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Edited by

Jack Knight

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PREFACE

JACK KNIGHT

This volume of *NOMOS*—the fifty-seventh in the series—emerged from papers and commentaries given at the annual meeting of the American Society for Political and Legal Philosophy in New Orleans, Louisiana, on January 4, 2013, held in conjunction with the annual meeting of the American Association of Law Schools. Our topic, “Immigration, Emigration, and Migration” was selected by the Society’s membership.

The conference consisted of three panels, corresponding to the three parts of this volume: (1) “Why Do States Have the Right to Control Immigration?,” (2) “Law’s Migrations, Mobilities, and Borders,” and (3) “Immigration and Legitimate International Institutions.” The volume includes revised versions of the principal papers delivered at that conference by Sarah Song, Judith Resnik, and Thomas Christiano. It also includes essays that developed out of the original commentaries on those papers by Adam B. Cox, Michael Blake, James Bohman, Jennifer Hochschild, and Cristina M. Rodríguez. I am grateful to all these authors for their insightful contributions.

Thanks are also due to the editors and production team at New York University Press, and particularly to Caelyn Cobb. On behalf of the Society, I wish to express gratitude for the Press’s ongoing support for the series and the tradition of interdisciplinary scholarship that it represents.

Finally, thanks to Andrew Rehfeld of Washington University in St. Louis for organizing the original conference with me and to Samuel Bagg of Duke University for providing expert assistance during the editorial and production phases of this volume.

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PART I

WHY DO STATES HAVE THE RIGHT TO CONTROL IMMIGRATION?

WHY DOES THE STATE HAVE THE RIGHT TO CONTROL IMMIGRATION?

SARAH SONG

Public debate about immigration proceeds on the assumption that each country has the right to control its own borders. The right to control immigration is broadly assumed to flow from state sovereignty. This view is reflected in early American immigration jurisprudence. In establishing the national government's power over immigration, the U.S. Supreme Court declared, "Every nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominion, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."¹ The power to control immigration has been qualified in certain respects by international law, such as in the case of diplomats whose privileges are well-defined in law and over whom the host state's discretion is limited. However, when it comes to the question of the right to exclude foreigners, international law accords enormous discretion to states. While there are constitutional limits in some countries on how noncitizens already inside the territory can be treated, when it comes to foreigners outside the territory, states may act solely on the basis of considerations of advantage or convenience. As Linda Bosniak has observed, this "hard on the outside and soft on the inside" approach is reflected not only in law but also in many normative theories of migration and citizenship: an ethic of inclusion applies

to noncitizens inside the territorial boundaries of the state, while an ethic of exclusion applies to those outside.²

But what, if anything, justifies the modern state's power over borders? Why, if at all, does the state have the right to control immigration? Many scholars of immigration and citizenship take this question for granted, focusing instead on questions about the substantive content and procedures of immigration law and policy. The reason for this is partly pragmatic. After all, states exist, and they exercise power over borders, whether or not there is a good justification for such exercise. In addition, scholars of migration and citizenship understandably focus their attention on more pressing questions about the substance and procedures of immigration policy. But I also think that many immigration scholars really believe that the state has the right to control its own borders, even if they have not developed the normative grounds of their view.

How, if at all, might the state's right to control immigration be justified? This chapter provides an answer in three sections. First, I examine the earliest immigration law cases in U.S. history in order to uncover the underlying assumptions about sovereignty and immigration control that make up the normative foundations of U.S. immigration law. These cases rely on dominant principles of international law of the day, especially the work of Emer de Vattel. I argue that while these cases make clear the great extent of the state's power over immigration, the leading theorist they rely on falls short of providing adequate normative justification of the state's right to control immigration. In the second section, I turn to contemporary political theory and philosophy for justifications of the right to control immigration. I critically assess three leading arguments, based on (1) cultural and national identity, (2) freedom of association, and (3) property. In the third and final section, I offer an alternative argument based on the idea of democratic self-determination.

I. SOVEREIGNTY AND IMMIGRATION CONTROL IN U.S. IMMIGRATION LAW

The U.S. government's power over immigration—its “plenary power”—was established by the U.S. Supreme Court's decision in the *Chinese Exclusion Case* (1889).³ This case is a good place to

begin our analysis of the normative foundations of the modern state's right to control immigration because it contains the American nation's very first assertion of national sovereignty over immigration. It marked, in Rogers Smith's words, a “significantly novel” and “momentous” shift toward viewing immigration regulations as acts of relatively unbridled national sovereignty, not exercises of the police powers of state governments or the federal commerce power as was the case for much of the nineteenth century.⁴ What normative principles ground this assertion of state sovereignty and the power to control immigration?

Chae Chan Ping, a Chinese laborer, came to the United States in 1876, in a period when the Burlingame Treaty of 1868 seemed to permit unrestricted immigration from China. The United States had negotiated the treaty with an eye toward recruiting Chinese laborers and improving trade with China, but racist and nativist sentiments against the Chinese became widespread in California and nationally. In 1882, Congress suspended immigration of Chinese laborers for ten years. Those already in the United States who wished to leave and return were required to obtain certificates to show they had come before November 1880. Chae obtained a certificate in 1887 and returned to his native China. The following year, while he was still abroad, Congress barred the return of Chinese laborers, regardless of whether they had certificates.

Aboard a ship in San Francisco Bay, Chae challenged the 1888 statute in a petition for habeas corpus on two grounds. First, he argued that the statute violated the 1880 treaty provision that Chinese laborers already in the United States could leave and return. Writing for the majority, Justice Field acknowledged the conflict between the treaty and statute but found that although they were on an equal footing, the statute prevailed because it was enacted later in time. Chae's second challenge was that, as a constitutional matter, the 1888 statute was “beyond the competency of Congress to pass it.”⁵ This case provided the Court with its first opportunity to address directly the question of the federal government's power to exclude foreigners.⁶ In setting out the conceptual framework for immigration law, the Court's main concern was to establish the federal government's immigration power under the Constitution, not to question whether the rights of individual aliens might constrain Congress's immigration power.⁷

Justice Field held that the federal government has the power to regulate immigration and that the political branches could exercise this power without being subject to judicial review:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. . . . Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. (609)⁸

The principles upon which the Court established Congress's power to control immigration were maxims of international law dominant at the time, which viewed the right to exclude as essential to sovereignty:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.⁹

The Court goes on to affirm a virtually unlimited right to exclude, including the exclusion of "foreigners of a different race . . . who will not assimilate with us" and are thereby "dangerous to [the] peace and security" of the nation.¹⁰

Two years later, in *Nishimura Ekiu v. United States* (1892), the Court expanded the plenary power doctrine in two ways.¹¹ First, it broadened the plenary power doctrine by applying it to Congress's procedures in the enforcement of immigration laws and not just its substantive rules for admission and exclusion as in the *Chinese Exclusion Case*. Second, it rejected a challenge based on a claim of individual constitutional right. An administrative officer declared

that Nishimura was likely to become a public charge, which in turn made her excludable under the statute. She argued that due process required a judicial proceeding.¹² As in the *Chinese Exclusion Case*, the Court invoked principles of international law to establish that the immigration power belonged to the federal government and the political branches in particular:

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. . . . It belongs to the political department of the government.¹³

In establishing the government's immigration power, the Court cites the Swiss author Emer de Vattel, whose *Les droit des gens* (*The Law of Nations*, 1758) was the most important book on international law in the eighteenth century. Vattel was "the favorite authority in American theory of international law" in the first decades after the American founding, and his influence in the United States extended through the nineteenth century.¹⁴ The passages of Vattel cited by the Court in *Nishimura* focus on the right of sovereign nations to refuse entry to foreigners:

The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as they may think it advantageous to the state. There is nothing in all this, that does not flow from the rights of domain and sovereignty.¹⁵

After this passage cited by the Court, Vattel goes on to discuss the example of the Chinese government, which "fearing lest the intercourse of strangers should corrupt the manners of the nation, and impair the maxims of a wise but singular government, forbade all people entering the empire." Such a prohibition was "not at all inconsistent with justice, provided they did not refuse humane assistance to those whom tempest or necessity obliged to approach their frontiers. It was salutary to the nation, without violating the rights of any individual, or even the duties of humanity, which

permit us, in case of competition, to prefer ourselves to others" (II.94).

Vattel's references to "justice" and "humane assistance" hint at moral constraints on state sovereignty. He claimed to be following the German author Christian Wolff, whose *Ius gentium method scientifica pertractatum* (*The Law of Nations Treated According to Scientific Method*, 1749) Vattel expressly sought to develop and extend. Wolff derived the duty to mutual aid by way of an analogy between the law of nature among individuals and the law of nature among states. Wolff's naturalism was influenced by Aristotle and has antecedents in Aquinas, Grotius, and Leibniz. In this tradition, nature exhibits an order and teleology to which the faculty of reason gives human beings privileged access.¹⁶ The "law of nations" was simply the law of nature of *individuals* in the state of nature as applied to *states*. Vattel adopted this analogy, clinging to the language of naturalism but limiting its role to the support of individual rights in a liberal society. Like Wolff, Vattel viewed "a political society" as "a moral person" with "an understanding and a will of which it makes use for the conduct of its affairs." When a people confer sovereignty on any one person, they thereby "invest him with their understanding and will, and make over to him their obligations and rights, so far as relates to the administration of the state, and to the exercise of the public authority" (I.40).¹⁷ As in the case of persons, the primary duties of states are (1) to preserve and perfect themselves, and (2) to assist each other in fulfilling those duties each state owed to itself. States should "cultivate human society," primarily through trade so long as the pursuit of commerce did not conflict with their primary duties to themselves. Yet states, like persons, should remain free and independent, constrained by the rules necessary for their common society but otherwise autonomous (I.23). Vattel optimistically suggested that states, acting upon the principles of natural law alone, would ultimately form a universal republic: "A real friendship will be seen to reign among them; and this happy state consists in a mutual affection" (II.12).

