



Winter 2022

Borders and Water Conflicts: Mitigating Conflicts with Love and Cooperation

Peter J. Longo

University of Nebraska at Kearney

Anthony B. Schutz

University of Nebraska School of Law

James M. Scott

Texas Christian University

Recommended Citation

Peter J. Longo, Anthony B. Schutz & James M. Scott, *Borders and Water Conflicts: Mitigating Conflicts with Love and Cooperation*, 62 NAT. RES. J. 125 (2022).

Available at: <https://digitalrepository.unm.edu/nrj/vol62/iss1/5>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact disc@unm.edu.

BORDERS AND WATER CONFLICTS: MITIGATING CONFLICTS WITH LOVE AND COOPERATION

ABSTRACT

Borders are political constructs, not constructs derived from laws of nature. Borders carry more potential for conflict than any other matter in political relations. In international relations, wars have been fought over borders and territory. But, territory does not necessarily entail a dispute about the geographic location of a border. Trans-boundary natural resources disputes emerge because the laws of nature do not bend to this peculiar human construct. As much can be seen in international and intra-state water conflicts, where political boundaries provide individuals with a tribal identity that eclipses the power of natural resources to tie people together in basins. Nevertheless, despite the tribal power of these divisive disputes, cooperative approaches emerge. Water users from competing political jurisdictions – within and between states – greatly benefit from cooperative water policies and practices based on philia, brotherly love. But the conditions under which such mutual concern emerges are not universal. Law can bring them to bear, and it should. Once it does so, the philia-driven commitments are often drawn up in compacts or agreements that will bind the parties in a long-term relationship that is more or less reflective of their original philia. In this paper we analyze water disputes between Kansas-Nebraska, Texas-New Mexico, and Egypt-Ethiopia-Sudan, and evaluate how cooperative models, consistent with philia, are employed to mitigate water fights.

* Dr. Peter J. Longo is Professor of Political Science at University of Nebraska at Kearney.

** Anthony Schutz is Associate Professor of Law and Associate Dean for Faculty at University of Nebraska College of Law.

*** Dr. James M. Scott is Herman Brown Chair and Professor of Political Science at Texas Christian University. A version of this paper was presented at the Association for Arid Land Studies Meeting Portland, Oregon April 8-11, 2015.

INTRODUCTION

When political units clash over borders, territory, and shared resources, the stakes are high, and conflict—at times violent—is common. International relations stresses borders, territory, and resources as preconditions to war.¹ Such disputes frequently turn on access to and control of resources, including water. Within countries conflicts between political jurisdictions over borders and shared resources, such as water, often confound and divide.

Garret Hardin's classic work, *Tragedy of Commons*, serves as a reminder to be aware of neighborly needs.² Political boundaries encourage individualism and as scarcity becomes a reality, boundaries can work against the community good. Yet, boundaries are sometimes overcome. Jurisdictions within a country, and between countries as well, often use reciprocal gain and cooperation to resolve natural resource disputes.³

These experiences suggest that competition is not the whole story. Rather, cooperation, collaboration, and, indeed, "love of neighbor" carry great advantages as foundational principles and guides to water allocation schemes. The allocation of water determines the daily life of the citizenry and the overall well-being of a state. Scarcity of water, real or perceived, can lead to unnecessary conflicts as well as costly fights. But fights over water can be mitigated by employing schemes based on traditional notions of love and, in turn, sustainable cooperative agreements.⁴ The premise that love and cooperation can mitigate water conflicts might seem a bit idealistic for onlookers, but love can yield positive results.

Indeed, love can be the foundation for cooperative resolutions to water fights. In a cost-benefit framework, love potentially adds considerable value in water allocation. After all, the political and physical realities of water supply provide fodder for conflict. Cooperation becomes essential. As the United Nations notes, the world's 263 transboundary lake and river basins cover almost half the Earth's surface, 145 nations have territory in these basins, and 30 countries lie entirely within them. There are approximately 300 transboundary aquifers, helping to serve the 2

-
1. PAUL D. SENESE & JOHN A. VASQUEZ, THE STEPS TO WAR: AN EMPIRICAL STUDY 11,12 (2008); JOHN A. VASQUEZ, THE WAR PUZZLE 7, 293 (1993); John Vasquez & Marie T. Henehan, *Territorial Disputes and the Probability of War, 1816-1992*, 38 J. OF PEACE RSCH. 123, 123,136 (2001) [hereinafter *Territorial Disputes*]; see generally WHAT DO WE KNOW ABOUT WAR? (Sara McLaughlin Mitchell & John A. Vasquez eds., 3rd ed. 2021) [hereinafter WHAT DO WE KNOW ABOUT WAR?].
 2. Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1247 (1968).
 3. Joseph Dellapenna & Joyeeta Gupta, *Toward Global Law on Water*, 14 GLOBAL GOVERNANCE, 437, 444 (2008); Patricia Wouters, *National and International Water Law: Achieving Equitable and Sustainable Use of Water Resources*, 25 WATER INTERNATIONAL 499, 499 (2000).
 4. See JOHN FLECK, WATER IS FOR FIGHTING OVER: AND OTHER MYTHS ABOUT WATER IN THE WEST (2016) (subverting the common narratives of crisis and conflict with examples of cooperation and problem solving in the face of scarcity); see Jaweed Kaleem & Ian James, *California, Arizona and Nevada Agree to Take Less Water From Ailing Colorado River*, LOS ANGELES TIMES (Dec. 15, 2021, 6:07 PM), <https://www.latimes.com/world-nation/story/2021-12-15/drought-colorado-river-water-agreement>.

billion people who depend on groundwater.⁵ Cooperation is essential, especially in areas vulnerable to the impacts of climate change and where water is already scarce. Wetlands around lakes and floodplains that straddle national boundaries provide essential ecosystem services to the surrounding populations, such as food provision, barriers against flooding and the natural processing of pollution.

