

Migration and Self-Determination

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ABSTRACT

Free international migration has enormous benefits. But many argue that governments can legitimately restrict migration in order to protect the supposed “self-determination” of natives. Some claims of this type are based on group rights theories, which hold that members of a particular racial, ethnic, or cultural group are the “true” owners of a particular territory. Others are based on notions of individual freedom of association, which analogize the rights of national governments to those of private property owners or members of a private club. This article criticizes both collective and individual rights theories that purport to justify a power to exclude migrants. It also critiques claims that migrants’ “home” governments can curtail emigration by forcing them to stay.

INTRODUCTION

Few if any other policy changes can help so many people as much as breaking down barriers to international migration. A recent World Bank report concludes that “[i]gnoring the massive economic gains of immigration would be akin to leaving billions of hundred dollar bills on the sidewalk.”¹ Allowing free migration throughout the world could potentially double global GDP, a far larger gain than any other possible policy reform would produce.² As Harvard economist and former Treasury Secretary Larry Summers stated, “I do not think there is a more important development issue than getting questions of migration right.”³

And that does not even account for the improvements free migration would make for human rights and “noneconomic” elements of well-being. Expanded migration rights can enable many more people to exercise political freedom by choosing which government they wish to live under. For much of the world’s population, international migration is virtually their only hope to exercise any meaningful political freedom at all. Some 2.7 billion people (more than a third of the world’s population) live in the 49 countries designated as “not free” in Freedom House’s most recent annual survey of

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¹ CAGLAR OZDEN, ET AL. MOVING TO PROSPERITY: GLOBAL MIGRATION AND LABOR MARKETS 3 (2018). The phrase is adapted from Michael Clemens, *Economics and Emigration: Trillion Dollar Bills Left on the Sidewalk?*, 25 J. ECON. PERSP. 83 (2011).

² Clemens, *supra* note 1. See also discussion of this issue in ILYA SOMIN, *FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM* 67–70. (2020).

³ Lawrence H. Summers, Speech at the Center for Global Development: Rethinking Global Development Policy for the 21st Century (Nov. 8, 2017 (transcript available at <https://www.cgdev.org/publication/rethinking-global-development-policy-for-the-21st-century>)).

political freedom.⁴ In “not free” states, the government is undemocratic, and there is little or no protection for civil liberties.⁵ Another 1.8 billion people live in the 58 “partly free” countries, where political rights and democracy are still very limited.⁶

Freedom to migrate across state boundaries can also expand human rights in other ways. Consider such cases as religious and ethnic minorities fleeing persecution, women fleeing sexist patriarchal societies, and political dissenters fleeing repression.⁷

But even if migration rights can enhance the political freedom of migrants, it does not follow that they increase political freedom overall. Perhaps the political freedom of foot voting migrants is at odds with that of ballot-box voting natives. One of the most common objections to free migration across international boundaries is that the existing population within those jurisdictions has a right of self-determination that entitles it to keep out migrants. This article assesses such claims and explains why they are flawed and should not be allowed to justify barriers to migration.

Some self-determination arguments of this type are based on individual rights theories that analogize states to private individuals or private groups that have a right to exclude. They assert that national governments’ right to exclude is similar to the way members of a club can exclude new applicants for membership or the way property owners can exclude those who wish to trespass on their land.⁸ Others rely on notions of group rights, holding that the right to exclude newcomers from a given territory rests with a particular ethnic or cultural group. Additional group rights justifications for the power to exclude hold that such authority is simply inherent in the notion of national sovereignty or in democratic citizens’ collective right of “self-determination.”

In addition, some claim that migration rights can be restricted to benefit not the receiving society, but that which migrants seek to leave behind. Perhaps they have a duty to stay home and “fix their own countries” or prevent them from suffering “brain drain.” By depriving their homeland of valuable labor that it is supposedly entitled to control, migrants’ departure could potentially impede the self-determination of their countries of origin, not just their new ones.

In this article, I assess and largely reject both collective rights and individual rights theories of self-determination that justify exclusion. Part I addresses a wide range of group rights theories, while Part II takes on individual rights claims. In Part III, I criticize claims that migration can justifiably be restricted because the migrants’ home societies have a right to force them to stay. Part IV explains why self-determination arguments often deployed as justifications for restricting international migration would actually justify extensive constraints on internal migration, as well. Those who advocate restricting the former type of migration, but not the latter, cannot logically defend their position on the basis of reasoning that would actually justify both.

⁴*Freedom in the World 2018: Table of Country Scores*, FREEDOM HOUSE 6 (2018), https://freedomhouse.org/sites/default/files/2020-02/FH_FIW_Report_2018_Final.pdf [https://perma.cc/E3H8-8KWC].

⁵*Id.* at 2–3.

⁶ *Id.*

⁷ For more detailed discussion of the ways in which international migration can expand political freedom and human rights, see SOMIN, *supra* note 2, at 64–79.

⁸ See, e.g., ANDREW ALTMAN AND CHRISTOPHER HEATH WELLMAN, A MORAL THEORY OF INTERNATIONAL JUSTICE 158–88 (2011); A. JOHN SIMMONS, BOUNDARIES OF AUTHORITY 239–42 (2016); Stephen Kershnar, *There is no Moral Right to Immigrate to the United States*, 14 PUB. AFF. Q. 141–158 (2000).

This article does not consider the related, but distinct, argument that migration can be restricted in order to prevent migrants from creating “political externalities”: influencing their new jurisdiction’s government policies in harmful ways. Political externality criticisms of foot voting are considered in detail in my recently published book, *Free to Move: Foot Voting, Migration and Political Freedom*.⁹ In that work, I also critique a variety of other consequentialist arguments against migration rights, both domestic and international.¹⁰ Ultimately, I do not claim that international migration rights can never be restricted for any reason. Even the right to freedom of movement within national borders is not absolute, and some extreme circumstances can justify restricting international movement, as well.¹¹ Rather, I make the more modest, but still significant, claim that freedom of movement should not be restricted based on claims of self-determination.

I. GROUP RIGHTS CLAIMS

A. *Ethnic and Cultural Self-Determination*

Perhaps the most common type of group right claim for a power to restrict immigration is based on the rights of distinct ethnic, racial, or cultural groups to self-determination.¹² As Michael Walzer puts it in a well-known defense of this theory, nations must maintain a “community of character” dependent on culture, and “[t]he distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life.”¹³ Otherwise, he fears, people will become “radically deracinated.”¹⁴

Arguments for restrictions on migration based on group membership founder on the flaws inherent in claims that there is a right to live in a polity that privileges a particular culture or ethnic group. Among other flaws, such a right would imply the power to coerce even currently existing residents to prevent them from changing their cultural practices. To adopt Walzer’s terminology, that may be the only way to truly guarantee “closure.”¹⁵

After all, a culture can be transformed through internal change no less than through immigration. Older generations often complain about the cultural changes created by the choices of the young. Over time, the latter often end up radically changing the manners, morals, and social norms they inherited. Yet few argue that their elders have a right to use force to prevent it, much less to the point of expelling anyone who fails to conform to the previously dominant cultural patterns.¹⁶

⁹ See SOMIN, *supra* note 2, at 122–26.

¹⁰ See *id.* at 45–90, 121–50.

¹¹ For more detailed discussion of my approach to such issues, see *id.* at 121–50.

¹² See, e.g., MICHAEL WALZER, SPHERES OF JUSTICE 31–63 (1983); Michael Walzer, *Exclusion, Injustice, and the Democratic State*, 40 DISSENT 55 (1993).

David Miller, *Immigration: The Case for Limits*, in CONTEMPORARY DEBATES IN APPLIED ETHICS (Andrew Cohen & Christopher Heath Wellman eds., 2005); DAVID MILLER, STRANGERS IN OUR MIDST: THE POLITICAL PHILOSOPHY OF IMMIGRATION 60–68 (2016).

¹³ WALZER, *supra* note 12, at 39.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ For related criticisms of Walzer’s argument, see JOSEPH CARENS, ETHICS OF IMMIGRATION, 260–62 (2013); Bas van der Bossen, *Immigration and Self-Determination*, 14 POL. PHIL. & ECON. 270 (2015).

Indeed, virtually any significant social change can potentially undermine an existing culture or “way of life,” and sometimes radically so. As Michael Clemens and Lant Pritchett point out, “if migration barriers are deemed necessary to preserve a ‘way of life’ of inherent value, it would need to be clarified why similar reasoning would not have obstructed the Industrial Revolution, the entry of women into the labor force, and the abolition of serfdom—all of which greatly altered an existing ‘way of life.’”¹⁷

David Miller points out that internal cultural change is usually smaller than that which might be brought about by immigrants because “normal processes of education and socialization” will ensure “a good deal of continuity” between parents and their children.¹⁸ But this is a difference of degree rather than kind. If members of a dominant cultural group have the right to use the power of government to forestall unwanted cultural change, why does that authority only apply to rapid change, and not the slower kind? Some cultural conservatives may have strong objections to the latter, almost as much as to the former.

