

Boundaries, Democracy, and Territory*

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Abstract

This paper places the issue of subsidiarity in the context of a wider question: “What boundaries between political units ought there to be?” Rejecting the idea of a world without borders, it begins by examining the view of international lawyers, encapsulated in the principle of uti possidetis, that existing state boundaries must be treated as sacrosanct unless modified by mutual consent. It then considers three normative approaches to boundary-drawing. The functional approach seeks to create political units that can best perform the economic and other functions expected of states. The political approach argues for boundaries that will enclose well-functioning democracies, which depends partly on the constitution of the demos itself, and partly on its likely impact on those outside of the boundaries. The homeland approach looks for boundaries that respond to the pre-existing territorial claims of nations and other groups. Since all three approaches have merit, boundary-drawing must try to accommodate each of them, which in the case of disputed boundaries will mean looking for solutions other than the traditional hard-bordered nation-state.

I. Introduction

The issue of subsidiarity forms part of a wider set of questions about the constitution of political power. On what basis should political units be formed, and what powers should they have? How widely or narrowly in space should their bounds be set? Such matters cannot be addressed without reflection on the ends that political bodies of all kinds – not only states, but also international bodies such as the EU and the many smaller subdivisions of the political world – ought to serve. These underlying goals may, however, conflict; the idea of subsidiarity itself conceals a potential clash between local self-determination (which points towards making political units as small as possible on democratic grounds) and efficiency (which is likely to favour larger units as necessary for effective policy-making). Although such value conflicts cannot be definitively resolved, by bringing them into the open we can better understand what is at stake when some reconfiguration of the political system is being mooted.

The focus of the present article is on the values that should inform political boundary-drawing. As just indicated, the question of the powers that political units should possess cannot be divorced from their scope – the jurisdiction within which those powers will be exercised. The arguments about subsidiarity that we are familiar with assume that the boundary problem itself has already been resolved – the debate is over the division of power between higher and lower units of predetermined scope. But in reality that is never a closed issue: states may split or amalgamate, they may choose how to define the regions that are to be granted devolved government, and they may redraw the borders of their counties or provinces. Behind such decisions lie issues of principle that it is the aim of this

article to explore. It can therefore be regarded as a prolegomenon to the subsidiarity issue itself. The basic question it asks is: what boundaries between political units ought there to be? How should the earth's surface be divided up into separate units of political jurisdiction?

There's one answer to these questions that I am simply going to lay to one side – the answer that says that ideally there should be *no boundaries at all*. The world should form a single, undivided political unit. I lay it aside because it would be hard to find any (serious) legal or political philosopher who defends it. Political cosmopolitans – believers in some form of world government – are quick to insist that *of course* there should be smaller units under the global authority discharging many of the functions that states and their subdivisions now perform. Their objection is really to state sovereignty, not to states as units of administration. Everyone pays at least lip service to the principle of subsidiarity, and therefore must take seriously the issue that I am addressing here, namely how should we decide where the dividing lines between units of jurisdiction be drawn? What principles can we call upon to guide us?

II. Territorial Integrity and *Uti Possidetis*

There is another response to my question that needs fuller discussion. It holds that the question is wrongly asked, because the boundaries are already in place, and there are very strong reasons for not altering them. It's idle to speculate about how the world ought to be divided up, because the division has already occurred, and it would be folly to try to amend it. International lawyers who defend this response appeal to the principles of territorial

integrity and *uti possidetis*.¹ The first of these holds that the boundaries of established states are to be regarded as fixed and inviolable – no unilateral alterations are to be permitted. The second holds that where new state boundaries are created, as for example in the case of decolonisation, these borders must follow existing lines of demarcation between administrative units. Boundaries, then, are regarded under international law as non-negotiable, and this is said to be essential to contain the manifold disputes and violent conflicts that would arise were states allowed to make claims on one another's territory, or secessionist groups to bid for revised frontiers.

What are we to say about these conservative principles of international law? Note first that they have nothing to say about boundaries *within* states. If the UK decides to redraw county boundaries, as it has done several times in the past, or a federal state such as Germany or Canada decides to change the shape of its Länder or Provinces, opponents cannot call on territorial integrity or *uti possidetis* to prevent this happening. These are matters governed entirely by domestic constitutions, and therefore open to internal political debate on the merits of any proposal. The silence of international law on questions of internal jurisdiction is somewhat remarkable, since it purports to offer protection to the rights of national minorities and indigenous groups – but not by safeguarding territorial arrangements such as devolved government which might be used to give them a measure of self-determination.²

¹ "*Uti possidetis*", meaning "as you possess", originated as a doctrine in Roman law that stabilised property by awarding continued possession of a disputed item to the current holder. It was later applied by analogy in international law to the territorial holdings of states.

Note further that neither territorial integrity nor *uti possidetis* prevents states from dividing or amalgamating by agreement. When Norway and Sweden, or the Czech Republic and Slovakia, divorced by mutual consent, there was no objection to converting what had hitherto been an internal line of division into an international border. Nor were principles of international law violated when the border between East and West Germany became merely an internal boundary between the Länder of a united Germany.