Political and physical benefits underscore the need for cooperative possibilities. Variations of love can provide the framework for cooperative water policies. To establish these benefits, this paper proceeds in four parts: first, we generally describe the political context in which water conflicts and management exist; second, we glean and develop a working concept of love from those general descriptions of emergent cooperation; third, we examine water conflicts between Nebraska-Kansas, Texas-New Mexico, and Egypt-Ethiopia-Somalia; finally, we offer conclusions on how cooperative models derived from love can be employed to mitigate water fights.

WATER CONFLICT AND EMERGENT SOLUTIONS

Competition and conflict over territory and resources has long been at the heart of conflict between political units, both within and between states. Within states, water conflict can be divisive and intense even with the structure of law and overarching central institutions. In the United States, the imposition of political boundaries on a landscape with little regard for water resources creates conflict.⁶ Indeed, our propensity to use rivers as boundaries is a fault, not a feature of sound institutional design for water resources management. And so, disputes quickly ensued. Thankfully, however, the federation we created imbued a central authority with the power to settle the inevitable disputes. The Supreme Court of the United States emerged as an important purveyor of relationships, using its jurisdiction of original actions to implement the power to achieve equitable apportionments of interstate water resources.⁷

In an anarchic international system without central authority, clashes over land, rivers, and maritime matters are central to relations between states.⁸ Such clashes can, and do, lead to violence.⁹ As Homer-Dixon argued some more than two

5. U.N. Water, *Transboundary Waters: Sharing Benefits, Sharing Responsibilities*, UNITED NATIONS WATER, 1 (May. 6, 2008), <https://www.unwater.org/publications/transboundary-waters-sharing-benefits-sharing-responsibilities/> [hereinafter *Transboundary Waters*]

6. A similar observation holds for water-quality problems. See Anthony B. Schutz, *Agricultural Discharges Under the CWA: Old Questions and New Insights*, 52 U. PAC. L. REV. 567, 574-76 (2021) (discussing the statutory pinch points in the CWA where political and judicial forces operate to navigate the tensions between water-quality ends and our federal structure).

7. *Kansas v. Colorado*, 206 U.S. 46 (1907) (establishing jurisdiction in interstate water disputes and both recognizing and resolving a dispute using equitable principles).

8. Cf. Kelly Daniels & Sara McLaughlin Mitchell, *Bones of Democratic Contentment: Maritime Disputes*, 20(4) INT'L AREA STUD. REV. 293 (2017) (analyzing maritime disputes among democratic countries for evidence of a greater incidence of diplomatic conflict resolution); cf. Andrea P. Owsiak & Sara McLaughlin Mitchell, *Conflict Management in Land, River, and Maritime Claims*, 7(1) POL. SCI. RSCH. & METHODS 43 (2019) (analyzing divergent incidences of third-party resolution of disputes between countries regarding land, river, and maritime areas).

9. See *Territorial Disputes*, *supra* note 1, at 136 (presenting evidence that finds on the whole, territorial disputes have a higher probability of going to war than policy or regime disputes); See

decades ago, water is “the renewable resource most likely to stimulate interstate resource war.”¹⁰ More recently, Goldenberg described the dire conditions facing many parts of the world, from California to the Middle East, North Africa, South Asia, and elsewhere in which scarcity in shared water resources such as rivers and aquifers could contribute to instability, competition, regional tension, and even violent conflict.¹¹ In 2012, the US intelligence community warned of the national security concerns generated by global water problems.¹² As Peter Gleick of the Pacific Institute summarized, “the risk of conflicts over water is growing – not shrinking – because of increased competition, because of bad management and, ultimately, because of the impacts of climate change.”¹³ This is the case for both domestic conflicts across state or provincial borders and international conflicts across country boundaries.

At the same time, however, political units cooperate over water resources much more often than they fight, at least in terms of violence. Within states, cooperative agreements are common to promote resource sharing.¹⁴ But the emergence of love is not necessarily spontaneous. In the case of sub-national interstate agreements, the love that leads to their creation is an unnatural distribution of rights. In its natural state, upstream users have power that downstream users cannot mitigate, absent some sort of legal recourse. Such is the nature of water supplies in a river system, at least in areas where scarcity is an issue. Upstream users always have the upper hand.

Interestingly, the United States’ federalism and its associated value of comity among states means that political boundaries that cross water resources allocate rights to the river among the two (or more) polities. In turn, these political bodies have recourse to the United States Supreme Court to garner an equitable distribution of the resource. The standards that await states seeking an equitable apportionment are murky:

generally PAUL D. SENESE, *supra* note 1 (studying the significance of territorial disputes and contiguity in war); *See generally* WHAT DO WE KNOW ABOUT WAR? *Supra* note 1 (evaluating why countries go to war); JOHN A. VASQUEZ & MARIE T. HENEHAN, TERRITORY, WAR, AND PEACE VASQUEZ (2010). Which both stress centrality of disputes of territory and resources such as water to the causes of violent conflict.