In addition, sometimes internal cultural change can be very rapid, as in the dramatic shift towards greater acceptance of gays and lesbians in many Western societies over the last twenty to thirty years. Many social conservatives deeply resented both the speed and direction of that transformation.

Theories like Miller’s and Walzer’s also imply a much higher degree of cultural consensus within a country’s native population than is actually likely to be the case. Far from having a unitary “community of character,”¹⁹ most societies actually have considerable disagreement over cultural issues, often even among people who belong to the same ethnic and linguistic groups. Some natives may fear the cultural impact of immigrants, while others either actively welcome it, or at least do not object to it. It is not clear why restrictionists’ values should be treated as if they exemplify the society’s true “character,” as opposed to the values of those who favor greater openness.²⁰ International law on the definition of the “peoples” who have a right to “self-determination” is similarly vague and does not offer a clear indication of who, if anyone, has the right to define those “peoples”’ cultural values.²¹

Anna Stilz suggests that such difficulties can be avoided if the right to exclude migrants for purposes of protecting natives’ culture is limited to states with “a largely culturally homogenous population” in which “almost all constituents” share the dominant culture.²² In such cases, states can exclude migrants on cultural grounds without thereby biasing the state’s institutional framework “in favor of some cultural preferences over others.”²³

Unless the terms “largely” and “almost all” are given very loose definitions, this approach would deny the right to cultural exclusion to all or nearly all existing states.

¹⁷ Michael Clemens and Lant Pritchett, *The New Economic Case for Migration Restrictions: An Assessment*, 138 J. DEV. ECON. 153, 163 (2018).

¹⁸ MILLER, *supra* note 12, at 63.

¹⁹ WALZER, *supra* note 12, at 39.

²⁰ For a related criticism of Walzer for assuming greater unity within societies than can be justified by the facts, see David Luban, *Romance of the Nation State*, 9 PHIL. & PUB. AFF. 392 (1980).

²¹ On this point, see LIAV ORGAD, *THE CULTURAL DEFENSE OF NATIONS: A LIBERAL THEORY OF MAJORITY RIGHTS* 178–81 (2015).

²² ANNA STILZ, *TERRITORIAL SOVEREIGNTY: A PHILOSOPHICAL EXPLORATION* 192 (2019).

²³ *Id.*

Certainly, the United States, Canada, the nations of Western Europe, and other countries to which most potential migrants seek to move are nowhere near “homogenous” and do not have a single dominant culture to which “almost all” current residents subscribe.

But, even in the case of a genuinely homogenous nation, Stilz’s argument does not avoid the problems that bedevil other justifications for a right to exclude based on culture. If the government of a society with a “homogenous” culture has a right to use coercion to preserve that culture from change, it presumably does so against internal transformations, as well as those that might be caused by immigrants.

Even in relatively homogenous nations, internal forces can also cause cultural change over time, unless suppressed. Thus, the Stilz approach still ends up providing a justification for internal cultural repression in any society for which it could justify immigration restrictions.

Another problem with the cultural self-determination argument is that only a small fraction of the world’s ethnic or cultural groups has a state of their own. There are currently some 190 nations in the world, but thousands of ethnic, religious, and cultural groups who lack a nation of their own, or even a province within a larger nation where they are the majority.

Few argue that the principle of self-determination entitles each such group to sovereignty over a territory from which they can exclude others. And it seems clear that many such groups do maintain a functioning culture that persists over time, even if not in a completely unchanging fashion. Certainly, most members of such groups have not become “radically deracinated.”²⁴ If this is true of currently stateless groups, it is difficult to see why it is not equally true of those who—often through conquest or historical accident—happen to have a majority in an existing nation-state.

Perhaps things are different in the case of an ethnic or cultural group that has acquired previously unoccupied territory and then developed it. It could be argued that such a group then has exclusive rights to the territory that cannot be claimed by ethnic groups that coexist with others or acquired “their” land by conquest.²⁵ But, if so, virtually no actual government can claim such a right, as nearly all are the products of repeated conquest or coercion, and most rule territories occupied by multiple cultural or ethnic groups, not just one. As Jacob Levy points out, “[i]t is unlikely that the current possessor of any piece of land on earth acquired it peacefully and legitimately from someone who acquired it peacefully and legitimately from someone who acquired it peacefully and legitimately from someone, and so on until original acquisition . . . [M]any of the forceful dispossessions and acquisitions have been ethnic or nationalistic” in nature.²⁶ Because of this history of conquest and dispossession, “most or all land is subject to more than one claim of past possession by some ethnic or national group.”²⁷

This is undeniably true of the western democracies of Europe, North America, and Australia, the countries to which the largest number of potential migrants seek access. Nations such as the United States, Britain, Germany, France, and others, are all

²⁴ WALZER, *supra* note 12, at 39.

²⁵ *Cf.*, MILLER, *supra* note 12, at 60, who argues that the right inheres in a “groups with shared national identities that, over time, have transformed the land at stake, typically endowing it with both material and symbolic value; David Miller, *Immigration: The Case for Limits*, in *CONTEMPORARY DEBATES IN APPLIED ETHICS* 193–206 (Andrew I. Cohen & Christopher Heath Wellman eds., 2005).

²⁶ JACOB T. LEVY, *THE MULTICULTURALISM OF FEAR* 219 (1998).

²⁷ *Id.*

the products of a long history of aggression and coercion, and all rule over populations that are far from being ethnically or culturally homogenous.

In the case of the U.S. for example, the nation was established in the Revolutionary War, despite the opposition of a large minority of Loyalists who preferred continued British rule.²⁸ Later, the U.S. acquired much additional territory through conquest and coercion, in wars with Mexico and various Native American peoples. Other advanced nations that are popular destination countries for immigrants have comparable histories of conquest and coercion.

That does not prove these governments have no right to exist or that they are necessarily worse than those of other states. It certainly does not prove that the establishment of the United States or any other nation was necessarily unjust, relative to the available alternatives at the time.²⁹ But it does foreclose claims to a right to restrict migration based on exclusive development of their territory by a particular ethnic or cultural group.³⁰

The same goes for the notion of an exclusive historical attachment to the territory that no other group can lay claim. Given the multiethnic nature of nearly all modern nations—particularly those advanced societies that most migrants seek to enter—it will rarely, if ever, be true that members of only one group have a historical connection to the area in question.

Similar flaws bedevil nationalistic theories that ground the right to exclusive control of territory based on a group’s “family-like bonds of mutual loyalty that persist among them,” as Yoram Hazony does in a prominent recent defense of nationalism.³¹ Hazony contends that such states can justly be formed when “a permanent peace has been formed among a number of competing tribes that share a common language or religion and an earlier history of banding together for the sake of common efforts.”³²

In reality, however, virtually all governments rule over large numbers of people who do not feel anything approaching “family-like bonds” with many of their compatriots, and virtually all were formed in large part by conquest, not voluntary agreement among “tribes.”³³ Elsewhere in his book, Hazony recognizes that his

²⁸ See, e.g., THOMAS B. ALLEN, *TORIES: FIGHTING FOR THE KING IN AMERICA’S FIRST CIVIL WAR* (2010); MAYA JASANOFF, *LIBERTY’S EXILES: AMERICAN LOYALISTS IN A REVOLUTIONARY WORLD* (2012).

²⁹ In my view, the American Revolution was still preferable, on moral grounds, to continued British rule, despite the many shortcomings of the rebels and their new government. See Ilya Somin, *The Case Against the Case Against the American Revolution*, REASON (July 4, 2019), <https://reason.com/2019/07/04/the-case-against-the-case-against-the-american-revolution/> [https://perma.cc/Q6BF-S75V].

³⁰ For a discussion of the virtually insuperable difficulties in trying to determine which ethnic or cultural group deserves exclusive rights to a given territory, see CHANDRAN KUKATHAS, *IMMIGRATION AND FREEDOM* (forthcoming 2021). For the argument that being a member of an ethnic group that settled an area first is a morally irrelevant characteristic that cannot justify immigration restrictions, see BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 89–93 (1980).

³¹ YORAM HAZONY, *THE VIRTUE OF NATIONALISM* 89 (2018).

³² *Id.* at 121.

³³ For more detailed critiques of Hazony’s theory of nationalism, see Mark Koyama, *A Nationalism Untethered to History*, LIBERAL CURRENTS (Sept. 25, 2018), <https://www.liberalcurrents.com/a-nationalism-untethered-to-history/> [https://perma.cc/2AFX-4WVK]; and Alex Nowrasteh, *Ridiculous Claims in Yoram Hazony’s The Virtue of Nationalism*, CATO INSTITUTE (Nov. 1, 2018), <https://www.cato.org/blog/ridiculous-claims-yoram-hazonys-virtue-nationalism> [https://perma.cc/QFN5-5ZTJ]. As Nowrasteh points out, Hazony’s definition of legitimate nationalism turns out to be so narrow as to exclude virtually all the major European nations. *Id.*

conception of nationalism, in fact, requires “a majority nation whose dominance is plain and unquestioned, and against which resistance appears to be futile.”³⁴ If so, his approach is little different from more traditional justifications for the domination of majority ethnic or cultural groups over others.

