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# Just Borders: The Foundations of Immigration Policy

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JUST BORDERS: THE FOUNDATIONS OF IMMIGRATION  
POLICY

by

CODY FENWICK

A master's thesis submitted to the Graduate Faculty in Liberal Studies in partial fulfillment of  
the requirements for the degree of Master of Arts, The City University of New York

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This manuscript has been read and accepted for the Graduate Faculty in Liberal Studies in satisfaction of the thesis requirement for the degree of Master of Arts.

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## ABSTRACT

Just Borders: The Foundations of Immigration Policy

by

Cody Fenwick

Advisor: Karen Miller

Do countries have a presumptive right to limit immigration at their discretion? It is often assumed that they do, though both the immigration restrictions championed in practice and the purported justifications for the principled right to deny entry to foreigners are often supported by implicit (or explicit) racist prejudices. Many political philosophers have offered putatively more sophisticated and reasoned defenses of the state's discretionary right to restrict immigration. I discuss the philosophical arguments for the restrictionist view on grounds of national territorial rights, and separately, on the grounds of nationalist partiality toward one's fellow citizens. I will argue that both of these apparent grounds for immigration restrictions fail to justify the right to adopt exclusionary policies. My thesis, then, is a negative one, breaking down a philosophical position and dismantling its arguments rather than constructing a new theory. But in casting down a fundamentally flawed theory, my arguments, I believe, gesture toward the outline of a more promising view of just national borders.

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## INTRODUCTION

On his campaign website, then-candidate for president Donald Trump declared in 2016, “A nation without borders is not a nation. ... A nation that does not serve its own citizens is not a nation. Any immigration plan must improve jobs, wages, and security for all Americans.”

And when Bernie Sanders, a Democratic candidate for president, was asked specifically in an interview with *Vox* about whether an “open borders” policy — effectively eliminating immigration restrictions — could make the world’s poor much better off, he replied:

“It would make everybody in America poorer — you're doing away with the concept of a nation state, and I don't think there's any country in the world that believes in that. If you believe in a nation state or in a country called the United States or UK or Denmark or any other country, you have an obligation in my view to do everything we can to help poor people.”

These quotes both reflect essentially the same view: national sovereignty—that is, that which makes a country a country—requires restricted access to immigration. This is a common view, and it is conceptually distinct from the bias and often-malicious prejudice often directed toward immigrants. But whether it can be justified or made commensurate with the foundational principles of liberal democracy is an open question.

Philosophers have offered myriad arguments in support of restrictionist immigration policies like those Sanders and Trump defended in the preceding quotes. On the restrictionist view, it is up to countries to choose which immigration policies they would like to adopt through their deliberate processes. In other words, nations are justified in exercising near-complete discretion to restrict immigration, and they can do so without violating the bounds of justice (the major widely accepted exception to this discretion is the international law regarding refugees and asylum seekers). My aim is to examine these arguments and see whether they hold up against

critical scrutiny.

The arguments I discuss argue for this view either on grounds of national territorial rights or on grounds of nationalist partiality toward one's fellow citizens (or some combination of the two). I will argue that both of these apparent grounds for immigration restrictions fail to justify these policies. My thesis, then, is a negative one, breaking down a philosophical position and dismantling its arguments rather than constructing a new theory. But in casting down a fundamentally flawed theory, my arguments, I believe, gesture toward the outline of a more promising view.

But before delving into philosophical theory, it is worth examining the state of the mainstream debates about immigration policy. The history and present of immigration restrictions in the United States has been repeatedly been justified with appeals to false and bigoted ideas, as I will show. While I later consider serious philosophical arguments in favor of immigration restrictions, understanding the racism at the center of much anti-immigrant sentiment is a necessary precondition for assessing the foundations of these policies.

As Charles Jaret notes, though attitudes towards immigration at the turn of the twentieth century in the United States were relatively lax, the major exception was anti-immigrant bias toward Asians. In particular, many working class people were particularly suspect of Chinese immigrants, whom they accused of taking the jobs and wages that belonged to Americans.<sup>1</sup>

Labor unions, backed largely by white workers, lobbied successfully for passage of the Chinese exclusion act in 1882, which restricted immigration by Chinese workers. The unions typically justified this policy based on the need to protect union jobs and to prevent the supply of cheap Chinese labor from driving down wages for the rest of the population. Prior to the Chinese

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<sup>1</sup> Jaret (1999) pg. 27.

Exclusion Act, the Immigration Act of 1875 banned criminals from immigrating to the United States, and prohibited the bringing in or contracting of forced Asian immigrant Labor. This was the first American law passed to limit immigration.

Reviewing a series of anti-Asian posters and cartoons in her article “Old ‘Yellow Peril’ Anti-Chinese Propaganda,” Gwen Sharp sheds light on some of the motivations for exclusion and prejudices towards these immigrants. Before the categorization of Latinos had cultural meaning, Asians were seen not as white or black, but as yellow, giving rise to fear mongering over the supposed “yellow threat.” Most of the Chinese immigrants who came to the United States before the twentieth century were single men—women were not allowed to immigrate—and they were viewed as threats to white women. In these images the Chinese men are depicted as ravenous, animalistic, and violent, with grossly exaggerated and racialized features. Other imagery stressed the moral superiority of white men who took care of their wives and children over the more itinerant single lives of the Chinese men, who were shown living in squalor. This imagery was used to stress the injustice of letting immigrants drive down the wages of hard-working native-born American citizens. Sharp notes that attitudes towards the Chinese didn’t shift again in American thought until the World War II, when they were seen as good relative to the Japanese, who became the enemy.

Meanwhile, Italians and European Jews, two of the largest groups coming to the United States at the beginning of the twentieth century, were not viewed, as they largely are in the twenty-first century, as whites. Rather, they were regarded as “mongrel” races, distinct from Nordic and Anglo-Saxon peoples.<sup>2</sup> Italians and Jews were not seen to be on the same level as the people of Asian or of African descent, and they were frequently permitted the status of “white”

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<sup>2</sup> Foner (2000) pg. 143.

citizens when they were naturalized. But there was also a widespread belief, accepted even in academic and scientific circles of the day, that Jews and Italians could dilute the quality of the American racial makeup and that they were racially inferior to Northern and Western Europeans. On the forefront of this form of “scientific racism” was a well-known book published in 1916 called *The Passing of the Great Race*. Author Michael Grant expounded the virtues of the fairer-skinned Europeans while decrying any mixing with the darker-skinned Mediterranean peoples. Another observer wrote in 1915 about the fears of intermarriage between native-born Americans and the “new immigrants” that “it is fair to say that the blood now injected into the veins of our people is sub-common.”<sup>3</sup>

Jaret observes that straightforward racism of the sort previously commonly expressed alongside anti-immigrant attitudes, has largely fallen out of favor in the mainstream discourse.<sup>4</sup> Certainly, explicitly racist attitudes are still expressed, but these more often come from marginal voices. Even when mainstream voices express extreme anti-immigrant views, they tend to include a caveat that the views are not based on race. For instance, when Donald Trump announced his campaign for president in June 2015, his speech included the lines:

When Mexico sends its people, they’re not sending their best. ... They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.

After facing criticism for these remarks, he urged that he was just stating the truth and that, “I’m not a racist. I don’t have a racist bone in my body.” Previous opponents of immigration at the beginning of the twentieth century had no need to deny charges of racism.

But many of the fears now cited about immigration are consistent with those that were

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<sup>3</sup> Ross (1917) pg. 72.

<sup>4</sup> Jaret (1999) pg. 25.

propounded in the nineteenth century. For instance, even back in 1931, Edith Abbott wrote in a report of the National Commission on Law Observance and Enforcement:

The theory that immigration is responsible for crime, that the most recent ‘wave of immigration,’ whatever the nationality, is less desirable than the old ones, that all newcomers should be regarded with an attitude of suspicion, is a theory that is almost as old as the colonies planted by Englishmen on the New England coast.<sup>5</sup>

Such claims, though common, are not rooted in reality.

In their analysis of crime and incarceration rates from 1904, Moehling and Piehl found that there was only mild statistical support for the view that immigrants were particularly prone to criminal behavior. Rates of major crime were similar for native-born and foreign-born populations in the United States, except for the cohort of men ages 18 and 19. At these ages, immigrants were significantly more likely to commit serious crimes. However, this difference disappeared by 1930, at which time immigrants were slightly *less* likely to be incarcerated than the native born population. The authors also note that in 1904 immigrants were more often charged with minor crimes. They argue that this tells us very little about actual crime rates because prejudice against immigrants likely led to harsher scrutiny by law enforcement.<sup>6</sup>

Studies on recent effects of immigration on crime rates are even more definitive. In particular, Ousey and Kubrin examined Census data on immigration, crime, and other demographic measures from 1980, 1990, and 2000 in 159 American cities. They examined the changes in immigration patterns and changes in crime rates, using regression analysis to examine whether increases in immigration led to a rise in crime. In fact, they found the opposite: areas with increased immigration saw a decrease in violent crime. They posit that this is due to the

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<sup>5</sup> Quoted in Moehling and Piehl (2009) pg. 739.

<sup>6</sup> Moehling and Piehl (2009) pg. 760.

strong family relationships, which are more common among immigrant households, since single-parent households and divorce rates are positively correlated with crime rates.<sup>7</sup> This work joins a large body of evidence suggesting that immigrants are less likely to commit crimes compared to native-born Americans. Another more recent study by Aaron Chalfin found that Mexican immigration specifically led to no increase in the property or violent crime rates in American cities. To compensate for possibly confounding factors, such as already decreasing crime rates attracting immigrants to certain cities, Chalfin examined the effects of poor weather patterns in Mexico as a cause of increased migration. Under these conditions, the null hypothesis was confirmed.

And yet, anti-immigrant views based on fear of crime persist, as expressed in the quote above from Trump. During much of his campaign for president in 2015 and 2016, Trump portrayed the United States as besieged by crime, emphasizing the threat posed by immigrants. He won the Republican Party nomination in 2016 in part on his pledge to build a wall—paid for by Mexico—on the southern U.S. border to keep out immigrants. His inaugural address in January 2017 referred to the “American carnage” of “the crimes and gangs and drugs that have stolen too many lives.” In December 2017, in the midst of legislative negotiations about immigration policy, he said his opponents in the Democratic Party wanted “to have illegal immigrants pouring into our country, bringing with them crime, tremendous amounts of crime.”

Under the Trump administration, the Department of Homeland Security opened an office called Victims of Immigration Crime Engagement aimed at drawing attention to immigrant crimes. The president himself frequently referenced the gang MS-13, largely consisting of members of Central American heritage, as a major law enforcement priority. The Department of

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<sup>7</sup> Ousey and Kubrin (2009) pg. 466.

