

The Irrelevance of History: In Defense of a Pure Functionalist Theory of Territorial Jurisdiction

KJARTAN KOCH MIKALSEN*

Abstract. This article defends a pure functionalist theory of territorial jurisdiction according to which a state's moral right to rule over a territory rests on its present moral performance as a freedom-enabling institutional structure. A common objection against functionalist theories is that they cannot explain why it matters that one particular state has exclusive jurisdiction over a certain territory. This deficiency is often associated with the *annexation challenge*, which is supposed to show that functionalist theories cannot deal adequately with cases of annexation. Against this line of criticism, I argue that the pure functionalist justification of the right to rule is capable of tackling challenges related to particularity and annexation. First, the pure functionalist theory explains why it is important that one particular state rules over a given territory. It also tells us what set of laws and what government we should comply with. Second, the pure functionalist justification of the right to rule entails sufficient conceptual resources to account for the wrongdoing involved in annexation. Although the theory deems past wrongs irrelevant for the justification of the right to exercise jurisdiction on a territory, it is adequately sensitive to historical injustice.

1. Introduction

Most of the earth's surface is divided into territorially bounded states, each of which claims an exclusive right to exercise jurisdiction on their own territories. The right to exercise jurisdiction is the right to make, apply, and enforce laws. As such, the right to territorial jurisdiction raises the question of political legitimacy, which concerns a government's moral right to rule or its moral right to impose legal norms on its subjects. In line with a common view, I take the legitimacy of a government to correlate

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with a duty to obey on the part of those who fall under its jurisdiction. Accordingly, the question of political legitimacy is the question of how to justify a government's right to oblige others through the imposition of contingent and coercive norms. Why does the government exercising jurisdiction over the geographical area on which we reside and interact with others have a right to impose legal norms on us, and why are we obliged to comply with the legal prescriptions and prohibitions determined by this government?

In this article, I argue that it is possible to justify an exclusive right to rule over a territory on a purely functionalist basis. Although there are different types of functionalist theories of territorial jurisdiction, their common denominator is that they ground a state's right to rule over given territories in the present performance of essential moral functions. They differ from past-oriented theories, such as voluntarist or nationalist theories, for which legitimate rule over territory depends at least partly on the historical connection between a state and its territory. According to *voluntarist* theories, a state has the moral right to rule over a territory only if this territory consists of land to which those who have consensually subjected themselves to it had prior rights to ownership. According to *nationalist* theories, a state is the legitimate ruler over a territory only if there is a morally significant historical attachment between this territory and the national group represented by the state. By contrast, *functionalist* theories justify a state's rule over territory as a necessary correlate to the state's present moral performance.¹ What matters are the merits of a state's accomplishments here and now. Inasmuch as a state performs satisfactorily, exclusive rights over territory follow, because the essential moral functions of states must be carried out territorially.

We might distinguish between functionalist theories that are broadly consequentialist and functionalist theories that are broadly Kantian (cf. Simmons 2013, 2016). For consequentialists, the essential function of states typically is to establish an institutional structure that promotes or maximizes some kind of moral good (e.g., welfare or happiness). For Kantians, the essential function of states typically is to establish an institutional structure that protects the fundamental rights of individuals and that facilitates fair terms of interaction or a just distribution of basic goods. I will defend a functionalist theory of the Kantian variety, and I call it a *pure* functionalist theory because of its monistic structure. The basic idea of this theory is that states organizing public legal institutions are necessary in order to establish conditions that enable persons to interact on terms of equal freedom. The theory proceeds from the single normative idea—expressed in Kant's principle of right—that all individuals have an equal right to freedom, and the justification of an exclusive right to exercise territorial jurisdiction brings in no normative ideas extraneous to this idea.

The aim of this article is to defend the pure functionalist theory against the common objection that functionalist theories cannot explain why states should have exclusive rights to rule over particular geographical areas. At best, the critics argue, theories of this kind can tell why we need states, but they do not tell why it matters that one particular state has exclusive jurisdiction over a certain territory. In order to demonstrate this alleged deficiency, critics often appeal to the *annexation challenge*,

¹ For the tripartite division into voluntarist, nationalist, and functionalist theories, see, for instance, Simmons 2016. For earlier uses of the term *functionalist* for the kind of theory that I defend, see Moore 2015 and Stilz 2011.

which is supposed to show that functionalist theories cannot deal adequately with cases of annexation. Because of their emphasis on present performance of general moral functions, functionalist theories presumably lack conceptual resources to account satisfactorily for the wrongdoing involved in military conquest.

Against this line of criticism, I argue that the pure functionalist justification of the right to rule is capable of tackling challenges related to particularity and annexation. At least one functionalist theory—the pure functionalist theory—can explain why it is important that only one state rule over a territory and why annexation is wrong. The most controversial claim in my account is that historical injustices are irrelevant when considering whether a government has the right to exercise territorial jurisdiction. This may seem paradoxical and counterintuitive. However, accepting present jurisdictional borders, even if wrongfully established, is quite reasonable, and it is much to prefer to its alternative. Moreover, the pure functionalist theory provides adequate practical guidance since it accounts for the wrongdoing involved in annexation and tells us what set of laws and what government we should comply with.

