



## Land and Justice

*Cara Nine* on how to decide where borders should be drawn

Territorial borders are one of the most significant factors in human well-being. Whether one enjoys basic freedoms, lives above a poverty line, or has access to basic medical care largely depends on *where* one lives and under which political authority.

Since the location of borders makes such an impact, a fundamental question is: Where should borders be drawn?

To justify the placement of borders, an inquiry can follow one of two broad approaches. First, one could take existing or historical borders as a starting point, and use their location to assess the ethical placement of borders. Alternatively, one could use something ethically ‘pure’—that is, not tainted by historical arbitrariness, such as cultural integrity or nationality—to determine where borders should be drawn. The former approach characterizes institutionalist theories, and the latter approach, cultural theories.

Cultural theories draw borders around cultural groups. **Avery Kolers** advances one of the most sophisticated versions of a cultural view. On Kolers’ account, territorial rights should be determined by, first, identifying relevant cultural groups, second, assessing the appropriate location of their territory, and third, evaluating the fitting size of the territory. A valid group under this theory is an ‘ethnogeographic community’, a group of people who share ‘culturally specific conceptions of the land’, and whose ‘land-use practices densely and pervasively interact’. Nationalism presents a more familiar version of the cultural view. Under nationalist theories, the relevant claimants are, well, nations—groups of people who hold similar cultural, historical, and political identities. A national territory includes those lands where the nation has a deep, formative historical connection. A cultural homeland can be an important source of identity and value formation in individuals, and hence a people’s connection bears significant moral weight. Because of the normative importance of maintaining a connection between the people and their cultural homeland, a nation claims a *prima facie* moral claim to its national territory.

Using culture to explain borders has certain benefits. Many individuals care about and identify with cultures. From overwhelming allegiance, individuals are motivated to perform both ordinary and extraordinary acts, like paying taxes and going to war. Additionally, the language of culture and nationalism has given many minority groups a position from which they can fight for recognition against oppressive political institutions.

Although these benefits seem worth holding onto, cultural views invite levelling criticisms. First, endorsing cultural theories risks perverse incentives to incite war, genocide, and oppression. Most of the genocidal massacres in recent history have been executed in the name of nationalism. Second, the problem with using a culture to define borders is that the culture's descriptive qualities do not align with the normative claim to *political* power. Culture is significant because it helps form individual identity, and a cultural community gives a person a sense of history and background identity against which individual choices can be made. If a person were to lose her culture, she would be either stuck in a cultural vacuum or forced to undergo a painful assimilation into a new culture. However, only focusing on cultural groups can't capture everything that gives life meaning. Religion, political ideology, family ties, professional ethos, and club ethos provide meaningful identities for some individuals, **'and how well an individual fares will in some cases be more dependent upon the success of these identity-conferring groups than upon the flourishing of her nation'**. Consequently, groups with cultural features have significance and should be respected by political institutions, but do not need to define those institutions.

Given the difficulties facing cultural theories, I'm moved to endorse something like an institutional view. One of the strongest defenders of this kind of view is Allen Buchanan. On his **account**, state borders should remain where they are, except in extraordinary circumstances. (In cases of genocide or massive human rights violations, or unjust expansionism, for instance, a group may have the right of secession, redrawing territorial borders.)

Buchanan's version can be expressed as follows:

1. Territory A is defined by *status quo* borders.
2. State Alpha, shaped by Territory A, is a legitimate state. That is, it secures conditions of minimal justice for its members.
3. If a state is legitimate (if it doesn't perpetrate mass human rights violations or oppression), then it has a moral claim to territorial rights as defined by status quo borders.
4. Given the above, State Alpha has a moral claim to Territory A.

So, where should borders be drawn?

Buchanan's theory answers this question only in a circular way, in that it relies, in Premise 1, on the *status quo* drawing of borders. Why should these borders be here? Buchanan answers: because they are here. What is missing is the link between borders and a separate moral explanation for why borders should be drawn in any particular ways.

**My theory** fills that gap using Lockean analysis. This theory draws an analogy between the normative creation of territorial rights and the normative creation of property rights. In traditional Lockean theory, a farmer labouring on the land comes to have property rights over that particular piece of land. The property right is created because of the farmer's value-producing interaction with the land. Similarly, the state that creates justice within, and using the resources of, a territory comes to have territorial rights over that particular territory. The Lockean theory draws a connection between the location of borders and the creation of salient moral quality: justice. On this Lockean theory, the collective capacity to establish justice within and over a territory counts as value-creation. A particular territory is justified if the state within the territory secures conditions of justice for its members. This theory avoids the circularity of Buchanan's view by justifying the location of borders through their moral qualities: their authentic role in establishing justice for the people who live there.

However, my theory may still seem ignore what lies at the moral heart of border disputes: feelings of nationality, culture, and a deep connection to a particular place. My theory cannot provide an account of where borders *should* be alternatively located in advance of their being drawn. Rather, they can only evaluate the justification of *existing* borders.

But wait. What does it mean to provide an account of where borders should be drawn before they're drawn? Is that even possible? My colleague Joel Walmsley and I have argued that **it's not**. This is because political borders are *emergent*.

Emergent features of a system arise from the system's parts, but the way they will emerge is unpredictable before the fact. This also characterizes borders; borders are constituted by the psychological, legal, and political factors that give rise to them, but given the complexity of interactions between these 'lower level' features, the borders that emerge do so in ways that are often unpredictable. This can be seen in at least two ways. First, the territorial border is a political phenomenon. While the political event creating territorial borders may be connected with cultural or other historical elements, the border itself is determined by a political process and ratified in international law. This process involves a variety of unpredictable outcomes from negotiation, compromise, consideration of external pressures, and the current balance of political power, and so on. The political nature of the border reflects the essence of the territorial right, that it is a right to political power. Thus, the nature of a border's creation fits with its primary function: both are political. A border's political creation comes about only after a historical process of emergence. Second, once the border is created, it seems to play a causal role in the development of morally relevant events. The creation of a national culture, for example, often forms around a people and a territory that already exists. The culture is influenced by the borders in ways that it is not influenced before the border comes into existence. Consequently, the effects of the borders seem to be distinct from the effects of the events that cause the borders to come into existence. The individual elements that make up the border do not appear to have the same causal capacities as a border itself, once it has emerged (although I shall have more to say about this shortly).

In effect, the only way to figure out how these psychological, legal and political features will give rise to a territorial border is to 'run them and see'. Nonetheless, once a territorial border is in place —once it has in fact emerged—one might, with some effort, retrospectively pick out the factors that gave rise to it, in order to explain it after the fact; one might, for example, point to a particular clause in a treaty and note how it was interpreted by a particular individual or group in order to provide a legal rationale for the placement of the border.

The inability—or better, unwillingness—of institutionalist theories to specify where borders *should* be placed in advance of their being drawn is a virtue of the theory, not a flaw. Given the nature of borders themselves, and the complexity of interactions that give rise to them, one simply cannot address the normative question in advance of seeing where the borders have actually been placed.

So, where should borders be drawn? The first step in answering this question is to evaluate the moral legitimacy of existing borders. Do the institutions within those borders create conditions of justice within that domain? If yes, then the location of these borders is, *ceteris paribus*, justified. If not, then the lower-level factors that went into drawing those borders need to be examined to see where they went wrong. Such an examination may reveal alternative political arrangements that could serve as better institutions in the creation of geographical justice.

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