There is also much debate among international lawyers about both the meaning and the relevance of the principle of *uti possidetis* when new states are being created. There is disagreement about whether it applies only under the circumstances in which it was first formulated – that is when colonial empires are being dissolved and new independent states are being formed in the previously colonised regions –or whether it applies much more widely, for example in cases of secession from an established liberal democracy (this was one of the contested issues that arose when Quebec was seeking to secede from Canada: if independence were granted, would this imply the new state taking the whole of the territory that had previously constituted the province of Quebec, or might it only be entitled to something smaller than this?).³ There is also disagreement over whether the territory

² See Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), Part V. Cassese calls this one of the “basic flaws” of current international law. As he puts it, “current international law is *blind to the demands of ethnic groups and national, religious, cultural, or linguistic minorities*. Not only does international law refrain from granting any right of internal or external self-determination to these groups, but it also fails to provide any alternative remedy to the present plight of so many of them.” (328)

that is regarded as “possessed” under the principle is the territory that is *legitimately* possessed by virtue of historical precedent, treaty, etc., or the territory that is *physically* possessed in the sense of being occupied and controlled at the present moment. A distinction is sometimes drawn along these lines between *uti possidetis juris* and *uti possidetis de facto*, and over the course of time both of these principles have been used to defend territorial claims⁴ – so it is hard to maintain that there is a univocal principle of international law that can be used when boundaries are being physically contested, as for example in Ukraine today.

Stepping back from international law, there is something puzzling about the claim that existing territorial boundaries must be regarded as sacrosanct, *except* when the self-determination of colonized peoples is at issue, in which case new states may, indeed must, be created – but strictly within the administrative boundaries that already exist. As many commentators have pointed out, colonial boundaries were created for different purposes, and often as a result of mutually advantageous deals struck between the colonisers, so there is no reason to believe that the areas they circumscribe are especially suitable to be the territories of independent states. Indeed the reverse might be true: internal boundary lines may have been drawn with the intention of preserving the unity of the colonial state, so that for example they cut across the territories traditionally held by ethnic groups, but

³ For discussions of *uti possidetis* on which I rely here, see Suzanne Lalonde, *Determining Boundaries in a Conflicted World: the Role of Uti Possidetis* (Montreal and Kingston: McGill-Queen’s University Press, 2002); Steven Ratner, “Drawing a Better Line: *Uti Possidetis* and the Borders of New States,” *American Journal of International Law* 90 (1996): 590-624; Malcolm Shaw, “Peoples, Territorialism and Boundaries,” *European Journal of International Law* 8 (1997): 478-507.

⁴ See Lalonde, *Determining Boundaries in a Conflicted World*, ch. 2.

that very feature becomes problematic once the subunit becomes an independent state.⁵

The aftermath of decolonisation left many ethnic groups in the position of national minorities who were denied rights of self-determination, and in consequence very often many other rights as well. One form of domination was replaced by another.

Defenders of *uti possidetis* argue that its use is justified by the fact that applying any alternative principle would have worse consequences still, given the circumstances in which it is typically invoked. They also point out that its use does not prevent borders being redrawn by mutual agreement between neighbouring states once these have been established. Yet according to Shaw, “where no such consensual re-arrangement is possible for whatever reason, not to operate on the basis of *uti possidetis* is likely to cause immense problems. Any attempted ethnic reconfiguration of the Former Yugoslavia on a totally free-for-all basis, without the presumptive *uti possidetis* rule with regard to boundaries, would most likely have produced an even worse situation than that which did occur”.⁶

However it is one thing to treat *uti possidetis* as a starting point for thinking about boundary drawing, and quite another to treat it as a determinative principle. There are a number of grounds for demoting it to the status of a pragmatic rule that may have value in situations of conflict but should not deter us from thinking in a more fundamental way about the nature

⁵ See Ratner, “Drawing a Better Line”, 602-4, and Margaret Moore, “The Territorial Dimension of Self-Determination,” section 1 in *National Self-Determination and Secession* ed. Margaret Moore (Oxford: Oxford University Press, 1998), 134-57.

⁶ Shaw, “Peoples, Territorialism and Boundaries,” p. 502.

and positioning of boundaries. First, it has not as a matter of fact played the central role in settling boundary disputes that its defenders claim – in practice a number of alternative principles have been invoked by parties to these disputes.⁷ Second, as I noted earlier, the concept is ambiguous: either it says that new boundaries should follow existing lines of control, in which case it gives an incentive to warring parties to grab as much land as they can before agreeing to negotiate, or it says that they should follow the lines used by previous administrators, or laid down in treaties – in which case there may well be disputes as to which historic boundaries are the relevant ones to consider. Third, there is no guarantee that following one or other of these interpretation of *uti possidetis* will in fact create a viable state – one that is capable of carrying out the various functions that a legitimate state needs to be able to perform (see further below). That a region once constituted a district within an empire does not entail that it can fly solo. Fourth, nor does it give any weight to the principle of self-determination, except in the rather narrow sense that once a state has been established, its inhabitants will at least formally enjoy self-determination as a territorial unit. No group within the state has been given the opportunity to say whether it wishes to form part of the state so constituted, as opposed to forming a unit of its own, or attaching itself to a neighbouring state. Although the principle of self-determination has its limits – for any given political arrangement, there will always be some individuals who would ideally prefer a different configuration – where we find territorially-concentrated groups with collective identities and aspirations to some form of

⁷ This is one of the main contentions of Lalonde, *Determining Boundaries in a Conflicted World* – see especially the Conclusion.

autonomy, it seems arbitrary to say that no weight at all should be given to their interests when boundaries are being drawn.