Vattel's optimism was counterbalanced and ultimately outweighed by his realism. He acknowledged "most nations aim only to strengthen and enrich themselves at the expense of others" (II.16). Self-interest prevents states from adhering to the

principle of mutual aid in foreign affairs. Instead, he suggests that states should rely on a morally less appealing but more workable vision of a world order based on a balance of power. In doing so, he repudiated Wolff's idea of a *civitas maxima* as the foundation of the voluntary law of nations in favor of a system of sovereign states based on a balance of power.¹⁸ Vattel emphasized that while nations, like individuals, have a general duty of assistance to others, this duty was limited by the perfect right of a state to its own self-preservation and self-perfection.¹⁹ The duty of mutual aid is a contingent obligation, extending only insofar as a nation's liberty and well-being permit. Vattel derives moral obligation not from an external source but from what he viewed as man's most basic motive: self-love and a desire for the happiness of a perfect soul.²⁰ He applied this very same motive to nations: a nation's duty of self-preservation and self-perfection could be derived only from its basic self-interest and its desire to attain the highest level of national happiness. Like individuals, nations could attain collective happiness only by developing more enlightened forms of self-interest, forms that take into account the well-being of other nations but that make the national interest primary.²¹

Wolff and Vattel were the first to provide an explicit articulation of the principle of nonintervention, the key element of Westphalian sovereignty. The fundamental norm of Westphalian sovereignty is that "states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behavior."²² Vattel argued that no state had the right to intervene in the domestic affairs of other states. Although he adopts an argument made earlier by Pufendorf, Vattel is frequently credited with giving the principle of the equality of sovereign states the prominence it has had in international law ever since. Reasoning by analogy, he claimed that just as men are equal in the state of nature, states are also equal, regardless of whether they are small republics or large kingdoms. Vattel was, of course, aware that states are actually vastly unequal in resources and power, but his point about equality—understood as a normative principle—was that all nations are equally independent, equal in dignity, and equal in the rights and duties they have under natural law.²³

Vattel's theory of sovereignty has had important implications for the legal regulation of the movement of goods and people across

borders. A state's duty to self-preservation and self-perfection is "perfect": it outweighs the obligation to assist other states in their efforts to preserve and perfect themselves. The state's duty to other states is "imperfect": it does not create an obligation to do anything in particular, and no other state can claim to have been injured by an alleged violation of it. So, for example, while a state ought to enter into mutually advantageous trade relations with other states and sell its products at a "fair price," considerations of self-preservation allow it to limit trade or even reject commerce with other states altogether.

Vattel's realist perspective also has implications for immigration policy. As in the case of trade, a state could decide to close off its borders entirely to strangers, including those seeking a right of passage to "escape from imminent danger" or "procur[e] the means of subsistence," if it proved contrary to the interests of the nation.²⁴ In considering whether the "exiled or banished" have a "right to dwell somewhere on earth," Vattel erred on the side of asserting a state's right to exclude:

Every nation has a right to refuse admitting a foreigner into her territory, when he cannot enter it without exposing the nation to evident danger, or doing her a manifest injury. What she owes to herself, the care of her own safety, gives her this right; and in virtue of her natural liberty, it belongs to the nation to judge, whether her circumstances will or will not justify the admission of that foreigner. (I.230)

Thus also it has a right to send [asylees] elsewhere, if it has just cause to fear that they will corrupt the manners of the citizens, that they will create religious disturbances, or occasion any other disorder, contrary to the public safety. In a word, it has a right, and is even obliged, to follow, in this respect, the suggestions of prudence. (I.231)

These two passages were cited in their entirety by the U.S. Supreme Court in *Fong Yue Ting v. United States* (1893) to expand the U.S. government's power over immigration.²⁵ In this case, the Court expanded plenary power beyond the *exclusion* of foreigners outside the territory to *deportation* of resident aliens already

inside the U.S. territory. An 1892 statute had extended the ban on Chinese immigration for ten years. Those already residing in the United States could stay only if they could get a white witness to testify to their pre-1892 residency. Fong and two other Chinese laborers claimed pre-1892 residency but were unable to produce white witnesses.

Writing for the majority, Justice Gray rejected Fong's constitutional challenge to the white witness rule, finding no meaningful distinction between the power to exclude a noncitizen outside the territory and the power to deport a noncitizen already present in the territory: "The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power."²⁶ Relying on both the *Chinese Exclusion Case* and *Nishimura*, Justice Gray concluded that the political branches could continue to regulate immigration immune from judicial review. In a subsequent case, *Yamataya v. Fisher* (1903), the Court suggested that a noncitizen already inside the U.S. territory who objected to deportation procedures might have some success.²⁷ While leaving the plenary power doctrine untouched, the Court refused to permit *Yamataya's* deportation on two grounds: (1) aliens inside the United States can invoke more constitutional safeguards than aliens outside the territory, and (2) courts reviewing deportation orders should examine procedural due process questions more closely than substantive immigration rules.²⁸

Taken together, these four foundational immigration law cases suggested constitutional objections by foreigners *outside* the United States would not be successful, but foreigners *inside* the United States might have some success in challenging deportation orders.²⁹ We have seen how the Court, drawing on Vattel, established the federal government's immigration power by declaring it to be "inherent in sovereignty." The right to exclude foreigners was simply assumed to be crucial to the self-preservation of states. Yet, neither the Court nor the key theorist cited by the Court provides a compelling justification for the state's right to control immigration.

Vattel himself viewed territorial sovereignty as analogous to private property, but what he says is more metaphorical than adequate to the task of justifying territorial sovereignty. While he

distinguishes between the concepts of sovereign rule (*empire*) and ownership (*domain*) of the national territory, he tends to emphasize their interrelatedness. He defines the concepts in the following way:

1. The *domain*, by virtue of which the nation alone may use this country for the supply of its necessities, may dispose of it as it thinks proper, and derive from it every advantage it is capable of yielding.
2. The *empire*, or the right of sovereign command, by which the nation directs and regulates at its pleasure every thing that passes in the country. (I.204)

Vattel also emphasizes the connection between ownership and sovereignty in discussing how a nation comes to acquire sovereignty: "When a nation takes possession of a country to which no prior owner can lay claim, it is considered as acquiring the *empire* or sovereignty of it, at the same time with the *domain* The whole space over which a nation extends its government, becomes the seat of its jurisdiction, and is called its *territory*" (I.205). A nation may acquire sovereignty by another route: "a number of free families" who were "previously in possession of the domain" may "unite for the purpose of forming a nation or state" and thereby "acquire the sovereignty over the whole country they inhabit" (I.206). Thereafter, although different types of property (private, common, joint) may be legally established within the national territory, the nation continues to enjoy a kind of ownership not only over the land but also over everything within its territory that is "susceptible of ownership," including goods to which private individuals hold legal title (I.235).

Vattel's blurring of ownership and sovereignty must be understood in historical context. While political rule and property ownership were distinguished for some purposes by the Roman law terms *imperium* and *dominium*, the latter term also connoted rule, especially in medieval usage, that was retained in the English word "dominions" and the technical use of *dominium* in jurisprudence to denote the territorial dimension of sovereignty. While property came to be thought of as private and thus devoid

of public authority, ownership of certain property carried with it the franchise until modern times. And because the state's sovereign authority extended not only over people but also over land, conceptions of sovereignty continued to include attributes of ownership in addition to jurisdiction and legislation. As Whelan observes, in the seventeenth and eighteenth centuries, although the two terms are distinguished, there is a substantial amount of conceptual overlap, usually to the advantage of absolutist and patrimonial theories, which in one way or another portray the ruler as not only the sovereign but also the owner of his country.³⁰

How, then, might we understand Vattel's emphasis on the connection between sovereignty and "public ownership of a country" if not for the reason of defending absolutist and patrimonial theories, which he explicitly rejected? One reason for emphasizing the connection is that sovereign power includes some specific powers that appear to be derived from the nation's collective ownership of the goods in its territory (e.g., the power of eminent domain and the power of taxation). Second, it supports Vattel's derivation of the state's *right to exclude* aliens from the state's *right of ownership* of the country:

Since the lord of the territory may, whenever he thinks proper, forbid its being entered, he has no doubt a power to annex what conditions he pleased to the permission to enter. This . . . is a consequence of the right of domain. Can it be necessary to add, that the owner of the territory ought in this instance to respect the duties of humanity? The case is the same with all rights whatever: the proprietor may use them at his discretion.³¹

Vattel's derivation proceeds by way of analogy: just as a property owner can exclude others from his property, the sovereign state can exclude foreigners from its territory. As I will argue later, while metaphorically alluring, the property argument for a state's right to exclude falls short as a convincing justification of the state's right to control borders. I turn now to take up the question to which Vattel and early American immigration jurisprudence do not provide a satisfactory answer: What, if anything, justifies the modern state's right to control immigration?

II. CONTEMPORARY JUSTIFICATIONS OF A STATE'S RIGHT TO CONTROL IMMIGRATION

This section examines three leading normative justifications of a state's right to control immigration, based on three distinct grounds (1) cultural and national identity, (2) freedom of association, and (3) property. I discuss the limits of these arguments with the aim of setting the stage for an alternative justification in the final section of the chapter.

A. Cultural and National Identity

In his well-known discussion of the idea of membership, Michael Walzer offers a defense of the state's right to control immigration based on the value of *distinctive cultures and groups*:

The distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life. If this distinctiveness is a value, as most people . . . seem to believe, then closure must be permitted somewhere. At some level of political organization, something like the sovereign state must take shape and claim the authority to make its own admissions policy, to control and sometimes restrain the flow of immigrants.³²

Walzer's argument here assumes that a central purpose of states is the protection of distinctive cultures and groups. Combined with the empirical premise that protection of distinctive cultures "depends upon closure," he concludes that "something like the sovereign state" must form and claim the authority to make its own admissions policy.

Walzer echoes Vattel in suggesting the right to control immigration flows from state sovereignty and then moves to offer a justification of this right in terms of cultural preservation:

Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be *communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.³³

For Walzer, the normative ground for a state's right to control immigration is the preservation of a distinctive communal identity. As for the extent of this right, Walzer recognizes that self-determination is "not absolute": it is subject "both to internal decisions by the members themselves" and to "the external principle of mutual aid."³⁴ If we look at Walzer's discussion of particular examples, the constraints on the state's right to exclude appear to be quite weak. The right of nations to cultural self-determination is taken to be consistent with the "White Australia" policy in which the Australian government imposed racial restrictions in its immigration policy.³⁵ It is not surprising that an account of state sovereignty based on preserving the "distinctiveness of cultures and groups" would include racial exclusion in light of the historical salience of race to national identity.

Political theorist David Miller has developed the cultural argument for a state's right to control borders in more explicitly *nationalist* terms focusing on language and what he calls "public culture." Miller views the right to control immigration as part of a more general theory of a state's territorial rights, which includes control over the land itself, resources on the land, and the movement of people and things across territorial borders. Miller takes the following as his starting premises:

1. The public culture of many societies is worth preserving.
2. Citizens of these societies have an interest in controlling "the way that their nation develops, including the values that are contained in the public culture."³⁶

He points to the example of Québec. The French language is a vital part of Québécois culture and identity. Québécois citizens have good reason to "differentiate sharply among prospective immigrants between those who speak the national language and those who don't." Miller leaves open how restrictive an immigration policy has to be in order to maintain "cultural continuity"; it will depend on "the empirical question of how easy or difficult it is to create a symbiosis between the existing public culture and the new cultural values of the immigrants."³⁷

On the nationalist account, a state's right to control immigration is the collective right of nations with deep ties to the territory.