B. The Injustice of Discrimination Based on Parentage and Place of Birth

Ethnic and cultural group-based claims for a right to exclude are particularly problematic for liberal democrats committed to principles of non-discrimination on the basis of race and ethnicity. The standard defense of racial and ethnic non-discrimination is that race and ethnicity are morally irrelevant characteristics that people have no control over.³⁵

Whether a person is black, Asian, white, or Hispanic says nothing about her moral worth or what rights she should have. Most liberal democrats recoil at the idea that we should restrict people’s freedom because they chose the wrong parents.

What is true of race and ethnicity is also true of place of birth. Whether a person was born in the United States, Mexico, or China is also a morally arbitrary characteristic that she has no control over and which should not determine how much freedom she is entitled to. To adapt a famous quote from Martin Luther King, Jr., place of birth is no more indicative of “the content of your character” than race of birth.³⁶

In principle, immigration restrictions based on culture might not be based on either place of birth or parentage and thus, might be different from racial and ethnic discrimination. A person not born in France nor in an ethnically French family might still become familiar with French culture and choose a life that follows French cultural mores, no less than a native of France. In practice, however, virtually all efforts to discriminate on the basis of culture in immigration policy *do* rely on place of birth, parentage, or some combination of the two. These characteristics are used as proxies for culture, in much the same way as domestic racial and ethnic classifications were historically often used as proxies for a variety of traits.

Outside the context of immigration, legal and political theorists who argue for racial and ethnic preferences generally do so on a strictly limited basis, usually in order to compensate for large-scale historical injustices through, for example, race-based affirmative action programs or reparations payments.³⁷ Some also argue that racial and

³⁴ HAZONY, *supra* note 31, at 165.

³⁵ See, e.g., Robert K. Fullinwider, *Achieving Equal Opportunity*, in *MORAL FOUNDATIONS OF CIVIL RIGHTS*, (Robert K. Fullinwider & Claudia Mills eds., 1986).

³⁶ In his iconic 1963 “I have a Dream” speech, King famously said: “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.” MARTIN LUTHER KING, JR., *I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD* 103 (James Melvin Washington ed., 1986).

³⁷ See, e.g., RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW*, (2013); DAVID BOONIN, *SHOULD RACE MATTER: UNUSUAL ANSWERS TO THE USUAL QUESTIONS* 24–174 (2011).

ethnic discrimination is defensible in cases where it is the only way to avoid a great evil, such as a massive terrorist attack.³⁸

Whatever the merits of such arguments, they clearly cannot justify systematic discrimination against migrants based on place of birth—discrimination that often targets groups who are themselves the victims of massive injustices at the hands of the rulers of the nations they seek to leave. As discussed more fully in my forthcoming book *Free to Move*, few migration restrictions are the only means to avoid a still greater evil.³⁹

In addition to their similarity to racial and ethnic discrimination, migration restrictions based on parentage or place of birth also have troubling similarities to medieval feudalism. As Joseph Carens puts it,

[t]o be born a citizen of a poor country . . . is like being born into the peasantry in the Middle Ages Like feudal birthright privileges, contemporary social arrangements not only grant great advantages on the basis of birth but also entrench those advantages by restricting mobility, making it extremely difficult for those born into a socially disadvantaged position to overcome that disadvantage, no matter how talented they are or how hard they work.⁴⁰

For most people, citizenship status determines where they are allowed to live and work, which in turn largely determines not only their economic fate, but often whether they will have protection for even very basic human rights. Moreover, citizenship itself is primarily determined by birth—much like membership in old-time aristocracies. If you were not born a USS citizen or a close relative of one, there is very little chance you will ever be allowed to emigrate to the United States. For most others, the so-called “line” they must join is either nonexistent or likely to be decades or centuries-long.⁴¹ The same point applies to your chances of emigrating to other advanced liberal democracies if you were neither born there nor are the child of a current citizen.

Some countries have established a “right of return” for members of the majority ethnic group within that nation, such as Germany for ethnic Germans, and Israel for Jews.⁴² This, too, however, is a kind of hereditary privilege, albeit based on race or ethnicity, rather than family connections to current citizens.

Like traditional aristocracy, the modern aristocracy of citizenship is not a completely hermetically sealed class. Just as a commoner could sometimes join the nobility by marrying an aristocrat, so a foreigner can become eligible for American citizenship by marrying a current citizen. And just as kings and emperors would

³⁸ See, e.g., RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 161 (1997) (arguing that racial profiling might be permissible in a case where it is the only way to prevent an imminent bombing, where “the social need is absolutely compelling: weighty immediate, and incapable of being addressed sensibly by any other means”).

³⁹ See SOMIN, *supra* note 2, at 121–50.

⁴⁰ CARENS, *supra* note 16, at 226; See also Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987).

⁴¹ See David Bier, *No One Knows How Long Legal Immigrants Will Have to Wait*, CATO INSTITUTE (Jul. 28, 2016), <https://www.cato.org/blog/no-one-knows-how-long-legal-immigrants-will-have-wait> [<https://perma.cc/2AWS-JJ86>].

⁴² Christian Jopke and Zeev Rosenheek, *Contesting Ethnic Immigration: Germany and Israel Compared*, 43 EUR. J. SOC. 303 (2002).

sometimes elevate to the nobility those commoners they considered especially deserving (or especially useful), so too do modern governments sometimes grant residency rights (and the opportunity for eventual citizenship) to particular classes of migrants without family connections to current citizens, such as workers in certain professions. These exceptions to the rule of hereditary privilege are important. Nevertheless, they are still exceptions to a general rule that keeps the vast majority “in their place.”

Today, we reject traditional hereditary aristocracy and especially the notion that nobles had a right to use mobility restrictions to keep the serfs tied to the region where they were born. And we reject it even though nobles could plausibly argue that aristocrats had a distinct culture that might be imperiled by allowing peasants to move about freely.

Place of birth may sometimes correlate with morally relevant characteristics, even though it does not cause them. People born in one nation may, among other things, be more likely to become criminals or terrorists than those born in another.

But the same is true of different racial and ethnic groups. In the United States, African-Americans, on average, have higher crime rates than members of many other ethnic groups.⁴³ White males are disproportionately likely to become domestic terrorists.⁴⁴ It does not follow, however, that we would be justified in imposing severe restrictions on the freedom of blacks or white males as a group.

In both cases, it would be unjust to restrict people’s freedom merely because they happen to be members of the same racial or ethnic group as others who have committed various crimes and misdeeds. The same point applies to potential immigrant groups singled out for exclusion, merely because others born in the same place have a disproportionate propensity to engage in some form of wrongdoing.

Defenders of migration restrictions might argue that the ideal of self-determination allows current residents to impose ethnic, cultural, and parentage-based restrictions on immigrants that would not be permissible in the case of natives, but this argument is circular. It assumes the validity of the very point that must be proven: governments have a special right to exclude potential immigrants, based on culture, that does not apply to otherwise similar natives.

Ethnic, racial, or cultural characteristics of immigrants cannot justify uniquely negative treatment for them. That is because many natives also have similar characteristics, yet it is considered impermissible to impose discriminatory treatment on *them*.

C. The Sovereignty Argument

Another variant of the group rights justification for exclusion holds that governments can exclude migrants not because of the special claims of any particular racial or ethnic population, but because the right to bar migrants is intrinsic to the very nature of sovereignty: an independent nation must have it if it is to continue to exist. This argument has little support from political theorists, but it often occurs in public discourse.

⁴³ See, e.g., Matthew Cella & Alan Neuhauser, *Race and Homicide in America: By the Numbers*, US NEWS & WORLD REP. (Sept. 29, 2016) <https://www.usnews.com/news/articles/2016-09-29/race-and-homicide-in-america-by-the-numbers>.

⁴⁴ See *Terrorism in America After 9/11*, NEW AMERICA FOUNDATION (2015) <https://www.newamerica.org/in-depth/terrorism-in-america/> [https://perma.cc/YN3T-Z3WS].

For example, President Donald Trump claimed during the 2016 presidential campaign that “[a] nation without borders is not a nation” and therefore “[t]here must be a wall across the southern border” of the United States.⁴⁵ When, in 1889, the United States Supreme Court belatedly ruled that the federal government had the power to exclude migrants, despite the lack of any explicit statement to that effect in the Constitution, the ruling was based on the theory that the power to “exclude aliens from its territory . . . is an incident of every independent nation” and therefore, must be an “incident of sovereignty belonging to the government of the United States.”⁴⁶

It may well be true that nations must have borders of some kind in order to exist. Perhaps each government must have some form of authority bounded by territorial limits. Yet, even if we assume that a nation cannot exist without borders, it does not follow that the maintenance of borders requires immigration restrictions.