All of this is to say that there is some purpose in asking the wide question with which I began, namely “what boundaries between political units ought there to be?”, even though no-one is proposing that we should begin a wholesale renegotiation of existing state or sub-state boundaries. We are looking for guidance when borders are actually in dispute, as for example in Ukraine or Israel-Palestine today, when one state seeks to appropriate territory currently controlled by another, as for example in disputes over island territories such as the Falklands/Malvinas in the Atlantic or the Senkaku/Diaoyu islands in the East China sea, or finally when a sub-state group demands a devolved form of government, or aspires to outright secession, as in the case of the Catalans and the Scots. I do not believe that there is any defensible single rule that can be applied to resolve these disputes. Instead there are a number of quite distinct considerations that seem relevant. I suggest that we might begin our thinking about boundaries from three quite different starting points, and reach different conclusions as a result – though eventually we have to find some way of combining the three perspectives.

III. Boundary-drawing: The Functional Approach

First, we might adopt what I shall call a *functional* approach to boundaries. We want the units that are formed by boundary drawing to be viable units, which means in the case of states in particular that they are at least able to perform the functions that states must discharge to be recognized as legitimate by the international community. They must be able

to protect the basic rights of their members adequately, which will depend on the size of the unit, and the human and natural resources it contains. They must also be economically viable, with the means either to produce for themselves what their members need for sustenance or to provide for them through trade in goods or services. They must be capable of being defended against likely external enemies. And they must not create serious externalities for other states – for example if their survival were to depend on monopolising the natural resources in a particular region, or creating pollution that engulfed their neighbours. There are echoes here of Aristotle’s description of the polis as being self-sufficient in the sense of containing within itself everything that is necessary to secure “the good life”.⁸

One question that arises is whether the functional approach should be understood as setting a threshold of viability, or whether we might use it in a more ambitious way, to identify an optimal set of boundaries. A utilitarian, for example, might argue that boundaries should be created and placed wherever the aggregate happiness of all requires, with the calculus making no distinction between the welfare of insiders and the welfare of outsiders. However such a utility calculation, besides being very difficult to perform, would have to take account of factors other than state functioning, as I understand it here. It would need to incorporate, for example, the subjective preferences of individuals as to their membership in different political communities. These belong within the rival approaches to boundaries that I shall be discussing shortly. Alternatively a utilitarian might use the likely costs of changing boundaries as a reason for applying the criterion conservatively, and conclude, as Sidgwick for example does, that a state acquires an exclusive right over a piece

⁸ Aristotle, *The Politics*, trans Thomas Sinclair (Harmondsworth: Penguin: 1962), Book 1.

of territory just so long as it exercises “a tolerably effective and continuous governmental control over the territory in question”.⁹ This establishes a threshold of functionality, but declines to ask whether a different way of assigning authority over land might be *more* “effective” by utilitarian standards.

Functionality might appear to provide greater guidance when what is under discussion are not state boundaries but the boundaries of the units of devolved authority within the state. Indeed subsidiarity itself can be read as embodying a principle of functionality – ‘assign powers in whatever way is likely to be most efficient, measured according to the predicted effects of decisions taken at either higher or lower levels’. Here we would be weighing the advantages conferred by detailed local knowledge against the savings that could be made by not having to replicate the same functions in neighbouring regions (we can see this weighing taking place, for example, in the debate over whether to have many small police authorities, or much larger authorities in which specialist services such as forensics can be concentrated).

Might an appeal to *distributive justice* allow us to develop a more ambitious version of the functional approach? Could we argue that boundaries should be drawn in whatever way maximises justice overall? Such an approach, however, is fraught with difficulties. We

⁹ Henry Sidgwick, *The Elements of Politics*, 2nd ed. (London: Macmillan, 1897), 254. For a fuller discussion of Sidgwick and utilitarian approaches to territory, see David Miller, “Territorial Rights: Concept and Justification,” *Political Studies* 60 (2012): 252-68, and David Miller and Margaret Moore, “Territorial Rights,” in *Global Political Theory* ed. David Held and Pietro Maffettone (Cambridge: Polity Press, forthcoming).

would first need to agree on which criterion of justice should be applied – what the “currency” should be, and what principle we should use to judge when that currency had been fairly distributed (equality, sufficiency, maximin, etc.). We would also need to decide whether for the purposes of establishing boundaries, we should apply our principle to individual holdings or to collective holdings. For example, suppose we thought the relevant currency was access to natural resources and the relevant principle was equality. And suppose the decision was whether two adjoining areas of land, A and B, should form a single state, or two separate states. We might think that the one-state solution, because it would allow the pooling of the resources found in A and B, would be superior from the standpoint of justice. If we allow A, richer in natural resources, to become a separate state, collectively its members will be better-resourced than those in B. On the other hand, allowing A and B to form separate states might be better from the point of view of internal redistribution. Their members might enjoy a higher degree of solidarity with one another than they would as part of the combined unit, and therefore be more willing to support institutions that correct for inequalities by redistributing resources from the resource-rich to the resource-poor. So for the individual members, the two-state solution might prove to deliver more justice, measured in the currency of individual resource-holdings. It will be hard to draw boundaries on the basis of an appeal to distributive justice, therefore, until we decide whether the equality principle should apply to collectives or to individuals, and until we know how the units we create are likely to perform as agents of justice, in the first place with respect to their own citizens.¹⁰

¹⁰ There is, of course, a quite different way of thinking about boundaries and justice, which involves looking at the historical processes whereby states have acquired their present territories. This does not, however, form part of what I am calling a functional approach to boundaries, which is