Justice released a 2018 report in partnership with DHS purporting to show that immigration was a major cause of terrorism. Many experts criticized this report as deeply misleading, as it counted people extradited to the United States who are believed to have committed crimes abroad, and it did not include in its account any incidents of domestic terrorism.

Trump's portrayal of the United States as a country gripped by crime did not reflect reality. He has said multiple times that the country's murder rate was the "highest it's been in 47 years," when in fact it was near a 45-year low. According to data from the Justice Department, nationwide violent and property crime rates dropped precipitously in 1990s from their heights in the crime wave that swept the 1970s and 1980s. Though the United States did experience an increase in the murder rate for a few years following 2014, it still remained exceptionally low by comparison to recent decades. And since the share of the United States population that is foreign-born continued to rise after crime began to plummet in early 1990s, any attempt to link immigration to national chaos would strain credibility.

Given the evidence that immigrants do not raise the crime rate, what accounts for the persistent myth? Brader et. al examined the motivation for opposition to immigration to test the hypothesis that the most important determinant in anti-immigrant attitudes is who the immigrants are. They wanted to examine the impact news coverage and media discussions of immigration affects public opinion. In a series of nationally representative experiments, they found that white Americans were more opposed to immigration when news about the downsides to immigration featured images of Latino immigrants rather than Europeans.<sup>8</sup> Even when the information presented was identical, the researchers found that cues suggesting immigrants belong to a racialized nonwhite group triggered greater fear and subsequent opposition to increased

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<sup>8</sup> Brader et al. (2008) pg. 975.

immigration. Respondents who viewed images of European immigrants while the supposed downsides of immigration were emphasized reported a similar change in their perception of immigration as a threat, but only the anxiety caused by images of Latino immigrants led to hostile reactions and attitudes towards immigrants.

This research suggests that opponents of immigration likely are motivated by racist attitudes, even if they do not recognize them as such. It also means that the most effective rhetoric against immigration will play on public attitudes and mistrust of racialized groups, even if it explicitly rejects racism.

When President Trump, having run a campaign that highly exaggerated the extent of immigrant criminality, moved to make immigration legislation, further evidence of its racist motivation appeared. In a meeting with a group of senators to discuss a proposal in January 2018, the president wondered aloud why Americans would want immigrants from “shithole” countries such as Haiti or African nations, according to multiple reports of the event. Instead, he reportedly suggested that immigrants from places such as Norway should be encouraged to come. Sen. Tom Cotton of Arkansas, a Republican ally of Trump who worked closely with the president on immigration legislation, approvingly cited on Twitter an article by writer Andrew Sullivan arguing “huge shifts in the ethnic and racial demography of a country” were a legitimate worry for immigration policymakers. Cotton and Trump both endorsed the RAISE Act, which would cut the authorized immigration rate in half.

One of the other main critiques of immigration that has been popular since the Chinese Exclusion Act is the claim that immigrants pose an economic threat to the native-born population, and in particular, those who are economically vulnerable. In the article “The wage impact of the Marielitos: A reappraisal,” for example, George Borjas cites the case of the Mariel

Boatlift, a period of mass emigration from Cuba to Miami in the early 1980s, to argue that the new migrants decreased the wages of native born low-income workers. David Roodman has disputed these findings and argues that negative effects, such that they exist at all for low-income workers, are at most very modest. Borjas represents a minority opinion among academic economists, who by and large view immigration as a boon to the economy as a whole.

But perhaps most interesting is research by Citrin et al. that found that anti-immigrant sentiment was not very highly correlated with personal economic insecurity. That is, those who would suffer most if immigration depressed native wages were not much more likely to oppose immigration. Using the National Election Study survey data from 1992 and 1994, the researchers found that opposition to immigration was largely driven by perceptions of the health of the American economy, anxiety over taxes, and negative attitudes towards Asians and Hispanics, rather than personal economic interest.<sup>9</sup>

A later study by Fetzer confirmed these findings by examining anti-immigrant attitudes in the United States, France, and Germany. He used public opinion poll data to analyze personal characteristics that predicted opposition to immigration in each of these countries. Again, general economic vulnerability was only weakly correlated with anti-immigrant sentiment; being unemployed showed no effect on attitudes towards immigrants at all.<sup>10</sup> Fetzer also tested the significance of cultural marginality, and found that belonging to minority racial, ethnic, or religious groups, as well as being female or foreign born, decreases the likelihood of holding anti-immigrant views. This is consistent with the view that racial minorities may be more likely to oppose immigration, because these groups tend to have other characteristics that do contribute

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<sup>9</sup> Citrin et al. (1997) pg. 877.

<sup>10</sup> Fetzer (2000) pg. 17.

to the development of anti-immigrant attitudes, such as low educational attainment and low-status occupations. Holding all else constant, racial minorities will be more likely to favor immigration than white Americans.<sup>11</sup>

In short, many of the purported justifications for anti-immigrant attitudes, such as immigrant proclivity for crime, are not supported by evidence. Similarly, despite the long-lasting popularity of the claim that immigrants negatively affect wages, economic vulnerability to these sorts of conditions is not predictive of personal opposition to immigration. One would assume that if concern about the economic impacts of immigration were truly an important concern, it would be felt most by those who would suffer from economic disruption.

Academic studies also suggested that racist attitudes were predictive of support for Donald Trump's 2016 president campaign, which, as discussed, perpetuated anti-immigrant ideas and promised restrictionist policies. Major, Blodorn, and Blascovich found, for example:

Reminding White Americans high in ethnic identification that non-White racial groups will outnumber Whites in the United States by 2042 caused them to become more concerned about the declining status and influence of White Americans as a group (i.e., experience group status threat), and caused them to report increased support for Trump and anti-immigrant policies.<sup>12</sup>

Another study by Luttig, Federico, and Lavine found racist attitudes among the president's supporters. Trump voters were more likely to oppose housing policies when they were primed to think the beneficiaries would be a black person rather than a white person. These findings further support the contention that racist attitudes are a significant motivation behind support for restrictionist immigration policies.

Though new trends in anti-immigrant attitudes continue to shape policy discussions on

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<sup>11</sup> Ibid.

<sup>12</sup> Major, Blodorn, and Blascovich (2018) pg. 931.

the topic of immigration in the United States, there are resilient threads and patterns of thought that persist over generations. In what follows, I move from examining the historical patterns of anti-immigrant sentiment to an analysis of philosophical arguments in favor of strong immigration restrictions. I will explain and rebut various arguments for a strong discretionary right to exclude immigrants. I break these arguments into two types: those that rely on territorial rights to justify exclusionary policies and those that rely on concepts of national community and partiality. Chapter 1 will cover my analysis of the concept of territorial rights and whether they justify restrictive immigration policy. In Chapter 2, I will turn to the concept of nationalist partiality.

## CHAPTER 1: The Dubious Foundations of Territorial Rights

Immigration restriction is not merely a matter of law enforcement, border patrol or employment policy. When a nation declares that immigrants will only be accepted into its borders for any long-term period, it is most fundamentally an assertion of territorial rights. It is, in other words, a claim about land: who has the rights to it, who can enter it, and who can be justly excluded from it.

In the 21<sup>st</sup> century, it has become widely accepted that nation-states legitimately claim territorial rights over all the land within their internationally recognized borders. Since the end of the Cold War and the following dominance of an increasingly capitalist world order, nations divide significant portions of their interior lands into private property, ceding much of the discretionary choices about the care, protection, and maintenance of the land to the owners.

However, even within the scheme of property rights, the state claims various higher-order rights: most saliently, the right to determine who is granted which land rights and what forms these rights take. It retains the authority to enforce contracts across property. All other forms of criminal, civil, tax, business and regulatory laws apply within the land it claims as territory, subject to constitutional checks. With the use of eminent domain, the state even asserts the right to reclaim land from the property owner with due compensation. These putatively justified authorities of the state severely circumscribe the individual right to hold land as private property.

The state also claims the authority to limit the rights of foreigners to enter the country. This aspect of territorial rights, too, like that of those listed above, is another form of a limitation on individual property rights. Were a private owner's land rights absolute, she would be free to bring any people she wished on to her land, regardless of their citizenship status or national origin. It might seem that this aspect of immigration restriction only incidentally impinges on

land rights, because for any individual landowners to invite a foreign national to their property, the foreign national would have to enter at an airport or traverse roads that are publicly owned. Yet consider someone who owns property on the United States-Mexico border, many of whom face the imposition of having their land marred by an intrusive and unsightly border wall. These landowners are barred from bringing Mexican nationals straight across the border from Mexico onto their land. Any Mexican wishing to enter their lands has to at least go through a border checkpoint; if denied there, entrance to the U.S. citizen's land is legally impossible. In these cases, the territorial nature of immigration restrictions becomes obvious.

Political philosophers have proposed several theories of territorial rights that serve to justify territorial claims. A compelling theory of territorial rights should explain the connection between the people that comprise the citizenry of a nation and the land that they occupy and claim.

In proposing such a theory, David Miller breaks territorial rights into three main elements: jurisdictional rights, resource sovereignty, and border control.<sup>13</sup> Jurisdictional rights entail that the state can legitimately set up and enforce laws over any person within its territory. Resource sovereignty reserves the management of natural resources for the state. And border control is the right of the state to control who enters the territory. This right is asymmetric. International norms do not recognize a general right of states to limit exit from the territory. Indeed, prohibiting exit from a state can be considered a violation of human rights, except in special circumstances, such as criminal investigations and punishments.

My main focus in what follows is on the border control element of territorial rights. Though I discuss theories of territorial rights broadly and will critique them with a wide lens, the

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<sup>13</sup> David Miller (2012) pg. 253.

aim of my analysis is to primarily to assess the justifiability of restrictive immigration policies. Territorial rights may provide a moral foundation for excluding immigrants. To see how, consider property rights over land. Our idea of property rights is grounded in the fact that people have (qualified) rights over their homes and land. These property rights give them the right to decide who may or may not occupy that space. If someone enters your home in the middle of the night, or any other time at which they are unwelcome, it is widely believed that you have the moral and legal right to demand that they leave.<sup>14</sup>

Do national territorial rights confer upon the state and citizenry comparable discretionary rights to exclude immigrants? Many assume that they do. But to justify this assumption, we need a persuasive theory of territorial rights.

We cannot simply assume that states simply have a right to exclude immigrants. As I discussed in the introduction, immigrants are frequently subjects of bigotry, and bigotry has consistently motivated erroneous and morally objectionable practice such as the institution of slavery, the subjugation of women, and the demonization of the LGBT community. And immigrants have clear interests in being able to enter the countries of their choice. Leaving one's home is usually a difficult choice, so we should presume that most people do it for powerful and at least initially compelling reasons. States that restrict immigration limit the freedom of potential immigrants and demand that non-citizens obey their laws. This requires some kind of explanation.