10. Thomas F. Homer-Dixon, *Environmental Scarcities and Violent Conflict: Evidence from Cases*, 19 INT’L SEC. 5, 19 (1994).
11. Suzanne Goldenberg, *Why Global Water Shortages Pose Threat of Terror and War*, THE GUARDIAN (Feb. 8, 2014, 7:04 PM), <http://www.theguardian.com/environment/2014/feb/09/global-water-shortages-threat-terror-war>.
12. *See* INTEL. COMMUNITY ASSESSMENT, ICA 2012-08, GLOBAL WATER SECURITY (2012) (focusing on the long term impacts of growing populations, economic changes, and climate change in strategically important water basins in the United States that threaten stability and tension), https://www.dni.gov/files/documents/Newsroom/Press%20Releases/ICA_Global%20Water%20Security.pdf.
13. Goldenberg, *supra* note 11; *see* PETER GLEICK ET AL., ENDING CONFLICTS OVER WATER (2020) (exploring conflicts in India, Africa, and Yemen over severe water quality problems that have triggered social unrest and violent protests).
14. *See* JOSEPH F. ZIMMERMAN, INTERSTATE COOPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS 172-74 (State Univ. N.Y. Press Albany 2012); *see* MICHAEL L. BUENGER, ET AL., THE EVOLVING LAW AND USE OF INTERSTATE COMPACTS 6 (A.B.A., 2d ed. 2016).

whenever . . . the action of one State reaches through the agency of natural laws, into the territory of another State, the question of the extent and the limitations of the right of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.¹⁵

To strike a chord that sounds of both equity and justice, the Court considers the harm to the complaining State and the benefit of the responding State. At times, the Court has used the equities of time to settle disputes, looking to when the water was first put to a beneficial use. And, at other times, it has considered different factors. As Chief Justice Holmes put it, “[T]he effort always is to secure an equitable apportionment without quibbling over formulas.”¹⁶

A similar phenomenon attends wholly intra-state distributions of rights where downstream users are naturally subject to the impact of upstream users. Many states implement prior appropriation to equitably distribute water resources according to the time at which one began using their rights. Downstream users are thus empowered vis-à-vis upstream users. In these systems, time is the egalitarian lens. In other systems, usually marked by a lack of scarcity, so-called riparian rights exist in a system of sharing and reasonableness.

Between nation states, cooperation generally prevails as well, in part driven by the principles of international law, reciprocity, custom, mediation, and so on. Indeed, according to the United Nations Department of Economic and Social Affairs from 1965-2014 there were 37 water disputes that involved violence, while 150 treaties establishing cooperation and water sharing were signed.¹⁷ According to Wolf, Yoffe and Giordano, from World War II until 1999, incidents of cooperation over water outnumbered conflicts by more than two to one.¹⁸ Over the past century, such agreements have focused on issues related to water use.¹⁹ Overall, international law on water usage has generally stressed two core principles: equitable and reasonable utilization, and no significant harm (as relates to the rights/usage and dispute resolution).²⁰

Whether within or between countries, cooperative approaches to water disputes carry great advantages. As Carius, Dabelko and Wolf explain:

Water has also proven to be a productive pathway for confidence building, cooperation, and arguably, conflict prevention . . . In some cases, water provides one of the few paths for dialogue in

15. *Kansas v. Colorado*, 206 U.S. 46, 97–98 (1907).

16. *New Jersey v. New York*, 283 U.S. 336, 343 (1931).

17. U.N. Dep’t of Econ. and Soc. Aff., *Transboundary Waters, International Decade for Action ‘Water for Life’ 2005-2015* (Oct. 23, 2014), https://www.un.org/waterforlifedecade/transboundary_waters.shtml.

18. Alexander Carius, Geoffrey D. Dabelko & Aaron T. Wolf, WATER, CONFLICT AND COOPERATION 60, (ESCP REPORT Issue 10 2004), https://www.wilsoncenter.org/sites/default/files/media/documents/publication/ecspr10_unf-caribelko.pdf.

19. U.N. Dep’t of Econ. and Soc. Aff., *supra* note 17.

20. Tamar Meshel, *Swimming Against the Current: Revisiting the Principles of International Water Law in the Resolution of Fresh Water Disputes*, 61 HARV. INT’L. L. J. 135, 139 (2020).

otherwise heated bilateral conflicts. In politically unsettled regions, water is often essential to regional development negotiations that serve as de facto conflict-prevention strategies.²¹

In this context, we argue that achieving cooperation and avoiding conflict among competing political jurisdictions—within and between states—is enhanced by cooperative water policies and practices derived from *philia*, brotherly love. However, *philia* is unlikely to emerge in the absence of some distribution of rights or other exercise of power that brings participants together.

A WORKING CONCEPT OF LOVE

We draw on *philia* for our understanding of love in this article. Rapport offers a useful overview of various love categories: “*eros*: a powerful, overwhelming physical attraction; *ludus*: playing the field and refusing single devotions; *storge*: an affection developing slowly over time; *pragma*: a search for compatible qualities in others; *mania*: prey to possessive jealousy, an obsessive preoccupation; *agape*: a selfless, altruistic, patient, gentle, even dutiful, giving; *philia*: a mutual friendliness and familiar attachment.”²² From a theoretical basis, *philia* best captures the potential for mitigating water conflicts and promotes cooperation.

Indeed, the love category of *philia* has captured the attention of political theorists throughout the centuries. Aristotle built theories of friendship and governing from the foundation of *philia*. Brewer comments that:

Aristotle uses the term ‘*philia*’ to pick out a broad array of human relationships, ranging from the most intimate relationships between lovers or partners, through the relationships we commonly call friendships, to the relatively casual and impersonal relationships among fellow citizens. What genuine forms of *philia* have in common, according to Aristotle, is that all of them involve reciprocated goodwill (*eunoia*) between two persons, each of whom is aware of the other’s goodwill.²³

The value of utilizing love in the formulation of public policy is that political conflicts are diminished in favor of a broader understanding of shared human needs. Simply stated, water is a universal human need, regardless of state or nation status. Acknowledging the commonalties, as required by this love, ought to reduce individualism and favor collective policies and outcomes. Hence, love is the common driver.

21. Alexander Carius, *supra* note 18, at 60.

22. Nigel Rapport, *Loving Recognition: A Proposal for the Practical Efficacy of Love as a Public Virtue*, 24 J. ROYAL ANTHROPOLOGICAL INST. 126, 127-28 (2018).