It seems, then, that the functional approach when applied to states will only be able to specify a threshold below which a proposed boundary should be rejected on the ground that the unit it would encompass would turn out to be a “failed state”, for one reason or another – but not provide much guidance beyond that. It is worth noting that such a threshold condition crops up even in theories of political authority that have a strong voluntarist component – i.e. that place considerable weight on the associational preferences of those who are going to form the units in question – and one might wonder why that should be.¹¹ That is, why shouldn’t a group of people who wish to form a self-determining political community be allowed to do so even if it seems certain that the community so formed will not be viable, say on economic grounds? Isn’t it just a form of paternalism to prevent them? There are two complementary answers to this question. One is that we cannot escape having international obligations to protect human rights, including rights to subsistence, and it is reasonable that we should take steps to avoid having potentially burdensome obligations placed on our shoulders. Preventing people from forming unviable states or communities is one aspect of this (of course we need good grounds for thinking that what is being proposed really does fall below the threshold). The second is that territorial jurisdiction requires the presence of an institution that sufficiently protects the basic rights of those who occupy that territory, so a group cannot claim territory unless it is able to establish such an institution in the place in question. In other words, even if we

concerned simply with whether the territorial units that are created by boundary-drawing will meet various performance criteria.

¹¹ See, for example, Christopher Wellman, *A Theory of Secession* (Cambridge: Cambridge University Press, 2005), esp. ch. 1; Harry Beran, “A Liberal Theory of Secession,” *Political Studies* 32 (1984): 21-31.

were to concede that some foolhardy group setting off to colonize an island that for good reason has remained uninhabited up to now has the right to make the attempt, that group could not establish territorial rights there unless it meets the threshold – so the land could be incorporated into some larger state against their will. Suppose Greenland, for instance, were eventually to separate entirely from Denmark, but then prove incapable of supporting the majority of its inhabitants above subsistence level; then I think Denmark or some other state would be entitled to assert its authority over that land, and justified in doing so.

To sum up, the functional approach will set limits to boundary-drawing that eliminate some possible configurations, but won't do more than that: it won't give us guidance on most of the questions about decolonisation, secession, annexation, or boundary-disputes that arise in practice. For more guidance we need to turn to the second approach, which I'll call the *political* approach, and which focuses on the quality of the political relationships that a particular set of boundaries will produce.

IV. Boundary-drawing: The Political Approach

The political approach to boundaries asks not just about the creation of viable states, but about legitimate states, and more specifically about democratic states. So it will enquire into the social and psychological characteristics of the "people" that will be brought into existence if a particular boundary proposal is adopted. In its general form, this approach asks: given the array of persons who occupy the area defined by mooted boundary B, it is possible to create a political authority in that area that those people will regard as legitimate? In its more specific, i.e. democratic, form, the question is: given the set of

people who occupy the area defined by mooted boundary B, it is possible to create a well-functioning democracy within the area so defined?

In separating the political approach to boundaries from the functional approach, I am assuming that legitimacy cannot simply be reduced to functionality. It may well be a necessary condition of legitimacy that the political authority in question adequately discharges certain functions – maintains social order, protects human rights, etc. – but it cannot be a sufficient condition, unless we are prepared to say that an effectively functioning empire or colonial regime is *ipso facto* legitimate. The missing element here is a belief on the part of the inhabitants of B that the regime in question is entitled to govern them, which will depend on the inhabitants' own conceptions of legitimate authority – for example, which persons or institutions can adequately represent them. I am not intending to be narrowly prescriptive here. A theocratic government may pass the legitimacy test if the people it governs have the appropriate beliefs.

A critic might nonetheless argue that a legitimate government can be created in any area that one might choose, so long as it satisfies certain conditions, such as having institutions that allow for everyone in that area to exercise their political rights. If this were true, then the political approach, in its general form, would offer little guidance on the boundaries question. But I believe it is false. Legitimacy cannot be conferred by institutional design alone. People have in addition to identify with the authority that is being created. As I suggested above, one should be ecumenical about the basis on which this identification could occur – whether it involves recognizing religious leaders, or a shared national or local identity, for example. But the problem can be understood by considering a simple case in

which a proposed boundary encircles a majority community and a minority group that is deeply hostile to the majority, who it regards as not only alien, but also dangerous, as a result perhaps of a history of persecution. Under these circumstances it is going to be very hard to devise any institutional arrangement for that area that could appear legitimate to both minority and majority. The political approach will suggest drawing boundaries such that these two groups are not forced to cohabit within a single political unit.

In its more specific form (which will be my focus here), the political approach asks whether a proposed boundary could circumscribe a well-functioning democracy. So here we enter the domain of what has come to be known as the “democratic boundary problem”.¹² In its most general form it can be expressed in the question “who should be included within the scope of a democratic decision procedure?”, a question that applies whether or not the democratic constituency in question is spatially delineated (it might, for example, arise within a business organization or a university). But it becomes particularly salient in cases where a geographical boundary is used to mark the scope of such a procedure – i.e. the results of the procedure will apply to all those located inside the boundary in question – because many of those who are so placed are likely to find it very hard to relocate

¹² There is a growing literature on this. See, for example, Frederick Whelan, “Prologue: Democratic Theory and the Boundary Problem,” in *Nomos XXV: Liberal Democracy* ed. J. Roland Pennock and John Chapman (New York: and London: New York University Press, 1983), 13-47; Gustaf Arrhenius, “The Boundary Problem in Democratic Theory,” in *Democracy Unbound* ed. Folke Tersman (Stockholm: Stockholm University, 2005), 14-29; Sarah Song, “The Boundary Problem in Democratic Theory: why the demos should be bounded by the state,” *International Theory* 4 (2012): 39-68; Ben Saunders, “Defining the Demos,” *Politics, Philosophy and Economics* 11 (2012): 280-301; Eva Erman, “The Boundary Problem and the Ideal of Democracy,” *Constellations* 21 (2014): 535-46. My own contribution is David Miller, “Democracy’s Domain,” *Philosophy and Public Affairs* 37 (2009): 201-28.

geographically, for reasons too obvious to need spelling out. So a brief discussion of the democratic boundary problem is needed here.