I will begin my analysis of potential explanations by discussing Michael Walzer's view of territorial rights based on the communal "right to place." Next, I will discuss John Rawls' view of territorial rights based on an analogy to property rights that I call the "custodial view."

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<sup>14</sup> It is debated the extent to which you may have the right to use force to expel an uninvited guest from your property. However, few deny that you would be justified in locking them out.

Both of these views, though worth discussing, are underdeveloped, and fail to establish a convincing theory.

Miller presents the most in-depth account of territorial rights, which echoes John Locke's theory of property. This view, I maintain, does not sufficiently capture our intuitions about territorial rights, and its criteria are both too vague and too inflexible to do the work we need from such a theory.

In the final two sections of this chapter, I discuss Henry Sidgwick's remarks about territorial rights in the *Elements of Politics*. While not entirely satisfactory, I argue that Sidgwick presents a more compelling view of territorial rights than the other thinkers I reviewed. The last section presents my own conclusions about how we should think about territorial rights broadly and border controls in particular.

### *Walzer and the right to place*

In *Spheres of Justice*, Michael Walzer discusses the nature of territorial rights as an ethical grounding for the exclusion of immigrants. While he offers a relatively expansive defense of the rights of refugees and non-citizens residing within a nation's territory, he offers moral justification for blanket immigration restrictions, as long as the community supports them.

Some of his arguments focus on the importance of immigration restrictions to preserving civic community, which I will discuss in the next chapter. Here, I will focus on his arguments about claims to territory.

First, Walzer notes that, as I've discussed, nations are unique in their claims to territorial

rights, which entail a control of “physical location.”<sup>15</sup> “With this control,” he writes, “comes certain obligations.”<sup>16</sup> Walzer’s vision of these obligations comes Hobbesian social contract theory, in which the government’s authority is justified by an (non-historical) implicit contract between the state and the people. The obligations entailed by the control of territory are not simply limited to a country’s citizens but to non-citizens residing in the nation’s territory.

These obligations of the state by virtue of its territorial control include the individuals’ “right to place”—that is, the right to have somewhere to live. Walzer continues:

The right is not, indeed, to a particular place, but it is enforceable against the state, which exists to protect it; the state’s claim to territorial jurisdiction derives ultimately from this individual right to place. Hence it has a collective as well as an individual form... The state owes something to its inhabitants simply, without reference to their collective or national identity.<sup>17</sup>

He goes on to say that while individuals can expect to be entitled to the place they happen to occupy, the place they’ve lived with their families and created a life. If, for some reason, this land becomes unavailable, they are entitled to somewhere nearby. This helps explain why, for instance, Germany has territorial rights over Germany and not Sweden. Germany is where citizens of the German government live; the German government has an obligation to provide them a place to live, and Germany is the most natural and fitting place to provide the land.

The historical connections between the people and the land, moreover, give them reason to want to hold on to that land. And those reasons give the state reasons to assert territorial rights over the people’s historical land claims. By claiming authority over a unified geographical area, a people also preserve their national identity and community going forward.

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<sup>15</sup> Walzer (2008) pg. 42.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid pg. 43.

“Nations look for countries because in some sense they already have countries: the link between people and land is a crucial feature of national identity,” Walzer writes. He also notes that many of the key functions of a state, including distributive justice, education, and welfare programs are best facilitated by a state with territorial rights over its land.

These arguments, as far as they go, establish the people’s reasons for favoring a state with territorial jurisdiction over land historically connected to a nation. However, the analysis thus far provides no reason or justification for excluding immigrants from this land. Allowing newcomers to enter a country’s territory does not inherently limit the state’s ability to fulfill the needs its people have for place, connections to the land, and the functions of a state that require (or at least function best under) a unified geographical territory.

To argue that immigrants can be justly excluded, Walzer frames the issue as a question of “aid.” He argues, plausibly, that there must be some limit to our obligations to provide aid to others—few accept the consequentialist view that we must sacrifice whatever is necessary to improve the overall wellbeing of humanity. Since the obligation to aid is limited, so too, Walzer concludes, is our obligation to allow immigrants to enter our territory.

The view of allowing immigration as a form of aid, however, is unfounded. Territorial rights, under Walzer’s conception discussed so far, do not imply a right to exclude. Exclusion itself is a burden a state enforces against others—both foreign and domestic. It proclaims that certain lands—even those owned privately—are off-limits to foreigners without proper permission from the state, and it asserts as legitimate the use of border agents and whatever necessary force to back up these demands. Letting immigrants enter, then, is best seen not as a form of aid, but as the removal or absence of a threat of force.

Once immigrants have made a home in a new country, the state may gain new obligations

to them, as dictated by the country's internal laws. But these obligations are determined by the internal political considerations and deliberations of the state and people, in response to the perceived utility and duty to provide aid. If incoming immigrants were imposing demands on the nations resources that were too onerous, stretching beyond what the state and the citizens could reasonably be expected to provide, then it could be permissible for the state to reconsider legislation that requires such onerous aid. Since excluding immigrants from the country entirely would not be necessary to the state to be avoid the excesses of benevolence, the limitations on the duty to aid cannot justify discretionary immigration restrictions.

Walzer considers this counterargument, but the defense he offers against it is troubling and insufficient. He highlights the "White Australia" policy, an explicit endorsement of a racist immigration restriction, which was heartily defended by Australian officials as promoting a "homogenous" society of largely a single European race. Walzer argues that if Australians were to face the prospect of a mass southward immigration from Asia, and they were not permitted to exclude newcomers at will to their territory, they would have only two options: they could allow the mass immigration and accept a multi-ethnic society, or they could cede some of their land to the newcomers and accept a smaller white Australian country.

This choice, Walzer implies, is particularly burdensome. If states were demanded to cede land every time national migration trends called for it, he argues, this would undermine the very idea of territorial rights. He writes: "To argue, for example, that living space should be distributed in equal amounts to every inhabitant of the globe would be to allow the individual version of the right to place in the world to override the collective version."<sup>18</sup>

And given the importance he places on a community's ability to maintain its national

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<sup>18</sup> Ibid pg. 47.

identity, which I will discuss in more detail in the next chapter, he argues that states must have the right to exclude immigrants. But I should note here that the White Australia policy is a particularly pernicious form of immigration restriction, reflecting many of the false and dehumanizing ideas that drive anti-immigrant sentiment as discussed in the introduction. These kinds of reasons for exclusion are generally thought completely illegitimate within liberal democracies. Race cannot be a moral reason to exclude groups of people from schools, workplaces, public accommodations or towns. Therefore, it's hard to see how it could be justified as grounds for exclusion from a nation.

Walzer's appeal to territorial rights as grounds for restricting immigration rights is also dubious. His consideration of the proposal for the equal distribution of territory globally is not a serious vision proposed by those who object to immigration restrictions; in fact, I know of no cosmopolitan theorist who has proposed this idea. Rejection of a farfetched alternative cannot justify discretionary immigration restrictions.

It's also worth noting that Walzer's example of a massive wave of hundreds of thousands of immigrants from Asia entering Australia could only be the result of a massive humanitarian disaster. When a massive tsunami hits or devastating wars break out, some of these burdens may affect neighboring countries. It's not implausible to think that citizens of countries not directly affected by the catastrophic phenomenon would have an obligation to bear some of the costs, even if these costs are substantial.

But Walzer's overall view of immigrants seems to exclusively cast them as burdens to be dealt with. This is a simplistic and largely mistaken view of immigration. Consider, for instance, the fact that U.S. cities and states tend to be recognized as thriving when they are attracting more internal migrants, while regions where few want to move are sources of concern. New entrants to

a city, state or country can bring new wealth, innovation, labor and economic opportunities along with them, even when they come from poor countries.

When immigrants are recognized as individuals who will expand the size of a society, rather than merely burden it, Walzer's territorial arguments for limiting immigration, already resting on weak foundations, fall apart. As I have discussed, his theory of territorial rights does not provide a moral basis for excluding immigrants. The discussion of "White Australia" offers his view no additional support.

It's conceivable that a massive influx of immigrants could become a drain on resources and a serious burden on a receiving country under certain conditions. If certain unfortunate circumstances applied, these consequences could even potentially be disastrous for the immigrants themselves, but the incentives at play could give each individual immigrant an apparent reason to act in a way that, when followed through en masse, is worse for everyone. Such group dynamics play out in the case of a bank run. Under such extreme circumstances, a state may well be justified in levying significant restrictions on immigration. But this justification only applies to specific emergencies (that may, admittedly, be enduring). This no more justifies discretionary immigration restrictions than the government's authority to quarantine people with particular infectious diseases gives it unrestrained permission to lock up citizens for any reason.

### *Rawls and the custodial view*

When Rawls discusses the foundations of territorial rights in *The Law of Peoples*, he begins by acknowledging that borders are largely built upon historical contingencies. They are, in this way, troublingly arbitrary from a philosophical perspective. Nevertheless, he finds

grounds for supporting territorial rights by analogy to property rights:

The point of the institution of property is that, unless a definite agent is given responsibility for maintaining an asset and bears the loss for not doing so, that asset tends to deteriorate. In this case [of national boundaries] the asset is the people's territory and its capacity to support them *in perpetuity*; and the agent is the people themselves as politically organized.<sup>19</sup>

In other words, the assertion of territorial rights allows the state to act as a competent steward or custodian of the nation's lands for the benefit of the people. In an earlier passage, Rawls says that these territorial rights allow the government to take responsibility not only for the territory and the capacity of the land to support the people, but also "the size of the population... [and] maintaining the land's environmental integrity."<sup>20</sup>

Like Walzer, Rawls approaches the question of immigration as if it is inherently a burden; he names immigration second in the list of three major foreign policy "problems," in between unjust war and weapons of mass destruction. Since, as discussed in the introduction, empirical research does not justify this view of immigration, it's hard to interpret this view as anything other than unreflective prejudice.

Rawls does not frame his theory of territorial rights as a justification for restricting immigration. In fact, his assumption that states have a presumptive right to restrict immigration serves as *motivation* for his theory of territorial rights. In emphasizing the importance of territorial rights and the purpose they serve, he writes: "People must recognize that they cannot make up for failing to regulate their numbers or to care for their land by conquest in war, by migrating to another people's territory without their consent." Later, in a footnote, Rawls says his view implies "at least" a qualified right to restrict immigration, but he doesn't explain why or

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<sup>19</sup> Rawls (2001) pg. 39.

<sup>20</sup> Ibid pg. 8.

on what grounds.<sup>21</sup> He also approvingly cites Walzer's claims that cultural protectionism can justify excluding immigrants, a point I return to in my next chapter.