23. Talbot Brewer, *Virtues We Can Share: Friendship and Aristotelian Ethical Theory*, 115 ETHICS 721, 723 (2005).

Two foundations underpin the role of *philia*. In political theory, principles of empathy²⁴ and difference²⁵ and their potential roles in democracy, deliberation, and conflict resolution, buttress our emphasis on *philia*. Empathy is the ability to engage in the perspectives of others and to feel concern for their points of view, and it is often noted for its importance in democratic discourse, conflict resolution, and successful foreign policy.²⁶ While empathy is challenging to achieve effectively or successfully, feelings of difference may be even more essential to the role of *philia*, as they can generate openness, attentiveness, and receptiveness in and among participants in deliberation, negotiation, and conflict resolution, fostering and recognition of the legitimacy and validity of the perspectives of others.²⁷ Second, the concept of soft power from international relations scholarship provides further foundation to our focus on the role and application of *philia*. Originating in the work of Joseph S. Nye, Jr.,²⁸ soft power rests in the ability to attract and persuade, grounded in the appeal of policies (especially successful ones), culture, and ideas. In contrast to coercion, soft power relies on persuasion and cooption. As Nye put it, “[s]eduction is always more effective than coercion.”²⁹

Together, the principle of *philia* and the supporting concepts of empathy, difference, and soft power combine to create an approach to managing and resolving water disputes. This approach harnesses engagement in others’ perspectives, embrace of legitimate differences, and the power of ideas, persuasion, and appeal to *philia*’s emphasis on reciprocated goodwill and a broader understanding of shared human needs. Resting on these concepts, the common driver, love, forms the basis for cooperative water policies, even if sovereign lines blur notions of friendship and ensuing possibilities that love can serve as a framework to share water. And while these sovereign lines may blur friendships, they are often necessary to the concepts of soft power and empathy that drive cooperation.

RESEARCH DESIGN

We use an interpretive case study approach to apply an established, “conceptual framework that focuses attention on some theoretically specified aspects of reality” to a case—a set of events bounded by space and time—to provide better

24. See MICHAEL E. MORRELL, *EMPATHY AND DEMOCRACY: FEELING, THINKING, AND DELIBERATION* 158-95 (Pa. State Univ. Press 2010) (arguing for deliberative processes that involve empathy as necessary conditions for democracy).

25. Mary F. Scudder, *Beyond Empathy: Strategies and Ideals of Democratic Deliberation*, 48 *POLITY* 524, 526 (2016).

26. MORRELL, *supra* note 24, at 2; See generally *EMPATHY AND ITS DEVELOPMENT*, 3-38 (Nancy Eisenberg & Janet Strayer eds., 1987) (providing overview of concept).

27. Scudder, *supra* note 25 at 546; see generally MARY F. SCUDDER, *BEYOND EMPATHY AND INCLUSION: THE CHALLENGE OF LISTENING IN DEMOCRATIC DELIBERATION* 1-47 (2020) (providing helpful analysis of the nature and consequences of perceived difference).

28. See Joseph S. Nye Jr., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 5,6 (2004) [hereinafter *SOFT POWER*]; see generally Joseph S. Nye Jr., *BOUND TO LEAD: THE CHANGING NATURE OF AMERICAN POWER* (1990) (discussing American leadership in the context of power and power transitions in modern international relations, where getting others to what a state wants has as much to do with recognizing preferences and mutuality as it does with brute force and resource capture).

29. *SOFT POWER*, *supra* note 28, at x.

understanding of the events and explanations of their nature.³⁰ This approach thus explains the nature and outcomes of a specific case, but also sheds light on the case as a member of a broader class of phenomena³¹ and offers insights on the usefulness and/or limits of the theoretical/analytical framework.

Through the *philia-empathy-soft power* conceptual lens we have introduced, we examine and discuss three cases to illustrate how love contributes to the resolution of water conflicts: the Nebraska and Kansas fight; the New Mexico and Texas fight; and the Egypt and Ethiopia and Sudan Nile River conflicts. These cases are good instances of water conflicts that take place in domestic and international contexts. We pay attention to the emergence of cooperation and its durability. The most salient observation to be gleaned from these cases is the way in which law can create the conditions for love to thrive. The two domestic cases demonstrate the emergence of compacts as a manifestation of love. Post-compact, a continued commitment to mutual understanding has been difficult to find. But we glean important differences in compact design that have enabled the two basins to maintain different levels of cooperation. By contrast, the international case demonstrates how the lack of a legal structure inhibits the emergence of love and cooperation. Left to the natural distribution of power on the river (upstream over downstream interests), love struggles to emerge, much less ripen into a long-term cooperative effort with marginal struggles.

Kansas v. Nebraska

In many ways, rivers operate to tie people together on a landscape at multiple scales. The Republican River travels through Nebraska, Colorado, and Kansas before it converges with the Kansas River, which ultimately flows into the Missouri River, and eventually the Mississippi River, and finally into the Gulf of Mexico. Insofar as water quality in the Mississippi Basin is concerned, water users from Montana to Ohio and down to Louisiana are part of a community. For water allocation purposes, we often find different scales of interest as rivers traverse from dry to wet climates and the need for river water as a supply dwindles. As a result, one natural community of interests exists on the Republican River, which originates in a very arid Colorado, flows through Nebraska, and culminates in a relatively wetter eastern Kansas.

The geography of Nebraska and Kansas is monoscenic. To graphically represent Nebraska and Kansas, one would only need to draw a line across a sheet of white paper and to the north would be Nebraska and to the south would be Kansas. The differences in this scenario are indiscernible, but for the constructed line. If we inject demographics into the respective citizenry, once again the differences are subtle.