It is often understood in a rather narrow way, as a matter of specifying the individual characteristic that entitles you to be included as a member of the relevant constituency. For example, under the well-known “all affected interests principle”, if your interests are expected to be significantly affected by the outcome of a decision, or a series of decisions, then you are entitled to be represented in the body that takes those decisions.¹³ Other accounts offer alternatives to “interests” as the relevant feature. But as I have argued elsewhere, this way of looking at the democratic boundary-problem is too one-sided.¹⁴ About any proposed democratic institution, there are two questions to ask: who is likely to feel the impact of the decisions it takes? And, how is it likely to perform, measured by the *quality* of its decisions (where a decision of good quality might mean one that is empirically well-informed, fair to all concerned, etc., depending on the case)? In other words we have to be concerned about the composition and internal dynamics of the *demos*, as the group of people who together will take political decisions, as well as with the fit between the

¹³ For debate about this principle, see Robert Goodin, “Enfranchising All Affected Interests, and Its Alternatives,” *Philosophy and Public Affairs* 35 (2007): 40-68; Sofia Nasstrom, “The Challenge of the All-Affected Principle,” *Political Studies* 59 (2011): 116-34; David Owen, “Constituting the polity, constituting the demos: on the place of the all affected interests principle in democratic theory and in resolving the democratic boundary problem,” *Ethics and Global Politics* 5 (2012): 129-52; as well as the works cited in the previous footnote.

¹⁴ Miller, “Democracy’s Domain”.

membership of the institution and the impact of its decisions. And in doing so, we must be guided by realistic considerations, and not simply issue normative injunctions to the members. To illustrate what I mean here, consider the proposal for a one-state solution to the Israeli-Palestinian problem. To evaluate this proposal, we have to make an empirical assessment of how a democratic state that offers equal citizenship rights to all resident Jews and Palestinians might perform, given sharp differences of interest and perspective and a history of antagonism between these two groups. It is not enough to say, normatively, that the two communities must treat each other with respect, must make policy decisions that are fair to everyone within the state, etc.

One of the most important variables that affects the working of democratic institutions is the level of trust that exists within the community that operates them – interpersonal trust between the members as well as trust in the institutions themselves.¹⁵ Where trust levels are low, it becomes less likely that these institutions can operate in a deliberative manner, in which participants try to reach a consensus on what is to be done, guided by general considerations of fairness to all affected parties. Deliberation requires confidence that the concessions you are willing to make in the search for an agreement will be reciprocated by other participants, that participants are sincere in the reasons they give in support of their

¹⁵ For discussion and evidence about the way the presence or absence of generalised trust affects the functioning of democracy, see Robert Putnam, *Making Democracy Work: civic traditions in modern Italy* (Princeton, NJ: Princeton University Press, 1993); Tom Tyler, “Trust and Democratic Governance,” in *Trust and Governance* ed. Valerie Braithwaite and Margaret Levi (New York: Russell Sage Foundation, 1998), 269-94; Mark Warren, “Democratic Theory and Trust,” in *Democracy and Trust* ed. Mark Warren (Cambridge: Cambridge University Press, 1999), 310-345; Patti Lenard, *Trust, Democracy, and Multicultural Challenges* (University Park, PA: Pennsylvania State University Press, 2012), esp. ch. 2.

demands, and so forth. Where trust is lacking, deliberation is likely to be replaced by self-interested bargaining on the part of each group, where the outcome reflects the balance of power between them. This has a number of side effects. One is that it becomes less likely that *public goods* will be provided, since suspicious group representatives would rather bargain for goods that only their own members can enjoy.¹⁶ Another is that it becomes harder to gain support for policies that involve economic redistribution in favour of the poor, again for the reason that general considerations of social justice are displaced by group-specific demands.

Applying this to the boundaries question, and assuming that the boundary we are drawing is meant to circumscribe a well-functioning democracy, the questions we should ask are whether decisions taken by those within the boundary are likely to have a significant impact – especially a significant *negative* impact – on those outside, and whether the set of individuals that the proposed boundary would make into citizens are apt to form a coherent *demos*. In answering the second question, we cannot avoid issues of preference and identity. It is obviously important that the people who live within the boundary actually *want* to live together in a political relationship, and this will depend on whether they identify with each other in the right way. Identity matters too because of its connection to

¹⁶ For evidence about the effects of ethnic diversity on public goods provision, see Alberto Alesina, Reza Baqir and William Easterly, “Public Goods and Ethnic Divisions,” *Quarterly Journal of Economics* 114 (1999): 1243-84.

interpersonal trust.¹⁷ However, identity should not be treated as a fixed parameter. People who originally had no shared identity can come to have one as a result of political co-operation over time. But this does not mean that just any group of people can form a viable *demos* – this was the point made above in relation to Israel-Palestine. And identities that were previously convergent can come to diverge, as we are seeing at the present time in the case of England and Scotland. Of course, where a viable democratic polity already exists, steps can be taken to reinforce the collective identity that holds it together, rather than immediately opting for a new set of boundaries. But equally the divergence may prove to be unstoppable, in which case the optimum solution, from a democratic perspective, may be to split the territory, or at the very least to divide political powers between its component parts.