There are at least two ways that proponents of such a view have conceived of the relationship between the nation and territory. The first is an argument about *national identity*. Territory is taken to be central to the development of national identity. On Miller's account, there is a two-way interaction between a state's territory and the culture of the people who live on it. On the one hand, the culture adapts to the territory: whether the climate is hot or cold or whether the territory landlocked or open to the sea will encourage the development of certain customs and discourage others. On the other hand, the territory itself will be shaped and reshaped according to the "cultural priorities" of the people as they make their lives upon the land. Their "transformation" of the land may not be intentional or coordinated, but it nonetheless reflects their "cultural values." Through living on and shaping the land, the people endow it "with meaning by virtue of significant events that have occurred there, monuments that have been built, poems, novels, and paintings that capture particular places or types of landscape"; the inhabitants of a land come to attach value to living in a place that is rich in historical meaning.³⁸ The philosopher Chaim Gans makes a similar claim: the fact that a territory is "of primary importance in forming the historical identity of the group" is considered "a strong enough reason for the purposes of determining sovereignty over it."³⁹

A second way that proponents of the nationalist account of territorial rights have connected nations and territory is a quasi-Lockean argument about *labor*. It is not only in virtue of mixing my labor with the land but also in virtue of my adding value by laboring on a piece of land that I come to have a legitimate claim of ownership over it. In Locke's well-known formulation:

The *labor* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labor* with, and joined to it something that is his own, and thereby makes it his *property* . . . [I]t is *labor* indeed that *puts the difference of value* on every thing.⁴⁰

On Locke's account, labor is the ground for private property rights. Building on Locke's labor theory of value, Tamar Meisels

has developed a nationalist theory of territorial rights based on the concept of "settlement." Settlement refers not only to the physical presence of individuals on a piece of land but also to "the existence of a permanent physical infrastructure," which members of the nation have constructed. Sometimes such settlements are built in a conscious, premeditated manner, but more often than not they "simply evolve over time" as individuals or members of particular groups settle in a given place.⁴¹ Similarly, Miller argues that as the members of the nation "transform" the land, thereby adding value to it, "the nation as a whole has a legitimate claim to the enhanced value that the territory now has."⁴²

It is important to note that Meisels's and Miller's arguments are *quasi-Lockean*. While they are inspired by Locke's labor theory of value, their appeal to Lockean principles is more metaphorical than literal.⁴³ What is crucial to the nationalist justification is the *expressive* element reflected in claims of "settlement" (Meisels) or "transformation" (Miller). Acts of settlement/transformation express a particular national identity. By working the land, members of a nation are not simply adding value to it; they are, as Meisels puts it, "shaping the territory so as to coincide with a particular way of life." For example, nations must "choose between various modes of architecture and forms of agriculture," as well as "whether to industrialize, and, if so, to what extent and in what fields" and "whether to build churches or synagogues or mosques."⁴⁴ The enhanced value cannot be separated from the territory itself. Because the value added by the labor of the nation is, in Miller's words, "*embodied* in cultivated fields, buildings, roads, waterways, and all the rest," there is no way for the nation to retain that enhanced value without also retaining the territory. Thus, the case for a nation's right over the relevant territory is "straight-forward": such a right "gives members of the nation continuing access to places that are especially significant to them, and it allows choices to be made over how these sites are to be protected and managed."⁴⁵

Nationalist arguments for a state's right to control immigration suffer from at least four problems. First, they fail to account for the right of *collective* ownership, which is crucial for the nationalist account to go through. The labor of "settlement" and the work of "transformation" of the land are performed by *individuals*, not by

"the nation." So why should the collective entity of "the nation" gain property rights over the territory and not the particular individuals who actually performed the labor?

Second, why is settlement alone a morally sufficient ground for private property rights and rights of territorial jurisdiction? The Lockean view is that productive use of land is what generates legitimate entitlements to land. Locke himself famously suggested that "nine tenths . . . nay . . . ninety-nine hundredths" of the value of "the products of the earth useful to the life of man" is the result of human labor, and value-enhancing labor upon previously unowned land grounds a legitimate entitlement to it.⁴⁶ Miller and Meisels adopt this Lockean view in suggesting that members of the nation enhance the value of the land they work and build upon. But why should such acts entitle one to exclusive ownership of the land and not simply partial ownership proportional to the value one has added? The more basic question is why productive use of the land and other resources should be the sole or primary basis for generating rights to property and territorial jurisdiction.

A related third weakness of the quasi-Lockean "settlement" argument is its suggestion that *any group* that transforms the land is entitled to territorial control, including over territory that an existing state already claims territorial rights over. For example, if Korean immigrants in Los Angeles construct houses, restaurants, and monuments expressing their particular culture and call it Little Korea, do they thereby acquire territorial rights over that piece of Los Angeles? Many of us would say that while Korean Americans have a legitimate claim to private property rights over the fruits of their labor, they do not have territorial rights over the parts of Los Angeles they have worked. The nationalist might respond that immigrants reside and labor in the national territory with the existing nation's consent, and under the terms of that contract, their labor grounds a claim to some property rights but not territorial rights over the land they work. To make this response, however, nationalists would have to prioritize consent over the role of value-enhancing labor in establishing a claim to territorial control.

Finally, Meisels and Miller do not explain why labor confers rights of *territorial jurisdiction* over an entire territory rather than simply rights of *private property*. Imagine that a group of people settle in an uninhabited part of Oregon and build houses, schools,

and places of worship as well as till fields and plant crops. Could they then declare that they have rights of territorial jurisdiction over Oregon? We tend not to think of unoccupied land within the borders of an existing state as *terra nullius*. Accounts based on current settlement would permit these occupiers to stay and even give them exclusive rights to determine the political destiny of the land they've occupied. As Anna Stilz has argued, if the only rationale for the acquisition of jurisdictional rights is that land has been labored upon, the state cannot have jurisdiction over undeveloped areas.⁴⁷

We need a way to distinguish *property rights in the strict sense* (the right to control, use, and benefit from a particular resource) and *rights of jurisdiction* (the right to make first-order rules that define property rights and other rights and to interpret and enforce those rules, as well as second-order rules about who holds jurisdiction over what persons and resources). As Allen Buchanan has argued, a compelling theory of territorial rights and boundaries must distinguish between (1) jurisdictional authority (the right to make, adjudicate, and enforce legal rules within a domain), (2) metajurisdictional authority (the right to create and alter jurisdictions, including geographic jurisdictions), and (3) property rights of individuals and groups within jurisdictions.⁴⁸ I will return to the property rights versus jurisdictional rights distinction later in examining attempts to ground the state's right to control immigration in more literal interpretations of Locke's theory of property.

B. Freedom of Association

Some have defended the state's right to control immigration by appealing to the value of freedom of association. Christopher Heath Wellman makes such a case, beginning with the premise:

1. Legitimate states are entitled to political self-determination.

While he does not provide a defense of the principle of political self-determination, he emphasizes that the right of self-determination is owed to a group of people not merely in virtue of their standing as autonomous individuals but also in virtue of their special group role or standing. For example, it would be wrong for Sweden to forcibly annex Norway not only because doing so fails to

respect the individual autonomy of Norwegians but also because it fails to respect their special standing as Norwegian citizens: "their collective achievement of maintaining a political institution that adequately protects the human rights of all Norwegians."⁴⁹ I will return to the importance of self-determination for a defense of the state's right to control borders in the final section of the chapter.

Wellman's defense of a state's right to control borders rests on two additional premises:

2. Freedom of association is an integral component of self-determination.
3. Freedom of association includes not only the right to associate but also the right to dissociate.

The premise that freedom of association is a key part of self-determination is reflected in "the widespread conviction that each of us enjoys a privileged position of moral dominion over our self-regarding affairs, a position which entitles us to freedom of association."⁵⁰ Wellman argues that freedom of association includes both the right to *include* and the right to *exclude* potential associates, quoting Stuart White's discussion of freedom of association: "With the freedom to associate, however, there comes the freedom to refuse association. When a group of people gets together to form an association of some kind (e.g., a religious association, a trade union, a sports club), they will frequently wish to exclude some people from joining their association. What makes it *their* association, serving their purposes, is that they can exercise this 'right to exclude.'"⁵¹ White's discussion centers on intimate and religious associations within one political society.

Wellman's innovation is to extend the value of freedom of association to the state itself, arguing by way of analogy with small-scale associations. We would vehemently object if a government agency were to force an individual to marry another against her will. Similarly, we would object if a golf club were forced to admit members against its will. He concludes:

Just as an individual may permissibly choose whom (if anyone) to marry, and a golf club may choose whom (if anyone) to admit as

new members, a group of fellow citizens is entitled to determine whom (if anyone) to admit into their country.⁵²

For the very same reason an individual can reject a suitor, citizens of a legitimate state can reject foreigners who seek to enter. Citizens have the presumptive right, Wellman argues, to "close doors to all potential immigrants, even refugees desperately seeking asylum from incompetent or corrupt political regimes that are either unable or unwilling to protect their citizens' basic moral rights."⁵³

Insofar as Wellman's argument relies on an analogy with marriage, religious groups, and golf clubs, it is unconvincing. First, his analogy runs together crucial differences between these associations and the political community. The latter is not an intimate or small-scale association. I do not share a home, a place of worship, or a sports club with all my compatriots. A political community is typically large enough that I need not have intimate or regular contact with citizens I do not know. Wellman acknowledges that our interest in not being forced into association with others applies most clearly in the case of intimate associations, but he maintains that this objection does not defeat the presumptive right of free association of large-scale associations, such as the state. To make his case, Wellman draws on White's discussion of intimate and religious associations, but on closer inspection, we see that what is at stake for intimate and religious associations is unique to those associations and does not apply to the political community:

If the formation of a specific association is essential to the individual's ability to exercise properly his/her *liberties of conscience and expression*, or to his/her ability to *form intimate attachments*, then exclusion rules which are genuinely necessary to protect the association's primary purposes have an especially strong presumption of legitimacy.⁵⁴

The case for freedom of association rests in part on the nature of the association's *purpose*. We respect freedom of association in the marital context because of the intimate purpose of such associations, and we respect freedom of association in the religious context on account of the expressive purpose of such associations. But

the liberal state is not an intimate association, nor is it straightforwardly an expressive association. As Sarah Fine has argued, while the liberal state is committed to certain values (e.g., toleration, equality before the law, and individual liberty), there is reasonable disagreement about the basic list and ranking of such values.⁵⁵ Even if there were consensus on a list and ranking, adherence to such values is not sufficient to suggest that the state is an expressive association of the kind religious associations are—namely, associations committed to and expressive of comprehensive religious and moral doctrines.