Absent state boundaries, the allocation of natural power through river water is clear. Those upstream have a natural ability to harm those downstream. Matters are more pronounced with rivers like the Colorado, where the supply of water nearly

30. Jack S. Levy, *Case Studies: Types, Designs, and Logics of Inference*, 25 CONFLICT MGMT. PEACE SCI. 1, 5 (2008).

31. ALEXANDER L. GEORGE & ANDREW BENNETT, CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES 5 (2005).

completely originates in the Rockies and is carried to Arizona and California. As between Nebraska and Kansas on the Republican River, the user-power dynamic is similar.

The emergence of a compact on this river is a love story: cooperation emerged from the mutual interests of the party states. Recall, however, that the states were operating within a federal system of states with autonomy and comity. And even though the political boundary destroys the natural order of the river, it brings together constituent groups of upstream and downstream interests, empowers them, and gives them an opportunity to cooperate.

Two items drove cooperation in this instance. The first was uncertainty. Compacting operates against a backdrop of equitable apportionment on interstate waters. And while fairness is a likely outcome, the parameters of it are uncertain and often incremental. So the states formed a compact to settle the terms of their relationship. When disagreements would arise in the future, at least they had a clearer case to make to the Court.

The second was soft power. The federal government heavily influenced the states as they worked to create a beneficial solution to flood concerns on the river. It funded that effort and so wielded significant soft power throughout the process. As a condition on such funding, the states had to apportion the waters of the river among themselves through a compact. Empathy is much easier when soft power, and flooding, induces concern.

As this situation shows, once the state lines are drawn, some equal footing established, and the context appreciated, cooperative incentives create a system establishing who should get and do what. And, so, the parties created the 1942 Republican River Compact. This compact, like most others, provides a framework for cooperating with neighbors going forward. First comes love and then, perhaps, comes a formalization (marriage, perhaps). Consider the cooperative language of the 1942 Compact:

The states of Colorado, Kansas, and Nebraska, parties signatory to this compact (hereinafter referred to as Colorado, Kansas, and Nebraska, respectively, or individually as a state, or collectively as the states), having resolved to conclude a compact with respect to the waters of the Republican River Basin, and being duly authorized therefor by the Act of the Congress of the United States of America, approved August 4, 1942, (Public No. 696, 77th Congress, chapter 545, 2nd Session) and pursuant to acts of their respective legislatures have, through their respective Governors, appointed as their commissioner.³²

The Compact on its face indicates a formal relationship between the states. The formality suggests a framework of love that all parties will proportionally share water. Borders are broken-down and *philia* directs the sharing of water resources. Despite the Compact and potential of a love-based allocation, Nebraska—citizens and the government—chose not to follow the terms of the compact. The fight ensued

32. Republican River Compact, Pub. L. No. 60, 56 Stat. 736 (1943).

and resulted in the case, *Kansas v. Nebraska and Colorado*.³³ The language of the case holds the promise for cooperation and the negative consequences of ignoring the precepts of love. For instance: “[a]ll was smooth sailing for decades, until Kansas complained to this Court about Nebraska’s increased pumping of groundwater, resulting from that State’s construction of ‘thousands of wells hydraulically connected to the Republican River and its tributaries.’ Bill of Complaint, O. T. 1997, No. 126, Orig., p. 5 (May 26, 1998). Kansas.”³⁴

The promises the states made are found in the Compact. The Compact allocates to each of the states an agreed-upon share of the water supply within the Republican River Basin—roughly 49 percent to Nebraska, 40 percent to Kansas, and 11 percent to Colorado. Pursuant to the Compact, the States created the Republican River Compact Administration (RRCA) to calculate the Republican River Basin’s annual virgin water supply and to determine whether each State’s use of that water is within its allocation under the Compact.³⁵

Unfortunately, Nebraska chose not to live up to its cooperative promise. The dimensions were easy to understand: Nebraska was using more than its share of the water supply, to the detriment of Kansas. The two states had opportunities to settle the fight but chose to reject any sort of political love for neighbors or friends. Similarities between citizens turned into the underscoring of differences, particularly water allocations. So much for love of neighbor or following the framework of the water compact. Expensive litigation from the 2015 case has brought a formal and legal halt to the fighting.

There was, at least, a theory of equity that informed the parties’ arguments concerning the remedy. Kansas’s economic losses were much lower than the economic gain Nebraska experienced by overuse. If efficiency is part of the equity calculus, then the breach could be remedied by Nebraska compensating Kansas for its losses and keeping for itself the gains. Nebraska argued for this outcome. Kansas saw equity differently, requiring adherence to Nebraska’s promise that could only effectively be enforced by requiring Nebraska to pay to Kansas all of Nebraska’s gains. While the Supreme Court’s opinion has numerous legal lessons, for our purposes, the Court ordered Nebraska to abide by the compact and largely adopted Kansas’s understanding of an equitable remedy. Simply, “[t]he Court has broad remedial authority in such cases to enforce the compact’s terms. Here, compelling Nebraska to disgorge profits deters it from taking advantage of its upstream position to appropriate more water than the Compact allows.”³⁶ The Court went on to resolve a dispute concerning compact accounting in Nebraska’s favor, concluding with language evincing its overall goal of keeping the cooperative relationship entangled: “[a]nd amending the Accounting Procedures ensures that the Compact’s provisions will govern the division of the Republican River Basin’s (and only that Basin’s) water supply. Both remedies safeguard the Compact; both insist that States live within its law.”³⁷

33. *Kansas v. Nebraska*, 574 U.S. 445, 448 (2015).

34. *Id.* at 450.

35. *Id.* at 449-50.

36. *Id.* at 474-75.