My argument proceeds from the idea that states are freedom-enabling institutional frameworks, and that the moral right to rule rests on moral necessity. A state's moral right to rule over a particular territory is justified because rightful interaction among individuals would be impossible in the absence of a public authority vested with an exclusive right to exercise jurisdiction on this territory. The idea that the legitimacy of states rests on moral necessity helps us explain why annexation is wrong, and why historical injustices are irrelevant to the justification of territorial jurisdiction. According to the pure functionalist theory, a state's rightful powers extend to everything required by the performance of its moral function, but no state can justifiably pursue purposes incoherent with, or unnecessary for, its performance as a freedom-enabling institutional framework. This restraint rules out annexation, because annexation of territory is both extraneous to and in conflict with the moral purpose of legitimate states. At the same time, the idea that exercise of territorial jurisdiction is a necessary condition for rightful interaction among individuals makes historical injustices irrelevant to the justification of present jurisdictional borders. The unjust means of past border drawing cannot invalidate the right to rule over territory in the present, because if facts about the past could do so, then there would be virtually no legitimate territorial authorities enabling people to interact on rightful terms.

The argument proceeds as follows. In Section 2, I briefly draw out the contrast between the pure functionalist theory and past-oriented theories of the right to exercise territorial jurisdiction before presenting the annexation challenge. In Section 3, I present the pure functionalist justification of the right to exercise territorial jurisdiction. This prepares the ground for Section 4, where I present the pure functionalist case against annexation, arguing that there is no need for nonfunctionalist considerations in order to tackle the annexation challenge. Finally, in Section 5, I explain why the pure functionalist theory accepts present rule over territory, even if jurisdictional borders have been established in unjust ways.

2. The Antifunctionalist Critique: The Annexation Challenge

What justifies the exclusive right to rule over a territory? On the pure functionalist view, a state's exercise of jurisdiction on a given territory is justified by virtue of

establishing conditions that enable persons to interact on terms of equal freedom. This differs from past-oriented voluntarist or nationalist theories, which share the idea that an adequate account of the moral right to rule over a territory must include historical considerations about the way in which a particular state acquired its territory. According to voluntarists, we must consider whether the subjects of a state have consented “to submit both themselves and the land on which they live and work to the state’s authority” (Simmons 2016, 116–7). According to nationalists, we must consider whether the state claiming jurisdiction over some territory represents a prepolitically defined cultural nation with special historical ties to that particular territory (e.g., Meisels 2009, 113–34; Miller 2012). Both types of approaches acknowledge that the quality of political institutions is relevant to the assessment of a state’s legitimacy. History is not all that matters, but both voluntarists and nationalists deem accounts of rights over territory that ignore historical factors insufficient.

By contrast, the pure functionalist theory denies that historical considerations concerning a state’s foundation are relevant to the question of its legitimate rule over territory. It does not matter whether individual property owners have joined a state voluntarily, whether a cultural nation with prior rights to the relevant territory has authorized a state to act as its agent, or whether a state acquired control over its territory through conquest. What matters is the present performance of a particular state’s institutions in facilitating equal freedom for all. Territorial borders define the scope of a state’s jurisdiction, and if the state that for some reason governs the territory on which we reside or interact with others displays structural features that make it possible for people to exercise free choice on equal terms, we have a default obligation to comply with it.

In order to prove itself as an adequate theory of political legitimacy, the pure functionalist theory has to meet a common objection against functionalist justifications of the right to exercise territorial jurisdiction. This is the objection that such justifications cannot explain why it matters that one particular state has exclusive jurisdiction over a certain territory. Even if one agrees that states are institutional structures performing an essential moral function, one still needs to account for a state’s exclusive right to rule over a particular geographical area. It is not enough simply to establish that the exercise of jurisdiction by some state at some place is justified. We should also be able to account for the rights that a state has with respect to the territory that it claims as its own. According to the critics, functionalist theories lack the conceptual resources to give such an account because they ground the right to exercise jurisdiction in the performance of a general moral function that does not discriminate between different political entities as long as they are legitimate (Miller 2011, 2012, 2016; Moore 2015; Simmons 2013).

A common way of bringing out this problem is to appeal to the *annexation challenge*, which concerns cases of unjust displacement or subjection of people. Consider cases of military conquest involving removal of a former population from a territory. Does the conqueror acquire the right to rule over the territory simply by establishing a certain set of institutions on it? Or suppose that a powerful and legitimate state manages to annex the territory of another state without bloodshed. Suppose further that it immediately extends its institutional structure to the annexed territory, thus setting out to govern it in a legitimate way, granting the recently incorporated citizens the same rights and privileges as those living within its old borders. While such a takeover of foreign territory is an obvious case of wrongdoing, functionalist

theories seem incapable of addressing it because of their one-sided emphasis on current moral performance. After annexation, the aggressor state exercises jurisdiction on the same terms as before. All that has changed is the extended range of its institutional structure. The fact that the extension took place against the will of the inhabitants of the annexed territory does not seem to make much of a difference. As regards their involuntary subjection to the state's rule, their situation is similar to that of the state's original subjects.