Wellman acknowledges that freedom of association for groups that are “intimate or related to liberty of conscience and expression” is especially valuable, but he argues that freedom of association should not be restricted to these contexts. To make his case, he offers another analogy, this time between the golf club and the state:

If no one doubts that golf clubs have a presumptive right to exclude others, then there seems no reason to suspect that a group of citizens cannot also have the right to freedom of association, even if control over membership in a country is not nearly as significant as control regarding one's spouse.⁵⁶

But the political community is distinct from a golf club in at least two morally important respects. First, the state is not a voluntary association. Most of us live and die in the countries we are born citizens of. This lack of voluntariness to political membership raises the stakes of membership. Exclusion from a particular state can be hugely consequential in a way that exclusion from a golf club typically is not.⁵⁷ Outsiders have significant interests in becoming members, and exclusion brings high costs (and not just costs associated with expressive or intimate purposes) to nonmembers. Another reason that a state is different from a golf club is that states don't exist in a competitive environment conducive to market entrants. If a golf club refuses to admit me, I can form my own or join another. If a state refuses to admit me, I can neither form my own nor easily join another.

In light of these crucial disanalogies between the state and small-scale associations such as marriage, religious groups, and

golf clubs, the burden rests on proponents of the free association argument to elaborate why freedom of association remains so fundamental for states even if citizens will typically never have anything approaching face-to-face relations with the vast majority of her compatriots. Wellman suggests two reasons. First, the *sheer size* of the group dramatically shapes the experience of being a member. For example, as a private golf club increases its membership, there will be more wear and tear on the golf course. Similarly, as a political state increases the number of new members, citizens' lives will be affected by population density. This concern about “wear and tear” associated with increased membership depends on empirical considerations, and it does not deliver a principled justification for a state's right to control its own borders.

A second reason has to do with the power to shape the association's future. Control over rules of admission and membership are significant in part because new members will subsequently have a say in how the association is organized. Members have a say not only in determining future membership but also in determining the future course of the association more generally, including decisions about “the host state's cultural make-up, the way its economy functions, and/or how its political system operates.” Wellman emphasizes that it is this connection between a group's membership and its future direction that underscores why freedom of association is “such an integral component of self-determination.”⁵⁸ Wellman's point about the state's “cultural make-up” brings him remarkably close to Walzer's and Miller's views, which I find unpersuasive for reasons discussed earlier. Wellman is on to something when he raises the future direction of how the political system operates, but I think developing this point requires elaborating the connection between self-determination and democracy. A democratic association is a distinctive type of association, and I believe a more compelling case for the state's right to control borders can be found by examining the conditions of democratic association.

A second major weakness of Wellman's argument is the absence of any explicit justification for the state's jurisdictional rights over its territory of which the right to control immigration is a part. He blurs together the right to exclude those who want to be admitted to *citizenship* or *political membership* and the right to exclude those

who want to be admitted to the state's *territory*. But there are distinctive considerations that apply to justifying the state's right to control the movement of people into and within its territory. Consider again the case of golf clubs. Assuming a golf club has the right of ownership over a parcel of land, club members have not only the presumptive right to exclude outsiders from admission to club membership but also the right to exclude outsiders from entering and using the club's property. Club members, as joint owners of the club, have the right to control club property. Wellman implies a similar ownership-based account of territorial rights of the political community when he says: "My right to freedom of movement does not entitle me to enter your house without your permission . . . so why think this right gives me a valid claim to enter a foreign country without that country's permission?"⁵⁹ Just as an individual property owner is entitled to exclude outsiders from his house, members of a country are entitled to exclude outsiders from entering the country. Wellman's analogy runs together two types of rights that need to be distinguished, private property rights and rights of territorial jurisdiction.⁶⁰ Territorial rights are distinctive to states, and analogies with private property rights do not get us very far.

C. Property

Another defense of the state's right to control immigration appeals to the concept of property. These arguments draw literally rather than metaphorically upon Locke's theory of property and political authority. We can distinguish individualist and collectivist Lockean theories of territorial rights.

Consider first the *individualist* Lockean account. According to Locke's well-known theory of property, the right to private property is viewed as a natural, prepolitical right. Locke begins from the theological premise that God gave the earth to humankind in common and argues that individuals come to hold private property rights in particular parcels of land in virtue of mixing their labor with and adding value to that land.⁶¹ How does he move from a group of individuals with a natural right of private property over parcels of land to the collective entity of the state with territorial rights over land and people? The answer is Locke's theory of

the social contract: individual property owners make a voluntary agreement with one another in order to form a state with territorial jurisdiction. It is on the basis of voluntary consent that individual property owners give up their rights of jurisdiction over their property to the state. It is worth quoting Locke at length here:

Every man, when he at first incorporates himself into any commonwealth, he, by uniting himself thereunto, annexed also, and submits to the community, those possessions, which he has, or shall acquire, that do not already belong to any other government: for it would be a direct contradiction, for any one to enter into society with others for the securing and regulating of property; and yet to suppose his land, whose property is to be regulated by the laws of the society, should be exempt from the jurisdiction of that government, to which he himself, the proprietor of the land, is a subject. By the same act therefore, whereby any one unites his person, which was before free, to any commonwealth, by the same he unites his possessions, which were before free, to it also; and *they become, both of them, person and possession, subject to the government and dominion of that common-wealth*, as long as it hath a being.⁶²

Individual property owners not only enter into an agreement about the control and use of their respective bundles of property but also enter into a contract to transfer to the state *jurisdictional rights* contained in their bundle of property rights, including rights of law-making, enforcement, and adjudication of disputes. On Locke's account, the state's jurisdictional rights are derived from individuals' prepolitical property rights by way of their free consent.

There are several problems with the individualistic Lockean account.⁶³ First, on the Lockean account, a piece of land can become subject to the state's authority only via the consent of individual property owners, but some individuals occupying a state's territory have not consented to its authority. There will be pockets of anarchists who have actively refused consent to the state's authority, yet continuity of territorial jurisdiction is necessary for the uniform application of the law, which in turn is necessary for government to fulfill its aims.

The way Lockeans have dealt with this problem is to assume either that jurisdiction is already continuous or that there are

strong incentives for anarchists to submit to the state's authority. Robert Nozick famously adopted the second move, a move that is ultimately unpersuasive:

We have discharged our task of explaining how a state would arise from a state of nature without anyone's rights being violated. The moral objections of the individualist anarchist to the minimal state are overcome. It is not an unjust imposition of a monopoly; the *de facto* monopoly grows by an invisible-hand process and by morally permissible means, without anyone's rights being violated and without any claims being made to a special right that others do not possess.⁶⁴

How exactly does this work? The anarchist's objection is that the state's claim to a monopoly on the use of force within the state's territory violates her rights not only because the state claims to be the exclusive holder of the right to punish and exact reparations but also because it forces her to pay for protection that she would rather provide herself. Nozick maintains that anarchists (whom he also calls "independents") can be compelled to join the state voluntarily in exchange for adequate compensation for the loss of utility they experience by having to join. Adopting the concept of compensation from welfare economics, he argues that taking autonomy away from the independents is justified by giving security to those who voluntarily joined the state. The appropriate price of compensation is the amount that would return independents' utility to what it was before they were compelled to join, but rather than asking independents to determine the price themselves, the state would determine a fair price by some other process, based on interpersonal comparisons and trade-offs between the needs of independents and the needs of everyone else.⁶⁵ But this move is vulnerable to the very objection Nozick makes against utilitarianism: it fails to take the rights of each and every individual seriously. Nozick's claim that individuals who initially refuse to give their consent to the state can be compelled to join the state for some adequate state-determined compensation fails to respect the rights of the independents.

A second problem with individualistic Lockean accounts of a state's territorial rights is that they assume a piece of land, once

subjected to the state's authority, is *perpetually* subjected. Individuals give up not only their *jurisdictional* authority (the right to make, enforce, and adjudicate legal rules within a domain) but also their *metajurisdictional* authority (the right to create or alter jurisdictions, including geographic jurisdictions). While it is the original parties to the social contract who give up both types of rights, the agreement is taken to be binding on all future generations. But this assumption is at odds with Locke's own claim that individuals are by nature "all equal and independent."⁶⁶

Hillel Steiner has taken Locke's "all equal and independent" claim very seriously, arguing that individuals do indeed retain metajurisdictional authority and thereby have the right to exit the state with their property whenever they wish. As he puts it, "Precisely because a nation's territory is legitimately composed of the real estate of its members, the decision of any of them to resign that membership and, as it were, to take their real estate with them is a decision that must be respected."⁶⁷ The problem, of course, is that Steiner's solution requires us to abandon any conception of territorial rights as securing stable borders within which a state has a legitimate monopoly on the use of force and the right to establish justice.⁶⁸ One might reject Steiner's approach and instead interpret Locke as saying that a social contract that does not bind future generations would fail to live up to the primary purpose for which the political community was created: "for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties."⁶⁹ If each new member of every generation could secede if she wanted to, the political community could not last. Yet, if we take seriously Locke's insistence on the equal freedom of each individual, it is hard not to conclude that the (individualist) Lockean account of territorial rights fails to provide convincing reasons for believing a state's rights of jurisdiction trump an individual's right to equal freedom.

These difficulties with individualist Lockean accounts get at a deeper problem. In attempting to derive a state's territorial rights from individual property rights, they conflate private property rights with jurisdictional rights. Like the quasi-Lockean nationalist theories, individualist Lockean theories jump from the rights generally conferred by property ownership to the much wider set of jurisdictional and metajurisdictional rights claimed by states.

Take the example of my backyard. Because I own my backyard, I can exclude people from entering it, but my property ownership is insufficient to determine who has the right to make the rules governing my backyard as well as yours.

Does a *collectivist* Lockean theory of territorial rights fare better? While the Lockean argument for territorial rights has typically been understood as an argument about private property rights, Cara Nine argues that there is no reason that a more direct Lockean argument for territorial rights cannot also be made. Her strategy is to argue by analogy between an individual's property rights and a state's territorial rights: the state acquires territorial rights in the same way that individuals acquire property rights. The theory is "collectivist" because it claims that the collective entity of the state can directly acquire rights to land without prior reference to property rights or individual consent. On Nine's account, an agent has a right to land if (1) it is capable of changing the land, thereby creating a relationship with it, and (2) the relationship is morally valuable in terms of the Lockean principles of liberty, desert, and efficiency. The relevant agent in her account of territorial rights is the state, not individual citizens or the nation.