Thus the political approach to boundary-drawing is likely to be more discriminating than the functional approach, in the sense that there are going to be some geographically demarcated areas that meet all the functional criteria as political units, but that are unlikely to be successful as democracies, chiefly because their inhabitants do not collectively form viable *demoi* (one could also envisage the reverse case, where a small unit that might perform very well as a democracy internally would be too vulnerable to outside forces to function as a state: this is often said to explain the demise of the ancient city-state). It also adds a second dimension to the subsidiarity question, because now, in addition to asking about the relative efficiency of a more centralised or more decentralised decision-making

¹⁷ This is not to say that the relationship between identity and trust is straightforward. In the case of national identity, we have examined some of the apparently contradictory evidence on the attitudinal effects of having such an identity in David Miller and Sundas Ali, “Testing the National Identity Argument,” *European Political Science Review* 6 (2014): 237-59.

apparatus, we have also to ask about the democratic credentials of the “peoples” who would be created by different constellations of power. So it would be wrong to assume that two approaches so far considered will always yield the same answers to our initial question (“What boundaries between political units ought there to be?”). But now, to complicate matters further, I want to introduce the third approach, which for want of a better name I shall call the “homeland” approach.¹⁸

V. Boundary-drawing: The Homeland Approach

This approach postulates that boundaries should circumscribe pre-existing homelands, where these are identified by reference to the beliefs and actions of the peoples who live on them or aim to do so. In other words, we start from the social group, which might be the tribe, the ethnic group or the nation, and discover what this group takes to be “their” land; this might be the land that they currently occupy, the land that historically has been theirs, or the land with which they identify symbolically. From the group’s point of view, a boundary that creates an area of jurisdiction can allow it to control that territory, preserving what is already of value there, and/or developing it according to the group’s needs and aspirations.

¹⁸ The label might suggest that I am thinking only of national homelands in the discussion that follows, but my intention is to use “homeland” to cover all cases in which a group forms an attachment to a particular place, including indigenous groups or ethnic groups concentrated in urban enclaves, for example.

The immediate problem with this approach is that such territorial claims are likely to be both indeterminate – it will not be clear where the group’s alleged homeland begins and ends – and conflictual – rival groups will make territorial claims to the same area of land. Initially, therefore, we may be inclined to dismiss this third approach to boundary-making as involving purely subjective judgements about which groups are entitled to claim and enclose which pieces of territory, and appeal only to functional and democratic considerations when boundaries are being drawn. However this would come at some cost, since in the real world it’s apparent that territorial claims matter a great deal to nations and other groups, so solutions that simply ignore this strength of feeling are unlikely to be stable – people will fight to recover land that they regard as legitimately theirs, even if no other factors are involved. So is there any merit in the idea that political boundaries should reflect pre-existing claims to territory?

To see that there is, consider first why occupancy gives groups the right to remain where they have already made their lives.¹⁹ Consider a proposal to move such a group wholesale from one location to another, where the second location satisfies the functional criteria just as well as the first (that is, the land is equally fertile, the trade routes are as good, the territory is just as easy to defend, etc.). Though the group would undoubtedly survive in its new location, it would suffer a considerable loss. Its whole form of life would have been attuned to the place that it originally occupied. Its members’ productive skills – in farming or mining, say - would have been adapted to the specific features of that region. Social

¹⁹ For a fuller defence of group occupancy rights, see Margaret Moore, *A Political Theory of Territory* (New York: Oxford University Press, 2015), ch. 3. See also Anna Stilz, “Occupancy Rights and the Wrong of Removal,” *Philosophy and Public Affairs* 41 (2013): 324-56.

relationships between the members would depend upon a network of place-specific connections between people. And of course for many people there is likely to be an emotional attachment to natural or man-made features of the landscape with which they have become familiar. Evidence for this loss can be seen in cases in which people have been moved, whether involuntarily or by choice, from places where natural or political conditions made life extremely difficult. Typically they continue to hanker for a return even while recognizing that this is unlikely to happen.²⁰

Occupancy is not the only ground on which groups can make claims to territory. They can also lay claim to the fruits of their collective labour that have become embodied in the homeland, on condition that they have not seized it from some previous group of (legitimate) occupants.²¹ Most nations transform the territory on which they are settled in quite radical ways, and they do so in the expectation that they will continue to enjoy the improvements they have made and pass them on to their descendants. In order to do this they need to remain in control of the area in question. Hypothetically we can imagine an imperial power that rules from afar while allowing its subjugated peoples to enjoy all of the

²⁰ My two favourite examples are the evacuees from the remote Scottish island of St Kilda, and the Greek and Turkish populations exchanged between these two countries by international agreement in the 1920s. In both cases the people who were forced to move experienced significant problems in adapting to their new surroundings, despite the fact that their human rights were under threat (for different reasons) in the places they were leaving. For the former case, see Tom Steel, *The Life and Death of St Kilda* (London: Harper Collins, 1994); for the latter, see my discussion in "Secession and the Principle of Nationality," in David Miller, *Citizenship and National Identity* (Cambridge: Polity, 2000), 197.

²¹ I have argued for this claim in Miller, "Territorial Rights," 257-61.

productive resources and amenities that they have created on the land that they occupy.