Against the backdrop of such cases of territorial enlargement where prior inhabitants may or may not be displaced, theories that ground territorial rights in "performance and legitimacy in the present" are often judged as "not discriminating enough," because they "award such rights too easily to usurper states" (Miller 2012, 257). According to antifunctionalist critics, the only way to avoid the repulsive conclusion that conquest is a legitimate way of acquiring territory is to admit that historical factors are at least partly relevant to the justification of a state's right to rule. Yet such a concession would deprive proponents of functionalism "of their simple, sweeping answer to questions about why the native-born are legitimately subject to the authority of states they never chose" (Simmons 2013, 343).

3. The Pure Functionalist Justification of the Right to Exercise Territorial Jurisdiction

Contrary to antifunctionalists, I believe there is at least one functionalist theory that can tackle the challenges related to particularity and annexation. This is the pure functionalist theory that I defend. In order to show this, I will in this section give a brief presentation of the pure functionalist justification of the right to exercise territorial jurisdiction. I argue that this is a justification that deals satisfactorily with particularity because it explains why one and only one state should have jurisdiction over a territory. The following account does not rule out that the state ruling a territory could be *any* legitimate state. However, this does not rebut the pure functionalist theory, because the theory still provides the kind of practical guidance that we should expect from a theory of political legitimacy. I turn to the pure functionalist case against annexation in the next section.

The pure functionalist theory has its roots in Kant's philosophy of right. It rests on a normative conception of freedom where freedom is understood as the absence of subordination to particular others. Freedom means "independence from being constrained by another's choice [...] insofar as it can coexist with the freedom of every other in accordance with a universal law" (Kant 1996, MM 6:237).² According to this idea of "freedom as independence" (Stilz 2009a, 37), the equal freedom of all implies that each and every one is free to choose as they please provided they do not prevent others from doing the same. The idea differs from Isaiah Berlin's idea of negative freedom, which refers to the range of choices a person has (Berlin 2002). As a basic normative idea, freedom as independence is strictly relational, and concerns the standing of persons in their interactions with others. It requires that we do not

² All references to Kant in this paper are according to the Prussian Academy pagination. I have made use of *Toward Perpetual Peace* (PP) and *The Metaphysics of Morals* (MM). Both works are quoted as translated in Kant 1996.

arbitrarily deprive other people of their capacity to set ends for themselves, but not that everyone have an equal and equivalent range of opportunities to choose from unobstructed by others. As free and equal, all persons have the right to determine their own purposes, subject only to reciprocal restrictions, that is, restrictions that apply equally to all and do not simply represent someone else's subjective interpretation of what equality implies.

It requires public authorities vested with legislative, adjudicative, and executive powers to establish this kind of mutual independence among parties who cannot avoid interaction. The reason is that interaction in the absence of such authorities can only be regulated on the basis of the private judgments of the parties involved.³ If there were no public legislative, adjudicative, and executive authorities, right claims could not be fully determinate or enforceable. We would face unsolvable problems when attempting to draw the line between mine and yours, as well as to provide assurance that this line will be respected in ways compatible with the equal freedom of all. The former problem is a problem of indeterminacy. It concerns both the authorization of acquiring rights to property and the resolution of disputes over rights. Without a common authority representing all interacting parties equally, there could be no solution to these challenges, because any authorization or judgment would be unilateral, subjecting someone to someone else's arbitrary choice.

The problem of assurance concerns enforcement of acquired rights without access to a public enforcement agency. Again, we face a problem without a solution unless public legal institutions are in place. Even if the precise limits of everyone's rights were established, we would still need a guarantee for the general recognition of rights, but there is no such guarantee as long as private agents perform any coercive act. A private enforcer is a "unilateral will," which is arbitrary from the perspective of everyone else (Kant 1996, MM 6:256). Hence, given that contact with others is unavoidable, the absence of public authorities governing our interaction would leave us systematically dependent rather than mutually independent of each other.

Since the right kind of independence is not possible without public authorities, a government has a moral right to rule if its rule aims at creating a condition where all subjects of law enjoy equal independence in their interactions. A legitimate state establishes what Kant calls a "rightful condition" (ibid., MM 6:311) by uniting a plurality of persons under common laws and institutions. Its moral right to rule depends on its quality as a truly *public* authority that represents all those subject to its rule equally and that serves no partial interests vis-à-vis any of its subjects. This is to say that the jurisdiction claimed by a state binds us in virtue of its moral function as a freedom-enabling institutional structure securing the mutual independence of all subjects.