Not just any act upon the land will do; only morally valuable acts upon the land generate a legitimate right to it. Nine emphasizes the state's morally valuable role in making, interpreting, and enforcing property law, which is integral to determining how land is developed, and its role in establishing and maintaining markets, which create value in land and products deriving from the land. The state's territorial rights are justified for the same reason a person's property rights are: "because, on Lockean arguments, they help to realize the values of liberty, desert and efficiency."⁷⁰ First, a system of state territorial rights is "the best way to protect and promote liberty," since individual liberty requires "a physical space where the people's values can be brought to bear." The state also has a moral claim to the land based on the principle of desert because the state is "a unique and significant author of the land's value." Finally, a state system of territorial rights can make most efficient use of the land.⁷¹

Ryan Pevnick also adopts a collectivist Lockean approach with an explicit focus on the issue of immigration. In contrast to Nine's argument by direct analogy, Pevnick adopts a very broad

conception of property that he takes as encompassing both private property rights and territorial rights. He begins with the idea of self-determination, arguing that the right of a group to be self-determining can be justified by reference to "the group's *ownership* of goods produced through the labor and contribution of members." He calls this the "associative ownership" view. Pevnick takes the basic Lockean intuition—that we are entitled to the fruits of our labor so long as it does not harm others—to explain why we would allow a voluntary association to make its own decision about its future. Members of the association have produced something that would not have existed but for their labor, and this justifies members' claim to make decisions about the future of the association, including whom to admit as future members.⁷²

By adopting a broad conception of property, Pevnick seeks to show that the Lockean intuition underlying an individual's or a voluntary association's claims to ownership can be extended to *states*, even though the latter are nonvoluntary, intergenerational associations. People are born into particular states and simply find themselves subject to the coercive power of the state in whose territory they happen to reside. Pevnick, nonetheless, maintains the plausibility of viewing citizens as "joint owners" of state institutions, analogous to owners of the family farm:

Like the family farm, the construction of state institutions is a historical project that extends across generations and into which individuals are born. Just as the value of a farm very largely comes from the improvements made on it, so too *the value of membership in a state is very largely a result of the labor and investment of the community.* The citizenry raises resources through taxation and invests those resources in valuable public goods: basic infrastructure, defense, the establishment and maintenance of an effective market, a system of education, and the like . . . these are goods that only exist as a result of the labor and investment of community members.⁷³

In contrast to Nine, Pevnick argues it is the labor of *individuals in their role as citizens*, not simply "the state," that grounds the claim of joint ownership over public institutions. Like Miller and Meisels, Pevnick invokes Locke's labor theory of value to ground a state's territorial rights, but he differs from them in steering clear of the

idea of the nation in favor of individual citizens. In virtue of their aggregate labor, individual citizens help to create and maintain public goods and institutions, thereby gaining a right of joint ownership. Pevnick takes this ownership claim as grounding a claim to "at least some discretion in making future decisions about how those resources will be used," including whether and to whom the good of membership will be given in the future.⁷⁴

Anticipating the objection that his "associative ownership" view of a state's right to control immigration blurs together rights of territorial jurisdiction and rights of private property, Pevnick acknowledges that we cannot understand the state's territorial jurisdiction as a kind of private property strictly construed. He defines "jurisdiction" as the authority to administer a system of rights, including private property rights, within a given territory, yet he maintains that jurisdiction can still be understood as a claim about *property writ large*. Following Jeremy Waldron, he defines "property" or "ownership" as a general term for "rules that govern people's access to and control of things," such as land, natural resources, the means of production, and manufactured goods, as well as (for some) ideas, inventions, and other intellectual products. So when he calls someone an "owner" of a resource, he is simply saying that she has some bundle of rights over it, and the task is to elaborate the nature of those rights. Pevnick concludes that we should view *jurisdiction* as a kind of *collective property*: "The community as a whole determines how important resources are to be used. These determinations are made on the basis of the social interest through mechanisms of collective decision-making—anything from a leisurely debate among the elders of a tribe to the forming and implementing of a Soviet-style 'Five-Year Plan.'"⁷⁵

There are several major difficulties with Pevnick's and Nine's collectivist Lockean accounts. First, they blur together private property rights and jurisdictional rights, a point I have already belabored. The second problem has to do with the relationship between the collective entity of "the state" and individual members or "owners." Why should the collective entity of the state gain jurisdictional rights over the territory and not the particular individuals who actually performed the labor as agents of the state? How do we get from an aggregation of individual property owners to the collective entity with jurisdictional rights, if not by requiring

the consent of individual members or by making certain metaphysical assumptions about the nature of the state? For example, in considering the implications of "associative ownership" for long-term unauthorized migrants, Pevnick implicitly relies on the role of consent. A person's contributions to the maintenance of public institutions are not enough; the consent of existing members seems to be necessary. As he puts it, "In the case of illegal immigrants, by entering the country illicitly such individuals took their place in their community without the consent of the citizenry." While he acknowledges that unauthorized migrants make contributions through working and paying taxes, he contends that citizens have no obligation "to pass ownership of their institutions to illegal immigrants" because the migrants have "put themselves in this situation without the consent of the citizenry."⁷⁶ Pevnick's reliance on consent in the treatment of unauthorized migrants reveals that there is more to the claim about self-determination than simply claims about ownership through value-enhancing labor and fair exchange. By viewing claims of jurisdiction as a kind of property claim, Pevnick's account obfuscates what is distinctive about territorial jurisdiction.

Third, Pevnick does well to draw on the idea of self-determination, but his ownership account leaves unanswered important questions about the nature of self-determination. He views the right to self-determination as the right to *democratic* self-determination: the right of individual members to have an *equal say* in the making of the laws to which they are subject. Pevnick relies on an analogy between the state and voluntary associations, but voluntary associations rely on a range of decision-making procedures. For example, a student group or the Rotary Club may make decisions democratically, but a religious organization or a business may concentrate decision-making power in the hands of one or a few. This suggests that collective ownership claims of members support a right to self-determination that is consistent with a range of decision-making procedures, only some of which may be democratic. Another way of putting it is this: the fact of collective ownership alone cannot entail a right to democratic self-determination.⁷⁷ Our intuitions about collective ownership suggest that owners are entitled to *some* say in decisions regarding their collective property, but not necessarily an *equal say*.

How, then, do the collective ownership claims of citizens generate a specific right to *democratic* self-determination? Pevnick might reply that the ownership claims of citizens over public institutions they have built are special and thus give citizens a right of democratic self-determination, but this begs the question of how that right is to be justified.

III. THE VALUE OF SELF-DETERMINATION AND A DEMOCRATIC JUSTIFICATION

Another way to justify the state's right to control immigration is as part of a more general right of democratic self-determination of a people. The idea of self-determination stands for the proposition that members of a collective have a *pro tanto* right to make their own decisions about the policies promulgated in their name. Self-determination is a claim about self-rule. I briefly examine different accounts of the idea of self-determination to set the stage for a democratic justification of a state's right to control immigration.

First, on a *holistic* account of self-determination, states are said to have the right of self-determination because states, like persons, are moral entities with the capacity to realize their nature in the pursuit of ends. As discussed earlier, this view is reflected in Wolff and Vattel's arguments for the nonintervention principle in international law, which is based on an analogy between individuals and nations:

Nations are regarded as individual free persons living in a state of nature. . . . Since by nature all nations are equal, since moreover all men are equal in a moral sense whose rights and obligations are the same; the rights and obligations of all nations are also by nature the same.⁷⁸

The problem here is that states qua states do not think or act in pursuit of ends. Only individual people (or perhaps all sentient beings) think or act, either alone or in groups.⁷⁹ Much more needs to be said about the idea of the state as a moral entity before this view can be persuasive.

A second way of approaching a state's right to self-determination is in terms of *individual consent*. As Walzer suggests, "The rights of

states rest on the consent of their members. . . . [G]iven a genuine 'contract' it makes sense to say that the territorial integrity and political sovereignty can be defended in exactly the same way as individual life and liberty."⁸⁰ If one adopts a contractarian approach, the state's right to self-determination comes to rest on the autonomy of individuals—in particular, the freedom to associate with others in the pursuit of collective ends. As Charles Beitz puts it, "The liberty of states is a consequence of the liberty of persons to associate."⁸¹ As we saw in discussing Wellman's defense of the state's right to control immigration, the familiar problem is that there are few, if any, governments that are genuinely free associations, constituted by the actual consent of all citizens. Indeed, only a small subset of citizens, including immigrants who become naturalized citizens, have actually given their consent. As numerous critics have argued, territorial states are not voluntary associations. People do not freely create, join, and exit them. Most of the world's people (roughly 97 percent) live out their lives in the countries they happened to be born citizens of. One might respond by acknowledging that states are not free associations while also maintaining that state institutions derive their legitimacy from periodic affirmation via elections or acts of "tacit consent." Drawing on Locke, one might argue that by not exiting the territory of the state into which I was born or by not participating in political dissent, I tacitly consent to the state's authority. The problem with this response is that state institutions define the processes through which consent can be expressed, and it is these very institutions—to which we have not consented—that stand in need of justification.

A third way of understanding self-determination is as derivative of more fundamental principles, such as principles of justice. Beitz calls this the idea of a "hypothetical contract": a government is legitimate if it *would* be consented to by rational persons subject to its rule.⁸² The argument for respecting a state's right to self-determination is that interference with this right would violate principles of justice that *ideal*, not actual, citizens *would* endorse regarding the terms of their association. On this account, we should respect a state's sovereignty and refrain from interfering in its affairs because the state's institutions are just, on some conception of justice. Intervention is justified only if the state is unjust

and interference would promote the development of just domestic institutions.

Yet, one troubling feature of this third approach is that it views self-determination as a mere means to justice, failing to capture something intuitively important about self-determination. Consider an example provided by Beitz:

Country A is an imperial country, and area B, a territorially distinct area with generally accepted boundaries, is A's colony. Since A is the most benevolent of all possible imperial countries, there is no reason to think that granting independence to B will decrease the amount of social injustice in B; indeed, the opposite seems more likely because of various political and economic complications inside B which we don't need to explain. Nonetheless, the residents of B, in a fair and free election, overwhelmingly indicate their preference for national independence.⁸³

On Beitz's account of self-determination, which views self-determination as derivatively important in terms of its contributions to justice, country A should resist the results of the election and refuse to grant area B independence. Beitz responds that "intuitively, this seems implausible," and yet he ultimately concludes that this response is "weaker than it may seem" because it "simply does not apply to many real world cases."⁸⁴ But what if it did? If a benevolent imperial power like country A could do a better job ensuring substantively just outcomes, we would have to oppose B's move for independence on Beitz's view. We need to account for the independent value of self-determination, even while recognizing that it may serve as an important component of justice.