37. *Id.*

Nebraska and Kansas, by the mutually agreed terms of the Compact of 1943 and the Supreme Court decision, must share water. Though love broke down, the larger system worked to resolve the dispute and keep the parties together. And the remedial power held by that system requires the states to play fairly going forward, against a backdrop of a broad remedial power. Had their respective citizens and governments acted by the tenets of brotherly love, costly litigation could have been avoided. Perhaps Nebraska could have bargained with Kansas for more use, or Kansas could have asked only for compensation based on its harms, facilitating gains for its counterpart. But neither result came to fruition. The result is an example where the formal agreements managed to bring about a good result, despite a breakdown of philia. A similar situation can be found in Texas and New Mexico.

Texas v. New Mexico

The compact of 1938 between Texas, New Mexico, and Colorado represents another instance in which the parties should try to rekindle the love they once shared to reduce conflict and force the sharing of a scarce resource. The 1938 Compact was created amidst a backdrop of autonomy, comity, and equitable apportionment that served to disrupt the natural power dynamics of river use. The language of 1938 imbued a sense of love across sovereign lines:

The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purpose.³⁸

Compacts such as the 1938 Compact are consistent with a civic notion of love. Yet, once again, the political constructs of sovereignty not only enabled cooperation, but also eroded it. Throughout the history of the Compact, the participating states have been at odds. Colorado held water from New Mexico and New Mexico held water from the Rio Grande. The fight between Texas and New Mexico was intense and certainly lacked love. Kate Galbraith provides a vivid picture of the situation:

The Texas-New Mexico battle concerns the Rio Grande and the compact over the river water created between Texas, New Mexico and Colorado, where the river originates. The compact did not specify how much water each state would get, but it was aimed at ensuring that water flowed into the Elephant Butte reservoir and was properly stored. Additional agreements were made to split the water among Texas and New Mexico. Historically, Texas has been

38. Rio Grande Compact, Pub. L. No. 98, 49 Stat. 325 (1935).

eligible for 43 percent of the water, based on the ratio of irrigated farmland, with New Mexico getting 57 percent.³⁹

As a cogent legal analysis by Smith and Singh noted, the two states have considerable differences. Neither jurisdiction has any apparent desire to reduce the tensions caused by the borders. Of particular relevance, Smith and Singh stated:

New Mexico's main argument is that there is no obligation expressly stated under the Compact for New Mexico to deliver water or allow water to flow unimpeded to the Texas-New Mexico border, and thus Texas should be looking at the Reclamation contracts, where the federal government is responsible for delivering the water.

The second argument points to an alleged inconsistency in Texas's argument that New Mexico must allow water to flow to the Texas-New Mexico border unimpeded. Texas contends that the water under the Compact is delivered to Elephant Butte, allocated according to the Rio Grande Project, and is subject to the relevant contract arrangements. Once New Mexico delivers this water, it relinquishes its rights to these contractual arrangements involving the federal government. Given this state of affairs, Texas asserts that New Mexico is still responsible for ensuring the water flows to the Texas-New Mexico border unimpeded. New Mexico finds inconsistent that Texas argues that New Mexico is legally obligated to allow water to flow unimpeded after the point where its legal obligation to handle the water has been terminated under the Compact. New Mexico also argued that the issues raised by Texas are being litigated in alternative forums, and thus can be vindicated in other ongoing cases.⁴⁰

The two states failed at forging any type of love-based solution—fighting seemed more attractive than cooperating. Legal budgets were increased to adjust to the conflict. Suing neighbors over water can be expensive and seemingly has no end.

The fight underscores the state-centric drive of New Mexico and the costly impact for both New Mexico and Texas. The press corps in New Mexico views the fight as some sort of sporting financial competition. The love is for the fight and not for the resolution. Civic minded love was absent and any cooperative elements from the Compact had evaporated. The courts, once again, became the outlet. The costly fight continues, though it has made it to the Supreme Court recently.

In the 2018, the Court gave us *State of Texas v. State of New Mexico and State of Colorado*⁴¹ to settle a dispute involving the United States' role in this litigation. Justice Gorsuch delivered the unanimous decision against New Mexico. Justice Gorsuch wrote: "[i]n today's lawsuit, Texas claims that New Mexico has

39. Kate Galbraith, *Texas Budget Includes Millions for Water Suit Against New Mexico*, TX. TRIB. (June 12, 2013, 5:00 AM), <https://www.texastribune.org/2013/06/12/texas-allocates-5-million-new-mexico-water-lawsuit/>.

40. Robin Smith & Kavid Singh, *Water Rights: Dispute Over the Rio Grande: Texas v. New Mexico and Colorado*, 44 TX. ENVIR. L. J. 455, 458-59 (2014).

41. *Texas v. New Mexico*, 38 S. Ct. 954 (2018).

defined the Compact. But at this stage in the proceedings, we face only a preliminary and narrow question: May the United States, as an intervenor, assert essentially the same claims Texas already has? We believe it may.”⁴²

Tangentially, Colorado was a litigant in this case and argued that the national government did not have constitutional authority to participate in the enforcement of the Compact. The court rejected this position and underscored the constitutional authority of the federal government once a compact has been approved by Congress.

Once again, the Supreme Court served as the enforcer of “love” or as stated in the decision:

Our role in compact cases differs from our role in ordinary litigation. The Constitution endows this Court with original jurisdiction over disputes between the States. See Art. III, §2. And this Court’s role in these cases is to serve “as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force.”⁴³

The Court, having established the constitutional authority to resolve this conflict, went on to establish the parties to the relationship. Perhaps bringing the third party to the mix will assist in the cooperative effort, along with a special master. It is, after all, up to the Special Master to assure that New Mexico’s irrigation wells do not siphon off water intended by the Compact for Texas to receive downstream in the Rio Grande. The future actions ought to be based on mutual understanding and some level of friendliness.