To secure the mutual independence of all subjects, a state must ensure equality before the law and organize legislative, adjudicative, and executive institutions in accordance with the principle of separation of powers. In a legitimate state, the law protects everyone and no one is above the law. This requirement also applies to persons occupying public offices, which means that the legislative power must be separate from the executive and adjudicative powers. Avoiding subjection to arbitrary

³ For a detailed discussion of the condensed argument in this and the next paragraph, see Ripstein 2009, 145–81. See Hodgson 2010; Stilz 2009a, 35–6; and Varden 2008b for arguments largely congruent with that of Ripstein.

choice is possible only if officials performing executive and judicial functions act as prescribed by public laws. Moreover, limiting the power of the legislature to the function of lawmaking secures the independence of the courts, which is essential to the rule of law.

These institutional requirements designate necessary “conditions under which persons who occupy public offices exercise public authority rather than private power” (Weinrib 2016, 53). If a state exercises legislative, executive, and adjudicative powers in accordance with these requirements, then it is legitimate, because it is only possible to determine rightfully the boundaries between mine and yours, as well as to ensure reciprocal enforcement of rights by interacting within such an institutional structure.

This explains why historical considerations do not matter to the pure functionalist theory. If the state establishes necessary “moral background conditions” for realizing each person’s right to equal independence (Stilz 2009a, 54), prior consent or authorization would make no difference regarding the state’s legitimacy. Lack of voluntary subjection or an act of empowerment would not lessen its legitimacy in any respect. Anyone who refuses to accept the jurisdiction of the state that legitimately rules over the territory they happen to find themselves in fails to recognize other people’s right to interact with them on terms of equal independence. This is why Kant characterizes unwillingness to unite with others under “public lawful external coercion” as doing “wrong in the highest degree” (Kant 1996, MM 6:307 and 6:312). Since such unwillingness is incompatible with respect for each person’s right to independence, the unwilling suffer no wrong when forced to accept the laws of the land, and there is no need for their approval of the public institutions that make and enforce these laws.

The outlined functionalist account of the right to exercise jurisdiction is necessarily territorial. This is so because the right to equal independence is an essentially relational norm tracking the terms on which we interact with others. If we are to relate to others in conformity with each person’s right to equal independence, then all parties in actual interactions must comply with common norms. This in turn requires that all those interacting on French territory answer to French jurisdiction and that all those interacting on German territory answer to German jurisdiction. Otherwise, people who interact on these territories would comply with different sets of rules administered by different authorities that might come to diverging yet equally reasonable conclusions as to how we should determine the limits of mine and yours. In such a scenario, interacting individuals would lack a common and final authority to determine the rightful limits of their freedom, which in turn leaves the problem of dependency on the arbitrary choice of others unsolved. Accordingly, the pure functionalist justification of a government’s moral right to rule entails justification of its exclusive right to rule over a particular territory: the territory on which it currently upholds legitimate institutions.

In response to this, critics might object that the pure functionalist theory still does not establish a sufficiently strong link between state and territory. In an important respect, the pure functionalist theory rejects rather than responds to the particularity challenge.⁴ From a functionalist perspective it is nonessential whether the government of Alsace-Lorraine resides in Paris or Berlin. As long as one and only one

⁴ I would like to thank an anonymous referee for urging me to clarify this point.

legitimate government rules the territory, German rule could be just as good as French rule. Although I agree that the pure functionalist theory is compatible with a future scenario where Alsace-Lorraine is legitimately ruled by Germany, I do not see this as an important problem. The pure functionalist theory does not rule out future changes of borders between jurisdictions, but it does deliver what we should expect from an adequate account of political legitimacy. First, it explains why governments have a right to rule. Second, it explains why it is important that one particular state rule over a certain territory. Third, it provides adequate practical guidance by telling us what set of laws and what government we should comply with.

4. The Pure Functionalist Case against Annexation

Since current borders between jurisdictions typically are the contingent results of violent historical events, the argument of the previous section might seem morally problematic and open to the rejoinder that the pure functionalist theory is insensitive to historical injustices. For instance, Simmons claims that given the morally tainted history of present territorial divisions, to reject an historical dimension to theories of political authority is to admit that states can “gain legitimate political authority over persons and lands simply by having committed great enough wrongs” (Simmons 2013, 351). The main purpose of the remaining sections of this article is to show that the pure functionalist theory is not susceptible to objections of this kind. In the present section, I argue that the pure functionalist theory has sufficient conceptual resources to tackle the annexation challenge. Then, in the final section, I argue that disregarding the history of border drawing when justifying the right to rule over territory is a reasonable view fully compatible with recognition of the injustices involved in past border-drawing between jurisdictions.

4.1. *Annexation I: The Aggressor Case*

The wrongdoing involved in annexation might seem easiest to account for in cases where the annexing state is also an aggressor. According to the pure functionalist theory, acquisition of territory through the use of force is illegitimate because incompatible with the moral purpose of legitimate states. To seek resolution of a territorial dispute through the use of force is not only to wrong another state, but also to wrong one’s own citizens. Like aggressive war in general, acquisition of territory through force is impermissible on pure functionalist grounds because “a state has neither internal standing against its citizens nor external standing as against another state to make and act on judgments of right” (Ripstein 2016, 189).