In reality, borders have a wide range of other functions, besides regulating immigration. For example, they define the territory within which a given government’s laws are binding and also the land area within which it may deploy its armed forces without obtaining permission from other governments.

If all immigration restrictions were abolished tomorrow, borders could readily continue to facilitate these and other purposes. A nation that does not exclude peaceful migrants can still bar invading armies, and its government can still exercise territorially defined authority from which the authority of other governments is excluded.

Empirically, it is unquestionably the case that sovereign nations existed for centuries without exercising a general power to bar peaceful migrants. As Joseph Carens points out, most states made significant efforts to restrict entry and exit only in the late nineteenth century, and passport systems were not introduced until after World War I.⁴⁷

Perhaps the sovereignty argument rests not on the idea that states simply cannot exist without immigration restrictions, but rather that the power to impose them is a traditionally accepted attribute of sovereignty. Under current international law, it arguably is, though there are some limitations based on obligations to admit certain categories of refugees.⁴⁸

But the fact that current practices hold that a given power is an attribute of sovereignty does not mean that such a power is morally justified. Historically, state practice and dominant public opinion also held that sovereignty included such powers as the authority to suppress political speech and the practice of religions considered inimical to the ruler’s interests. For example, the influential 1555 Peace of Augsburg was based on the principle of *cuius regio, eius religio*—“[w]hose realm, his religion”—which ensured that rulers could promote their preferred official religion and suppress rival faiths.⁴⁹

The governments of that era agreed they had the right to suppress religion and censor speech, and these principles were enshrined in international law, as it was then understood. But that did not make them right and just. Similarly, we should not assume

⁴⁵ Quoted in Ilya Somin, *Nations Can and Do Exist Without Immigration Restrictions*, VOLOKH CONSPIRACY: WASH. POST (Aug. 18, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/18/nations-can-and-do-exist-without-immigration-restrictions/> [<https://perma.cc/QGJ7-QTTE>].

⁴⁶ *Chae Chan Ping v. United States*, 130 U.S. 581, 603, 609 (1889).

⁴⁷ CARENS, *supra* note 16, at 273.

⁴⁸ See SOMIN, *supra* note 2, at 165-67.

⁴⁹ See HAJO HOLBORN, *A HISTORY OF MODERN GERMANY: THE REFORMATION* 204-46 (1959).

that current state practices, including those supported by the current system of international law, are necessarily just.

In both earlier centuries and today, governments often have an interest in claiming powers to which they may not have any just entitlement. International law is heavily influenced by the preferences of such governments, including even the most deeply unjust ones.⁵⁰ Thus, we should not assume that any power considered a standard attribute of sovereignty in current international law is therefore defensible. Like any other government power, its existence requires independent normative justification.

D. Democratic Self-Determination

Sarah Song offers a collective rights justification for immigration restrictions linked explicitly to the ideals of democracy. She contends that democracy necessarily requires that citizens be able to participate in political decisionmaking and that ability entails a right to collective “self-determination.” That, in turn, require states have the power to restrict “admission” into the society because that is the only way in which we can respect “the right of individuals to be regarded as equal participants in significant political decisions by which they are bound.”⁵¹ New entrants could potentially dilute the participation rights of existing citizens, reducing their influence over public policy.

It is worth noting that Song’s argument applies to nondemocratic governments, as well as democracies. As she puts it, the “conditions for collective self-determination . . . can also be met through nondemocratic institutions that secure basic protections for the security and liberty of persons and provide ways for people to form and express public opinion.”⁵² Depending on how stringently we interpret these conditions, it is possible that a wide range of nondemocratic states can meet them, so long as they protect “security and liberty,” at least to some extent, and provide at least some mechanisms for the formation and expression of public opinion. But, in fairness, democratic governments constitute the overwhelming majority of those states to which a significant number of migrants seek access.

Even if it is otherwise valid, Song’s argument seems to justify not restrictions on immigration, but merely restrictions on access to political participation. As Song puts it, “[t]he right to control immigration derives from the right of the demos to rule itself” under conditions where “all members have an equal right to participate in shaping collective life.”⁵³ An entrant who does not have the right to participate in political

⁵⁰ On the influence of oppressive regimes on the content of international human rights law and some of its normative implications, *see, e.g.*, John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739–98 (2009).

⁵¹ Sarah Song, *Why Does the State Have the Right to Control Immigration?*, in NOMOS LVII: IMMIGRATION, EMIGRATION, AND MIGRATION *ed.*, 3, 38 (Jack Knight *ed.*, 2013); *See also* SARAH SONG, IMMIGRATION AND DEMOCRACY, 30–76 (2019).

⁵² SONG, *supra* note 51, at 62.

⁵³ *Id.* at 63. Song also suggests that deciding “whom to admit into the territory” is an element of collective self-determination “regardless of the particular effects of immigration,” *i.e.*, even apart from the impact on political participation. *Id.* at 63, 73. But this argument, if indeed she makes it, is circular, as it assumes the very premise that needs to be proven: that self-determination entails a right to exclude.

decision-making does not diminish existing citizens' ability to influence political decisions.⁵⁴

The political participation in question here is the use of the franchise or other methods of influencing government policy through "voice."⁵⁵ Influence through voice is necessarily a zero-sum game in which increasing the influence of some participants necessarily means diminishing that of others.⁵⁶ This is not the case with foot voting, where the ability of some to choose which policies they wish to live under does not in and of itself reduce the ability of others to participate in the formation of policy. Indeed, if a person eligible for the franchise departs a jurisdiction, that may slightly increase the leverage of those voters who remain behind in a smaller electorate where each of their votes has a marginally higher chance of determining electoral outcomes.

Moreover, even if we accept that citizens must be able to participate as equals, it does not follow that they are entitled to restrict participation in the political process to a particular set of people. They can still participate equally, even if the number of citizens increases, though the leverage of each participant is reduced whenever the number of citizens eligible to vote goes up.⁵⁷

There is also an even deeper limitation to the appeal to democratic self-determination that occurs before the democratic electorate in question has a right to self-determination. As Arash Abizadeh puts it, "the appeal to self-determination here begs the question of who the relevant collective 'self' rightly is."⁵⁸ Democracy may be "rule by the people." But there is no democratic way to determine who qualifies as a member of the people to begin with. Before any democratic procedures can even start to function, there must be a prior decision on who gets to participate. Thus, democracy cannot be democratic all the way down. Given the coercive history of virtually all existing states, it is likely impossible to identify a non-arbitrary point at which the existing inhabitants of a territory become the "people" who have a right to exclude future newcomers.

In the case of the United States, for example, did it occur when the ancestors of Native Americans first settled North America, when European colonists first established governments under the aegis of their homelands' monarchs, or when the United States was established as an independent state in 1776? Should it matter that none of these regimes was anywhere close to being democratic or that the United States arguably falls short of various democratic ideals even today?

Song herself suggests that a group can gain the status of a "people," presumptively entitled to exclude migrants from a particular territory, if they aim at "collective self-rule" and have "a history of political participation and contestation."⁵⁹ If this criterion requires all or most adult members of the group to have such a history, few

⁵⁴ Cf. Adam B. Cox, *Three Mistakes in Open Borders Arguments*, in NOMOS LVII: IMMIGRATION, EMIGRATION, AND MIGRATION 51–68, 63–64 (Jack Knight ed., 2017) (making a similar criticism of Song's argument).

⁵⁵ For the distinction between "voice" and "exit," see ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

⁵⁶ See discussion of this point in SOMIN, *supra* note 2, at 35–36.

⁵⁷ See discussion in *id.* at 102–03.

⁵⁸ Arash Abizadeh, *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders*, 36 POL. THEO. 37, 49 (2008); see also Abizadeh, *On the Demos and its Kin: Nationalism, Democracy, and the Boundary Problem*, 106 AM. POL. SCI. REV. 867 (2012).

⁵⁹ SONG, *supra* note 51, at 58.

if any existing states can meet its requirements, since virtually all have a long history of excluding women, at least some minority groups, and others from meaningful political participation.

While many formerly excluded groups have eventually obtained the right to participate in politics, that right exists within institutions that structure and constrain it. Those same institutions are often hard to change and established during the period when women and other such groups were not allowed to participate. Thus, it is questionable that the resulting state is legitimately “authorized by the people,” in Song’s terms, as opposed to a mere subset thereof.⁶⁰

If the “history” in question must be that of the group as a whole, it is unlikely that existing states can meet this test. If, on the other hand, it is enough that some subset of the group—perhaps even a small minority—has a history of participation and contestation, then that suggests that small elites can rightfully exercise the power to exclude (and perhaps other government powers). And they can do so regardless of the preferences of the rest of the population—so long as there is some appropriate sense that the elite and the masses are part of the same “people.”