Rawls also asserts that immigration only has four causes: religious/ethnic oppression, political oppression, famine (due to political failure), and overpopulation. He says that in his vision of "realistic utopia," all of these problems will be solved, and the "problem" of immigration will be "eliminated."<sup>22</sup> This is worth noting because it suggests that Rawls' utopian vision is one of minimal intermixing of populations across borders. It's not clear why we should think this state of affairs is desirable, unless we completely discount any of the myriad reasons human beings might have to immigrate to another country beyond those Rawls considered: love of a foreign nation, the pull of adventure, increased economic opportunity, unique job prospects, educational opportunities of all sorts, dissatisfaction with the laws and practices of one's home country (even if they're not unjust), and natural disaster, to name just a few.

Another major problem with Rawls' theory of territorial rights is that it takes too much for granted. He writes: "In the absence of a world-state, there *must* be boundaries of some kind, which when viewed in isolation will seem arbitrary, and depend to some degree on historical circumstances."<sup>23</sup>

But we can accept that there must be borders of some kind and that these will inevitably be somewhat arbitrary without accepting existing borders as they are. Why should, for example, Scotland accept that it is a part of the United Kingdom? Or why should the Kurds accept that land they occupy is part of Iraq? Rawls might say that they must accept these claims insofar as the United Kingdom and Iraq operate as stewards over the territory occupied by the Scots and the

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<sup>21</sup> Ibid pg. 39n48.

<sup>22</sup> Ibid pg. 9.

<sup>23</sup> Ibid pg. 39.

Kurds.

However, the Scots and the Kurds could have plausible grounds for secession so long as they were also able to form governments to perform as stewards over their lands. If they could, it would seem they would have as equal a claim to territorial rights as the existing governments. Rawls might claim that for reasons of stability, we should recognize only the territorial of existing states. But this is unsatisfactory, as it might seem to imply that the Nazi invasion of France gave the Germans legitimate territorial rights over the occupied land. Similarly, an appeal to “stability” could have been used to justify maintaining the sprawling and oppressive expanse of the British Empire, now widely regarded as unjust. A theory of territorial rights should be able to make sense of these more complex cases, but Rawls’s account provides no such guidance.

There’s also a fundamental tension in Rawls’s formulation of territorial rights. He says we must, essentially, take state borders as they are, and that their territorial rights serve the purpose of maintaining a certain territory as an asset. But we can’t assume that the configuration of nation states as it exists does promote the preservation of territory as an asset. Suppose a group of states share access to a particular asset—a natural resource vulnerable to overuse. Such resources may be much better maintained with a single unified government, which could prevent excessive competition that might unleash a tragedy of the commons. In these sorts of cases, two key components of Rawls’s theory of territorial rights—respect for historical borders and the stewardship duty of the state—seem to contradict.

The theory also suffers a serious deficit when compared to Walzer’s similar theory. By relying on an analogy to property rights, Rawls’ version of territorial rights presents a serious weakness when trying to justify immigration restrictions.

This is because the responsibility for maintaining an asset, a key reason Rawls thinks we

should value territorial rights, is neither necessary nor sufficient to ground the institution of property. If the point of a property rights regime were simply the maintenance of the homes as assets, the state ought to redistribute ownership of the of, say, homes to whoever among its citizens is best able to maintain their value and prevent it from deteriorating. This is neither how the institution of property works nor how it plausibly ought to work.

Instead, property rights help to protect individuals' interests in being able to use objects in myriad ways. The institution of property is designed to protect individuals' interests in preserving the value of goods and (particularly in the case of land) creating more value in an economic system. But we also have reasons to want to occupy land, engage in trade, use tools, and consume things in ways enabled by the institution of property unrelated to the *preservation* of value. In burning a candle, I destroy it's economic value—it can never be resold—as I extract from it the value it has for me personally for the time I am able to use it. It's for these all these reasons that the institution of property can be justified and (except in extreme libertarian conceptions of justice) supplemented through redistributive schemes based on need.

This is a problem for Rawls' theory of territorial rights because it raises the question of whether existing territorial claims—and the putative authority they give to states to justify restrictive immigration policies—is serving the full range of interests that a system of property is meant to fulfill.

The analogy is further flawed because while states have mechanisms to regulate and facilitate the institution of property, there's no supra-national authority to regulate the institution of territorial rights. If we follow Immanuel Kant, Thomas Hobbes, or David Hume in thinking that private property rights are necessarily tied to a system of government that can establish and enforce the institution on principles of justice, then Rawls's analogy to property rights falls apart.

As Hume wrote, property must be an established “convention enter’d into by all the members of the society to bestow stability on the possession of those external goods, and leave every one in the peaceable enjoyment of what he may acquire by his fortune and industry.”<sup>24</sup> Such a convention entered into by all cannot exist with regard to territorial rights without something like a world-state, which would render territorial rights moot. But without such a convention providing amelioration for the injustices inherent in the arbitrary distribution of territory, it’s not clear why foreigners should be expected to accept a country’s claims to territorial rights, and thereby, the right to restrict immigration.

I next consider—and reject—David Miller’s neo-Lockean theory of territorial rights that mirrors John Locke’s natural right theory of property, which does not require a national a governing body or universal assent to ground property claims.

#### *Miller and the neo-Lockean view*

On David Miller’s neo-Lockean account, the state obtains territorial rights based on the property rights of the people, considered holistically and cross-generationally. These are rights established by a collective of individuals with property rights, rather than comprising merely the aggregate of the rights all the individuals.<sup>25</sup> Miller tells us that there are two ways in which these kinds of groups can obtain claims to territorial rights. The first form of these claims can be established by transforming the land positively in a material way, and the second is established by adding symbolical or cultural value to the land.

Territorial rights are only strengthened by material change to the land when the changes

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<sup>24</sup> Hume (2003) pg. 348.

<sup>25</sup> David Miller (2012) pg. 258.

add what Miller calls “universal value.” And if the changes only have subjective cultural value, then they must not detract from the overall universal value of the land if these changes are to strengthen the rights-claim.<sup>26</sup> Territorial rights can be passed to successive generations, as these individuals contribute to the value of the land and cooperate with those who previously added to its value. The existence of symbolic value of land from the perspective of a particular group adds to their claim for rights, so long as the land that has symbolic significance is within the group’s homeland and assuming the symbolic claims are historically accurate.<sup>27</sup>

For example, the Sioux people believe the Black Hills is sacred land for their community. In a statement rejecting a monetary settlement for the lands, currently claimed by the U.S. government, President Theresa Two Bulls of the Ogala Sioux tribe said recognizing the sacredness of the Black Hills was essential to ensure that “our youth are engaged in keeping our culture intact and always growing towards the future.” This type of claim, tying the cultural value of the land to the continuation of the people, exemplifies Miller’s symbolic value condition. (It should also be said that the Sioux have more formal claims to the land regarding historical treaties that were violated by the U.S. government and a legacy of unjust treatment, though it’s noteworthy that they still choose to talk about their claims by appealing to the sacred.)

By making space for these types of symbolical and cultural claims in his account, Miller admirably avoids the pitfall of a purely materialistic conception of value that would privilege certain communities’ claims to land over others. This view picks up on important aspects of the way communities, in fact, make claims about their rights to particular territories. Nevertheless,

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<sup>26</sup> Ibid pg. 260.

<sup>27</sup> Ibid pg. 262.

this attempt to provide a two-pronged theory of the foundations of territorial rights fails in two ways. First, the symbolic value condition is too limiting a concept to cover all seemingly legitimate territorial claims that do not fall under the category of added material value. In other ways, however, it is too broad, and would suggest competing land-claims where we should think no real dilemma exists.

Miller explains that symbolic value comes from a given land's role as a centering force of national identity. We might feel this is an appealing claim to make in the case of the Sioux's ties to the Black Hills, but its vagueness is troubling.

Consider the following. There is much land which the government of Canada may own which is uninhabited and untouched. Much of it may not be "culturally significant," at least not in a robust reading of the phrase. Does the lack of material or symbolic value added to the remote parts of Canada indicate that the government does not have any justified territorial grounds there? Perhaps Miller would think that this is entailed, but it then becomes very unclear where the lines are drawn. A strip of highway through otherwise deserted flatland would give Canada claim to the highway, thereby presumably adding material value to the land, but how much of the surrounding area can thus be claimed by Canada? On Miller's account, it is unclear.

It might be objected that the status of Canada as containing all the land within its borders is culturally significant for the Canadians and thus gives them claim to the land. However, it seems if we allow this thought, territorial claims of this sort are very easy to come by. Suppose Alaskans thought it was culturally significant that the Alaskan border should include parts of the Northwest Territories. Miller's response in this case would be that the justification fails to

include the Northwest Territories as a part of the Alaskan “homeland.”<sup>28</sup> But this seems to just beg the question. Alaskans certainly could see the Northwest Territories as a fundamental part of their territory, at least as much as the Canadians would (assuming we are still discussing uninhabited portions.)

Miller claims that he finds it to be unlikely that the symbolic value claims of nations will include blatant historical falsehoods.<sup>29</sup> This may be true, but such claims need not contain falsehoods to be unpersuasive. The concept of Manifest Destiny, that Americans had a divine right to expand, has a long and verified history. If some feel this gives them claim to extend further into uninhabited, undeveloped Canadian land, Miller’s account might entail that they have at least *some* claim to do so. But this seems mistaken. It is not simply that Canadians have stronger claims to territorial rights over their uninhabited land, we assume, but Americans do not have any legitimate claim in this instance at all.

As I stated, Miller has good reasons for including symbolic value in his theory. He writes, “Relying simply on the material value argument would indeed bias the theory towards groups that look like developed Western nations.”<sup>30</sup> This is a fair point, but it’s doubtful that symbolic value solves this problem. Though the Sioux describe their ties to the Black Hills in terms amenable to Miller’s theory, others might not.

It’s hard to see how nomadic groups could make any kind of land claims on the neo-Lockean model—which was also a problem for Locke’s original property theory. As travellers, they wouldn’t add value to the land in the conventional sense, but they also might not think of the land “symbolically” either. Instead, they value the land they travel upon for the use they

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<sup>28</sup> Ibid pg. 261.

<sup>29</sup> Ibid pg. 262.

<sup>30</sup> Ibid.

make of it and could plausibly argue that territorial claims would help protect their ways of life. Miller would likely respond that their claims would be symbolic value claims, but it is very difficult to see how this really works. Could a group add symbolic value to lands they had not yet travelled to?

These questions are important, because the answers have ramifications to how we treat the claims of those who were abused by the procurement of territorial rights. Indigenous tribes who were forced off their land may not have had territorial rights as we now conceive of them, and the notion of symbolic value is insufficient to address the divergence in concepts of land ownership.

Turning to the focus of this chapter, Miller is explicit that his theory of territorial rights grounds a right to exclude. He argues that, given the material and symbolic value a nation's people have put into the land, it will naturally matter to them how many people occupy the land.

“If there are too many [people], it may become impossible for land to be used in the way that the group's values require, as pressure for new housing, roads and commercial development mounts,” he writes.<sup>31</sup> In other words, overpopulation may effectively reduce the population's perceived value in the territory.

