

Territorial Jurisdiction: A Functionalist Account*

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Our world is divided into a number of territorial jurisdictions, and these jurisdictions are ruled over by states which make and enforce laws applying to those present in their territory. In virtue of what could states have a right of jurisdiction over a particular portion of the earth's surface? This question becomes even more pressing and difficult when we note that our current territorial borders came into existence in ways that were at best morally arbitrary and at worst involved unjustifiable killing and aggression. According to:

Functionalism: The territorial rights of states are grounded solely in their successful performance of their morally required functions.¹

On one version of functionalism, states have rights over their territory if they successfully maintain social order within it. As has been pointed out elsewhere, however, this version of the view sets the bar for acquiring territorial rights implausibly low.² Maintaining social order is consistent with perpetrating serious injustices, and the perpetration of serious injustices should sometimes count against a state's claim to full territorial control. On another version of functionalism, states must meet a more demanding moral standard in order to have territorial

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¹ A selection of contemporary functionalists would include at least: Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (New York, NY: Oxford University Press, 2009); Charles Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1999), part II; Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York, NY: Oxford University Press, 2004); Thomas Christiano, "A Democratic Theory of Territory and Some Puzzles about Global Democracy," *Journal of Social Philosophy* 37, 2006, pp. 81–107; Jonathan Quong, "In Defense of Functionalism," in Jack Knight and Melissa Schwartzberg (eds.) *Political Legitimacy: NOMOS LXI* (New York, NY: New York University Press, 2019), pp. 47–64; Jeremy Waldron, "Two Conceptions of Self-Determination," in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 397–413..

² David Miller, "Territorial Rights: Concept and Justification," *Political Studies* 60, 2012, p. 255. Margaret Moore, *A Political Theory of Territory* (New York, NY: Oxford University Press, 2015), pp. 90–93.

rights, such as being sufficiently just. However, this version of the view is thought to be vulnerable to powerful objections that arise from reflection on a particular class of hypothetical cases. I will call these cases *ideal takeovers*. In an ideal takeover, one state takes control of another's territory in a manner that neither inflicts nor threatens violence on individuals, respects individual rights, and then it proceeds to govern over that territory justly. Functionalism's critics charge that the view is unable to offer a coherent explanation of why the usurper states do not gain rights over the territory they occupy in these cases. Yet intuitively, and in the eyes of international law, even non-violent takeovers like these are an unacceptable way of expanding your territorial jurisdiction.

The functionalist theory of territorial rights has several rivals. Some of these rivals are nationalist, holding that nations come to have territorial rights through their material and symbolic transformation of land.³ Others take their inspiration from Locke's view that territorial rights are ultimately grounded in the consent of individual landowners.⁴ And others argue that a central part of the reason that states have these rights is that they represent the claim of a collective people to be autonomous or self-determining.⁵ One thing that these rival views all have in common is that their proponents appeal to functionalism's purported implications in ideal takeover cases to argue for the superiority of their view.⁶

This paper defends a distinctive functionalist account of territorial rights that has plausible implications with respect to ideal takeovers. The central feature of the view I defend is that when states commit or threaten more serious injustices, they become liable to greater degrees of interference with their territorial jurisdiction in response. This is a natural view when thinking about the justice of war and other interventions short of war, but in discussions of the basis of territorial rights it has not been given adequate expression. I elaborate the view in greater detail over the course of considering a range of objections to functionalism that arise from reflection on ideal takeovers. Though some write as though there is a single objection to functionalism that arises from reflection on these cases, I think there are in fact three distinct concerns: (i) that

³ Miller, "Territorial Rights: Concept and Justification," pp. 257–262.

⁴ A. J. Simmons, *Boundaries of Authority* (New York, NY: Oxford University Press, 2016), pp. 116–131.

⁵ Moore, *A Political Theory of Territory*, pp. 34–70; Stilz, *Territorial Sovereignty*, pp. 89–153.

⁶ Moore, *A Political Theory of Territory*, pp. 89–108; David Miller, "Neo-Kantian Theories of Self-Determination: A Critique," *Review of International Studies* 42, 2016, pp. 858–875; A. J. Simmons, *Boundaries of Authority*, pp. 59–92; and Anna Stilz, *Territorial Sovereignty: A Philosophical Exploration* (New York, NY: Oxford University Press, 2019), pp. 90–93.

functionalism is incompatible with any plausible account of the rights of unsuccessful states; (ii) that functionalism is incompatible with any plausible account of the morality of military occupation; and (iii) that functionalism is incompatible with any plausible account of how we ought to respond to past territorial injustices.

The argument unfolds as follows. In section 1 I give a preliminary characterization of both functionalism and the objections from ideal takeovers. Section 2 responds to the objection that functionalism cannot deliver a plausible account of the rights of unsuccessful states, and in responding to this concern I set out the distinctive version of the view that will be appealed to throughout the paper. Central to my argument here is that functionalism can hold that the territorial rights of states vary in accordance with how successfully they perform their morally mandated functions, in a manner analogous to how individual rights against harm vary as individuals become liable to different degrees of defensive force. In section 3 I consider an objection to this functionalist view and respond with a discussion of the natural duty of justice and its role in the theory. In section 4 I move on to discuss the morality of military occupation and argue that functionalism can in fact account for the requirement to restore the political independence of an occupied territory. Then, in section 5, I consider the objection that functionalism is unable to take adequate account of historical injustices and argue in response that the view need not, contra its critics, be understood as purely forward-looking. Finally, section 6 offers a concluding remark on the implications of the paper's argument for the wider debate around territorial rights.