Given that political legitimacy rests on a state’s provision of an institutional arrangement that secures horizontal independence among interacting private persons, providing the necessary institutions establishes the right to exercise jurisdiction on a territory. However, no state has legitimate authority over other states or groups of people living beyond its own borders. In relation to other states and groups, each state is no more than a unilateral will whose judgements have no binding force beyond its own borders. Annexation is for this reason a case of one state employing arbitrary force against another. Although the aggressor might establish legal institutions enabling interaction on terms of mutual independence among subjects after extending its borders, annexing territory is still wrong, because it involves subjecting

others to arbitrary choice. The aggressor might argue that it is better at securing the rights of citizens or at utilizing the lands, but such claims can never justify a one-sided imposition of border change. The merits of the claims that a state makes against other states or nonstate groups are similar to the merits of the claims that private parties make against each other in the domestic context. They cannot give rise to any enforceable rights on their own, because legitimate use of force other than self-defense requires authorization by a nonpartisan public authority.

In addition to the wrong against others, the aggressor oversteps the boundaries of its legitimate authority over its own citizens. Since their authority rests on their freedom-enabling function, the legitimate powers of states are limited internally as well. In order to act within their own moral mandate, states must exercise their power consistently with each citizen's right to independence and restrict themselves to activities that serve their own maintenance and improvement as background structures for rightful interaction. Political authorities can demand that citizens abide by its laws, pay taxes, and support the institutions necessary for sustaining the state, but it cannot demand that citizens take part in aggressive war (Varden 2008a, 20–1). With respect to external relations, the only legitimate ground for action is self-preservation. Accordingly, a state can make citizens contribute to defensive purposes, whereas enrolling citizens for the purpose of acquiring new territory lies beyond the limits of its authority.

The preceding considerations show why annexation is wrong, and do so without appealing to nonfunctionalist concerns. The argument rests on the ideas that every person has a right to be in, and a duty to enter, a rightful condition and that no state has standing to unilaterally extend the scope of the rightful condition established by its jurisdiction over some territory. By choosing to resolve a territorial conflict through force, the aggressor violates another state's territorial integrity, which every state should enjoy in virtue of being a freedom-enabling institutional structure for its own citizens. In addition, the aggressor transgresses the limits of its legitimate authority over citizens by pursuing a purpose incongruous with the justification for the right to exercise jurisdiction. A state's basic duty is to maintain and improve itself as a public legal order. Usurper states contravene this duty by potentially throwing the citizens of their own and another state into a state of nature.⁵

4.2. *Annexation II: The Defender Case*

Cases of annexation in the aftermath of defensive war are sometimes considered a more difficult challenge for functionalist theories than cases of annexation involving aggression against other states. Say that a state occupies the territory of another state after victory in a defensive war. Inasmuch as defensive war is justified, could the victorious state rightly annex the occupied territory? Working from the reasonable premise that annexation is wrong even in such cases, Anna Stilz (2009b, 2011) introduces an interest-based right to political autonomy as an add-on to her functionalist "legitimate state theory." This is a right vested in groups that share a recent history of political cooperation and still have the capacity to organize legitimate state institutions. It consists in the right of such groups "to reconstitute legitimate political institutions on their territory when their prior state fails, becomes illegitimate, or is

⁵ For a similar point in a different context, see Maus 2004, 91.

usurped" (Stilz 2011, 591). According to Stilz, the right to political autonomy not only explains why states, unlike individuals in the state of nature, cannot be coerced into fusing with other states, but also why annexation is wrong, even in cases where a state controls foreign territory because of legitimate use of military force.

Stilz locates the moral ground of the right to collective autonomy in substantive civic bonds that develop over time between citizens of the same state. She assumes that ties of great importance to citizens can evolve through a shared history of political cooperation, and that the presence of such ties ultimately accounts for the wrongdoing involved in unilateral annexation. Unlike cultural nations, groups constituted by these kinds of ties are not defined by its members' recognition of shared characteristics, such as language, history, customs, and traditions. Their group identity is linked to the way political institutions and terms of citizenship have been shaped by their joint efforts in sustaining and developing their own state. The people whose autonomy is violated by aggressor states is not a prepolitical group, but a group constituted by coercive public institutions. Even if membership in this kind of group is involuntary, members of legitimate states have freely engaged in the processes shaping their common political and legal institutions. Through participation in law-making and regular law-abiding behavior, citizens put their stamp on the laws and institutions of their own state, making them distinct from the laws and institutions of other legitimate states. Since the particular form political cooperation takes in a state reflect the choices and priorities of its citizens, any usurper state fails to respect the morally relevant interest these citizens have in their relationship with fellow citizens (Stilz 2009b, 207; 2011, 597–8).