If Song’s argument does justify restrictions on mere entry into the territory of a state and not merely restrictions on eligibility for the franchise or other access to political power, it can just as easily be used to justify coercive restrictions on fertility as on immigration. After all, a baby born within the territory of a state also thereby “enters” the society and also may eventually vote and otherwise participate in politics, thereby reducing the influence of current citizens. In Song’s terminology, the power to restrict fertility is essential to a self-determining community because “part of what it means for a political community to be self-determining is that it controls whom to admit as new members.”⁶¹

It follows, therefore, that existing citizens of a democracy (acting through their governments) should have the right to forbid births, or—alternatively—deport infants unwanted by the government (or, perhaps by a political majority) beyond the nation’s borders.⁶² This implication might be avoided if the needs of self-determination might be satisfied by giving existing citizens the power to deny children the right to vote when they come of age. But, if so, the same can be said of the power to restrict migration, which also becomes unnecessary, in so far as restrictions on the franchise are an adequate substitute.

In sum, Song’s argument is insufficient to justify immigration restrictions, as opposed to restrictions on political participation. It also has morally unacceptable implications that few, if any, advocates of liberal democracy will accept.

II. INDIVIDUAL RIGHTS CLAIMS

In addition to group rights claims for states’ authority to exclude migrants, there are also individual rights theories, which analogize the nation-state to a private house or

⁶⁰ *Id.* at 60.

⁶¹ *Id.* at 73.

⁶² Perhaps the deportation would have to include their parents, as well.

club.⁶³ As one leading advocate of this theory puts it, “groups, even political states, can have rights to autonomy analogous to those enjoyed by individuals.”⁶⁴

More individualistic versions of the right to exclude migrants suffer from serious flaws, as grave as those of group rights theories. The most significant is that real-world states are not voluntary organizations, but coercive ones. Unlike club members, residents of nation-states are born into their polities and not allowed to choose freely whether to live under the authority of the government.

A. *The House Analogy*

The analogy between nations and private homes is ubiquitous in debates over immigration. It is commonly deployed by both laypeople and professional political theorists. But despite its popularity, it has serious shortcomings.

The house analogy appeals to the notion of property rights, but it actually ends up undermining private property rights, rather than upholding them. Far from protecting property rights, immigration restrictions actually abrogate the rights of property owners who want to rent their property to the excluded migrants, associate with them, or employ them on their land. In this way, the house analogy justifies policies that in fact restrict the property rights of true owners of private property.

Perhaps, however, the government is a kind of super-owner that has the right to supersede the decisions of private owners whenever it passes a law that does so. On that view, the state has all the same rights over land within its jurisdiction as a private owner has over his house. And when the two types of property rights conflict, the state’s claims prevail over those of the private owner.

Restated in this way, the house analogy could indeed potentially justify almost any immigration restrictions a government might choose to set up. But it can also justify a variety of repressive government policies that target natives, as well. If a state has the same powers over land within the national territory as a homeowner has over her house, then the state has broad power to suppress speech and religion that the rulers disapprove of.

After all, a homeowner has every right to mandate that only Muslim prayer will be permitted in his house or that the only political speech permitted within its walls is that which supports the Republican Party. The same logic would justify all kinds of other illiberal and oppressive policies, as well, so long as a homeowner could adopt the same rules within her house.⁶⁵

Ironically, the house analogy argument for immigration restrictions—most often advanced by those on the political right—has the same kinds of dangerous implications for individual freedom as the traditional left of center argument that government can

⁶³ Both analogies are advanced in Christopher Heath Wellman, *Freedom of Movement and the Right to Enter and Exit*, in *MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP* 83, 87 (Sarah Fine & Leah Ypi eds., 2016); *see also* Christopher Heath Wellman, *Immigration and Freedom of Association*, 119 *ETHICS* 109–141 (2008) [hereinafter *Immigration & Freedom*].

⁶⁴ *Immigration & Freedom*, *supra* note 63, at 123.

⁶⁵ For related critiques of this sort of claim, see BAS VAN DER VOSSEN & JASON BRENNAN, *IN DEFENSE OF OPENNESS: WHY GLOBAL FREEDOM IS THE HUMANE SOLUTION TO GLOBAL POVERTY* 48–50 (2018); LOREN E. LOMASKY & FERNANDO R. TESON, *JUSTICE AT A DISTANCE: EXTENDING FREEDOM GLOBALLY* 110–11 (2015).

override and restructure property rights as it wishes, because it supposedly created them in the first place by virtue of creating laws that define their scope and institutions that protect them against trespass.⁶⁶ If this latter argument is correct, it would also justify governmental restructuring of a variety of personal liberties that the government can be said to “create” by virtue of establishing rules related to their scope and protection.⁶⁷ The house analogy deployed by many immigration restrictionists has similar dangerous implications.

In a democratic society, the extent of the resulting oppression might well be less than in a dictatorship. Still, the house analogy would justify suppression of religion, speech, association, and other behavior that the political majority disapproves of.

Perhaps a democracy could prevent some of the illiberal consequences by establishing constitutional rights against them. But if the house analogy is valid, such guarantees are not morally required. They can be granted or withheld at the discretion of the government of the day, or whoever controls the constitutional amendment process. If, for example, the United States were to enact a constitutional amendment abolishing freedom of speech and religion and instead, require all residents (on pain of expulsion) to become members of the ruling party and the newly established official church, dissenters would have no basis for complaint.

As a homeowner, I can choose to let people who disagree with my political views enter my house or host religious services for faiths I disapprove of. I could even promulgate rules guaranteeing freedom of speech and religion on my land. But I have no moral duty to do so. A government entitled to the same rights as a homeowner could exercise such powers, as well.

B. The Club Analogy

The club analogy has many of the same flaws as the house analogy. It too would justify a variety of illiberal and oppressive policies. After all, private clubs can and do restrict membership on the basis of speech, religion, and other similar criteria. Michael Huemer points out that a private club could potentially require members to “refrain from expressing political opinions, refrain from voting if they are female, and so on.”⁶⁸

Like the house analogy, the club analogy ends up justifying policies that trample on the liberties of actual private organizations. It restricts the ability of natives to freely associate with immigrants whom they want to hire for jobs, rent property to, or even form genuine private clubs with.

In addition, there are crucial differences between a government and a private club. The latter includes only members who join voluntarily and agree to follow all of the club’s rules. If members wish to leave the club, they can do so while retaining all of their preexisting property and other preexisting rights. The justification for the club’s broad power to set membership criteria and expel violators is that it is a consensual organization. No one has to join it unless they consent to it.

⁶⁶ For this sort of argument on the left, see, e.g., STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 210, 217 (1999).

⁶⁷ See Ilya Somin, *Creation, Consent, and Government Power Over Property Rights*, CATO UNBOUND (Dec. 2010), <https://www.cato-unbound.org/2010/12/13/ilya-somin/creation-consent-government-power-over-property-rights> [<https://perma.cc/3C6Y-2UMV>].

⁶⁸ Michael Huemer, *Is There a Right to Immigrate?* 36 SOC. THEO. & PRAC. 29 (2010). For related criticisms of the club argument, see, SONG, *supra* note 51, at 43–46.

Democratic governments are more consensual than authoritarian states, but not nearly as much so as the club analogy assumes. Unlike genuine private clubs, every real-world democratic state was initially established in large part by coercion. For example, the American Revolution that established the United States prevailed only because the revolutionaries successfully coerced the substantial minority of Loyalist supporters of the British Empire into accepting the new government or, in many cases, fleeing.⁶⁹ Black slaves had even less opportunity to meaningfully consent than white loyalists. That does not necessarily mean that the Revolution was unjustified or that the United States should not exist. It *does* suggest that the United States government is not meaningfully analogous to a genuinely consensual private club. The same is true of every other existing government in the world.

Most people would take a dim view of a private club that proclaims everyone within a 100-mile radius has to be a member whether they want to be or not and therefore, subject to all club rules. If such a mandatory club should be allowed to exist at all, it at the very least should not be given the broad powers permitted a voluntary organization. Governments are much more like mandatory clubs than voluntary ones.⁷⁰ When a genuinely consensual private club asks you to join, it has to take “no” for an answer. The state, by contrast, usually treats “no” as if it were just another way of saying “yes.”⁷¹

Political theorists and libertarian activists have sometimes imagined governments established through genuinely consensual processes more akin to those by which clubs are formed.⁷² Perhaps such a government really would be analogous to a private club and would be entitled to exercise all the same rights. But there are no such club-like governments in the real world, and we are unlikely to see one established anytime soon.

C. Other Freedom of Association Arguments

In addition to the club and house analogies, political theorists have offered a number of other freedom of association rationales for a right to exclude migrants. These theories all have flaws similar to those of the club and house arguments.