Egypt and Ethiopia

In contrast to the United States, international disputes often lack the conditions that facilitate the emergence of *philia* over natural resources. The Nile River has served as the backdrop for numerous major historical water controversies. Once again, the political constructs have divided what nature has provided, creating autonomous nations on a landscape with its own power dynamic. Egypt is downstream, and Ethiopia is upstream. The historical dispute between Egypt and Ethiopia has been intense and prolonged. Sudan is a party in this fight as well. Not unlike the previous examples from the United States, the fight is all too familiar. Simply, the aggregation of downstream and upstream interests involves a sort of power distribution that can be helpful to love’s emergence.

The countries likely will not practice comity, because they do not have a court that can hear these disagreements. There is no backdrop, for example, of a direct and enforceable equitable apportionment from some international body (created by and for the parties). Instead, each country has power, but remains completely autonomous, so they have no structure to mitigate escalating and intense fights. The legal boundaries are the driving force behind discussions, but they drive little more than discord. Nevertheless, the countries are tied together by concerns for reciprocity and reputation, as well as the role of shared water resources, and that

42. *Id.* at 956.

43. *Id.* at 958.

creates momentum for negotiation, which, in turn, creates connections that mitigate open conflict.

The allocation of the Nile River has confounded lawmakers and users for centuries, underscoring the importance of implementing governing models based on love. The current Nile River fight is the result of Ethiopia's construction of the Great Renaissance Dam. In 2008, Ashok Swain provided a snapshot of the initial stage of progress:

In summary, Ethiopia poses a larger and more complicated problem for Egypt's water security than Sudan. Ethiopia simply does not possess alternative resources to mitigate its severe food shortages, unlike oil-rich Sudan which can opt for food imports. Although Ethiopia is geographically removed from potential military action, Egypt has nevertheless been successful in using its diplomatic might to deter foreign investment in Ethiopia's large irrigation plans in the Nile basin. While Egypt opposes vehemently any water diversion by Ethiopia for irrigation purposes, there has been some flexibility regarding the development of hydropower in the Ethiopian highlands. This is mostly attributed to the hope that these dams, as in Sudan, may help to arrest sedimentation. Ethiopia has only managed to harness 2 percent of an estimated production potential of 162,000 gigawatt hours (GWh) of electricity per year on its Nile tributaries. As of yet, Egypt has not objected to Ethiopia's ongoing construction of a large hydropower dam on the Tekeze River.⁴⁴

The intensity of the fight made military options a real possibility. As Abebe observed:

Since then, Ethiopia has moved forward with the Dam Project and Egypt has become increasingly concerned about the impact on the Nile. Though Ethiopia is still some distance from completing the Dam Project, Egyptian leaders have started to consider and threaten severe consequences for Ethiopia. In 2010, Egypt and Sudan plotted to take military action against Ethiopia to protect their interests in the Nile.⁴⁵

Scholars have covered the many issues raised by this project, ranging from military action to cooperation. Hammond well-stated the need for cooperation:

It is clear that water resource management in the Nile Basin will become increasingly complex as a result of climate and socio-economic changes. The need for countries in the Nile Basin to use water resource sustainably and to expand their water infrastructure is understandable. However, basin-wide agreements present the most promising way to manage water resources. Cooperation over

44. Ashok Swain, *Mission Not Yet Accomplished: Managing Water Resources in the Nile River Basin*, 61(2) J. OF INT'L AFF. 201, 207 (2008).

45. Daniel Abebe, *Egypt, Ethiopia, and the Nile: The Economics of International Water Law*, 15 CHI. J. OF INT'L L. 27, 33 (2014).

water is essential if countries are to develop and reduce their vulnerability to climate change. It is essential that this cooperation includes all parties.⁴⁶

But, cooperation remains possible. Shared needs and demands are positive motivators for cooperation. The obstacles are multiple and further complicated by a history of exclusion of Ethiopia. Indeed, as Waal describes, a 1929 treaty between Egypt and colonial Britain and a subsequent 1959 treaty between Egypt and Sudan govern the use of the Nile's water, both of which excluded Ethiopia and neither of which awarded it any water rights Waal.⁴⁷

The use of love would mitigate the harm from ill-designed water treaties. Love reduces the political constructs and instead focuses on the needs of neighbors. It places concerns for reciprocal goodwill and reciprocity at the forefront, while general concerns for reputation – an important element of soft power – dampen tendencies for outright conflict. In this manner, water becomes a shared resource to perpetuate the life of communities, regardless of state identities.

Moving forward to 2019, the prospect of governing by love at this 2019 moment seemed viable, yet daunting. Consider, as reported by Pace Madden, the following from a September 15, 2019, multinational meeting:

Sunday, September 15, irrigation ministers from Ethiopia, Egypt, and Sudan met in Cairo for talks regarding Ethiopia's plan to build the Great Ethiopian Renaissance Dam on the Nile River. The following day, due to disagreements over technical aspects related to the filling and operating of the dam, Egypt announced that talks had stalled. Egypt, which relies on the Nile for 90 percent of its freshwater, fears that the dam will threaten its water supplies; Ethiopia disputes that claim. Egypt. As a result, the two countries disagree over the annual flow of water that should be guaranteed to Egypt, as well as the management of water flows during droughts.⁴⁸

The dispute continues. Traditional discussions based on state sovereignty have failed Egypt, Ethiopia, and Sudan. Love, civic love, transcends the aforementioned sovereignties and resolution is brought about by cooperation derived from love.

Love is not just an idealistic fancy for water resolution. President Abdel Fattah Al-Sisi addressed the 74th United Nations General Assembly's General Debate and underscored the needs for cooperation amongst nations and indeed, civic brothers. As reported by Robert Terpstra, Al-Sisi's remarks fortified the possibility

46. Michael Hammond, *The Grand Ethiopian Renaissance Dam and the Blue Nile: Implications for Transboundary Water Governance*, GLOBAL WATER FORUM (Feb. 18, 2013), <https://globalwaterforum.org/2013/02/18/the-grand-ethiopian-renaissance-dam-and-the-blue-nile-implications-for-transboundary-water-governance/>.