I believe there is a disharmony between Stilz's grounding of the right to political autonomy in an interest theory of rights and her account of political legitimacy, which grounds the right to exercise jurisdiction in Kant's idea of freedom as independence. Although I cannot pursue the issue here, the result of introducing an add-on theory of an interest-based right to political autonomy seems to be a pluralist solution to the annexation challenge that lacks coherence and conceptual unity at the level of basic principles.⁶ More important in this context is the basic assumption motivating Stilz's turn toward an interest theory of rights. In line with antifunctionalist critics, Stilz assumes that "there would be no objection to annexation" if all that mattered to the value of a state were its performance of general moral functions, "such as protecting individuals' basic rights and providing essential public goods" (Stilz 2011, 595). This is to underestimate the potential of a pure functionalist theory. Contrary to Stilz, I believe it is possible to tackle the case of annexation in the aftermath of defensive war without introducing normative ideas foreign to a pure functionalist justification of territorial jurisdiction. In fact, we have already introduced the conceptual resources needed to do so.

⁶ For a good discussion of the contrast between an interest theory of rights and a Kant-inspired independence theory of rights, as well as an argument suggesting that the latter kind of theory best accounts for the phenomenon of claiming rights against one another, see Zylberman 2014. As regards Stilz, the reliance on interest theory is more outspoken in her later than in her earlier works. This might reflect a change of position in response to critics. I still find it justified to speak of an inconsistency here inasmuch as Stilz grounds the right to political autonomy in morally significant interests in both Stilz 2009b and Stilz 2011, where the justification of political authority unequivocally rests on the idea of freedom as independence. Besides, the latter idea also seems implied in recent work, such as Stilz 2015, 18.

Recall that the pure functionalist theory grounds the moral right to rule over a territory in the strong claim that interaction on terms of equal independence is impossible absent public legislative, adjudicative, and executive authorities. We are bound by the jurisdiction claimed by a legitimate state because the state serves a morally necessary function as a freedom-enabling institutional structure. Since their legitimacy is grounded in this specific function, states, unlike individuals, are not free to set ends of their own. An individual has the right to pursue whatever purpose he or she wants, provided pursuing that purpose does not involve subjecting anyone to arbitrary choice. By contrast, a state's legitimate exercise of political power is restricted to ends that are required for their own maintenance and improvement as freedom-enabling institutional structures. Annexing the territory of other states is not such an end. It is possible for a state to maintain and improve itself without extending the geographical scope of its jurisdiction. Accordingly, there is no pure functionalist rationale for annexation, even after victory in a defensive war. While use of defensive force is justified, bringing the citizens of the defeated state under one's own jurisdiction is not. Since unilateral imposition of border change is nonessential for a state's moral performance, annexation in the aftermath of defensive war is simply a case of subjecting others to arbitrary power.

Note that this lack of standing to extend current borders unilaterally concerns not only a state's relation to other states, but also its relation to groups whose political organization differs from the form of a state. Wherever there is some form of political organization, no other political entity is authorized to extend its own jurisdiction. The exercise of jurisdiction on a territory might be rudimentary or deficient, but no appeal to alleged superiority can serve as a valid justification for annexation. Just as in state-to-state relations, a state's standing in relation to groups whose type of political organization differs from the modern territorial state is that of a private party. And, as a private party, the state is simply a unilateral will whose judgements have no binding force on other parties to the relation.

According to the pure functionalist theory, moral necessity grounds the right to exercise territorial jurisdiction. The moral right to rule rests on the impossibility of interaction on terms of equal freedom in the absence of public legal institutions, and once legitimate institutions are in place on a territory, the people living there have discharged their duty to establish a freedom-enabling institutional framework for interaction. Some types of political organization may have virtues that other types lack, but the moral necessity that justifies a ruler's authority over the ruled within a territory does not hold in a state's relation to groups outside its borders. The existence of groups outside a state's borders does not hinder the sustenance of a domestic rightful condition, no matter the form of such groups' political organization. Their presence does not prevent a state from exercising its basic moral function. Externally, the right to exercise jurisdiction entails a right to use force defensively, but there is nothing in the pure functionalist theory which authorizes a government to one-sidedly extend its own jurisdictional borders to territory where some form of jurisdiction already exists.

5. Pure Functionalism and the Irrelevance of History

The argument of the previous section accounts for the wrongdoing involved in conquering foreign territory on purely functionalist premises. Yet, even if acquisition of

territory through the use of force is wrong, the pure functionalist still accepts current jurisdictional borders in cases where they are the product of military conquest. While this might seem like a troubling and counterintuitive view, I do not think it makes pure functionalism insensitive to historical injustice or an inadequate account of political legitimacy.

The pure functionalist acceptance of present jurisdictional borders without regard to the way they were drawn reflects the view that legitimate institutions are necessary background conditions for rightful resolution of conflicts over rights. Since legitimate institutions cannot precede themselves, we cannot demand that the validity of all present claims presupposes a clean track record (Ripstein 2014, 152). If we made rightful conflict resolution in the past a condition of rightful conflict resolution in the present and the future, then we would forsake forever the possibility of rightful procedures for settling disputes. Current jurisdictional borders may be the outcome of barbaric conduct, but in order to get things right we have no choice other than to accept that past disputes over territorial borders have not always been settled on the merits.