1. Functionalism, Territory, and Ideal Takeovers

As we have seen, functionalism holds that the territorial rights of states are grounded in their successful performance of their morally required functions. Since functionalist accounts can vary in what they take the morally mandated functions of states to be, different views about what states are required to do will lead to varying implications regarding when states have territorial rights. In this paper, I will take the relevant state function to be justice. This assumption narrows our focus to those theories that aim to ground territorial rights in the natural duty of justice. This is

the duty, falling on individuals, to support and comply with just institutions that apply to them, and to further just arrangements where they do not yet exist.⁷

Even with this assumption, however, the functionalist view still leaves considerable space for variance, since there are many conceptions of justice that might be combined with functionalism to deliver different implications regarding when states have territorial rights.⁸ In spite of this variance, all functionalist views hold that the question of whether a state has territorial rights is determined by its degree of success in the performance of its functions.

A second way that functionalist accounts can vary is in terms of how we conceive of the relationship between the successful performance of state functions and territorial rights. One commonly drawn distinction here is between two versions of functionalism, the threshold version and the maximizing version.⁹ On the threshold version, the functionalist will provide an account of the rights and liberties that a state must do a credible job of protecting in order to have territorial rights.¹⁰ Meeting this threshold gives the state a right against interference in its jurisdiction, even against other states who would govern the territory more justly were they to take it over. On the maximizing version, by contrast, functionalism says that states have territorial rights if they do best at delivering justice compared to their rivals. This maximizing view also sets a threshold above which states have rights against interference, but the threshold is specified comparatively: whether a particular state is above or below it depends on the capabilities of rival states. Importantly, I do not think that this distinction between threshold and maximizing versions of functionalism exhausts the ways that states' territorial rights might be related to their successful performance of their functions. In the next section I explore a different way of conceiving of this relationship, which I argue allows the functionalist view to deliver an intuitively plausible account of the rights of unsuccessful states.

⁷ Rawls, *A Theory of Justice: Revised Edition* (Cambridge, MA: Harvard University Press, 1971), p. 99.

⁸ To give a sense of this variance, in the existing literature there are some who appeal to a standard of human rights protection, such as Altman and Wellman, *A Liberal Theory of International Justice*, and Buchanan, *Justice, Legitimacy, and Self-Determination*. Others who appeal to a Kantian view, such as Waldron, "Two Conceptions of Self-Determination". And others whose broader commitments are Rawlsian, e.g., Quong, "In Defense of Functionalism".

⁹ Anna Stilz, *Territorial Sovereignty*, p. 91. See also David Copp, "The Idea of a Legitimate State," *Philosophy & Public Affairs* 28, 1999, p. 32.

¹⁰ For one statement of a threshold view, see Allen Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 70.

Let us set aside for now these ways that functionalism may vary in order to take a closer look at territorial rights. Territorial rights are typically divided into a right of jurisdiction, a right to resources, and a right to control the movement of goods and people across borders.¹¹ It is the right of jurisdiction that is our focus here. This is the right to make and enforce laws that apply to all those physically present in the territory. I take the right of jurisdiction to include a claim-right that imposes duties of non-interference on other parties with respect to its making and enforcing of law.¹² If a state has a right of jurisdiction over a piece of territory then individuals and other states are under a duty to refrain from interfering with its making and enforcing of law there.

The objections to functionalism that I will discuss in this paper appeal to cases of the form:

Ideal Takeover: State A non-violently takes control of (a portion of) state B's territory and then proceeds to govern it justly.

As we get into the details of the objections below, we will consider different versions of this case. But expressed generally these objections all charge that functionalism is unable to explain why the usurper state, A, would not gain a full set of rights over B's territory in these cases.¹³

2. The Unsuccessful States Objection

The first objection to functionalism that I will discuss holds that it is incompatible with any plausible account of the rights of states that fail to successfully perform their morally mandated functions. We have seen that functionalism can come in at least a threshold and a maximizing version, and I will work with the threshold version for the time being.¹⁴ On this view, as we have

¹¹ David Miller, "Territorial Rights: Concept and Justification," p. 253.

¹² Stilz, *Territorial Sovereignty*, pp. 89–90.

¹³ Even if functionalism cannot explain our intuitions about ideal takeover cases, it may still be able to explain why international law and institutions should prohibit territorial takeovers. At the level institutional design, this prohibition could be justified by the fact that territorial takeovers will typically be predatory and violent (see Laura Valentini, "On the Distinctive Procedural Wrong of Colonialism," *Philosophy & Public Affairs* 43, 2015, p. 327–328 for this suggestion). It might then be suggested that—because functionalism can deliver a plausible account of the content of international law—the view's counterintuitive implications in ideal takeover cases are no reason to reject it. In response I can only register my own view that questions of institutional design do not exhaust political morality, and so a plausible theory of territorial rights must also be able to explain our intuitions about the underlying morality of cases of occupation and annexation. For a defense of this view of political morality more generally, see G.A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008).

¹⁴ This is appropriate because the objection under consideration holds that functionalism is too permissive regarding territorial takeovers. Since maximizing functionalism is more permissive than threshold

seen, there is a justice-based threshold that states must meet in order to have territorial rights. But what are functionalism's implications for states that fall below this threshold? According to what I will call the *unsuccessful states objection*, there is no sensible place to set that threshold such that it is intuitively plausible to suggest that states falling below it lack territorial rights. Consider:

Unsuccessful State: State A fails to meet the justice-based threshold that functionalism sets. It is then non-violently annexed by nearby reasonably just state B, which proceeds to govern over the territory justly.

Functionalism seems to imply that state B can gain a full right of jurisdiction over A's territory here. But though it is widely accepted that there are some cases in which humanitarian intervention and military occupation are permitted or even required, the idea that a state loses its claim to territorial jurisdiction whenever it fails to meet some threshold level of justice seems highly implausible.¹⁵ One might be tempted to respond to this challenge by making the justice-based threshold quite low—with a low enough threshold the view would be able to hold that states rarely lose their claims to territorial jurisdiction. But this move seems to avoid one counterintuitive implication only at the cost of generating another. Suppose, for example, that we lower the threshold so that states have territorial rights if they successfully maintain social order. This threshold would imply that states which successfully maintain social order have full rights against interference in their affairs. But this is also implausible, because states can maintain social order while also committing moral transgressions against their own citizens or foreigners that are serious enough to justify war, humanitarian intervention, or other kinds of interference with their territorial jurisdiction. Given that lowering the functionalist threshold threatens to deliver a regime of territorial rights that is overly protective of states' jurisdiction in this way, the unsuccessful states objection can be put as a dilemma: either the threshold is so high that states falling below it receive inadequate protection, or it is so low as to be overly protective.