But we know that in practice this will not happen: secure enjoyment requires political control.

This argument is sometimes challenged on the ground that it presupposes the idea of a collective agent (a nation, or some other group with similar properties) that persists over historical time such that it can bequeath the fruits of its labours down through successive generations by remaining in control its homeland. Critics argue that where territory is improved, this is always the work of particular people.²² It is individual farmers who drain and plough fields, individual workmen and their employers who build houses, etc. These endeavours might give the people involved transmissible property rights, but the idea of a nation “owning” the territory its members have mixed their labour with makes no sense, it is alleged.

I think that this radically underestimates the extent to which the enhancement of territory is indeed a collective enterprise. In some case it will be formally collective, as when a government or a local authority, acting as the people’s agents, decides to invest public money in infrastructure – water supply or sewers, let’s suppose. In many other cases, individual people will engage in improving activities in the knowledge that their efforts form part of a division of labour in which many others are involved: the farmer ploughs his field in the knowledge that he can sell his crop to merchants, who in turn have customers wishing

²² See, for example, Anna Stilz, “Nations, States, and Territory,” *Ethics* 121 (2011): 572-601, Part 1.

to consume it. Behind this lie a set of laws, institutions and social norms that allow people's behaviour to be co-ordinated in such ways.

A more serious difficulty is that there may be disputes about the identity of the group responsible for carrying out the improvement. These arise, for example, when an indigenous people confronts a more technologically advanced colonising nation. Should we assume that following settlement these two peoples will form a single agent that over time will transform their joint territory, or should we say that each group can make separate claims, using different yardsticks by which to measure "improvement"? At the very least, this will have implications for the internal boundaries of a state created in that region, and for the allocation of powers between the centre and its subsidiary units.

Setting this issue aside for the moment, let's consider a third basis on which groups have asserted their territorial rights – what I have elsewhere called "symbolic value" claims.²³ The idea here is that there is land that belongs historically to the group whether or not they currently occupy it, and whether or not they are responsible for improving it. Such claims can arise in various ways. One has to do with sites that are regarded by the group as sacred, or form the location of important events in the group's history. Another has to do with land that was part of the group's territory in some previous epoch, but is no longer so. And a third is land that appears to form a "natural" part of the group's existing territory, for example an offshore island or an enclave currently occupied and/or controlled by a different group. In all of these cases the people in question may have an image of their rightful homeland that includes more than the territory that they currently control.

²³ Miller, "Territorial Rights," 261-2.

There is no denying the psychological force of these symbolic claims. Wars are fought over small pieces of land that appear to have little or no material value to the contestants. But should we treat them as any more than expressions of subjective preference? Much will depend here on our general view about nationality and other such collective identities. If we think such identities are either of intrinsic value to their bearers, or instrumentally important, for the reasons that I alluded to above in my discussion of boundaries and democracy, then we have to give some weight to the homeland approach. Consider the national case: ideas of the nation's proper homeland form an ineliminable part of national identity. Where some part of the homeland is occupied by a foreign power, this is regarded as an offence against national self-determination. Think, for example, of the Argentinians' claim to the islands they refer to as Las Malvinas. These islands are occupied by people who currently have no wish to become citizens of Argentina. The historical basis of the Argentinian claim is tenuous, relying as it does on a Papal Bull issued to Spanish colonisers in 1463, and a disputed treaty of 1713. Argentinians have neither occupied the islands (other than temporarily as invaders) nor contributed to their improvement. Nevertheless, it has become embedded in the Argentinian national psyche that these offshore islands properly form part of the territory of Argentina and ought to be brought under Argentinian sovereignty.²⁴

²⁴ According to the 1994 revision of the Argentinian constitution, "the recovery of said territories and the full exercise of sovereignty..... are a permanent and unrelinquished goal of the Argentine people".

I do not think that such beliefs can be dismissed as mere subjective preferences when boundaries are being drawn. They will not trump the claims of the people who actually occupy the land in question to determine their own future, but they should at least be accommodated symbolically if that is at all possible.

Because of the connection between collective identity and democracy, the homeland approach to boundaries will in many cases provide additional support to the political approach, when this takes a democratic form. But not always. Complications arise, for example, when a secessionist group wishes to establish democratic governance over the area that its members currently occupy, but this area also forms part of the historic homeland of some larger group. In these circumstances, many people (both inside and outside the area claimed by the secessionists) will find that they have split-level political identities. To do justice to these identities, the nation-state model in its traditional form has to be radically modified. But might this not involve a loss from either the functional or the democratic perspective? Isn't it better on either or both of these grounds to have political units with the clear and hard boundaries that characterised the "Westphalian" state?²⁵ It can be argued in support that such a state allows a democratic government the greatest possible degree of control over the policies it adopts, subject of course to the external environment in which it has to operate. Because all of the policy levers are held by the same pair of hands, consistent policies can be made and pursued – whereas under schemes in which powers are divided, each level of government is handicapped by having to adjust to

²⁵ For the argument that "the demos should be bounded by the state", see Song, "The Boundary Problem in Democratic Theory," 58-60.

decisions made elsewhere. A unitary state might prove to be the precondition for a strong Scandinavian-style welfare system, for example. If these arguments are valid, boundary-drawing will often be subject to trade-offs. Doing justice to a multiplicity of group identities and the place-related claims that accompany them will stand in some tension with considerations of efficiency and democracy that may favour sticking to the Westphalian model.²⁶