For this reason, the pure functionalist theory differs from Jeremy Waldron's idea of rights supersession. The idea is not that rights fade over time because of persistent dispossession or changed circumstances (cf. Waldron 1992, 16–26). Surely, well-founded bitterness and resentment related to wrongfully established borders between jurisdictions can diminish over time, but if legitimate institutions really are background conditions for rightful interaction, then recent wrongs do not undermine the right to rule any more than ancient wrongs. Given the pure functionalist justification, the passage of time has no impact on political legitimacy—that is, the moral right to rule.

I presume that many find the view that past wrongs do not undermine present legitimacy objectionable partly because it seems to provide would-be conquerors with unwelcome incentives. If unjust acquisition of territory can give rise to rights over territory, then the powerful might be tempted to change facts on the ground through the use of force. The pure functionalist theory clearly recognizes the injustice of aggression and conquest, but since wrongful use of force can result in redrawing of borders between legitimate jurisdictions, it might seem to justify conquest after the fact. Accordingly, the critic could object that the pure functionalist theory appears to legitimize conquest in spite of itself.

In my view this is a misguided objection. The pure functionalist theory is a theory of the conditions of rightful interaction, and not of the remedies that make wrongful behavior unlikely. In Kant's terminology, we might call it a moral-practical, rather than technical-practical doctrine (Kant 1996, MM 6:217–8). To hold against such a theory that it does not give us enough resources to prevent wrongdoing is to miss the mark. Although we might expect misbehavior, pointing out the lack of an empirical guarantee against wrongdoing fails to put into question a theory of the institutional preconditions that enable individuals to enjoy mutual independence in interaction.

Another reason the view that past wrongs do not invalidate the legitimacy of present jurisdictional borders can appear objectionable is that it contradicts a common moral intuition. This is the intuition that it is permissible for a state to take back annexed territory or for the inhabitants of annexed territory to fight for secession. Since it runs counter to this moral intuition, the pure functionalist theory does not seem to track an important aspect of justice.

To this objection, the reply is that in rejecting the relevance of history in the justification of a moral right to rule over territory, the pure functionalist theory does not disregard historical injustices. It simply denies that such injustices can be undone through further use of force. Self-defense is a legitimate ground for taking up arms, but once fighting collectives have agreed to end war and to sign a peace treaty, past wrongs cannot warrant future aggression. Nor can they warrant insurrection by those recently subjected to a new government.

It should be noted that the peace treaty plays a crucial role in this connection. Before the conclusion of a treaty, two or more parties are still in a state of war, competing for the right to rule over some territory. An occupant only becomes the sovereign authority of occupied territory if transfer of territory is part of the treaty ending the war. The ousted government is the true authority of a territory until the conclusion of such a treaty, and so controlling enemy territory by itself does not grant sovereign powers over it.⁷ But once a peace treaty has been signed, the warring parties must give up all further claims, even if asymmetrical power makes it possible for the victorious party to dictate the terms of the treaty. Two wrongs do not make a right, so retaliation because of the unfair terms of the agreement would not negate the original injustice. On the contrary, waging war in order to regain lost territory is pursuing rights unilaterally by means of force, and, as argued in the previous section, this is incompatible not only with the equal standing of states, but also with the obligation to maintain a rightful condition. By waging war in order to secure its own rights, a state for one thing acts as a superior in relation to a subordinate, but no state has that kind of standing. Moreover, to pursue rights through war is to endanger existing state-sanctioned legal orders, which conflicts with the fundamental duty to uphold the institutional conditions for rightful interaction among individuals. Like any aggressor, the state that seeks justice in this way risks throwing us back to a state of nature, where everyone is systematically subjected to the arbitrary choice of others.

Something similar holds with respect to individuals and groups who believe that past injustices generate a right to revolution. In his "Doctrine of Right," Kant claims that one "should not *inquire* with any practical aim in view into the origin of the supreme authority" to which one is subject, because such inquiries are "pointless and [...] threaten a state with danger" (Kant 1996 MM, 6:318). Inquiries into the historical origins of a state in order to ascertain whether it is legitimate or not are *pointless* because they cannot succeed. Prior to authoritative legal procedures that settle disputes according to merits rather than to conflicting parties' relative amount of force, there are no processes that can establish generally binding obligations to submit to political authorities. Inquiries into the origins of a state are also a *threat* to a state if undertaken in order to uncover a just cause for revolution. Like the state that seeks justice for past wrongs through war, the revolutionary that acts on grounds of a state's unjust founding undermines the institutional conditions that enable individuals to enjoy equal independence vis-à-vis each other. In trying to undo past injustices by violent means, the revolutionary acts contrary to the duty to respect the right of others to freedom as independence. Accordingly, past wrongs warrant revolution no more than they warrant war. Neither externally nor internally does the unjust foundation of a state

⁷ This qualification is compatible with the pure functionalist theory's nonvoluntarist justification of political legitimacy, because we are here considering the horizontal relations between sovereigns and not the vertical relations between a sovereign and its subjects.

invalidate its right to exercise jurisdiction on a territory. If a political entity governs in a legitimate way, then both its subjects and other states should respect its moral right to rule, even in cases where the boundaries of its jurisdiction are the result of wrongful use of force.