The functionalist could attempt to respond to this dilemma by trying to pinpoint a threshold that is neither too low nor too high. I think, however, that an alternative response is more plausible.

functionalism on this score, those who object to the permissive implications of functionalism will find the threshold variant more plausible.

¹⁵ For versions of this worry, see Ayelet Banai, "The Territorial Rights of Legitimate States: A Pluralist Interpretation," *International Theory* 6, 2014, pp. 98–104, and Moore, *A Political Theory of Territory*, pp. 99–100.

The right of territorial jurisdiction includes, as we have seen, a claim-right against interference. The threshold and maximizing variants of functionalism are two possible views about the relationship between the successful performance of state functions and this right, but there is also an alternative way to conceive of this relationship. To see this alternative possibility, note that the possession of a right is often conditional on meeting a certain moral standard of behaviour. This is true, for example, of our rights to property and our rights against harm. If we transgress a relevant moral requirement, we can become liable to be harmed or to have our property damaged as a means of preventing or remedying that transgression.¹⁶ Though philosophers disagree about the basis of moral liability, they almost invariably agree that liability is governed by a proportionality condition. In order to know whether someone is liable to a particular degree of harm, for example, we need to know whether that harm would be proportionate to the threat that they pose: an individual is only ever liable to a proportionate degree of harm, no one is liable to harm *simpliciter*.¹⁷ There is an important lesson for functionalism here. A plausible functionalist view should take the relationship between the successful performance of state functions and the right to territorial jurisdiction to be governed by a conception of liability. Distinct from both threshold and maximizing versions of functionalism, this view holds that as states commit or threaten increasingly serious moral transgressions, they consequently become liable to a proportionately escalating degree of interference in their jurisdiction. This is in line with the view that when individuals commit or threaten more serious moral transgressions they become liable to a greater degree of interference with their person or property. One strength of this view is that it allows us to say that some moral transgressions can make a state liable to interference in its jurisdiction without thereby saying that it lacks rights against interference entirely. For example, plausibly a reasonably just state has, as one of its rights against interference, a right against economic sanctions. Though a state may forfeit this right by perpetrating injustices, its forfeiture does not imply that it thereby forfeits all its rights against interference, such as its right against military occupation. A second key strength of the view, which I will discuss in further detail below, is that it allows us to account for morally

¹⁶ Here I paraphrase David Rodin in "Justifying Harm," *Ethics* 122, 2011, p. 79. For the idea of moral liability more generally, see Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," *Philosophical Issues* 15, 2005, pp. 386–405.

¹⁷ Rodin, "Justifying Harm," p. 79.

significant differences between the ways in which a state may fail to perform its morally mandated functions.

Before I return to the unsuccessful states objection, I want to make two comments about this version of functionalism. First, on the view I am proposing, the territorial rights of states are tied to their liability to interference. However, it is important to be clear that a state's liability to a particular degree of interference in its jurisdiction does not imply that this degree of interference would be justified all things considered. Liability to a degree of interference implies that the rights that would normally protect against that interference have been forfeited. Though this removes one barrier to the justification of interference, it does not directly imply that interference is permissible. If the only way of enacting the degree of interference to which a state is liable would cause excessive harm to third parties, for example, then this interference may be impermissible. Moreover, even when states retain their rights against interference, it may still sometimes be permissible to infringe these rights, such as when doing so would save many innocent persons from death.

The second comment is that in order to work out when states have rights of jurisdiction on this view, we need to work out when and to what degree they are liable to intervention. Though I have suggested that this move takes its cue from theories of individual liability to harm, there is disagreement among philosophers about both the moral basis of liability and the metric we should use to calculate the degree of force or interference to which a person is liable.¹⁸ Giving a full defense of a particular conception of liability is a large task that is beyond the scope of this paper. Instead of attempting that task here, what I want to flag is how this leads to a further dimension along which the functionalist account may vary. As I noted above, the functionalist theory will have different implications for territorial rights depending on the conception of justice that it is combined with. If we conceive of the relationship between the successful

¹⁸ On one view, only those who are culpable for a wrongful threat of harm to others are liable to defensive force: e.g. Kimberly Kessler Ferzan, "Justifying Self-Defense," *Law and Philosophy* 24, 2005, pp. 711–749. On a second view, it is those who, more minimally, are morally responsible for threats of harm that are liable: e.g. McMahan, "The Basis of Moral Liability to Defensive Killing". On a third view, it is acting as if others do not have the moral claims against harm that they normally possess that renders a person liable: Quong, *The Morality of Defensive Force* (New York, NY: Oxford University Press, 2020), pp. 18–57. And on a fourth view, because of the connection between being liable to a cost and having an enforceable duty to shoulder that cost, there are a variety of considerations that matter for determining liability: Victor Tadros, "Causation, Culpability, and Liability," in *The Ethics of Self-Defense*, edited by Michael Weber and Christian Coons, (New York, NY: Oxford University Press, 2016), pp. 110–130.

performance of state functions and the right to territorial jurisdiction as being governed by a conception of liability, we will also get different implications for the territorial rights of states depending on the conception of liability that functionalism is combined with. Though this adds to the number of philosophical questions we must answer before we can determine when states have territorial rights, I do not think it is a weakness of the view. On the contrary, it seems quite plausible to suppose that the answer to the question of when states have territorial rights will depend on various features of our broader conception of justice.¹⁹