While this is true, it applies as much to internal migration as it does to foreigners immigrating to the country. And yet, Miller does not argue that these considerations justify the state's right to discretionary restriction of *internal* migration grounds. Indeed, most philosophers working within the liberal tradition, along with United Nation's Declaration of Human Rights, recognize freedom of movement within one's own nation as a key right to be protected.

It's also not clear why the values of present occupants of a territory should be decisive.

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<sup>31</sup> Ibid pg. 265.

Their interests will be privileged by existing law and by the requirements placed on those seeking citizenship. The theory of territorial rights is supposed to explain why it is that a country's population can claim that its interests in the land trump the interests of other would-be claimants. But this theoretical aim cannot be achieved by simply asserting that the values of the population could be undermined by immigration, because the would-be immigrants' values could be undermined by exclusion. Assuming that the value the population places on the land are decisive begs the question at hand.

One more point worth noting: Miller's aim in his discussion of territorial rights may differ somewhat from mine from either a terminological or metaethical standpoint. He writes: "The argument establishes only that the group that legitimately controls territory, whether a nation or an indigenous people, should have the right to decide who has the right to enter – it does not determine which exercises of that right are justified and which are not."<sup>32</sup>

My discussion of territorial rights focuses on the moral question of whether and to what extent immigration restrictions can be justified. In my view, if a population has a moral right to exclude immigrants (or execute any other policy), then it, by definition, is morally justified in doing so.

Miller appears to reject this claim, asserting that a state may have the moral right to adopt a policy that is morally unjustified. But it is not clear why he accepts this view. To defend this view, one might think Miller could appeal to this type of claim: While a person may have a *legal* right to act in a certain way, they are not necessarily *morally* justified in so acting. The apparent contradiction is resolved by referring to two distinct normative schema: the legal and the moral. But since the questions under consideration are pre-legal—we are concerned with whether states

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<sup>32</sup> Ibid.

are entitled to enact restrictive immigration laws—this distinction is not relevant.

I surmise, then, that Miller takes himself to be discussing whether the international community should *recognize* a nation's immigration restrictions as acceptable. That may, indeed, be a separate question from whether such laws are morally justified.

### *Sidgwick*

Sidgwick's view of territorial rights is often interpreted as a defense of immigration restrictions, despite the fact that it was written at a time with relatively few such restrictions. However, as I will argue below, the best interpretation and application of the ideas he presented—jettisoning the parts that are outdated, biased, or inaccurate—actually provides a strong argument against the discretionary view of immigration restrictions.

In *The Elements of Politics*, Sidgwick notes important differences between the foundations of the institutions of property rights and territorial rights:

The main justification for the appropriation of land to the exclusive use either of individuals or of groups of human beings is that its full advantages as an instrument of production cannot otherwise be utilised; the main justification for the appropriation of territory to governments is that the prevention of mutual mischief among the human beings using it cannot otherwise be adequately secured.<sup>33</sup>

But while he argues that this grants the state its traditional jurisdictional rights, his comments about the right to exclude immigrants are more circumspect:

I do not think that the right of any particular community to the exclusive enjoyment of the utilities derived from any portion of the earth's surface can be admitted without limit or qualification any more than the absolute exclusive right of a private landowner can be admitted. The rigour of this right has hitherto been mitigated, in modern States generally, by the practical allowance of free immigration; but if this should ever be sweepingly barred, I conceive that the right of exclusion would be seriously questioned in the case of

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<sup>33</sup> Sidgwick (2012) p. 252.

States with large tracts of waste land suitable for cultivation and that some compromise would be found necessary between the prescriptive rights of the particular State and the general claims of humanity. On the one hand no well-ordered community could reasonably be required to receive alien elements without limit or selection; on the other hand, an absolute claim to exclude alien settlers adequately civilized, orderly, and self-dependent, from a territory greatly underpeopled, cannot be justified on the principle of mutual non-interference.<sup>34</sup>

As Teresa Hayter notes in *Open Borders: The Case Against Immigration Controls*, and as Sidgwick's 1981 text reflects, the modern states' right to exclude is a relatively new invention of the last century or so.<sup>35</sup> Looking at a world without immigration controls—and, it should be observed, the transportation technology that makes immigration substantially easier—Sidgwick retained some skepticism of the discretionary right to exclude immigrants.

In fact, while it may appear that Sidgwick holds a relatively balanced view about restrictive immigration policies, his view is actually exceptionally permissive of immigration. When he denies that the state has an “absolute claim” to exclude immigrants, he is denying the claim that I have repeatedly found unjustified by the territorial rights views discussed so far. Territorial rights as conventionally conceived supposedly ground a nearly unilateral and entirely discretionary option to exclude immigrants at the population's or government's whim.

Sidgwick does constrain the groups of people a country may be required to accept with the phrase “adequately civilized, orderly, and self-dependent.” There are surely racist implications contained in this description; however, under a generous recasting of his theory, we may read it as restricting the pool of acceptable immigrants to exclude criminals, mischief-makers, and invading forces. When he wrote, “no well-ordered community could reasonably be

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<sup>34</sup> Ibid pg. 255.

<sup>35</sup> Hayter (2000) pg. 1.

required to receive alien elements without limit or selection,” these types may be among those who can be selected against. Further, community mechanisms of immigrant selection can include the job and housing markets, which do not require a government threat of force to back them up. While I am admittedly taking expansive liberties in this interpretation of Sidgwick’s view, these modifications, which I believe are in the basic spirit of his theory, push Sidgwick toward the “open borders” camp of immigration theorists.

The reasons Sidgwick provides for denying a blanket right to exclude are of particular interest. First, he cites the existence of “territory greatly underpeopled,” and second, he appeals to the “principle of mutual non-interference.”

While Sidgwick is clearly discussing uninhabited land when he speaks of underpeopled territory, this part of his theory could also benefit from a modern modification. For example, he writes:

[W]here the territory was already fully peopled by human beings the immigration is not likely to be considerable, unless the war has been unusually destructive, since there would be no room for the immigrants without such a violent invasion of the private rights of the old inhabitants as would be generally condemned and would excite strong resistance and general odium.<sup>36</sup>

Sidgwick’s conception here of “fully peopled” land is curious—it’s not clear what it would mean. Consider, for instance, that the population of New York City in 1900 was about 3.5 million, according to the U.S. Census Bureau. By the end of the century, the population was 8 million. With increasing density of housing and infrastructure, the level at which the city could be “fully peopled” is indeterminate.

On the other hand, the land that Sidgwick is surely referring to—sprawling unoccupied landscapes—is actually a much more *demanding* place for immigrants to occupy, in terms of the

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<sup>36</sup> Sidgwick (2012) pg. 311.

burden it places on the state. Were immigrants to move to a country's unsettled lands, they would require utilities to be installed, postal routes, access to medical services, educational institutions, and all the other services for the needs the state is designed to meet.

The work of “unpeopled territory” in Sidgwick's theory is actually better replaced with the idea of unfilled *capacity* for population—something cities and other occupied regions of countries actually have in spades (though zoning laws can limit capacity.) Using this better concept, Sidgwick's theory would have been even more permissive of immigration.

Next, consider the principle of mutual non-interference, which is closely tied to the idea of unpeopled territory in Sidgwick's argument. Denying people access to available land when they have great need or want of it may be bad enough. But restrictive immigration policies don't just *deny* the provision of land. These restrictions are backed up with the threat of force. Border crossers can be apprehended by armed officers; undocumented immigrants can be confined; violators of the law can be deported. Backing up the restriction of immigration to unpeopled lands with the threat of violence is, in Sidgwick's view, a potentially unjust violation of the principle of mutual non-interference.

Another way to think about this is that territorial claims—particularly those that include control over immigration—impose themselves on the world. By claiming to have territorial rights over a given geographical area, a state limits and interferes in the freedoms of non-citizens who may have an interest in visiting or occupying land. That this limitation comes with the threat of violence demands justification, which thus far I have found lacking in theories of territorial rights.

*Territorial reasons, not rights*

None of the accounts discussed above provide a fully satisfying foundation of territorial rights that could justify the discretionary exclusion of immigrants. Though it may yet be the case that a very clever philosopher may produce such a formulation, I am doubtful that any full-fledged theory will succeed. Given the extent of anti-immigrant bigotry founded in racism, elements of which appears to have infected some of the intellectual discussions of territorial rights, I believe we should treat the project with skepticism.

Instead of a theory of territorial rights, I suggest that we should be open to the various *reasons* that people have for making claims to given territory. As I have alluded to, there may be cases, such as the claims of the Sioux on the Black Hills, that may require adjustments of the current arrangement of national borders. Secessionist claims may also require readjustments and reconfigurations. But this is something our account of territorial claims should accommodate. Political theory that completely justifies the status quo is hardly credible.

But as we've seen, peoples can make claims to territory on a wide range of grounds. Their land might be particularly symbolically important for them, in any number of cultural or religious ways, or just broadly meaningful because it's the land of their ancestors. Or it could be the only land they know, where they've developed a form of life to which they are particularly well suited, which cannot easily be replicated when emigrating. Or it could be land that they have materially added value to over generations, which they feel entitles them to possession of the land. Or perhaps they simply have had a valuable and important culture and society, and the land was what enabled them to maintain it.

We ought also to count considerations commonly thought to ground territorial "rights" as broad reasons for territorial claims. These include stability, state viability, the enforcement of property ownership, and the existence of reasonably just regimes, as discussed by Walzer,

Rawls, and Sidgwick. States as we know them require territory, and the functions of the state can produce significant value for the citizenry. So the mere existence of a valuable state will count some way toward justifying territorial claims.

But strong territorial claims are most persuasive with regard to establishing the state's jurisdictional boundaries. As I've argued, the foundations of the territorial claim to limit immigration are relatively weak. Since these limits constitute a serious imposition on others, and the enforcement of this imposition violates the principle of mutual non-interference, the state's reasons for restricting immigration must pass a very high threshold.

Meanwhile, states must recognize that immigrants often have very compelling reasons to enter their territory. They may be fleeing persecution, escaping poverty, joining with family members, or attempting to start a new life. These are all very strong reasons that ought to be respected. Since, as I have argued, the proposed theories of territorial rights do not justify a *right* to exclude immigrants from territory, these reasons immigrants have to enter must be taken very seriously. In many if not most cases, I believe, these reasons will be decisive.

It's also worth noting that the notion of "reasons" that I am employing is not necessarily additive. That is, it need not be read as an endorsement of consequentialist moral theories. Reasons can interact in many different ways, and they need not function with an aggregative nature; certain reasons rule out other kinds of reason from consideration at all, without "outweighing" them.<sup>37</sup> This allows for a prioritization of indigenous claims over those of present day regimes, even if the total "weight" of the reasons for the countervailing territorial claims is roughly equal. The exact form this adjudication will take cannot be predetermined, though I take

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<sup>37</sup> For instance, when deciding whether or not the accused in a murder trial is guilty, the jury mustn't consider the potential benefits to victim's family that might accrue from a guilty verdict, but only the evidence. Other standard objections to consequentialist reasoning apply.

this flexibility to be a part of the appeal of this approach.