Nothing in the preceding account implies that committing enough wrongs suffices to establish legitimate rule over persons and lands, as suggested by Simmons (2013, 351). On the pure functionalist view, past wrongdoing obviously cannot be the *source* of the right to exercise jurisdiction. Since only present moral performance grounds such a right, past military conquest cannot do so. For the pure functionalist, past wrongdoing is simply *not relevant* to the justification of a state's rule over a territory. If such considerations were relevant, then the moral right to rule would depend on historical facts, but no historical fact suffices to justify or to invalidate moral rights.

One should also note that the pure functionalist theory does not rule out all future border changes as unjustified. The pure functionalist theory denies that historical wrongs can be rectified through unilateral imposition of such changes, but, contrary to what Miller (2016, 862) suggests, it does not involve a gag rule telling citizens that one should never question current borders. Kant's argument against inquiries into a state's origins only concerns inquiries undertaken "for the sake of action" (Kant 1996, MM 6:318). Just as public critique is the proper way to address present injustices, so it is the proper way to address historical injustices. Weighty reasons can speak in favor of redrawing jurisdictional borders or granting intrastate groups some degree of autonomy *vis-à-vis* the central government of a state. The pure functionalist is ready to accept alienation because of past conquest and colonial oppression among the reasons that might support claims to redraw borders or acceptance of special rights to intrastate groups (cf. Stilz 2015, 19–20). Yet, in order to become conclusive and enforceable, any claim to redress for past injustices must be resolved by legitimate institutions in the present. Current borders between jurisdictions are not set in stone. They can be altered without violating rights, but only if alterations proceed through legitimate legal procedures. This means that the legitimacy of current jurisdictions is a background condition for justified border changes, and that the status quo is legitimate by default.

In this connection, it is worth mentioning that even if the pure functionalist theory denies that the passage of time has any impact on the moral right to rule, it does not reject the assumption that the temporal aspects of past wrongs can be relevant as a basis for arguments in support of future border changes in negotiations about the redrawing of borders. All else being equal, the pure functionalist theory is open to the possibility that recent wrongs can be more relevant than ancient wrongs in arguments about border changes that take place against the backdrop of a legitimate status quo.

However disquieting one finds the view that states have a moral right to rule over territories acquired in unjust ways, I believe it is wrong to treat this as a demonstration of a decisive flaw in the pure functionalist theory. On the contrary, there are good reasons for rejecting the relevance of history in the justification of the right to territorial jurisdiction. Virtually no state can plead innocence with respect to their origins. Very few states, if any at all, have an untainted or unchallengeable title to territory in accordance with past-oriented standards, be they nationalist or voluntarist. Making historical justice a requirement of the moral right to rule would set the threshold so high that hardly any state would be justified in ruling the territory it claims as its own. Given that interaction with others is unavoidable, this, in turn, would threaten

each person's right to freedom as independence, which depends on the institutional framework of a rightful condition. If historical injustice suffices to undermine present legitimacy, then we deprive present-day people of the right to a condition that enables escape from subjection to the arbitrary power of others. To my mind, the latter implication is clearly unacceptable. No one should be condemned to live at the mercy of particular others because of what someone did in the past. For this reason, the pure functionalist's rejection of the relevance of history is quite reasonable and much to be preferred to the opposite view, which would leave us in a condition where we enjoy rights only at the discretion of the stronger.

6. Concluding Remarks

In the preceding pages, I have argued that a pure functionalist theory of political legitimacy is capable of adequately accounting for particularity and the wrong of annexation. My defense shows that pure functionalism both provides sufficient practical guidance and responds to historical injustice in a reasonably sensitive way. The claim that past wrongs do not undermine present legitimacy may indeed seem counterintuitive, but cogent reasons speak in its favor. First, since the borders demarcating the range of different jurisdictions protect freedom-enabling public institutions, present territorial borders are of fundamental moral importance, even if established by morally problematic means. Second, to deny that historical injustice undermines legitimacy is not to disregard historical injustice. For one thing, the pure functionalist theory accounts for annexation as a moral problem. Moreover, the theory acknowledges that appeals to past wrongs can support claims to redraw borders or to special rights for intrastate groups (provided the status quo is recognized as legitimate until the relevant parties have come to an agreement on changes). Hence, the pure functionalist theory tracks reasonable judgments about justice, and it gives a cogent defense of the idea that legitimacy does not depend on just acquisition of territory.

As a final caveat, I would like to point out that I have not sought to prove the pure functionalist theory superior to competing theories. To show this would require a comprehensive and systematic comparison of the main alternatives, focused on their respective strengths and weaknesses. Considerations of space dictate postponement of such an investigation to a later occasion. However, I do believe that the discussion in the preceding pages moves the debate forward by providing reasons for thinking that a pure functionalist theory of territorial jurisdiction has less of a problem with tackling challenges related to particularity and annexation than critics often argue.

*Department of Philosophy and Religious Studies
Norwegian University of Science and Technology
7491 Trondheim
Norway
Email: kjartan.mikalsen@ntnu.no*

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