We can now return to the unsuccessful states objection. In *Unsuccessful State*, functionalism seemed to imply that, because the victim state failed to meet the functionalist threshold, the usurper state could gain rights over the territory by annexing it and ruling over it justly. Here I said that the objection poses a dilemma. If functionalism sets the threshold too high, it will have this intuitively implausible implication in these cases. However, if it lowers the threshold in order to avoid this implication, it will offer too much protection to unjust states. We can now see how functionalism can navigate the horns of this dilemma and provide a plausible account of the rights of states that fall below a threshold of reasonable justice. In some cases, the failure to meet this threshold will be due to the agency of citizens or state officials. These are cases in which either the rights of citizens or of outsiders are being violated by the state in question. But another way for a state to fail to meet a threshold of reasonable justice is to be lacking in the material resources, technological resources, or human capital needed to operate a sufficiently just state.²⁰ Where a state's failure to perform its morally mandated functions is in this way wholly innocent, the functionalist view suggested above can hold that it is not liable to intervention. The forfeiture of rights against intervention requires voluntary unjust acts or omissions, and in cases where a state's lack of success at performing its morally mandated functions is entirely traceable to unfavorable background conditions there will be no such acts or omissions.²¹ By incorporating a conception of liability functionalism can therefore hold that there is a significant moral difference between states that fail to perform their morally mandated functions wholly

¹⁹ For a similar sentiment in a different context see Simon Caney's discussion of the 'method of integration' in his "Just Emissions," *Philosophy & Public Affairs* 40, 2012, p. 259.

²⁰ Here I follow John Rawls's description of what he calls 'burdened societies' in *The Law of Peoples* (Cambridge, MA: Harvard University Press, 2011), pp. 105–106.

²¹ One view which does not hold that liability requires voluntary acts or omissions is Victor Tadros's (see his "Causation, Culpability, and Liability," pp. 113–114). However, his view still supports the claim that there is in general a significant moral difference of the kind I point to in this paragraph (see, for example, p. 130).

innocently and those that are violating the rights of their citizens or outsiders. For the latter states, there's a diminution in their territorial rights whereas for the former states there is not.²²

To elaborate on this point, let us consider a version of Unsuccessful State in which the victim state, A, is a *moderately unsuccessful state*: one that does a decent job of protecting its citizens' basic rights, but fails to be fully just because it does not secure distributive justice or fair equality of opportunity. The functionalist theory I have outlined can accommodate the verdict that the annexation of A's territory would be a disproportionate response to its failure to be fully just, and so a violation of its right to territorial jurisdiction.²³ Even if it is liable to some degree of interference by virtue of its failure to be fully just, it is not liable to a territorial takeover. But now consider a version of the case in which the victim state is a *significantly unsuccessful state*: one that routinely fails to protect at least some of its citizens' basic rights. For some significantly unsuccessful states, a territorial takeover may be a proportionate response. When we assess the proportionality of a course of action, we are weighing the costs associated with it against the costs of doing nothing at all to avert the harm.²⁴ Since the citizens of a significantly unsuccessful state routinely lack protection for their most basic rights, there are grave costs attached to doing to nothing at all. If an ideal takeover of the territory would secure these rights without generating other more significant costs, then it will satisfy the proportionality condition because it will be morally preferable to allowing the violation of its residents' basic rights to continue. But even if an ideal takeover will sometimes be a proportionate response to a seriously unsuccessful state, when such a state's failure to secure its citizens basic rights is wholly innocent in the sense described above, it will violate the necessity condition. When we assess the necessity of a course of action, we are weighing the costs associated with it against the costs of other courses of actions that would achieve the same end.²⁵ If Aggressor is attempting to kill innocent Victim, then

²² The idea of a wholly innocent unsuccessful state is, of course, an ideal type: in any real case there will surely be competing explanations as to why a state fails to be reasonably just. I do not mean to suggest that disentangling these explanations will be straightforward, only that the degree of responsibility for the failure to be just will be relevant to the state's liability to intervention.

²³ I will consider a possible objection to this claim in the next section.

²⁴ As we shall see shortly, this is what distinguishes proportionality from necessity. For discussion of the relationship between these two conditions see Thomas Hurka, "Proportionality and Necessity," in *War: Essays in Political Philosophy*, edited by Larry May and Emily Crookston, (Cambridge: Cambridge University Press, 2008), pp. 127–128 and Seth Lazar, "Necessity in Self-Defense and War," *Philosophy & Public Affairs* 40, 2012, pp. 3–44.

²⁵ Lazar, "Necessity in Self-Defense and War," pp. 5–14.

breaking Aggressor's arm to avert the threat would be proportionate. But if Victim could just as effectively avert the threat by breaking Aggressor's finger, then breaking his arm is unnecessary for there is an alternative less harmful course of action that would achieve the same end. When an unsuccessful state fails to secure its citizens basic rights due to a lack of material resources, technological resources, or human capital, an ideal takeover of its territory will be unnecessary because there is an alternative less costly course of action that can achieve the same end, namely providing assistance in the form of the resources needed to protect these rights. Since this alternative and less costly option is available, taking over the territory of an innocently unsuccessful state in order to secure these rights violates the necessity condition. Therefore, on the functionalist view I have proposed—where the relationship between a state's right to territorial jurisdiction and its successful performance of its functions is governed by a conception of liability—innocently unsuccessful states retain their rights against the interference that an ideal takeover would involve.²⁶

As I mentioned above, another aspect of the functionalist view I am proposing is that states can become liable to weaker degrees of interference without thereby losing their rights against interference entirely. This feature of the view also contributes to defusing the unsuccessful states objection. Part of the reason that there seems to be no sensible place to set functionalism's justice-based threshold is simply that it is not plausible to suppose that states lose all of their rights against interference at once. On the other hand, the idea that there is a threshold below which states forfeit their rights against economic sanctions, and another threshold below which they forfeit their rights against war or humanitarian intervention, and so on, is more plausible. Though we may often struggle say precisely where these thresholds lie, the idea that there is no sensible place to set them will strike most people as plainly false.