47. Alex De Waal, *Sisi Goes to Addis Ababa*, N.Y. TIMES (Jan. 26, 2015), <https://www.nytimes.com/2015/01/27/opinion/sisi-goes-to-addis-ababa.html>.

48. Payce Madden, *Africa in the News: Disagreement over the Great Ethiopian Renaissance Dam, Rwanda-Uganda Dispute Talks*, BROOKINGS (Sept. 21, 2019), <https://www.brookings.edu/blog/africa-in-focus/2019/09/21/africa-in-the-news-disagreement-over-the-great-ethiopian-renaissance-dam-rwanda-uganda-dispute-talks/>.

of resolution through love, with concerns for reciprocity and reciprocal goodwill at the core of his message:

“For decades, Egypt has sought to strengthen and deepen the bonds of cooperation with its brotherly Nile basin countries”, President Al-Sisi said in his address, marking the GERD project as necessary in furthering the interests of all the people in proximity to the Nile River basin. The president conveyed hope in his address that the common interests of the Blue Nile participants will be taken into consideration, stating simply that inaction with respect to the dam will not help, but rather hinder much-needed prosperity for water ecosystems.⁴⁹

President Abdel Fattah Al-Sisi’s message seemed hopeful. Love could drive a positive outcome for generations and yet future generations will be limited by the political constructs associated with Egypt, Ethiopia, or Sudan. The realities suggest that governing through love and cooperation needs formal political constructs. In twilight of 2021 Sudan’s Prime Minister Abdalla Hamdok requested formal mediation.⁵⁰

CONCLUSIONS: “WHAT’S LOVE GOT TO DO WITH IT?”

The previous vignettes demonstrate that border fights are costly and inefficient and in the international setting a security threat. Resolution does occur and it seems that cooperative models or models based on love would only accelerate and increase peaceful resolutions. Nobel-winner Elinor Ostrom wrote:

Many potential answers spring to mind regarding the question why some individuals do not achieve collective benefits for themselves, whereas others do. However, as long as analysts presume that individuals cannot change such situations themselves, they do not ask what internal or external variables can enhance or impede the efforts of communities of individuals to deal creatively and constructively with perverse problems such as the tragedy of the commons.⁵¹

The notion that love and cooperation can mitigate water conflicts might seem idealistic. Yet, love and cooperation must be offered as a viable possibility in a multivariate water policymaking arena. Policy driven just by realism does not thoroughly address peaceful possibilities. As we have seen from the selected examples, the border water issues share common characteristics and the fights become all too predictable. Cooperation and love create solutions when the right

49. Robert Terpstra, *President Al-Sisi Outlines Importance of Mutual Understanding on Renaissance Dam*, DAILY NEWS EGYPT (Sept. 25, 2019), <https://dailynewsegypt.com/2019/09/25/president-al-sisi-outlines-importance-of-mutual-understanding-on-renaissance-dam/>.

50. *Sudan Formally Requests Four-Party Mediation over Ethiopian Dam*, REUTERS (Mar. 16, 2021, 2:03AM), <https://www.reuters.com/article/uk-sudan-ethiopia-dam-idUSKBN2B80QK>.

51. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 21 (2015).

conditions exist. Tending to those conditions as the relationship ages could mitigate further tensions.

Our conceptual lens highlights a number of factors of importance from our three cases, four of which are worthy of further mention. First, our cases emphasize the importance of a legal structure and institutions – clearly present for the domestic cases, but absent or incomplete in the international one – to foster cooperative love-based interactions and provide mechanisms to actualize reciprocal good will in those instances in which it is most threatened. Indeed, our analysis suggests that norms and love thrive in the context of legal structures and institutions, and struggle in their absence. Second, our cases suggest the importance of reciprocal good will and reciprocity as concerns of the parties to water disputes, whether domestic or international. Even in the international case, longstanding norms of reciprocity in world politics act condition the calculations of sovereign states. However, our analysis suggests that the higher the tangible stakes (in terms of resources, costs, and benefits), the less effect norms/love have. Our analysis suggests this is the case for both domestic and international cases, but also that absent or incomplete structure and institutions amplify this effect. Third, our identification of concerns for empathy and difference as part of the *philia* framework help to reveal long-recognized and central tenet of conflict resolution and negotiation – the importance of “yesability:” the need to see things from the other side’s perspective and embrace negotiation/proposals that offer “wins” to them to secure their cooperation.⁵² Finally, our cases also suggest that concerns for reputation, a part of soft power, can help to foster cooperative relations and longer-term calculations of mutual interests and positive-sum gains as part of *philia*-driven perspectives and practices.

Love can, however, cause hate. This can happen as a direct result of the circumstances where love operates to bring sovereigns together. A political boundary separating a basin’s users provides a point that marshals users in contravention of the natural allocation of power along a river. And with appropriate backdrops of uncertainty, a need for cooperation emerges. Both parties gain and love blossoms. But as time wears on, the desires of one party may wander. And as the other party experiences fear and the possibility of water shortages at the hands of the other state, the love of one’s neighbor can drive the emergence of hate for the party that has not kept its promise.

If the sovereign powers would act in the common good, water would be shared. Trust and understanding, across and despite the political boundaries that made love work are necessary. The love for a state’s own citizens should not drive a hatred for the other state. Maintaining such a commitment is difficult. And, perhaps, a credible threat from something like a federal decisionmaker remains necessary.

52. ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 41-83 (1981) (describing negotiation techniques that uncover interests, rather than positions, and allow for the development of solutions that provide mutual gain).