Political philosopher A. John Simmons argues that a state may be justified in restricting immigration if it consists of “a substantial group of persons who willingly create (or join) a group committed to persisting as a viable, governed territorial polity.”⁷³ In that event, the resulting government would have the right to “fence, control, and exclude in the same ways that an individual landowner is.”⁷⁴ But virtually no existing government meets these criteria. None rules over only persons who “willingly” created or joined the polity in question. To the contrary, every actual government in the world was created at least in part through violence and coercion and exercises power over anyone

⁶⁹ See, e.g., JASANOFF, *LIBERTY’S EXILES: AMERICAN LOYALISTS IN THE REVOLUTIONARY WAR* (2011).

⁷⁰ Cf. Huemer, *supra* note 68.

⁷¹ This formulation is adapted from Jason Brennan, *Our Relationship to Democracy is Nonconsensual*, PRINCETON UNIVERSITY PRESS BLOG (Jan. 26, 2016), <http://blog.press.princeton.edu/2016/01/26/jason-brennan-our-relationship-to-democracy-is-nonconsensual/>.

⁷² See, e.g., ROBERT NOZICK, *ANARCHY, THE STATE AND UTOPIA* pt. 1 (1974).

⁷³ A. JOHN SIMMONS, *BOUNDARIES OF AUTHORITY* 239 (2016).

⁷⁴ *Id.* at 241.

who enters or is born within its claimed domain, regardless of whether those individuals voluntarily agree to its authority or not.

Simmons recognizes that real-world governments rule over “many unwilling persons and groups,”⁷⁵ but suggests that they might still have a broad power to exclude migrants, so long as they are “honestly working towards full rectification” of this and other similar injustices.⁷⁶ However, it is difficult to show that *any* existing states are in fact working towards anything approaching “full rectification” of their involuntary nature, and it may not even be possible for them to do so without ceasing to exist as effective governments.

Christopher Wellman argues that the right of states to make treaties implies that they also have a right to exclude migrants.⁷⁷ The power to make (or refuse to make) treaties indicates that states have a right of freedom of association. But freedom of association in turn also implies a right to exclude migrants with whom the government chooses not to associate.

But the power to make treaties does not necessarily imply a general right of “freedom of association” that includes the power to exclude migrants. Rather, a treaty is simply a contract between governments. As John Jay put it in *Federalist* 64, “a treaty is only another name for a bargain.”⁷⁸

Governments, like other entities, only have the right to make bargains on matters that are legitimately within their control. For example, I can sign a contract under which I have an obligation to teach classes at my university. But I cannot sign a contract requiring Bob to teach those classes in my place unless he has voluntarily authorized me to do so. Similarly, the power to make treaties only authorizes governments to make agreements on whatever subjects are otherwise within their legitimate authority. It does not, in and of itself, create a power to impose whatever restrictions they wish on either current residents of their territory or potential migrants.

Because of their coercive nature, governments (or the local majorities who select them) also cannot be properly analogized to private property owners or clubs. The latter have a presumptive right to exclude newcomers from their land. Governments, at least as a general rule, do not.

The fact that governments are coercive rather than voluntary does not prove they should not exist or by itself determine what powers they can legitimately exercise. But it does indicate that those powers cannot be justified by analogies to those of private homeowners or club organizers or by reference to theories of freedom of association, more generally.

D. The Right to Avoid Unwanted Political Obligations

Michael Blake argues that restricting migration is necessary for individual members of a society to be able to avoid the imposition of “unwanted obligations.”⁷⁹ He contends that states have a responsibility to provide “legal protection” of the “basic

⁷⁵ *Id.* at 246.

⁷⁶ *Id.*

⁷⁷ See Immigration & Freedom, *supra* note 63.

⁷⁸ THE FEDERALIST NO. 64 (John Jay).

⁷⁹ See Michael Blake, *Immigration, Jurisdiction, and Exclusion*, 41 PHIL. & PUB. AFF. 103 (2013).

rights” of people living within its territory.⁸⁰ Blake does not fully spell out exactly what is meant by basic rights, but he seems to mean such things as providing “physical security,” extending procedural protections to people accused of crimes, and ensuring the protection of criminal and civil law that applies to all persons within the state’s territory.⁸¹ If governments are not allowed to keep out migrants, their presence could impose unwanted obligations to protect rights on the existing citizens of the state in question.

To the extent that avoiding unwanted obligations is an important element of liberty and autonomy, immigration restrictions may be essential to ensuring their protection.⁸² The only way that existing citizens of the state can avoid these unwanted obligations would be to prevent migrants from entering, though Blake is careful to emphasize that this right to avoid unwanted obligations does not necessarily “trump” all competing considerations, such as the needs of people fleeing severe oppression.⁸³

Blake’s argument is an interesting and original approach to justifying immigration restrictions. But, even if we grant the contestable assumption that avoiding unwanted obligations really is an important human right, it has a number of significant limitations. The most serious arises from the fact that immigration restrictions themselves impose unwanted obligations. Most obviously, they impose obligations on those potential migrants who are required to avoid entering the nation in question. In many cases, that imposition might be very severe since it could consign the person in question to a life of poverty and deprivation.⁸⁴

Migration restrictions also impose unwanted obligations on natives, who are required to cooperate with deportation efforts and often must face the risk of racial and ethnic profiling, civil liberties violations, and even deportation as a result of bureaucratic error in cases where the authorities confuse them with illegal migrants.⁸⁵ Migration restrictions also, of course, impose the obligation to refrain from commercial and cultural relationships with migrants that require the physical presence of the latter.

On balance, migration restrictions are likely to impose far more severe unwanted obligations than those Blake focuses on. Protection of basic rights will, in most cases, only impose a modest increase in marginal tax rates for necessary government services, an increase that could be offset by the extra wealth created by migration itself.⁸⁶ By contrast, the unwanted obligations imposed by immigration restrictions are often far more severe, for both would-be migrants and many natives.

Imposition of unwanted obligations is a potential downside of almost any enforceable legal duty. In many cases, it is surely outweighed by the considerations justifying the imposition in the first place. But a legal duty that is itself justified by the need to avoid unwanted obligations is uniquely vulnerable to the objection that it actually imposes unwanted obligations more severe than those it prevents.

⁸⁰ *Id.* at 104.

⁸¹ *Id.* at 113–14.

⁸² *Id.* at 105–19.

⁸³ *Id.* at 104, 122–23.

⁸⁴ Blake recognizes that the right to exclude based on avoiding unwanted obligations might be trumped in cases where entry is necessary to protect the migrant’s own “basic rights.” *Id.* But this exception presumably does not apply to every case where exclusion would consign a migrant to a far worse situation than he or she would face otherwise.

⁸⁵ See discussion of these issues in SOMIN, *supra* note 2, at ch. 64–79 .

⁸⁶ See discussion of this sort of approach to dealing with extra expenses created by migration in *id.* at ch. 6.

Like Sarah Song’s argument,⁸⁷ Blake’s theory also potentially justifies restrictions on fertility, as well as migrations. After all, the birth of a child creates unwanted obligations to protect its basic rights, similar to those created by the arrival of a migrant.

To his credit, Blake recognizes this, but suggests that the creation of an unwanted obligation might be outweighed by the harm and injustice inflicted by fertility restrictions.⁸⁸ But if so, the same can be said any time exclusion of a migrant causes harm comparable in magnitude to a restriction on fertility. For many millions of people, being consigned to a life of poverty—or worse—in their nation of origin is, plausibly, at least as severe an imposition as having to have one less child than they would otherwise. This is especially true if the restrictions on fertility imposed by the state do not ban families from having children entirely, but “only” limit the number they are allowed to have, perhaps along the lines of China’s notorious “one child” policy.⁸⁹

Finally, it is worth emphasizing that the obligation to protect basic rights can often be fulfilled through expenditures that a state already undertakes on law enforcement institutions, simply to provide that protection for natives, and in other cases can be carried out by utilizing resources raised from the extra wealth created by migration itself. As such, the “extra” burden this obligation creates will often be minimal or even nonexistent. Blake’s “unwanted obligation” argument is distinguishable from the related, but distinct concern that immigration might harm natives by overburdening the welfare state or increasing crime.⁹⁰ At least in the vast majority of situations, we can protect the legitimate political freedom of natives without denying it to foot voting immigrants. Unconstrained foot voting rights may not be feasible in all cases. But it should be possible to expand them far beyond their current level without endangering legitimate rights of self-determination.

III. DO MIGRANTS HAVE A DUTY TO STAY HOME AND “FIX THEIR OWN COUNTRIES”?

Even if migration does not undermine the self-determination of the receiving nation, perhaps it violates the rights of the migrants’ nation of origin. The latter might have a right to compel the migrants to stay and contribute to the improvement of their homeland rather than departing for greener pastures elsewhere. If their government is unjust, corrupt, or oppressive, perhaps that makes the duty even stronger. In common parlance, this is the idea that would-be migrants have a duty to “stay and fix their own countries.” In a related vein, President Donald Trump suggested in a speech to the United Nations that would-be migrants should “build more hopeful futures in their home countries” and “make their countries great again.”⁹¹

Even if not everyone has an obligation to work to “fix their own countries,” perhaps such an obligation does apply to people with skills that might be especially

⁸⁷ See discussion earlier in this article.

