consequently, the exploration of shared sovereignty between riparian states is important in the efforts to maintain peace.

Second, rather than arising from holistic ‘control’ over territory, conflict often comes from particular incidents of territorial authority. The foregoing proposal endorses shared jurisdictional authority over riparian resources. This shared sovereignty necessarily entails joint decision-making over the articulation of zoning, development, and property rights. It does not include, however, any claims about immigration/citizenship or rights of access. States may retain current citizenship/immigration policies and borders while exercising joint jurisdictional authority over resources. This distinction between shared and unshared powers may avoid potential cultural, nationalist, or ethnic conflict between citizenry. It may also avoid worries about massive mobilization of individuals from one state to another.

Finally, there are many examples of peaceful jurisdictional overlap within and between states. The best example is of hierarchical self-determination within states, such as federal and municipal systems. The European Union is a prime example of regional self-determination, where French citizens have a limited say in what happens in Germany, and vice versa. Cross-border cooperation exists in the management of fish reserves in coastal waters and there is limited state cooperation over the management of shared rivers is mandated in international law. In short, cases of cooperation of self-determining units over shared territory already peacefully exists. The proposal supported in this chapter offers theoretical support to existing
cases of territorial overla and calls for the institutionalization of shared sovereignty over river resources. While a specific form of institutionalization is not described here, several models for cooperation can be derived from these smaller-scale examples.

To conclude, in the case of rivers, we have sufficient reason to reject traditional assumptions about the object of territorial rights: that the object is defined by what lies between political lines on a map and that the overlap of territorial jurisdictions is prohibited. Shared jurisdictional authority over riparian resources presents a coherent theoretical alternative to bilateral borders. Moreover, this alternative offers a better systemic approach to supporting rights of self-determination and international stability. Given that several diminutive models of shared sovereignty over resources already exist, there are good reasons to explore this option further in international law.

NOTES

2 Theories that use collectivistic Lockean principles: For comparison, contributive approaches include: , and.
4 I here focus on collectivistic Lockean theories of territory. While traditional interpretation holds that individual property owners create state territory by transferring their powers over property to the state, recent theorists have defended a collectivistic version of Lockean theory. The collectivistic version does not rely on a transfer of rights from individual property owners. Instead, groups can acquire territorial rights directly.
5 Similar arguments in a.
6 Nine, A Lockean Theory of Territory, 2008
7 A coherent conception of a ‘region’ must have a sufficient density of contiguous coordinates. This is not to say that all of the geographical coordinates of a region must be contiguous. Hawaii is not contiguous with the continental US, for example. However, Hawaii is a unit with sufficient contiguous coordinates to be considered a geographical region. For analysis.
8 2.27.4.
9 2.27.5.
10 This is an articulation of the Lockean ‘enough and as good’ proviso.

BIBLIOGRAPHY