Rights are a ubiquitous conception in both national and international legal frameworks, so my proposal will likely be met with resistance. Peoples and nations are used to assuming that they have a right to exclude immigrants. However, I maintain that the discussion of various kinds of reasons is preferable for use in the moral and political debates immigration. First, because I think the foundations of such rights are dubious, as I've discussed, but I also because I think discussions of reasons are actually more uncontroversial and flexible. They are merely facts that count in favor of certain claims, and this idea is fundamental to any moral or political dialogue.

My impetus for this research project was the observation that contemporary immigration policy debates typically proceed without any reference to the moral foundations of restricting immigration. If we dispel with the notion that states have a fundamental right to territory that allows them to exclude immigrants, we could begin to have a much more humane conversation about the reasons they have for coming.

## CHAPTER 2: Nationalist Partiality

If we dispense with, as I have urged, the notion of a moral right to territory, we find ourselves in a world populated with people making various claims to land that need to be heard. Among these claimants will be those who are seeking to immigrate.

How ought a just nation to respond to these claims? Without being able to appeal to a strong national right to its territory, it must take these claims seriously. But those wishing to defend restrictionist immigration policies have another argument to make. They can argue that members of nations have special obligations to their co-nationals over and above what they owe to foreigners—that is, they are partial to their own fellow citizens. Another way of expressing this idea is that we should give the reasons and interests of our fellow citizens greater weight than that we allow for the reasons and interests of those outside our borders.

Though the term has a variety of definitions, for this paper, I give the label of “philosophical cosmopolitanism”—hereafter just “cosmopolitanism”—to the view that national boundaries have no relevance to the moral obligations between people. Cosmopolitans believe that the like interests of one’s co-citizen and of a foreigner should count equally in moral deliberation. Nationalists, on the other hand, believe that we have special obligations to our co-citizens, and we ought to weigh their interests more heavily in our deliberations. (I do not consider the view *exclusionary nationalists*, who hold that it is only they in their particular country who have special obligations to one another—a view few political philosophers find credible.)

If the nationalist view is correct, we may be able to justify largely restrictionist immigration policies. While we would consider the interests of those who are trying to immigrate, they would need very strong reasons to override even relatively weak reasons that a

nation's population had for wanting to exclude them. This wouldn't justify a completely discretionary right to exclude, because certain kinds of proposed reasons for barring immigrants' entry—such as, for example, belief in racist myths about other countries—may not count as reasons at all. Since, as I've discussed, much opposition to immigration is erroneous in this way, many discriminatory immigration policies would be unjustified even if we are justified in being partial toward our co-citizens.

Arguments in favor of nationalist partiality tend to ground the special relationship of co-citizens in either the ties created by the state to ground partiality or on the pre-political connections among citizens. I will present two versions of each type of argument and explain why I think they fail to justify immigration restrictions. The arguments I provide would extend, I believe, to other versions of these arguments.

When a nation considers the claims of potential immigrants, then, it ought to weight the reasons the newcomers have equally with any reasons the present population has to restrict entry. Though not an endorsement of completely open borders, this argument suggests that restrictionist immigration policies are much more difficult to justify than is typically supposed.

### *Nagel and the dual role of citizens*

Thomas Nagel argues powerfully for nationalist partiality in "The Problem of Global Justice." The foundations of immigration policy and the right to exclude are not Nagel's explicit concern, though. Instead, Nagel adjudicates in the article the merits of cosmopolitan and nationalist (he uses the term "political") conceptions of socioeconomic justice, which is concerned with the distribution of benefits and burdens among individuals and their relative levels of wellbeing. I will test his theory of nationalist partiality as applied to immigration policy and argue that it fails.

However, my arguments do not explicitly address the implications for socioeconomic justice.

Under a political conception of justice, the obligations of socioeconomic justice apply only to co-citizens of nation states. Cosmopolitan justice, by contrast, extends the claims of socioeconomic justice to every person in the world. Though Nagel thinks cosmopolitan views of justice are appealing to a certain extent, he argues in defense of political justice on the grounds of nationalist partiality.

Nagel states a central challenge for proponents of political justice: “Whatever the standards of equal rights or equal opportunity apply domestically, the question is whether consistency requires that they apply globally.”<sup>38</sup> Since Nagel thinks that socioeconomic justice in part consists of redressing arbitrary inequalities, we must ask whether inequalities based on national origin are arbitrary or salient. Just as race, religion, and ethnicity ought to be irrelevant when we consider the obligations imposed by the value of equality, on a Rawlsian theory or any plausible alternative, we might think that a person’s nation of birth and citizenship are similarly irrelevant. If these factors are morally irrelevant, then limiting justice to the political conception would be erroneous and objectionable. We could make similar claims about discounting the interests of potential immigrants.

So are there features of the relationship among co-citizens that justify partiality? Nagel argues that calls for justice arise from the fact that those in democratic societies are “fellow participants in a collective enterprise of coercively imposed legal and political institutions.”<sup>39</sup> They act collectively through the usual democratic practices and by upholding a system of laws. These institutions are coercively imposed; laws are backed up with the threat of violence from an

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<sup>38</sup> Nagel (2005) pg. 115.

<sup>39</sup> Ibid pg. 128.

armed police force and a punitive penitentiary system. Partiality for co-nationals is justified, Nagel argues, because they exist in a special relationship as “participants in the ‘general will.’”<sup>40</sup>

Some of the facets of the “dual roles” are left obscure. For example, Nagel writes that co-citizens are “both putative joint authors of the coercively imposed system, and subject to its norms, that is, expected to accept their authority even when the collective decision diverges from our personal preferences.”<sup>41</sup> But it’s not obvious what “accept” means here. Citizens may or may not follow any given law, respect it as legitimate, or agree to help enforce it.

Meanwhile, foreigners and potential immigrants can be subject to a state’s laws as much as its own citizens. States, after all, do not *only* coerce their own citizens. They potentially use violent force (or threats) against visitors, immigrants, denizens, and those in other nations, in the form of everyday policing, border patrols and military power. Wars, tariffs, treaties, and international institutions impose costs and burdens, sometimes death, on foreigners.

Restrictive immigration policies are themselves a major form of coercion. As I’ve discussed, the claim to territorial rights involves an assertion of governmental authority over a particular area of land—establishing, in the famous phrase, a “monopoly on the legitimate use of violence.” Since we live in a world with a limited land area, any jurisdictional and territorial claims necessarily reduce the territory available to other individuals and peoples to make use of and occupy. Precious resources are cordoned off and monopolized. Territorial claims are thus put limits on the freedom and opportunities of the rest of the world’s population.

Some might argue that this isn’t really coercion, because as long as foreigners avoid those regions in which the state has jurisdiction, they will not be subject to its will. But this

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

would be the equivalent to saying that citizens are not really coerced by their own government, because as long as they follow the laws, they are not subject to its will. Neither of these arguments succeeds, because the threat of force is a paradigmatic case of coercion—just think of the proverbial gun to the head—even when the force is never carried out.

So one might fairly say that the state’s coercion of its own citizens is therefore nothing special—it coerces everyone. If this is right, Nagel’s invocation of the coercive nature of the state as the foundations of nationalist partiality would be significantly undermined.

Nagel offers a response to this objection:

Immigration policies are simply enforced against the nationals of other states; the laws are not imposed in their name, nor are they asked to accept and uphold those laws. Since no acceptance is demanded of them, no justification is required that explains why they should accept such discriminatory policies, or why their interests have been given equal consideration. It is sufficient to claim that the policies do not violate their prepolitical human rights.<sup>42</sup>

This passage shows clearly that Nagel holds the view I am arguing against. Under his theory of partiality toward our co-citizens, Nagel believes no justification of immigration laws is due to the would-be immigrants and their interests do not deserve “equal consideration.”

Nagel’s suggestion here that foreigners are not expected to “accept” immigration laws rings hollow. There are constant demands that potential immigrants “wait their turn” and “play by the rules.” Undocumented immigrants within a country are expected to both comply with existing laws and to “accept” arrest if they are apprehended—at least as much as any citizen would be expected to “accept” the enforcement of laws. They may not be expected to “uphold” the law, as Nagel points out—but then, most citizens who are not law enforcement professionals are not expected to do anything to uphold immigration laws either.

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<sup>42</sup> Ibid pg. 130.

Even if we grant that there's a unique way in which citizens do accept and uphold their nation's laws, these laws are nevertheless *enforced* upon non-citizens. Unwanted would-be immigrants are turned away from border crossings by armed guards. Sometimes undocumented immigrants are killed by border police. Others are arrested, deported, or forced into dangerous attempts at entry in order to avoid law enforcement.

The fact that their bodies are acted upon—to the point where they are sometimes killed—is a more significant fact than the claim that laws are done in their citizens' names and demand the citizens' acceptance. This use of coercion call for justification.

Nagel might respond that killing an undocumented immigrant violates pre-political rights (what we might call human rights), and that's what demands explanation. Even short of killing, confinement and physical deportation of bodies without consent is generally seen as a violation of human rights. Since his view allows that immigrants' fundamental rights should not be violated, he might argue that while general enforcement of border laws is permissible under his theory, it disallows objectionable forms of coercion that takes the form of human rights violations.

But we cannot determine whether or not these rights are being violated unless we can assess whether or not the immigration laws themselves are just. We do generally recognize that states can confine and lock people up when they have good reason to do so—for instance, if they're a dangerous criminal. Similarly, though recent advocacy movements have persuasively argued that they occur much less often than we might assume, there are plausibly some circumstances in which law enforcement can reasonably use lethal force against civilians if no other option is available to maintain safety, such as in the case of a hostage-taker. But whether these police actions are justified depends on whether or not the laws in question are themselves

just. Nagel's view seems to imply that most any immigration policy will be justified, because the immigrants themselves are owed no justification. Under this theory of state power, potential immigrants are subject to high levels of government coercion.

Nagel would point out, however, that his theory justifying nationalist partiality is two-fold: Citizens are partial to each other not just as mutual subjects of the state's coercion, but as co-authors of the laws upheld in one another's names. Even if my argument that foreigners are also subject to state coercion is correct, I certainly haven't shown that they are co-authors of the law.

And indeed, they are not. But this should actually be seen as another strike against Nagel's view. Consider another passage from his essay:

[T]he state makes unique demands on the will of its members—or the members make unique demands on one another through the institutions of the state—and those exceptional demands bring with them exceptional obligations, the positive obligations of justice. Those obligations reach no farther than the demands do...<sup>43</sup>

As these remarks make clear, it is the demands on the citizens to participate in the general will that “bring with them exceptional obligations”—the ties of nationalist partiality, in my phrasing.