VI. Summary and Conclusion

I began by pointing out that under international law, boundaries between states were to be regarded as virtually unchangeable (except by mutual consent) whereas internal boundaries were left entirely to the discretion of the state itself. It is perhaps not surprising, given the origins of international law, that we should now regard this perspective as excessively statist in character – it plays to the interests of existing states in having a stable international order at the expense of the territorial aspirations and democratic demands of the people who inhabit them. A better approach is to think about how to create well-functioning systems of political authority, which may include arrangements other than the traditional sovereign state. I suggested that strict adherence to *uti possidetis* may actually fail the functional test,

²⁶ Could the trade-off be avoided by states engaging in active nation-building programmes, so that political identities adjust, over time, to their existing boundaries? This, after all, is to a large extent how nation-states were created in the first place – by the forceful suppression of minority identities within their borders. Even regions that were once debatable lands, such as Alsace-Lorraine, have now become integrated into one of the rival states. The problem, however, is that it is no longer feasible for liberal democracies to pursue the policies that would be necessary to achieve this while remaining true to their own principles. Human rights, multiculturalism, and the other components of contemporary liberalism prohibit the pursuit of strong forms of nation-building.

because it may produce units that are destined to become “failed states” by virtue of the ethnic or religious composition of the population that their boundaries contain. However I argued that the functional approach is incomplete as an answer to the boundaries issue. It provides a threshold that any proposed boundary arrangement must meet, rather than giving us a way of identifying the “best” arrangement by some standard of utility or distributive justice.

The democratic approach to boundaries is more promising. It has of course long been recognized that there is no non-circular way of using a democratic *procedure* to settle boundary issues, but the version of the approach I am recommending asks a different question: which set of boundaries would be optimal for the purpose of creating well-functioning democracies? The answer, however, turns out not to be straightforward. Partly this is because of a tension internal to democratic theory itself, between the quality of the *demos* that a given set of boundaries will create, and the extent to which the decisions it reaches may impose harms or constraints on outsiders. Although the issue is not entirely straightforward, the first factor tells in favour of having small units with relatively homogenous populations, whereas the second tells in favour of larger and more variegated units.²⁷ Partly it is because the democracy question cannot be insulated from the issue of territory itself – my third approach. A democracy cannot function, or cannot function effectively, if its boundaries are being internally disputed on territorial grounds – for example if one section of the population regards the state’s territory as properly theirs and sees the remainder as unwelcome interlopers (Israel-Palestine is again an obvious example here).

²⁷ See further Miller, “Democracy’s Domain”.

So the democratic approach has to be used in tandem with what I have called the homeland approach, which seeks to make political borders coincide with pre-existing territorial boundaries as these are understood by people on the ground. As was noted above, however, such boundaries are often contested. A sub-group within an established state may make a claim to exercise control over the territory that it regards as its own that is denied by the majority, who see the nation as a unitary whole. Two adjoining nations may each make claims to part of the other's present territory. Most difficult of all, we may encounter what I have elsewhere called "debatable lands": cases in which a small region is disputed between at least two neighbouring states, while within the region identities are contested – some identify primarily with state A, some with state B, while for others the region itself is their main source of identity.²⁸

In none of these cases can an adequate solution be found if we stick to the traditional nation-state model – a unitary state all of whose members identify with it politically and regard its existing boundaries as defining their homeland. It is simply not possible to create such states given the various configurations of identity outlined in the previous paragraph. Instead we have to find a way of dividing up powers that allows each of the groups in the relevant area some degree of self-determination over the territory it claims. This might, for example, involve a constitutionally entrenched scheme of devolved government for a region occupied by a national minority. It might involve two adjoining states agreeing to create a

²⁸ David Miller, "Debatable Lands," *International Theory* 6 (2014): 104-121. The example that I discuss there in some detail is Kashmir, disputed between India and Pakistan since their partition.

joint authority to manage the disputed area of land that lies between them, or agreeing to give each other's national minorities special rights. It might involve a still more complicated arrangement in which, for example, a form of consociational government is implemented in a territory occupied by groups with rival identities, overseen by the neighbouring powers.²⁹ In each case, the solution that reflects what I have called the homeland approach to boundaries will also mean that these boundaries no longer take the form that national boundaries have traditionally done. They will be less all-encompassing. For example, when governmental powers are devolved to a region, the boundary will be significant for some purposes but not for others. The legal rights or welfare entitlements of those living on either side may differ, but border-crossings are unlikely to be policed, for instance.

I believe that each of the three approaches to boundary-drawing I have sketched can be used to support the principle of subsidiarity – they provide different reasons why powers should be exercised at the lowest feasible level. Although initially presented as alternative ways of determining where the boundaries between states should be drawn, they can also be applied to the creation of sub-state institutions, and to the division of powers between these and the central state. The functional approach focuses attention on the relative efficiency of taking decisions at higher or lower level; the political approach, in its democratic version, asks about the level at which a well-functioning *demos* is most likely to be formed (it does not exclude people simultaneously being members of larger and smaller *demos*); the homeland approach looks at how groups are able to exercise effective control

²⁹ This is roughly the solution that was adopted for Northern Ireland under the Good Friday Agreement of 1998, although the balance of control between Britain and the Irish Republic is very heavily tilted in favour of the former.

over the physical space that matters most to them, whether for practical or symbolic reasons. Subsidiarity, in the official version enshrined in the European Treaties, for example, is presented in a way that reflects only the functional approach: its full significance can be better understood by bringing the other two approaches into play as well.