⁸⁸ Blake, *supra* note 79, at 118–19.

⁸⁹ See MEI FONG, ONE CHILD: THE STORY OF CHINA’S MOST RADICAL EXPERIMENT (2016).

⁹⁰ These latter issues are discussed in greater detail in SOMIN, *supra* note 2, at 127–33.

⁹¹ Quoted in Nic Robertson, *Donald Trump’s World View Was Laid Bare at the UN – And it Should Worry Anyone Who Understands History*, CNN (Sept. 26, 2018),

<https://www.cnn.com/2018/09/25/world/robertson-trump-un-worldview/index.html>

[<https://perma.cc/ZBR4-UKDG>]. In fairness, Trump did not claim that home governments would be justified in forcing potential migrants to stay.

useful to poor nations where they were born, such as health care professionals or engineers. Some political theorists argue that such people have a special duty to stay and work for the betterment of their home nations, either as a general principle, or in order to repay their home society for the “investment” it has made in their education and training.⁹² Such “brain drain” might justify forcing people to stay in their home countries, either by directly barring them from leaving, or by achieving the same result through denying them the right to move to other societies with greater opportunities.⁹³

The “fix their own countries” theory has several serious weaknesses. Consider the following paraphrase of an exchange I had with a questioner who approached me after I participated in a public debate on immigration policy in 2017:⁹⁴

Questioner: Why do Middle Eastern refugees have to come here? They should fix their own governments instead.

Me: Do you happen to know where your ancestors came from?

Questioner: They were Jews who emigrated from czarist Russia.

Me: Do you think they should have stayed in Russia and worked to fix the czar?

I do not blame the questioner for failing to come up with a good answer on the fly. Anyone can fall short when put on the spot, myself definitely included. Still, the fact remains that the “fix your own country” argument implies that the ancestors of most Americans (and also many Canadians, Australians, and others) were wrong to emigrate. The Russians should have tried to fix the czar and later, the communists. The Irish should have stayed home and worked to fix the British Empire. President Donald Trump's grandfather should have stayed in Bavaria and worked to fix imperial Germany,⁹⁵ and so on.

The fact that the “fix your own country” argument implies that the ancestors of most Americans were wrong to come does not, by itself, disprove it. We should not automatically assume that every longstanding American practice was necessarily right. Past generations of Americans erred in committing such injustices as slavery and segregation. Perhaps they were also wrong to come to the United States in first place. I suspect, however, that most people are not willing to bite this particular bullet. And they would be right not to.

⁹² See, e.g., MILLER, *supra* note 12; Thomas Pogge, *Migration and Poverty*, in *Citizenship and Exclusion* 14–15 (V. Bader, ed., 1997); Kieran Oberman, *Can Brain Drain Justify Immigration Restrictions?*, 123 *ETHICS* 427–55 (2013); PAUL COLLIER, *EXODUS: HOW MIGRATION IS CHANGING THE WORLD* chs. 9–10 (2013). Gillian Brock, *Part I*, in GILLIAN BROCK & MICHAEL BLAKE, *DEBATING BRAIN DRAIN: MAY COUNTRIES RESTRICT EMIGRATION* (2015); Anna Stilz argues that states may not be able to force skilled professionals to stay, but can impose special exit taxes on them, so long as they are set at “reasonable” levels. Anna Stilz, *Is there an Unqualified Right to Leave?*, in *MIGRATION AND POLITICAL THEORY* 66–75 (Sarah Fine ed., 2016).

⁹³ For an argument that brain drain justifies the latter, but not the former, see MILLER, *supra* note 12, at 111.

⁹⁴ “How Open Borders Promote Liberty,” Faculty of Law, University of Calgary, Calgary, Alberta, Canada, March 2017 (debate with Candice Malcolm).

⁹⁵ On Trump’s grandfather’s emigration from Bavaria, see Gwenda Blair, *The Man Who Made Trump Who He is*, *POLITICO* (Aug. 24, 2015), <https://www.politico.com/magazine/story/2015/08/the-man-who-made-trump-who-he-is-121647> [https://perma.cc/96V2-L4WU].

The claim that immigrants fleeing poverty or oppression have a duty to stay home and “fix” their countries is wrong for reasons that go beyond intuitions about American history. Most fundamentally, it treats people as the property of their home societies and suggests they have a moral duty to perform labor for them. If they can be forced to forego emigration in order to help their home society, why not also require them to perform forced labor? Otherwise, they might potentially choose to remain unemployed or work at a job less useful to “fixing” the society than one chosen by the state.

In most cases, potential migrants have little or no responsibility for the injustice and poverty they are fleeing. Russian Jews, like the questioner's ancestors, were not responsible for the many injustices of the czarist regime. Likewise, today's refugees from Venezuela, Syria, and other unjust and corrupt governments have generally had no meaningful role in creating the awful conditions in those countries. It is therefore wrong to claim that they must risk lifelong privation in order to “fix” the unjust regimes in their home countries. That point applies with extra force in cases where efforts to fix the regime are likely to result in imprisonment or death at the hands of the state. We rightly honor brave dissidents who risk life and limb to oppose injustice. But such sacrifices are not morally obligatory, and no blame attaches to those who forego them—especially if they have family members to protect, as well as themselves.

In addition, most migrants have little, if any, chance of succeeding in “fixing” their home governments, even if they tried. In most such societies, injustice and oppression are deeply embedded in the political system, and most would-be migrants lack the clout to fix it. Had the questioner's ancestors stayed in Russia, it is nearly certain that they would not have succeeded in reforming the czarist regime, no matter how hard they tried. The same goes for most migrants and refugees today. At least as a general rule, there is no moral duty to take great risks to attempt the nearly impossible.

This point is especially strong when it comes to authoritarian states, where ordinary people have little or no influence on government policy. But the constraint also applies, though with lesser force, to many dysfunctional countries that are democratic. Even in advanced democracies such as the United States, Canada, and the nations of Western Europe, many harmful and unjust government policies persist because of widespread voter ignorance and bias.⁹⁶ The same is true (often to a much greater extent) of the corrupt and dysfunctional democratic governments from which migrants flee. In most cases, potential migrants have little or no chance of reversing this dynamic anytime soon.

Occasionally, an unjust political system comes to a turning point when change is more feasible than is usually the case. But such situations are difficult to foresee, and it is wrong to demand that people (often literally) bet their lives on the hope that such an opportunity will come up soon.

Even when such an opportunity does arise, it is still far from clear that the average would-be migrant could make a real difference in the outcome. And even if he could, there is still the very real possibility that a revolution could produce a worse government rather than a better one. Had the questioner's ancestors stayed in Russia long enough to

⁹⁶ See, e.g., ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE* (rev. ed. 2016); SOMIN, *supra* note 2, at 16-19 (discussing political ignorance and its impact).

witness the fall of the czarist regime, they would have seen that very scenario play itself out. The communists won the resulting civil war and proceeded to engage in oppression and mass murder on a vastly greater scale than the czars ever did.⁹⁷

The “brain drain” theory has flaws similar to those of the more general “fix your own country” theory. It is, at the very least, questionable whether forcing skilled workers and professionals to stay in their own countries would really improve conditions there. Even if it would, it is no less wrong to treat highly-skilled workers as forced laborers. They too have a right to own their own labor and—in most cases—they too played little or no role in causing their home societies to have unjust governments and poorly-developed economies. The brains in question do not belong to the government of their home state or to its other residents. They belong to the people to whom they are attached.

The argument that skilled workers have a duty to “repay” their home country’s investment is equally unavailing. It too implies a right to impose forced labor on the person in question. If a Zimbabwean trained as a doctor chooses to stay in Zimbabwe but work as a painter, the government’s “investment” in her medical education is no less “lost” than if she migrates abroad. If it is unjust to forbid the former choice, it stands to reason that it would be equally wrong to forbid the latter.⁹⁸

Moreover, any obligation the worker might have to “repay” the state for supporting her education is surely vitiated, at least in part, by the fact that the state’s policies are often responsible for the relatively poor quality of opportunities available in her home country as compared to those in others. This problem is accentuated if the state’s flaws go beyond poor economic opportunities and extend to various forms of political and social oppression. If there is some sort of “account” to be balanced between the state and workers who receive training at public expense, the latter should get “credit” for the sub-par opportunities provided by the state and for exposure to various forms of oppression.

Things may be different in cases where the worker has voluntarily signed a contract to provide a term of service in exchange for subsidized education or training. Assuming the contract is genuinely voluntary and not obtained by coercion or some other form of unjust pressure, the individual in question may indeed have a duty to carry out his or her end of the bargain.⁹⁹ But there is no general obligation to stay in one’s home country merely because the person in question has received some form of subsidized education or training.