The account presented in this section shows that functionalism can, contra its critics, provide an adequate framework of ideas with which to think about the territorial rights of states that fail to successfully perform their morally mandated functions. Though this account does not yet tell us precisely when unsuccessful states retain these rights—in part because that will depend on the conceptions of justice and liability that the view is combined with—it does isolate the

²⁶ Note that the view does not deny that there are some cases in which a territorial takeover may be a justified response to a severely unjust state. But this is no embarrassment, for even functionalism's critics typically accept that a takeover can sometimes be a proportionate and necessary. See Stilz, *Territorial Sovereignty*, at p. 131.

considerations that are relevant to thinking about this question. Most importantly this view can, in line with our intuitions, explain why states can sometimes retain their rights against interference despite their failure to be fully just.

3. The Natural Duty of Justice

I now want to address a natural objection to the functionalist account developed in the previous section. How, it might be asked, can a functionalist theory hold that the takeover in Unsuccessful State is ever disproportionate? Proportionality calculations proceed by weighing the costs of a course of action against the benefit it secures. But since the takeover of the unsuccessful state is justice *enhancing* it appears that it is, from the point of view of justice, entirely beneficial. And if there are no justice-based costs to be weighed against the benefits that the takeover secures, then it seems it cannot be disproportionate on a functionalist view.

This is an important challenge. To respond to it, I return to the natural duty of justice mentioned above. In a widely quoted formulation, this duty holds that all individuals are under an obligation to support and comply with just institutions that apply to them, and to further just arrangements where they do not yet exist.²⁷ It is quite clear what this duty requires of individuals when they live under just institutions: support and compliance. But what exactly does it require of individuals when they live under institutions that are less than fully just? The canonical formulation of the duty does not offer a precise answer to this question, for there are a variety of ways in which the demands of a requirement to further just arrangements might be understood.²⁸

On the most demanding of these understandings, the duty generates an enforceable obligation to maximize justice in all circumstances. But many are likely to find this view too demanding to be attractive. A more plausible view holds that we have a degree of constrained discretion over how we discharge our natural duty of justice. On this view, though the natural duty gives rise to a range of enforceable obligations, it also permits us to act in ways that are suboptimal from the point of view of justice. Let me offer two examples to illustrate this idea. First, suppose that justice would be best served if all individuals voted for and supported the Equality Party, which campaigns for an egalitarian distribution of goods and opportunities. But

²⁷ Rawls, *A Theory of Justice*, p. 99.

²⁸ For a recent exploration of what the natural duty of justice requires of us in unjust conditions see Valentini, "The Natural Duty of Justice in Non-Ideal Circumstances: On the Moral Demands on Institution Building and Reform," *European Journal of Political Theory* 20, 2021, pp. 45–66.

many individuals in fact vote for and support the Sufficiency Party, which campaigns instead for everyone to have enough goods and opportunities, while eschewing any further commitment to distributive equality. The supporters of the Sufficiency Party are, *ex hypothesi*, acting suboptimally from the point of view of justice, but they do not fail to fulfil any enforceable obligations that stem from their natural duty of justice. Second, suppose that justice would be best served if a talented individual spent her spare time doing a highly effective form of political activism, but instead she chooses to spend this time gardening. Here again, even though by choosing gardening over activism she is acting suboptimally from the point of view of justice, she does not fail to fulfil any enforceable obligations she is under.

That we have a degree of discretion to act in these ways that are suboptimal from the point of view of justice is intuitively attractive, but the natural duty of justice clearly does not leave us free to act entirely as we please. There are two ways in which it is plausible to think that our discretion is constrained. The first and most straightforward of these is that we are not permitted to exercise our discretion in ways that violate basic rights. Though the voter for the Sufficiency Party may act suboptimally from the point of view of justice, no one has their basic rights violated as a direct result of her action. The second possible constraint arises from the fact that arguably if everyone were granted discretion over certain choices the ability of political institutions to play their coordinating function would be undermined.²⁹ In order for political institutions to be able to secure much if any justice for those living in their jurisdiction, they need to be able to provide a salient set of rules that can be appealed to settle disagreements about what justice requires.³⁰ And many have argued that to provide such a salient set of rules these institutions need to have the right to coerce those within their jurisdiction regardless of whether they consent, which is incompatible with individuals have unconstrained discretion over how they discharge their natural duty of justice. If individuals were granted full discretion over which state they paid

²⁹ The remainder of this paragraph draws on an argument that is commonly made in discussions of political obligation, which aims to ground obligations to obey the law in the natural duty of justice. See Quong, *Liberalism without Perfection* (New York, NY: Oxford University Press, 2011), pp. 126–131; Waldron, “Special Ties and Natural Duties,” *Philosophy & Public Affairs* 22, 1993, pp. 22–27; and Wellman in Christopher Heath Wellman and A. John Simmons, *Is There a Duty to Obey the Law?* (Cambridge: Cambridge University Press, 2005), chapter 1.

³⁰ Wellman even suggests a plurality of competing security schemes would generate so much conflict as to be morally equivalent to the state of the nature. See *Is There a Duty to Obey the Law?* at p. 16.

taxes to, or which state they followed the laws of, regardless of where they lived, then this would undermine the ability of political institutions to play their essential coordinating function.