I want to suggest that self-determination is not only an element of justice; it is also a part of an ideal of *democracy*. The democratic principle of self-determination stands for the proposition that a group of people has the right to make its own decisions about policies made in its name. Self-determination is a claim about self-rule. In international law, the right of self-determination is understood as the right of a people to determine its collective political destiny through democratic means.⁸⁵ The first article of the UN Charter, signed in 1945, declares self-determination to be a

fundamental right of all peoples.⁸⁶ The idea of a universal right of self-determination is further enunciated in the International Covenant on Civil and Political Rights, which states, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."⁸⁷

We can build on the idea of self-determination to develop an alternative, democratic justification for a state's right to control immigration. My argument consists of the following claims:

1. A people/demos has the right of self-determination.
2. The right of self-determination includes the right to control admission and membership.
3. The demos should be bounded by the territorial boundaries of the state.
4. Citizens of a territorial state, in virtue of their role as members of the (territorially defined) demos, have the right to control admission and membership.

I briefly elaborate each of these claims in the following.

A. A People/Demos Has the Right of Self-Determination

This is the idea of popular sovereignty: that a group of people (the demos) ought to have independent political control over significant aspects of its common life. As a concept in international law, self-determination was seen to apply only to specific territories (first, the defeated European powers; later, the overseas trust territories and colonies) and was understood primarily as a right of secession. It has evolved to be understood as a right of all peoples to participate in democratic processes of governance.⁸⁸ The claim of self-determination need not be understood solely as a claim for full political independence or autonomy; it is a claim for some independent political control over significant aspects of its common life. Self-determination implies an independent domain of political control, but it leaves open the domain of control (what sorts of activities and institutions the group controls), the extent of its control over various items in the domain, and the particular

political institutions by which the group exercises control over its domain.⁸⁹

What is the content of the right of self-determination? We can begin by looking to the principles and practices of international law. Thomas Franck suggests three components to the normative entitlement to democracy in international law, which already enjoy "a high degree of legitimacy in international law": the right to participate in political processes, the right of free political expression, and the right to take part in "periodic and genuine elections which shall be taken by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." Together these elements aim at "creating the opportunity for all persons to assume responsibility for shaping the kind of civil society in which they live and work."⁹⁰

Turning to moral and political theory, a more minimalist interpretation of the right of self-determination says it is a right to *some* say in the making of the policies to which one is subject. For example, one might focus on accountability rather than equal rights of participation, identifying, as Buchanan does, three features that make up a more minimal conception of democracy: (1) representative majoritarian institutions for making most general laws "such that no competent individual is excluded from participation," (2) the highest government officials are accountable to the people by being subject to removal from office, and (3) there are institutionally secured freedoms of speech, association, and assembly, which are required for reasonably free deliberation.⁹¹ On a more demanding interpretation of self-determination, what is required are *equal* rights of participation in the governing processes. For example, Thomas Christiano defends the idea of each citizen having "an equal say" in determining the most fundamental public rules.⁹² This more demanding interpretation is required for an account of self-determination to count as democratic self-determination.

What are the grounds of the right of democratic self-determination? To anticipate the objection that democratic self-determination is inherently incompatible with respecting individual human rights, it is important to see that self-determination can be derived from the premise that all persons *qua* persons should be treated with equal concern and respect (the moral equality

principle). There are different views about what it is about persons that is to receive equal respect (e.g., whether it is the well-being/good of persons or the autonomy of persons that is the proper object of equal consideration), which we need not settle here. The moral equality principle is the most common justification offered for basic human rights, rights whose violation poses the most serious threat to the individual's chances of living a decent human life. The familiar list of basic human rights includes the right to life, the right to security of the person, the right against enslavement and torture, and the right to resources for subsistence, among others. More controversially, the case can be made that respecting the moral equality of persons also requires recognition of the right to democratic governance. Equal consideration requires that all persons be regarded as equal participants in significant political decisions to which they are subject. The right to democracy is an important element of the institutional recognition of the equality of persons.

Even if one rejects the idea of a human right to democratic governance, there are instrumental reasons for recognizing the right to democracy as a legal aspiration in international law. Democratic governance is of such great instrumental value for the protection of human rights that it ought to be required for any government to be considered legitimate. Evidence in support of this argument is Amartya Sen's work showing famines are much less likely in democracies, as well as the "democratic peace" literature that suggests democracy is the most reliable form of government for securing peace, which should lessen the violation of human rights.⁹³ These arguments support the case for understanding the right of self-determination as a right to *democratic* governance.

B. The Right of Self-Determination Includes the Right to Control Admission and Membership

The right of self-determination of a people is the right to independent political control over significant aspects of its common life. As Frederick Whelan puts it, "The admission of new members into the democratic group . . . would appear to be such a matter, one that could not only affect various private interests of the current members, but that could also, in the aggregate, affect the quality

of their public life and the character of their community."⁹⁴ Walzer goes even further: "Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination."⁹⁵ I agree with the basic claim made here by Whelan and Walzer but part ways with Walzer on the grounds for self-determination. In my view, the right of self-determination derives not out of a concern to preserve a distinctive cultural identity as discussed earlier, but rather from respecting the right of individuals to be regarded as equal participants in significant political decisions to which they are bound.

C. The Demos Should Be Bounded by the Territorial Boundaries of the State

This is a controversial claim, which I have defended in another essay and which I can only briefly summarize here.⁹⁶ I begin with the normative requirements of democracy. A settled conviction about democracy is that it is rule by the people who regard one another as equals. What is required to meet this demand of equal regard? The idea of equality might enter a theory of democracy at different levels: at the level of normative justification and at the level of institutional design.⁹⁷ A more complex view of democracy differentiates between normative justification and the institutional requirements of democracy. As a matter of justification, the idea of equality places limits on the sorts of reasons that may be given to explain why we should accept one rather than another conception of fair terms of democratic participation. It is the role of a theory of *political equality* to connect the normative justification with the institutional requirements of democracy. Political equality is a constitutive condition of democracy. Political equality requires protecting certain equal rights and liberties, as well as ensuring the equal worth of these rights and liberties by providing equal opportunities for political influence.

The realization of political equality depends on the existence of a stable bounded demos. The modern state demarcates such a stable demos. The boundaries of the demos are already demarcated according to the boundaries of state membership, but my argument is not that we should accept the state system because it is the status quo. My point is that we have reasons internal to democracy

for bounding the demos according to the territorial boundaries of states. What are these democratic reasons?

First, it is a historically contingent but morally relevant fact that the modern state is the primary instrument for securing *the substantive rights and freedoms constitutive of democracy*. Without the state, individuals will disagree about what rights they have and when rights are violated. Even if individuals agree on what rights they have, some people may not respect those rights without a common third-party enforcer. A state system of public law establishes a common view of the rights of individuals, and it has the coercive means to enforce that view. The state also provides institutions for adjudicating conflicts among individuals. In short, the institutions of the modern state serve legislative, executive, and judicial functions necessary for the creation and maintenance of the system of rights, including rights of participation.⁹⁸

A second reason for bounding the demos according to the boundaries of the territorial state has to do with *solidarity*. The state is not simply an instrument of decision making or a means to securing rights; it is also a key site of solidarity, trust, and participation. Democratic participation happens not in a vacuum but in relation to a rich network of institutions. Trust plays an indispensable role here. As Charles Tilly has argued, trust "consists of placing valued outcomes at risk of others' malfeasance, mistakes, or failures." Trust relationships are those in which people regularly take such risks. Trust is more likely among a group of people who come together repeatedly within a stable infrastructure of institutions and who share a sense of solidarity rooted in a shared political culture. To the degree that individuals integrate their trust networks into political institutions, the greater the stake people have in the successful functioning of those institutions. As Tilly puts it, individuals "acquire an unbreakable interest in the performance of government. The political stakes matter."⁹⁹ A shared political culture based on common citizenship is crucial for fostering trust and solidarity, which in turn enables democratic participation.

A third reason for bounding the demos according to the territorial boundaries of states focuses on the connection between citizens and their *political representatives*. Democratic representatives must be accountable to a specified demos. As Seyla Benhabib has argued, "Democratic laws require closure precisely because democratic

representation must be accountable to a specific people."¹⁰⁰ A system of territorial representation ensures that political representatives know in advance *to whom* they are accountable. Territorial representatives know they are acting on behalf of the citizens of their state, and the solidarity based on a common political culture within a state is likely to make representatives more attentive to their constituents than if the constituents were all of humanity constituting a global demos or episodic demoi defined by the "all subjected" or "all affected" principles of democratic legitimacy.¹⁰¹

In sum, the demos should be bounded by state boundaries because the state (1) is the primary instrument for securing the conditions of democracy, (2) serves as the primary site of solidarity conducive to democratic participation, and (3) establishes clear lines of accountability between representatives and their constituents.

Among the many objections one might raise is that democratic theory, properly understood, presupposes an *unbounded demos*. Focusing directly on the issue of border control, Arash Abizadeh has argued that the democratic theory of popular sovereignty is incompatible with "the state sovereignty view," which says immigration control should be under the unilateral discretion of the state itself. Abizadeh comes to this conclusion by way of two premises: (1) that the demos is, in principle, unbounded, and (2) that democratic justification for a state's regime of border control is owed to all those subject to the border regime's coercive power. He defends the first premise by arguing that the contrary thesis (that the demos is inherently bounded) is incoherent. The incoherence is said to stem partly from the "boundary problem" in democracy theory: that democracy "cannot be brought to bear on the logically prior matter of the constitution of the group itself, the existence of which it presupposes."¹⁰² As I have argued elsewhere, the claim that democratic theory cannot answer the boundary problem rests on a narrow, proceduralist conception of democracy.¹⁰³ If we instead view democracy as a broader set of substantive values and principles, including the principle of political equality, we have reasons internal to democracy for bounding the demos according to the territorial boundaries of the state.