But these demands may be rather weaker than Nagel may suppose. Some people never vote and hardly ever think about politics. Through the course of their lives, they may give little thought to the laws they live under. While these laws are still, as I have argued, fundamentally coercive, they may not *feel* particularly burdensome in the subjective sense.

Contrast this with the very real burdens placed on any potential immigrant. Their options for entry are heavily constrained. Even if they are admitted, they have to navigate a complex array of applications, rules and deadlines to keep their status up-to-date and valid—with

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<sup>43</sup> Ibid.

deportation as their constant threat. Most, however, will simply be denied legal entry, and if they attempt to come in unauthorized, the obstacles they'll face are formidable.

What corresponding benefits do would-be immigrants get from the state? They *may* receive foreign aid, and perhaps the bare consideration of their applications is a benefit of sorts. And, in Nagel's view, the country must recognize their fundamental human rights. But they also may live under the foreign government's military power, market forces, pollution, and treaties. Unlike the citizens of the state, they are denied the opportunity to co-author the state's laws.

The burdens a country may place on foreign citizens, in the ways I've described, may be significantly more costly than the burdens it places on its citizens. Recall that the right to exit is a fixture of international human rights law, meaning that while the state can unilaterally prevent foreigners from becoming immigrants, according to Nagel, it *must* allow its citizens to become emigrants, if they choose. So while the state coerces both its own citizens and foreigners, it mitigates the coercion of its citizens by providing them a voice in the formation of laws and a right to exit.

I will assume that giving the right to vote and an unencumbered right to enter to potential immigrants would be, for various reasons, untenable. But even if this is true, the asymmetric nature of the mitigation of the coercive power of the state would seem to demand that—at the very least—the interests of potential immigrants should be treated equally to the interests of existing citizens and residents when crafting border policy.

Is it right to conceive of the “being part of the collective will” component of being a citizen as mitigating the state's coercion? Nagel curiously describes this feature of citizenship as a demand, which he says is “unique.”

But whether this is demand is best thought of as demanding, it is also certainly a benefit,

at least partially. And potential immigrants generally *want* this “demand” placed on them—they want to become a part of the collective will of the country they’re trying to join. The coercion they are subject to is, in no small part, an effort to deny them access to this collective will (consider the furor over the mere idea that undocumented immigrants might illegally vote in the United States).

On Nagel’s view, then, the special obligations to our co-citizens are grounded on a privilege we reserve to ourselves and deny to potential immigrants—even while subjecting them to the coercive power of the state. While not incoherent, this idea should strain the credulity of any thinker in the liberal tradition.

#### *Richard Miller and the ties of residency*

Richard Miller argues in *Globalizing Justice* that the “ties of modern citizenship” create special obligations and partiality between co-nationals. Though he refers to these as ties of citizenship, it’s more accurate to say *residency*, since he argues this partiality entails “a duty to relieve disadvantages of all who make their home in the territory of one’s government.”<sup>44</sup>

Which kinds of ties create this special moral relationship? Miller argues that the “justified functions” of a state bind people together and generate mutual obligations. These functions include:

- Enforcement of property rights
- Taxation
- Provision of public facilities
- Financing of education
- Regulation of commerce and business cycles

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<sup>44</sup> Richard Miller (2010) pg. 39.

These “diverse and vitally important roles of a modern state ... generate a rich array of political duties toward disadvantaged compatriots,” Miller writes.<sup>45</sup>

To his credit, Miller emphasizes the importance of the duties we have to the least well-off residents of our country. And he acknowledges that international commerce and enforcement can generate some of the important obligations to foreigners that they do with compatriots. These obligations are weaker, though, because they are only based on commerce and not a rich array of state functions.

He argues that the ties of the modern state give us strong reasons to support those who are disadvantaged—even at the expense of disadvantaged foreigners. He writes: “[E]ven if the citizenry of a developed country had a duty of justice to open its borders to those who seek to make use of economic opportunities, this responsibility would fall far short of their duty to relieve socially imposed disadvantages of compatriots.”

In justifying this assertion, Miller relies on a few empirically dubious claims. He says that most of the disadvantages people face are due to structures within their own countries, rather than because of immigration restrictions. However, as Ahmed et al. have shown, inequality between countries is a larger driver of global inequality than inequality *within* countries.<sup>46</sup> But even if, say, the Indian government’s failure to provide its citizens with a just level of redistribution were the cause of some of its impoverished citizens’ choice to immigrate, the receiving country could not justly use this as an excuse to exclude them. The Indian government’s failure to treat its citizens fairly is *another* deprivation—above and beyond poverty—that the immigrants seek to rectify by finding a new home. By refusing to let the

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<sup>45</sup> Ibid.

<sup>46</sup> Ahmed et al. (2017) pg. 23.

foreigners enter, the would-be receiving nation is using its coercive powers to force the would-be immigrants to remain in an unjust state.

Miller notes that immigrants often come “reluctantly,” seeming to imply that this fact demands a better solution and mitigates the cost of exclusion. But it actually strengthens the claim immigrants have to make on the receiving countries. If immigrants are reluctant to leave their homelands but do so anyway, they likely had compelling reasons to do so—reasons that must be taken seriously. It is easier to justify disregarding someone’s whims than the deeply considered choices they make when they have few good options.

Miller also seems to assume that incoming immigrants, at least at a certain level, would be a burden to the receiving country’s disadvantaged citizens. As I suggest in the introduction, the evidence for this belief is far from decisive, and it is often inspired more by racism than economic reality. However, if it is the case that incoming immigrants were expected to lower the wages of poor, native workers, immigration restrictions are neither the only nor the best solution. A state can make up for this imposition with, for example, targeted wage subsidies like the Earned Income Tax Credit.

This would allow the nation to both meet its obligations to its most disadvantaged members while welcoming the immigrants. When these arrangements are feasible, the situation has no trade-offs. And in such cases, the question of partiality need not be resolved. But perhaps such trade-offs will not always be feasible and the partiality issue will remain.

Miller’s argument for justifying nationalist partiality still falls short because he doesn’t recognize the necessity of the coercive element to maintaining borders. This creates another function of state that we impose on foreigners in addition to ties of international commerce. It is partially analogous to the maintenance of the institution of property, but, as I discussed in

Chapter 1, territorial rights lack the governing institution that can take responsibility for ensuring the institution is just. This consideration makes the obligations generated by the tie of immigration restrictions even stronger, because imposing a system on others without safeguards to ensure that it is just requires some kind of compensation if it is to be at all fair.

Miller also fails to consider the salience of the fact that potential immigrants *seek to take part in* all the key functions of the state that justify partiality. This is particularly important because when discussing each functions of the state that citizens participate in, he notes that people have independent reasons to engage in these functions. For example, he says we all have reason to favor a system of law enforcement that justly reduces overall violence, and we all have reason to want schools that can create an educated populace.

But immigrants, too, have reasons to want to participate in and benefit from these institutions. In Miller's view, though, the pre-existence of these institutions within a nation creates ties between its members that demands they favor themselves over foreigners, even over foreigners who want to share in the institutions *for the very same reasons*.

Surprisingly, in the same chapter, Miller inadvertently gives strong arguments for rejecting this view. When discussing the need for a reasonable amount of economic redistribution within a society, he writes: "In the ongoing public enterprise of provision, those who have already benefitted more cannot rightly claim more provision than others on the basis of those prior benefits." He later adds: "The prosperity of the well-off derived, to a large extent, from their having benefitted richly from public provision of opportunities that the disadvantaged could not take abundant advantage of, through no fault of their own."<sup>47</sup>

Miller rightly applies this reasoning to the cleavage between a nation's well-off members

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<sup>47</sup> Richard Miller (2010) pg. 47.

and the poor. But we should also apply it to the distinctions between a nation's members and foreigners. We can say, contra Miller, that the fact that the members of a nation already receive the benefits of participating in state functions does not back up a claim of privileged exclusivity to those benefits just because the residents received the benefits first. Potential immigrants have been excluded from these state functions—through no fault of their own—that the members of the nation have benefitted richly from. These conditions cannot serve to justify the potential immigrants' exclusion, backed up with a threat of violence.

Miller might respond by saying that this argument is unfair, because the people his version of nationalist partiality seeks to protect are those who are disadvantaged, not privileged. Since they are the ones who need protections, my attempt to turn his reasoning around on him might fail.

However, compared to the disadvantaged residents of the receiving nation, the incoming immigrants are almost certainly more disadvantaged. They lack access to the benefits of being in the nation, which they presumably desire and that even the nation's most disadvantaged have access to. They also face the force of the border agents, who ostensibly serve to protect the nation's members.

Some immigrants, of course, will be of a higher socioeconomic class than the receiving nation's disadvantaged. These immigrants may indeed be better off along most or all measures than many of the nation's citizens. But these people—often called “highly skilled immigrants”—are not plausibly seen to pose any kind of burden on the nation's disadvantaged population. If highly skilled immigrants drive down wages, they do so in highly paid fields like medicine and engineering, which can actually decrease prices paid by the native working class.

So the more disadvantaged immigrants can make a claim to be let in because they are

face more hardship than the receiving country's disadvantaged native population. Well-off immigrants can make a claim to be let in because they don't pose an economic burden to the disadvantaged population. For these reasons, Miller's attempt to justify immigration restrictions on nationalist partiality grounds fails.

*The analogy to clubs and families*

One likely response to my line of argument here—that the exclusionary nature of a nation shouldn't be used to justify a lack of partiality toward potential immigrants—would be to draw an analogy to a clubs or families. Membership in a club or family, we usually think, is completely up to the group's discretion. The existing members can decide to include or exclude any person and any number of people that they feel is appropriate. Nations, some believe, are similar in this way to families and clubs.

Walzer makes a version of this argument. He argues that like clubs or families, countries cannot bar people from exiting, but they can limit entry.

“Like clubs, countries have admissions committees,” Walzer writes. “In the United States, Congress functions as such a committee ... it establishes general qualifications, categories for admission and exclusion, and numerical quotas.... Then admissible individuals are taken in ... mostly on a first come, first-served basis.”

He concludes: “This procedure seems eminently defensible...”<sup>48</sup>

Walzer admits that there are some moral qualifications on which kinds of admission criterion may be used, though he doesn't go into detail on this matter. Indeed, even within families, there seems room for moral criticism. It would be wrong for a family to refuse to accept

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<sup>48</sup> Walzer (2008) pg. 40.

one member's new spouse for racist reasons, for example, or to give a child up for adoption because of its sex—even though, for other reasons, excluding a potential spouse or giving away a child may be a defensible choice.