Even if both constraints hold, we still have what I will call *coordination compatible discretion* over how our natural duty of justice is discharged. Because we have this degree of discretion, we may act in ways that are suboptimal from the point of view of justice without contravening any of our enforceable duties. With this point in mind, we can now return to the objection. That the natural duty of justice leaves space for coordination compatible discretion implies that the citizens of the Unsuccessful State typically have no enforceable obligation to accept the ideal takeover. Granting those citizens the discretion to reject the ideal takeover would not undermine the ability of the political institutions to play their essential coordinating function, nor would it violate anyone's basic rights.³¹ Therefore even if the takeover would lead to a more just distribution of goods and opportunities, their discretion allows them to reject it—just as it allows them to refuse to act in other ways that would be optimal from the point of view of distributive justice. The objection therefore errs in suggesting that from the point of view of justice the takeover is entirely beneficial. On the contrary, the takeover engenders a serious injustice: it forces the citizens of the Unsuccessful State to serve an end that they have no enforceable obligation to serve.³²

Note that this point holds even though the end that the citizens are being forced to serve is the end of greater justice. To see this, return to the examples above—even though justice would be better served if individuals voted for the Equality Party rather than the Sufficiency Party, it would nonetheless be a serious injustice to force them to do so. This result is possible because conceptions of justice can be internally complex: they can include both claims about what distribution of goods and opportunities justice requires and claims about what ways of pursuing a more just distribution are acceptable at the bar of justice.³³

³¹ Here I assume we are considering the ideal takeover of what I called a moderately unsuccessful state above.

³² Quong has recently offered an alternative functionalist explanation of why many ostensibly justice enhancing takeovers are not in fact justice enhancing to the one I propose (“In Defense of Functionalism,” pp. 53–56). I lack the space here to adequately compare my account with his.

³³ Beyond the examples mentioned here, there are numerous other examples of the internal complexity of justice. Take the proportionality condition on defensive force, for example. The world in which Aggressor flicks innocent Victim's ear for no good reason is an unjust one. But since justice includes a proportionality condition, Victim preventing that scenario from occurring by using lethal defensive force against Aggressor would also be unjust.

At this point, it might be objected that coordination compatible discretion must be grounded in a value other than justice. If the conclusion that we have this kind of discretion is one that we can only reach by weighing the value of justice against the distinct values that rival theories of territorial jurisdiction appeal to, such as collective autonomy or national self-determination, then this response to the objection will impugn the functionalist credentials of my account. There is, however, no reason to think that coordination compatible discretion must be grounded in a value other than justice. To see this, let me provide a brief sketch of how coordination compatible discretion could be a part of our account of justice using the example of social contract theory. The social contract theories I have in mind defend a conception of justice on the basis that it would be the object of agreement among suitably idealized free and equal persons.³⁴ In this context, a conception of justice is likely to include principles for the regulation of social and political institutions, as well as a set of duties falling on individuals. The question of what conception of justice free and equal persons would agree to is of course a matter of controversy among social contract theorists. But it is quite plausible to suppose that it would include coordination compatible discretion—that is; that it would include a version of the natural duty of justice that permitted individuals to act in some ways that were suboptimal from the point of view of its account of distributive justice. For a social contract theorist like this, coordination compatible discretion will be just as much a part of their conception of justice as the distributive principles they endorse. This sketch is brief, of course, but it suffices to show what is needed: there is no reason to think that coordination compatible discretion *must* be grounded in values that are external to our account of justice.³⁵

4. The Occupation Objection

Let us now move on to a different objection to functionalist theories of territorial jurisdiction. The military occupation of one state's territory by another involves, like war, at least the threat of

³⁴ The classic statement of such a view is of course Rawls, *A Theory of Justice*.

³⁵ In a similar vein, it might now be objected that the functionalist label is meaningless if it can be applied to the view I have presented here. Any theory, it might be suggested, including those typically understood as functionalism's main rivals, could be reformulated as holding that states territorial rights are grounded in their realization of an internally complex conception of justice. But I also do not think this is the case. Nationalist theories are not best understood as based on the natural duty of justice, and—as I will argue in section 5 below—functionalism is committed to the supersession of historic territorial injustices, and so remains fundamentally distinct from a Lockean historicist theory.

military force. It is therefore natural to assume that the morality of occupation will be broadly speaking continuous with the morality of war. This means that a just occupation, like a just war, must be a morally acceptable way of protecting against or preventing injustice.³⁶ But even when a military occupation has an impeccable moral justification, it is generally believed that the occupiers must aim eventually to restore the sovereignty of the occupied territory. To illustrate this, consider the following case from Anna Stilz:

Annexation: In 1945, the Allies occupied Germany in a legitimate use of force. Suppose that instead of restoring the territory to the German people, the United States had simply annexed their zone of occupation, turning it into an additional state of the union. After annexation, the United States governed legitimately, protecting the Germans' human rights and granting them rights of democratic participation in the now-unified polity.³⁷

The objection to functionalism that we will now consider says that it is unable to explain why this action by the United States would be wrong. The initial occupation was just, and functionalism seems to have no resources with which to ground a requirement to give up control of the territory if it continues to be ruled sufficiently justly. To put things another way, the functionalist claim that ruling justly is the sole criteria for gaining and maintaining territorial rights seems to be incompatible with the highly plausible view that following a just occupation there is an obligation to restore the occupied country to independence once it is possible to do so safely.³⁸ We can call this objection to functionalism *the occupation objection*.

Before I respond to this objection, it will be useful to first take a brief detour into the political morality of secession. In theories of the right to secede, there is an important distinction between two kinds of view:

Remedial Right Only: Separatist groups within a state only have a right to secede and form an independent state if they have been the victims of sufficiently serious injustices at the hands of the political authority that they currently live under.

Primary Right: Separatist groups within a state may have a right to secede even if they have not been treated seriously unjustly by their current state.³⁹

³⁶ For an early exploration of the morality of occupation see Jeff McMahan, "The Morality of Military Occupation," *Loyola of Los Angeles International and Comparative Law Review* 31, 2009, pp. 7–29.

³⁷ Stilz, *Territorial Sovereignty*, p. 92.

³⁸ This obligation is widely endorsed in discussions of military occupation. See, for example, Cécile Fabre, *Cosmopolitan Peace* (Oxford: Oxford University Press, 2016), pp. 53–88 and 218–244.

³⁹ Allen Buchanan, "Theories of Secession," *Philosophy & Public Affairs* 25, 1997, pp. 34–37.