Abizadeh argues that the incoherence of attempts to bound the demos also stems from an externality problem: state action,

including its border policies, always involves exercising coercive power over members and nonmembers, and such power must be justified to all subjected to coercion. This point connects to Abizadeh's second major premise that interprets the idea of democratic legitimacy as requiring all those subject to a state's coercive power to have an *equal* say in the exercise of that power.¹⁰⁴ While I agree with Abizadeh that justification is owed to all those subject to the coercive power of the state, I disagree with the conclusion that justification must take the form of equal enfranchisement of all members and nonmembers in state policy making. It is plausible to think the demand for justification can be met in other ways that are compatible with democratic principles, such as supporting policies that respect the basic human rights of all those subjected to the policy and supporting the development of democratic institutions in the home states of nonmembers.

One reason for thinking that it may be compatible with democratic principles to have different responses for members and nonmembers arises from distinguishing coercion and authority in theorizing democratic legitimacy. Abizadeh interprets the principle of democratic legitimacy as requiring justification to all those who are subject to a state's *coercive power*. Another way of approaching democratic legitimacy is more attentive to, in Joshua Cohen's words, "democracy's institutional character": democratic legitimacy "arises from the discussions and decisions of members, as made within and expressed through social and political institutions designed to acknowledge their *collective authority*." We can recognize that democracy comes in many forms, but "more determinate conceptions of it depend on an account of membership in the people, and correspondingly, what it takes for a decision to be *collective*—made by citizens 'as a body.'"¹⁰⁵ The demos is not an aggregation of individuals coerced by the same power but rather an enduring collective that makes decisions with binding authority.

D. Citizens of a Territorial State, in Virtue of Their Role as Members of the (Territorially Defined) Demos, Have the Right to Control Admission and Membership

If claims 1 to 3 are plausible, then it is citizens of a territorial state, in virtue of their role as members of the territorially defined

demos, who have the right to control borders and membership. Citizens are both the ultimate beneficiaries and the ultimate authors of the exercise of jurisdictional authority, through democratic processes of participation and representation.

In contrast to the property justification, the state's right to control immigration is neither an instance of nor derived from private property rights; it is a jurisdictional right. In contrast to the cultural and nationalist accounts, the state's right to control immigration is not grounded on a claim about the importance of preserving a distinctive culture or national identity; it rests on the right of members of the territorially defined demos to be self-governing as political equals. Self-governance includes not only control over current collective decision making and the future direction of the political system but also the right to regulate admission into the territory and into full membership. In contrast to the freedom of association argument, the state's right to control immigration does not rest on analogies with marriage, religious associations, and golf clubs, and it does not elide property rights over golf clubs with jurisdictional rights over a state's territory. The state is importantly disanalogous from other associations not only because state membership is typically nonvoluntary but also because of the state's indispensable role in meeting the constitutive and instrumental conditions of democratic participation and representation.

IV. CONCLUSION

It is important to clarify the ways in which the arguments presented here are limited. In pursuing the question of why the modern state has the right to control immigration, I have not provided an answer to the important question, How should the state's claim to control immigration be weighed against the migrant's claim to enter? To answer this question, we need to consider not only the perspective of the political community but also the perspective of migrants. More than twenty-five years ago, Joseph Carens famously made the case for open borders, concluding "there is little justification for restricting immigration."¹⁰⁶ Although Carens did not grapple seriously with the idea of self-determination and the normative requirements of democracy, his essay is a powerful reminder that consideration of what migrants are owed should be

central to any debate about the ethics of migration. In this chapter, I have argued that the state has a *pro tanto* right to control immigration based on the normative requirements of democracy. This is *not* to say that this right is an absolute constraint that "trumps" all other considerations. *Pro tanto* reasons for action are typically contrasted with conclusory reasons for action; the latter require us to act, regardless of other considerations in play. *Pro tanto* reasons are reactions for action, but they may be overridden by competing reasons.¹⁰⁷ The next step is to develop a broader normative framework for considering the claims of migrants alongside the claims of political community.

In addition, I want to clarify that the democratic argument for the state's right to control immigration is *not* an argument for "closed borders" or "exclusion." The democratic argument offered here speaks to the question of *who* has the right to control, not how open or closed borders should be. I believe democratic political communities have strong reasons, arising from the values and principles of liberal democracy, for supporting more porous border policies than most countries have pursued in practice. Exploring these reasons and their implications for contemporary immigration policy is a task I leave for another day. The point of this chapter has been to take seriously the idea of the democratic right of self-determination and its implications for who has the right to control immigration.

NOTES

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1. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892), citing Emer de Vattel, *Les droit des gens* [*The Law of Nations*] (1758), ed. Béla Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), II.94, II.100.

2. Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton, NJ: Princeton University Press, 2006), 99. Bosniak interprets Michael Walzer as an exemplar of such a "separation" approach. He accepts the right of political communities to control "first ad-

missions" (immigration), but once persons are admitted to the national territory, "second admissions" (naturalization) into full membership "are subject only to certain constraints of time and qualification, never to the ultimate constraint of closure" (Michael Walzer, *Spheres of Justice* [New York: Basic Books, 1983], 61). I examine Walzer's view in greater detail later in the chapter. For discussion of the feasibility and desirability of making this distinction, see Bosniak, *The Citizen and the Alien*, and Adam B. Cox, "Immigration Law's Organizing Principles," *University of Pennsylvania Law Review* 157 (2008): 341–93.

3. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

4. Rogers M. Smith, "Beyond Sovereignty and Uniformity: The Challenges for Equal Citizenship in the Twenty-First Century," *Harvard Law Review* 122 (2009): 919. For other interpretations of these canonical immigration law cases as novel assertions of strong state sovereignty, see Stephen H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* (Oxford: Oxford University Press, 1987), 177–222; Louis Henkin, "The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny," *Harvard Law Review* 100 (1987): 862–63; Bosniak, *The Citizen and the Alien*, 51.

5. *Chae Chan Ping*, 130 U.S. at 603.

6. The Constitution explicitly mentions the power to "establish a uniform Rule of Naturalization" (Art. I, § 8, cl. 4), but it is silent on the power over admission and exclusion of foreigners outside the territory.

7. As Hiroshi Motomura observes, this was an earlier era of constitutional law when equal protection was on its way toward "separate but equal" and judicial recognition of the substantive and procedural rights of individuals was "far beyond the constitutional horizon" ("Immigration Law after a Century of Plenary Power," *Yale Law Journal* 100 [1990]: 551).

8. *Chae Chan Ping*, 130 U.S. at 609.

9. *Chae Chang Ping*, 130 U.S. at 603–4.

10. *Chae Chan Ping*, 130 U.S. at 606.

11. *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892).

12. Motomura, "Immigration Law after a Century of Plenary Power," 552.

13. *Nishimura Ekiu v. United States*, 142 U.S. at 659.

14. The U.S. Supreme Court cited Vattel as its prime authority for international law cases into the late nineteenth century. Arthur Nussbaum notes that in the history of the law of nations, Vattel's book attained a circulation second only to Grotius's *De jure belli ac pacis* (*On the Law of War and Peace*, 1623–24). He attributes Vattel's influence to several factors: the need for a systematic reference book on international law at a time when there was a rapid increase in international legal problems; the outdat-

edness of Grotius's seventeenth-century work; "the ambiguity of Vattel's propositions—indeed, the ambiguity of an oracle" that made it an easy reference in diplomatic correspondence; and the fact that "the spirit of the work" was "well in accord with the principles of the Declaration of Independence." See Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1954), 160–61.

15. Vattel, *The Law of Nations*, II.94, cited in *Nishimura Ekiu v. United States*, at 659.

16. Nicholas Greenwood Onuf contends Wolff was the last systematic thinker to give this teleological vision unqualified support ("Civitas Maxima: Wolff, Vattel and the Fate of Republicanism," *American Journal of International Law* 88 [1994]: 283).

17. See also Frederick G. Whelan, "Vattel's Doctrine of State," *History of Political Thought* 9 (1988): 76–81.

18. Nussbaum, *Concise History of the Law of Nations*, 150–51; Onuf, "Civitas Maxima," 297–301.

19. Vattel, *The Law of Nations*, I.13–14. After World War I, Vattel was interpreted as an unconditional supporter of reason of state who "disguised his evil intentions through words of sublime charity" (Béla Kapossy and Richard Whatmore, "Introduction," in Vattel, *The Law of Nations*, xiv–xvi). By contrast, other interpreters of Vattel maintain that his approach is "more humanitarian, more cosmopolitan, and, in a measure, even democratic" (Nussbaum, *Concise History of the Law of Nations*, 157).

20. Emer de Vattel, *Essay on the Foundation of Natural Law and on the First Principle of the Obligation Men Find Themselves under to Observe Laws*, in *The Law of Nations*, 752.

21. Kapossy and Whatmore, "Introduction," xvii; Whelan, "Vattel's Doctrine of State," 83.

22. Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999), 20.

23. Whelan, "Vattel's Doctrine of State," 80. This emphasis on the equality of sovereign states is reflected in the Preamble to the UN Charter (1945), which speaks of the "equal rights . . . of nations large and small."

24. Vattel, *The Law of Nations*, II.123.

25. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) at 707–8.

26. *Ibid.* at 713. Justice Gray also rejected the claim that deportation constitutes punishment: "The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment" (730).

27. *Yamataya v. Fisher*, 189 U.S. 86 (1903). The government had arrested and tried to deport Yamataya four days after she had landed in the United States.

28. Motomura, "Immigration Law after a Century of Plenary Power," 554.
29. However, in a series of cases in the twentieth century, rather than softening the plenary power doctrine's harshest aspects in regard to the treatment of noncitizens present in the U.S. territory, the Court has upheld the U.S. government's power to exclude such noncitizens. See, e.g., *United States ex rel. Knauff v. Shaughnessy*, 163 U.S. 537 (1896); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).
30. Whelan, "Vattel's Doctrine of State," 74.
31. Vattel, *The Law of Nations*, II.100; cf. II.94. For further discussion, see Whelan, "Vattel's Doctrine of State," 73–75.
32. Walzer, *Spheres of Justice*, 39.
33. *Ibid.*, 62 (emphasis in original).
34. *Ibid.*
35. He proposes that Australians, given their racial preferences in the early twentieth century, faced one of two choices: they could discharge the duty of mutual aid to "necessitous men and women, clamoring for entry," either by admitting them or by yielding some of their land for the needy strangers to establish a separate community, thereby preserving a "white Australia" (Walzer, *Spheres of Justice*, 46–47).
36. David Miller, "Immigration: The Case for Limits," in Andrew I. Cohen and Christopher Heath Wellman, eds., *Contemporary Debates in Applied Ethics* (Oxford: Blackwell, 2005), 200.
37. *Ibid.*, 200–201.
38. David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), 218.
39. Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University Press, 2003), 100.
40. John Locke, *Second Treatise of Government*, ed. C. B. MacPherson (Indianapolis: Hackett, 1980), § 27, 40.
41. Tamar Meisels, *Territorial Rights*, 2nd ed. (New York: Springer, 2009), 118.
42. Miller, *National Responsibility and Global Justice*, 218.
43. As Meisels puts it, "For all the references to property argumentation and to Locke himself throughout this book, none of its arguments entails the straightforward and unequivocal application of Lockean property arguments—or any other theory of property for that matter—to the national case" (*Territorial Rights*, 8).
44. *Ibid.*, 126–27.
45. Miller, *National Responsibility and Global Justice*, 218–19 (emphasis in original).
46. Locke, *Second Treatise of Government*, § 40.