But we should be skeptical about the analogy to clubs and families (Walzer notes that the family analogy may be more apt, given the assumption of hereditary citizenship.) First, no one *needs* to be a member of a club or even a family. Acceptance by a country, on the other hand, is virtually a necessity for the recognition of basic rights, because states are the only institutions capable of protecting rights.

We also need access to states because of the resources and opportunities they provide. Economic opportunities, educational opportunities, security, food and water are all much more accessible in a well-functioning state than they are elsewhere.

And as I've been arguing, the territorial claims that states make impose demands on everyone, even those outside their boundaries. They have both laid claim to a significant portion of the Earth's finite land resources, and they've bound the human and natural resources of that land under their own jurisdictions. These claims are backed up by violent force. For these reasons, the state is obligated to at least take seriously the claims potential immigrants make for entry.

David Miller makes a similar point, writing:

In the case of state, the advantages that they deny would-be immigrants who are refused entry are very substantial; and because states monopolize stretches of territory, and in other ways provide benefits that cannot be replicated elsewhere, the “go and start your own club” response to immigrants is not very plausible.<sup>49</sup>

Clubs and families are distinct from nations, additionally, because exclusive membership

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<sup>49</sup> David Miller (2014) pg. 199.

is a necessary condition of the nature of these institutions. A family that anyone can join or a club with no firm membership rolls may perhaps not properly be called a family or a club at all. These institutions are about creating and maintaining certain kinds of relationships among their members, relationships that cannot be shared universally for the same reason you can't be everyone's best friend.

Some people believe nations are like this; Bernie Sanders and Donald Trump made these kinds of claims in my introduction. However, this is a mistake. A state with open borders would still be a state; it could have a citizenry that participates in elections for politicians with authority to govern over a given territory. Its territorial rights, which lacking the feature of border control, would still include jurisdictional and resource sovereignty claims. Nothing about the concept of the state requires exclusive membership.

### *Culture*

Perhaps the most contentious reason given to support the idea of nationalist partiality and to justify immigration restrictions is the appeal to culture. Valuing one's culture above others, using it to justify discrimination, and the devaluation of foreign cultures are all common argumentative moves of the racist, and many of these appeals reflect little more than the bigotry discussed in the introduction. However, serious philosophical arguments have been put forward about the importance of culture to a nation and the effects immigration has on a country's way of life, and these claims are worth analyzing.

David Miller makes the case for regarding the preservation of culture as sufficient grounds for immigration restriction in his essay "Immigration: The Case for Limits." To begin, he argues that states require a "common public culture" that helps support democracy and other

important social goals.<sup>50</sup> Immigrants, however, will naturally come with their own cultural attitudes, practices, and values, which will change the public culture by, say, shifting the mix of religious beliefs.

Acknowledging that culture will necessarily change over time, Miller argues that members of a country still have an interest in trying to shape the way the culture develops and maintain continuity over time “so that they can see themselves as the bearers of identifiable cultural tradition that stretches backwards historically.”<sup>51</sup> He does not explicitly cast his argument as one of nationalist partiality; he merely says that preserving culture is a reason to restrict immigration. However, he neglects the fact that, even if preserving culture may be a reason to restrict immigration, many immigrants themselves likely have overriding reason to be let in. He writes:

How restrictive an immigration policy [the cultural preservation argument] dictates depends 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, and this will vary hugely from case to case ... a political judgment needs to be made about the scale and type of immigration that will enrich rather than dislocate the existing public culture.<sup>52</sup>

If, as Miller makes explicit, cultural preservation is simply a *reason* for restricting immigration, then his argument in the above quotation is mistaken. Decisions about whether and how to restrict immigration must consider the reasons a nation has to preserve culture *as well as* the reasons that immigrants have to enter. Earlier in the essay, Miller argues against the idea that there is a moral right to immigrate, but even if we accept those arguments, they doubtless have *reasons* to immigrate.

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<sup>50</sup> Ibid.

<sup>51</sup> Ibid pg. 200.

<sup>52</sup> Ibid pg. 201.

Miller's argument only makes sense if we assume that the cultural reasons we have to restrict immigration ground a form of nationalist partiality. Perhaps David Miller would want to say that the bounds of cultural identity create bonds of partiality, similar to the Richard Miller's claims about the just functions of a state.

In one way, this version of culture-based nationalist partiality is on stronger footing to respond to the objections I posed to Richard Miller's view. I argued that immigrants are in part coming to participate in the state's functions such as education and regulated commerce, so these institutions cannot plausibly serve to create an exclusionary form of nationalist partiality. However, immigrants are not necessarily coming to participate in the cultural practices and traditions of a state and may intend to reject them. This makes it a more plausible basis for partiality.

It's important to note that even if we accept certain versions of the arguments for nationalist partiality, they may not have universal applicability. As Walzer notes—and David Miller seems to agree—an argument for nationalist partiality based on culture would be of limited use for a country like the United States. Walzer writes:

The claim of American advocates of restricted immigration (in 1920s, say) that they were defending a homogenous white and Protestant country, can plausibly be called unjust as well as inaccurate; as if non white and non-Protestants citizens were invisible men and women, who didn't have counted in the national census!<sup>53</sup>

Indeed, the United States—even New York City alone—is filled with so many pockets of different cultures and countless ethnic enclaves that it would be patently ridiculous to maintain that there was single culture to maintain. Immigration itself is a fundamental feature of American culture.

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<sup>53</sup> Walzer (2008) pg. 40.

The argument may be more plausible for more ethnically and culturally homogenous countries. Could Japan, for example, claim that its unique culture creates a bond of partiality among its citizens that justifies discounting the interests of outsiders?

One way to push back against this argument is to say that the United States should serve, in one way, as a multicultural model. It shows that unique and valuable cultures can exist alongside others within the same country or city without tragic loss. Cultures do not need nation-states. Multiculturalism has its challenges, there's no doubt, but that doesn't mean exclusionary immigration restrictions are justified. Democracy, too has serious challenges, but that doesn't justify autocracy.

Richard Miller, while defending nationalist partiality on other grounds, gives an even more definitive reason for rejecting the culture argument. He points out that even in relatively homogenous countries, there are still typically minority groups with different cultural practices and histories. While cultures are the site of important values, these differences with the majority culture cannot justify discriminatory political decisions.<sup>54</sup> If, for instance, the Japanese government were to offer limited access to the national health insurance system to the Korean minority living in the country because they were a cultural minority, this would be widely regarded as unjust. Since cultural partiality cannot justify this form of political exclusion, it cannot justify restrictive immigration policies. One might want to say that cultural partiality only justifies exclusionary policies toward immigrants—but this simply begs the question. Why immigrants should be treated differently at all is what the theory of nationalist partiality is trying to explain, so an appeal to their mere status as immigrants cannot be a part of our answer.

Richard Miller argues that basing immigration restrictions on such cultural considerations

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<sup>54</sup> Richard Miller (2010) pg. 38.

would be an improper application of nationalist partiality. Analogously, while we are justified in being partial to our families, nepotism is an improper application of familial partiality. I can't justify, for example, petitioning my local officials to change the law so that it disadvantages my neighbors and benefits my family on the grounds they're my family. For the same reason, I can't bar entry to potential newcomers because of my cultural connections to my compatriots.

As this example shows, even if one rejects nationalist partiality as grounds for immigration restrictions, there might still be some forms justifiable of nationalist partiality.

It worth observing that there's a fundamental tension in David Miller's account of cultural grounds for excluding immigrants. After arguing that cultural preservation justifies restrictive immigration policies, he argues that immigration restrictions themselves cannot be applied on a discriminatory basis.

“What cannot be defended in any circumstances is discrimination on grounds of race, sex, or, in most instances, religion—religion could be a relevant criterion only where it continues to form an essential part of the public culture, as in the case of the state of Israel,” he writes.<sup>55</sup>

David Miller's quick switch from “in any circumstances” to “in most instances” should give us pause. There's no clear reason to distinguish between religion on the one hand and sex and race on the other. In trying to provide such a reason, he says immigrants who are refused entry are owed an explanation, and saying they belong to the wrong race or sex would be insulting “because these features do not connect to anything of real significance to the society they want to join.”<sup>56</sup>

But this does not sufficiently explain why a culture's preference for immigrants of a

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<sup>55</sup> David Miller (2014) pg. 204.

<sup>56</sup> Ibid.

particular race or sex is illegitimate on David Miller's view. Would a nation with a deeply (and genuinely) misogynistic culture be permitted to exclude women immigrants? Why should the cultural basis of the racist "white Australia" policy be rejected on his view? These questions are particularly hard for David Miller to answer given his inclusion of religion as a potentially legitimate basis for exclusion. His explanation of the "insulting" criterion doesn't hold water as a justifiable distinction between race and gender on the one hand and religion on the other. Immigrants who were denied because of their religion could likely be insulted for being denied.

Also, conspicuously missing from the list of illegitimate considerations for restricting immigration is "national origin"—a commonly rejected basis for discrimination that would, of course, undermine David Miller's entire argument if included in his list. This troubling instability in the view (absent from Walzer's view, which troublingly permits racial discrimination in immigration) should cast further doubt on its plausibility.

Some might believe, in spite of these arguments, that it is just too much to ask of a nation that its cultural history be drastically altered by immigration and that restrictive policies cannot ameliorate these effects. Can we really expect people to put up with changes to their languages, religious norms, and values of their society?

I think the answer is yes. In fact, in liberal societies, we already demand this. In "The Difficulty of Tolerance," T.M. Scanlon argues that liberalism requires that, as members of free societies, we will have to put up with changes in our culture that we don't like. He notes that he would not be happy to see religion become more culturally dominant and that he thinks that sexuality and sexual attractiveness are given too much importance in society. However, part of living with others is knowing that, while these cultural worries can be legitimate issues to worry about, they should not be subject to legislative restriction.

In a fascinating passage, he reflects on how tolerance is important in his relationship with his children:

It is their society just as much as it is mine. What one learns as a parent, however, is that there is no guarantee that the society they will want is the same one that I want. Intolerance implies that their right to live as they choose and to influence others to do so is conditional on their agreement with me about what the right way to live is. If I believe that others, insofar as they disagree with me, are not as entitled as I am to shape the mores of our common society, then I must think this of my children as well should they join this opposition. Perhaps I hold that simply being my children gives them special political standing. But this seems to me unlikely. More likely, I think, is that this example brings out the fact that intolerance is a denial of the full membership of “the others.”<sup>57</sup>

This an astute observation is revealing, especially as it applies to immigration. If we accept, as I have been arguing, that the moral foundations of immigration restrictions is much less firm than is commonly supposed, we might fear that this view will lead to wave after wave of newcomers that we can't predict. But we should realize that, as each generation is born, we already receive wave after wave of unpredictable newcomers. Though there is always incessant intergenerational sniping, we recognize that the correct attitude toward the newcomers is one of acceptance and respect. We should find a way to cultivate that same disposition toward the next generation of those coming to our shores.

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