Those who hold the remedial right only view take the right to secede to be like the right to revolution: a right that can only permissibly be exercised in conditions of severe and persistent injustice.⁴⁰ Proponents of this view may hold different positions on the nature and extent of the injustice that is required for a group to have a right to secede, but they are united in denying that there is a right to secede from a just state. Those who hold the primary right view, by contrast, may differ in their position on the other conditions that a separatist group must meet to have a right to secede, but they are united in holding that there can be a right to secede from a reasonably just state.

Though functionalism is often associated with the remedial right only view, it is also compatible with a primary right view that holds that a separatist group has a right to secede if they are willing and able to set up a sufficiently well-functioning state.⁴¹ If functionalism is combined with this primary right view, then it has no problem explaining our intuitions in Annexation. After all, what is intuitively problematic about Annexation is the thought that the United States could, by virtue of coming to rule the German territory in this way, justly become permanent unwanted rulers of it. But on a primary right view, this possibility is ruled out. Provided that the residents of the German territory are willing and able to set up a sufficiently just state, then they have a right to do so, as does any other separatist group which meets this condition.

Some may be uncomfortable with this way of accounting for the intuition in Annexation because of more general concerns about the primary right view. These concerns may have different sources, but for many perhaps this right will simply be undesirable because of its potential consequences, given that it seems to permit an endless and costly splintering of states. Whatever the source of this discomfort, though, it cannot be wielded consistently by someone who wants to account for the intuition in Annexation. This because any view that can account

⁴⁰ Ibid., p. 35.

⁴¹ I suspect the association of functionalism with the remedial right only view is because Buchanan, one of the most influential functionalists, endorses this combination of positions (*Justice, Legitimacy, and Self-Determination*, p. 331). But the idea that functionalism could be combined with the primary right view is not novel. For example, in Quong's defense of functionalism he suggests that it is compatible with a majority within a territory voting to secede ("In Defense of Functionalism," pp. 57–58). Waldron also argues that when there are competing claims to political authority within a territory we should sometimes appeal to majority rule ("Special Ties and Natural Duties," pp. 25–27).

for the intuition in Annexation will have to endorse a version of the primary right to secede. Though this claim is a conjecture, I believe it is a highly plausible one.

To support the conjecture, we can begin by noting that existing views that can account for the intuition in Annexation seem to be committed to a version of the primary right. Consider Stiliz's view, which explains this intuition by appeal to the value of political autonomy. Political autonomy is, on this view, an interest in there being a correspondence between the political institutions that we live under and our individual judgments about the appropriate way to establish justice.⁴² For this interest to be satisfied, the correspondence between our institutions and our judgments must come about via a causal process: the political institutions must be shaped by citizens judgments about justice, and there must be a route via which they might "revoke authorization of their government if it ceases to reflect their shared will".⁴³ Put another way, this interest requires that a state reflect its population's shared will as to "how (and by whom) they should be ruled".⁴⁴ Though I cannot consider Stiliz's theory in detail here, what is important to note for now is that this interest in political autonomy is not fulfilled for persistently alienated internal minorities. The alien coercion they experience is, therefore, a *pro tanto* wrong on this view. This means they may have a right to secede, provided that their claim is consistent with the provision of basic justice and can feasibly be addressed.⁴⁵

Next, consider Cécile Fabre's view that individuals have a right, once their obligations of sufficientarian justice have been discharged, to form self-governing political associations and shape their future.⁴⁶ This view can also explain the intuition in Annexation, as these jointly-held sovereignty rights are compatible with the temporary military occupation of the German territory, but not, in this case, with its permanent annexation.⁴⁷ But, again, it comes with a commitment to the primary right view, as the members of a separatist movement that want to

⁴² *Territorial Sovereignty*, p. 107.

⁴³ *Ibid.*, p. 110.

⁴⁴ *Ibid.*, p. 90.

⁴⁵ Two caveats must be added here. First, Stiliz is careful to note that this claim does not amount to a unilateral right to secede, because in some cases the claim to independence may be overridden, and in other cases it may warrant a different institutional response (such as internal autonomy or federalism). Second, she also notes that it would be undesirable to incorporate anything more than the remedial right into international law (*Ibid.*, pp. 136–137). However, neither of these caveats negates the commitment to a version of the primary right view as matter of deep morality, which is what is relevant here.

⁴⁶ For example: *Cosmopolitan Peace*, p. 229.

⁴⁷ For Fabre's discussion of a related case, see *Ibid.*, p. 132.

exercise the right to form a self-governing political association do not need to show they are the victims of an injustice at the hands of their state.⁴⁸

Rather than continuing to provide further examples here, I will instead explain why the conjecture presented above is likely to be true. Those who have a just military occupation imposed on them are subject to a form of rule that they experience as alien. But if the military occupation is just then this alien rule is just, both in the process via which it came about and in the way in which it is conducted. The situation of the occupied group is therefore morally equivalent to that of the groups which have a right to secede on the primary right view. The primary right view, after all, holds that a group that is subject to political rule that both came about via a just process and is conducted sufficiently justly can nonetheless have a right to political independence if they experience that rule as alien. Given how similar the situation of these two groups is, it is hard to see how any view that can explain the intuition in Annexation can reject the primary right view. The strongest candidate for a morally relevant difference between the two cases is that in the case of occupation the alien rule comes about as a result of war. But if we reject the view that war is a *sui generis* domain of morality governed by its own special principles, then this alone will be no reason to draw a moral distinction between the two cases.⁴⁹ If the cases are morally analogous in this way, then the conjecture presented above is sound: any view that can account for the intuition in Annexation will also be committed to the primary right to secede.⁵⁰

To summarize: functionalism can respond to the occupation objection by appealing to the primary right to secede. Some may want to reject this account of the political morality of secession, but no one who thinks the United States acts wrongly in Annexation can do so consistently.