47. Anna Stilz, "Nations, States, and Territory," *Ethics* 121 (2011): 577.
48. Allen Buchanan, "Boundaries: What Liberalism Has to Say," in Allen Buchanan and Margaret Moore, eds., *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003), 233.
49. Christopher Heath Wellman, "In Defense of the Right to Exclude," in Christopher Heath Wellman and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (Oxford: Oxford University Press, 2011), 25.
50. *Ibid.*, 31.
51. Stuart White, "Freedom of Association and the Right to Exclude," *Journal of Political Philosophy* 5 (1997): 360–61.
52. Wellman, "In Defense of the Right to Exclude," 37.
53. Christopher Heath Wellman, "Immigration and Freedom of Association," *Ethics* 119 (2008): 109.
54. White, "Freedom of Association," 381, cited in Wellman, "In Defense of the Right to Exclude," 32 (emphasis added).
55. Sarah Fine, "Freedom of Association Is Not the Answer," *Ethics* 120 (2010), 349–50.
56. Wellman, "Immigration and Freedom of Association," 114.
57. This is not to deny that in some contexts, exclusion from a golf club or other voluntary associations, such as the Jaycees or Boy Scouts, can result in significant harms to those excluded. Context-sensitive judgments are necessary to determine whether the harms are significant such as to require constraints on the association's right to exclude.
58. Wellman, "In Defense of the Right to Exclude," 39–40.
59. Wellman, "Immigration and Freedom of Association," 135.
60. Wellman does suggest a territorial requirement of sorts: that states must be "sufficiently territorially contiguous" to fulfill their functional purposes. In his work on secession, he suggests the territorial contiguity requirement justifies state coercion of all inhabitants within a state's territory. However, while this requirement might support the state's claim to coerce those individuals already inside its borders, the requirement has no bearing on the state's right to exclude foreigners outside its territory who wish to enter. See Wellman, "Immigration and Freedom of Association," 131; Christopher Wellman, *A Theory of Secession* (Cambridge: Cambridge University Press, 2012), 16–17; Fine, "Freedom of Association Is Not the Answer," 355.
61. Locke, *Second Treatise of Government*, chap. 5.
62. *Ibid.*, 8, § 120, p. 64 (emphasis added).
63. My discussion of the first two problems with individualistic Lockean accounts is indebted to Anna Stilz, "Why Do States Have Territorial Rights?," *International Theory* 1 (2009): 185–213.

64. Robert Nozick, *Anarchy, State, Utopia* (New York: Basic Books, 1974), 114–15.
65. *Ibid.*, chaps. 4–5.
66. Locke, *Second Treatise of Government*, chap. 2, §6, p. 9.
67. Hillel Steiner, "Territorial Justice," in Simon Caney, David George, and Peter Jones, eds., *National Rights, International Obligations* (Boulder, CO: Westview Press, 1996), 144.
68. Cara Nine, "A Lockean Theory of Territory," *Political Studies* 56 (2008): 150–54.
69. Locke, *Second Treatise of Government*, chap. 8, § 95, p. 52. Locke himself did not directly address the aspect of territorial rights pertaining to control over the movement of people and goods across borders. It is interesting to note that Locke has been a source for property-based defenses of a state's right to control immigration, as well as a source for contemporary libertarian arguments in favor of open borders.
70. Nine, "A Lockean Theory of Territory," 155–56 (emphasis added).
71. *Ibid.*, 157–61.
72. Ryan Pevnick, *Immigration and the Constraints of Justice* (Cambridge: Cambridge University Press, 2011), 33–34.
73. *Ibid.*, 38.
74. *Ibid.*, 44.
75. Pevnick, *Immigration and the Constraints of Justice*, 43–44. See also Jeremy Waldron, "Property and Ownership," *Stanford Encyclopedia of Philosophy* (2004).
76. Pevnick, *Immigration and the Constraints of Justice*, 164, 165.
77. For elaboration of this point, see Shelley Wilcox's review of Pevnick's book (*Ethics* 122 [2012]: 617–22).
78. Christian Wolff, *Jus gentium method scientifica pertractatum* [1749], sec. 2, pp. 9, 16.
79. See Charles Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1979), 76.
80. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), 54.
81. Beitz, *Political Theory and International Relations*, 77.
82. *Ibid.*, 69, 80.
83. *Ibid.*, 103.
84. *Ibid.*
85. Thomas M. Franck, "The Emerging Right to Democratic Governance," *American Journal of International Law* 86 (1992): 52.
86. Charter of the United Nations, Article 1, June 26, 1945.
87. International Covenant on Civil and Political Rights, December 16, 1966.

88. Franck, "Emerging Right to Democratic Governance," 54–5. James Anaya's distinction between "constitutive self-determination" (when a group makes a fundamental choice concerning its political status) and "ongoing self-determination" (self-government, though not necessarily full independence) captures two important dimensions of self-determination.
89. Another way of putting it is that the right of self-determination is a moral right, which could take a range of legal forms and may sometimes be overridden by competing moral values. As some theorists of international law have emphasized, "the right of self-determination" is a moral right that encompasses a diverse bundle of legal rights, which needs to be disaggregated and includes not only the right of secession but also forms of intra-state autonomy, such as federalism. See Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), 333, 343.
90. Franck, "Emerging Right to Democratic Governance," 91, 63 (quoting from the Universal Declaration of Human Rights, Article 21), 79.
91. Buchanan, *Justice, Legitimacy, and Self-Determination*, 146.
92. Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford: Oxford University Press, 2008). See also Joshua Cohen, "Deliberation and Democratic Legitimacy," in Alan Hamlin and Philip Pettit, eds., *The Good Polity: Normative Analysis of the State* (Oxford: Basil Blackwell, 1989), 17–34.
93. Amartya Sen, "Democracy as a Universal Value," *Journal of Democracy* 10 (1999): 3–17; Bruce Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton, NJ: Princeton University Press, 1993). For more discussion of moral egalitarian and instrumental arguments for a human right to democracy, see Buchanan, *Justice, Legitimacy, and Self-Determination*, 142–44.
94. Frederick G. Whelan, "Citizenship and Freedom of Movement," in Mark Gibney, ed., *Open Borders? Closed Societies? The Ethical and Political Issues* (Westport, CT: Greenwood Press, 1988), 28.
95. Walzer, *Spheres of Justice*, 62.
96. Sarah Song, "The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State," *International Theory* 4 (2012): 39–68.
97. Charles Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton, NJ: Princeton University Press, 1989), 17–19.
98. Thomas Christiano has argued for the necessity of justice for democracy and the indispensable role played by the state in establishing justice and, from these premises, has developed a democratic theory of terri-

tory. See Christiano, "A Democratic Theory of Territory and Some Puzzles about Global Democracy," *Journal of Social Philosophy* 37 (2006): 81–107. My argument views *democracy* as an independent ideal and asks what substantive rights and goods are required by the ideal, although I think what I am saying here is consistent with an account, such as Christiano's, that links the demands of justice with the demands of democracy.

99. Charles Tilly, *Democracy* (Cambridge: Cambridge University Press, 2007), 74.

100. Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004), 219.

101. On the limits of empathy and the difference that size makes, see Robert A. Dahl, *On Political Equality* (New Haven, CT: Yale University Press, 2006), 42–44, 59–63. See also Rousseau, *On the Social Contract, in The Basic Political Writings*, trans. Donald A. Cress (Indianapolis, IN: Hackett Publishing, 1987), 2:9.

102. Arash Abizadeh, "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders," *Political Theory* 36 (2008): 46, quoting Frederick G. Whelan, "Prologue: Democratic Theory and the Boundary Problem," in J. Roland Pennock and John Chapman, eds., *NOMOS XXV: Liberal Democracy* (New York: NYU Press, 1983), 40.

103. Song, "The Boundary Problem in Democratic Theory."

104. Abizadeh develops his democratic version of the coercion principle ("the democratic justification thesis"), building on the work of Joseph Raz and Michael Blake. Blake argues that a state's coercive practices trigger a demand for moral justification to all persons subject to coercion if we are to take seriously the individual autonomy of persons. It is worth noting that Blake seems to assume that the boundaries of state coercion coincide with the state's territorial boundaries. See Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), and Michael Blake, "Distributive Justice, State Coercion, and Autonomy," *Philosophy and Public Affairs* 30 (2001): 257–96.

105. Joshua Cohen, "Procedure and Substance in Deliberative Democracy," in *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton, NJ: Princeton University Press, 1996), 407.

106. Joseph Carens's essay remains the leading defense of the claim that all persons have the right of freedom of movement across national borders, premised on the moral equality of all human beings and considered from libertarian, utilitarian, and Rawlsian principles (Carens, "Aliens and Citizens: The Case for Open Borders," *Review of Politics* 49 [1987]: 251–73).

107. On this distinction, see Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), 116–17.

2

THREE MISTAKES IN OPEN
BORDERS DEBATES

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What might justify laws that restrict the free movement of people across international borders? In this chapter I hope to correct three common mistakes made by those who try to answer this question.

First, I argue that debates about open borders often conflate three quite distinct questions—about whether border restrictions are ever permissible, about when they are permissible, and about who gets to decide which are permissible. Keeping these questions separate, as well as understanding the analytic relationship among them, is crucial to making progress on philosophical issues related to international migration.

Second, I want to draw attention to a historical mistake that often lurks in the background of open borders debates. Early American immigration jurisprudence often features prominently in discussions by both legal scholars and political philosophers. This is because the canonical cases from the period of Chinese exclusion are widely seen as the moment when the U.S. Supreme Court definitely rejected open borders claims and laid out the legal justification for state-imposed restrictions on migration. As I will show, however, this view is mistaken. These canonical cases were not about open borders arguments, and as a result they have little or nothing to say about what might justify restrictions on migration.