⁴⁸ Cécile Fabre, "Peace, Self-Determination and Reckoning with the Past: A Reply to Butt, Lippert-Rasmussen, Pasternak, Wellman and Stemplowska," *Journal of Applied Philosophy* 36, 2019, p. 396.

⁴⁹ This is now a familiar and common claim in just war theory. For a recent defense, see Tadros, *To Do, To Die, To Reason Why: Individual Ethics in War* (Oxford: Oxford University Press, 2020), pp. 12–27.

⁵⁰ A further difference between the two cases is that in a just military occupation the occupying state neither seeks nor receives recognition from the international community that the occupied territory is now under its permanent jurisdiction. But it is hard to see how this fact makes a moral difference here. If the United States had annexed Germany and then sought and received recognition for the new boundaries of its state from the international community, it is quite implausible to think that this alone would extinguish the right to political independence.

5. The *Pro Tem* Objection

For the final objection to functionalism that I will discuss here, consider the following case from A.J. Simmons:

Expansion: Imagine that [...] the United States somehow managed to move its southern border barriers further south by several miles, declaring the newly enclosed territory to now be part of the United States. The U.S. commences to effectively and fairly administer justice in this new territory and extends full U.S. citizenship rights to all of the (former Mexican) residents of the territory. Mexico, of course, vigorously objects but is unable to do more than that; and after a suitable period of international mourning, this attempted expansion of territorial jurisdiction begins to look successful.⁵¹

Simmons suggests that though functionalism can regard the actions of the US as wrong in this case, it cannot regard them as the kind of wrong that stands in the way of gaining territorial rights over the area. Since functionalists hold that states gain territorial rights by successfully performing their morally mandated functions, it seems to be committed to saying that the US gains such rights over the area in question by virtue of fairly administering justice within it. As Stilz puts the worry, the problem is that while Mexico has a right to political independence on this view, it “holds only *pro tem*, and may be lost if in the future they become subject to reasonably just foreign rule”.⁵² Following suit, I will call this the *pro tem objection* to functionalism.

I think Simmons is right to conclude that functionalism must hold that the US could eventually gain rights over the disputed territory in *Expansion*. But whether this is counterintuitive depends on whether functionalism is committed to holding that the US gains these rights after a short period of just rule. The view that there is some future point in time at which the US would have rights against interference in this territory, perhaps long after both the perpetrators and the victims in *Expansion* are dead, is simply the view that historical injustices can be superseded.⁵³ And though this view is not without its critics, functionalism’s commitment to it does not render it counterintuitive. Simmons agrees, as he writes that the problem is that according to functionalism “*last week’s* wrongs are said by today to have faded away and been superseded”.⁵⁴

⁵¹ *Boundaries of Authority*, p. 75.

⁵² *Territorial Sovereignty*, p. 93.

⁵³ Jeremy Waldron, “Superseding Historical Injustice,” *Ethics* 103, 1992, pp. 4–28.

⁵⁴ *Boundaries of Authority*, pp. 75–6. Emphasis in original.

Simmons thinks that functionalism has this implication because it is a purely forward-looking view, unable to take account of backward-looking considerations. But I do not think this accurately describes a plausible functionalism.⁵⁵ Functionalism holds that states territorial rights are grounded in their successful performance of their morally mandated functions. The successful performance of these functions can include attending to past injustices that have been committed by or in the name of the state. Past injustices can give rise to various obligations: to restore to the victims what was taken from them, to pay them compensation, to apologize, and so on. The US has committed a serious injustice in Expansion, and this plausibly gives rise to a variety of obligations, chief among which is an obligation to return the territory to its previous rulers.

If the US continues to rule over the unjustly acquired territory, it will be liable to a degree of interference in response.⁵⁶ The right of jurisdiction includes, as we have seen, a claim-right against interference with the making and enforcing of law. This means that for as long as the US is liable to a degree of interference in response to its unjust expansion, it lacks a full right of territorial jurisdiction. Put simply, in order to have a full right of territorial jurisdiction you must have a claim-right against all forms of interference; so, the absence of this claim-right against at least some forms of interference means that you lack a full right of territorial jurisdiction. By holding that the US is liable to a degree of interference, functionalism can therefore resist Simmons's conclusion: the expansion of US territory in this case is both wrong, and the kind of wrong that stands in the way of it quickly gaining full territorial rights.

6. Conclusion

As I noted at the outset, functionalism has several rivals: nationalist theories, Lockean theories, and theories that appeal to collective autonomy. Though the forgoing arguments do not offer a decisive reason to prefer the functionalist theory over these rivals, they do have an important role to play in the dialectic. Proponents of these rival views often accept that the functionalist theory

⁵⁵ Quong also makes this point: "In Defense of Functionalism," p. 61.

⁵⁶ Whether or not it would be justifiable for Mexico to declare war as part of an effort to regain the territory depends on whether it is permissible to defend purely territorial interests by means of war. This claim has been disputed by some just war theorists such as David Rodin (see e.g. "The Myth of National Self-Defense," in *The Morality of Defensive War*, pp. 69–89). However, even if it were true that Mexico may not permissibly try to regain its territory by means of war, the US will still be liable to other forms of interference, and therefore still lacks a full right of territorial jurisdiction.

has considerable initial appeal.⁵⁷ However, as we have seen, they invariably argue that it must be rejected or supplemented due to its inability to explain our intuitions about ideal takeovers.⁵⁸ I have argued, on the contrary, that functionalism can account for these intuitions. In order to do so, what it must do centrally is to take the relationship between territorial rights and justice to be governed by a conception of liability. Such a view offers a compelling way of spelling out the claim that the territorial rights of states depend on how successfully they are performing their morally mandated functions, and one that cannot be dismissed on the grounds that it is incapable of explaining our intuitions about ideal takeovers.

⁵⁷ For one place this is especially clear, see Moore, *A Political Theory of Territory*, p. 95.

⁵⁸ *Supra* note 6.