In sum, at least in the vast majority of cases, would-be migrants have no moral obligation to stay and “fix” their own countries. Are there exceptions to that generalization? Perhaps a few. Consider the case of the Shah of Iran, who fled his country after his regime was overthrown in 1979. The corruption and repression of the Shah’s government played an important role in stimulating the rise of the even more oppressive regime that replaced him.¹⁰⁰ Quite possibly, the Shah had an obligation to stay in Iran and work to fix the horrible mess that he himself played a major role in creating.

⁹⁷ For an overview, see RUDOLPH J. RUMMEL, *LETHAL POLITICS: SOVIET GENOCIDE AND MASS MURDER SINCE 1917* (1990).

⁹⁸ This example is adapted from a similar argument in BAS VAN DER VOSSEN & JASON BRENNAN, *supra* note 65, at 45.

⁹⁹ For this example, see *id.* at 46–47.

¹⁰⁰ For an account of the role of the shah’s policies in bringing on the 1979 revolution that overthrew him and led to the establishment of a more repressive regime, see, e.g., ABBAS MILANI, *SHAH*, (2011).

Perhaps he even had an obligation to do so despite the fact that staying in Iran could well have led to his execution by the new government. Similar reasoning arguably applies to other powerful government officials in unjust regimes.

Of course, this admonition only applies in situations where staying behind to remedy the wrongs you yourself caused has a real chance of succeeding. Arguably, even a leader as blameworthy as the Shah did not have an obligation to remain in Iran if doing so would accomplish nothing. But one could also plausibly argue that he had a duty to stay, regardless of the risk to his personal safety, so long as doing so had even a small chance of mitigating the harm he had caused.

Whatever we ultimately conclude about cases like that of the Shah, the vast majority of potential migrants are neither morally responsible for the injustices in their homelands nor in a position to do much about them. In many cases, they can actually do more to help their compatriots by leaving, earning higher wages abroad, and sending remittances to relatives who remain at home. It is therefore wrong to claim that they have a duty to stay.

In many cases, rather than harming their home countries, people who migrate away from poor nations actually benefit their homelands. Emigrants often send remittances back to family members who remained in their countries of origin. For some developing countries, remittances account for a high proportion of their GDP, including 29% for Haiti and over 17% for El Salvador.¹⁰¹ One study finds that a 10% increase in the proportion of a nation's population that emigrates leads to a 2% decline in the proportion of people living on less than \$1 per day, and a 10% increase in remittances can reduce the poverty rate by 3.5%.¹⁰²

Evidence on the political effects of remittances is more mixed, with studies concluding that it may increase participation in civil society groups and strengthen electoral competition, but also modestly reduce voter turnout.¹⁰³ The latter effect is not necessarily negative, as in some cases reduced turnout may actually modestly decrease the negative effects of political ignorance.¹⁰⁴ But such relatively modest political effects are likely to be small compared to the much larger economic benefits remittances provide to poor societies.

In addition to the benefits of remittances, emigration can increase growth in home countries in other ways. These include stimulating investment in education, promoting innovation through an increased flow of ideas, and even encouraging democratization through greater contact with freer societies.¹⁰⁵ Migration to freer and more liberal

¹⁰¹ Drew Desilver, *Remittances from Abroad Are Major Economic Assets for Some Developing Countries*, PEW RESEARCH CENTER (Jan. 29, 2018) <http://www.pewresearch.org/fact-tank/2018/01/29/remittances-from-abroad-are-major-economic-assets-for-some-developing-countries/> [https://perma.cc/SGK3-Q3FM].

¹⁰² Richard H. Adams and John Page, *Do International Migration and Remittances Reduce Poverty in Developing Nations?*, 33 WORLD DEVELOPMENT 1645–69 (2005). For citations to numerous other studies on the benefits of remittances, see BAS VAN DER VOSSSEN & JASON BRENNAN, *supra* note 65, at 183 nn.6–7.

¹⁰³ For an overview of the literature see, Covadonga Meseguer & Katrina Burgess, *International Migration and Home Country Politics* 49 STUD. INTER. DEV. 1 (2014).

¹⁰⁴ On this point, see Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government is Smarter*, 221–22 (2nd. ed., 2016).

¹⁰⁵ For an overview of relevant research on these points, see Michael A. Clemens, *What Do We Know About Skilled Migration and Development?* MIGRATION POLICY INSTITUTE POLICY BRIEF NO. 3 (2013).

societies can have a significant effect on political attitudes in the origin countries,¹⁰⁶ which in turn can help promote liberalization there.

IV. APPLICATIONS TO INTERNAL MIGRATION

Nearly all of the self-determination arguments for restricting migration considered in this article can be used to justify constraining internal migration, no less than that across international boundaries.¹⁰⁷ Yet, strikingly, this is rarely done. Those who support free internal mobility but use these sorts of claims to justify constraints on international migration have a serious internal contradiction in their positions.

The existence of this contradiction does not prove there can never be any justifiable restrictions on freedom of movement. Some restrictions can potentially be justified if applied equally to internal and external migrants. For example, a quarantine may be the only way to protect innocent life against the spread of a deadly disease and that quarantine could be applied to all known carriers of it, regardless of their country of origin. But those who seek to justify selective restrictions imposed on one type of migration, but not the other, cannot do so based on reasoning that actually applies to both.

A. *Self-Determination Arguments for Restricting International Migration Also Justify Restricting Internal Migration*

Consider the house and club analogies. At least as a general rule, the owner of a private house can choose to give outsiders access to some rooms within it, but not others. For example, he can let them into the living room, but not the bedroom or the basement. Similarly, he might choose to give different access rights to different visitors, allowing some full access to all parts of the house, while others are only permitted to enter designated areas. As anyone who has lived in an apartment building or condominium knows, such variations in access are not unusual.

If a government has the same rights to restrict access to its territory as a private homeowner, it follows that it can forcibly confine some residents to a particular part of its territory and forbid them to move elsewhere. For example, the U.S. government might permit some people to live only in Virginia, but not in other states, or only on the East Coast, but not the West Coast. Christopher Wellman, a leading advocate of the house and club analogies, actually concedes that his theory would allow governments to impose significant restrictions on internal migration, so long as those restricted in this way could still live in a jurisdiction where it is possible to maintain a “minimally decent life.”¹⁰⁸

The club analogy has many of the same implications. Like a homeowner, club members can restrict access to parts of the club’s property. Even members of the club might face some restrictions. The club can even have a multitier membership structure, with “first class” members given full access to all club properties while others are restricted to specific parts of it. The implications for restrictions on internal mobility are fairly obvious and similar to those of the house analogy.

¹⁰⁶ See, e.g., *id.*; Clarisa Pérez-Armendáriz, *Cross-Border Discussions and Political Behavior in Migrant-Sending Countries*, 49 *STUD. COMP. INTER. DEV.* 67–88 (2014).

¹⁰⁷ For related argument emphasizing similarities between external and internal freedom of movement, see CARENS, *supra* note 16, at 237–52.

¹⁰⁸ See Wellman, *supra* note 63, at 89.

Arguments that migrants from troubled societies have a duty to stay home and “fix their own countries” can also be readily applied to residents of subnational jurisdictions seeking to move elsewhere in the same country. This logic suggests that residents of relatively impoverished American states, such as Mississippi and West Virginia, or those with comparatively corrupt and poorly-run state and local governments, such as the city of Detroit throughout much of the last fifty years, have a duty to stay there and work to improve their policies and governance.

From the 1950s to the present, the city of Detroit lost many hundreds of thousands of people to out-migration, in large part as a result of its poor governance,¹⁰⁹ going from being the fourth largest city in the United States in 1940 to merely the 21st largest as of 2016.¹¹⁰ Perhaps some or all of those people had a moral obligation to stay and “fix” the Motor City.

The “brain drain” argument suggests that this duty is particularly strong in the case of skilled professionals and those whose education was subsidized by the state government in some way. That category might, for example, include students who benefited from favorable in-state tuition rates at state universities, which give state residents a steep discount compared to the rates paid by out-of-state students.

J.D. Vance, author of *Hillbilly Elegy*, recently advanced an argument of this type, though he notably does not advocate for actually forcing people to stay in their home regions.¹¹¹ In 2017, Vance returned to his home state of Ohio, feeling an obligation to contribute to his community by doing so.¹¹² He writes:

Many people should leave struggling places in search of economic opportunity, and many of them won’t be able to return . . . But those of us who are lucky enough to choose where we live would do well to ask ourselves, as part of that calculation, whether the choices we make for ourselves are necessarily the best for our home communities—and for the country.¹¹³

¹⁰⁹ For a recent summary of studies on this subject, see Scott Beyer, *Why Has Detroit Continued to Decline?*, FORBES (July 31, 2018) <https://www.forbes.com/sites/scottbeyer/2018/07/31/why-has-detroit-continued-to-decline/#74a06083fbc1> [https://perma.cc/97V8-2JN9].

¹¹⁰ Christine MacDonald, *Detroit Population Rank is Lowest Since 1850*, DETROIT NEWS (May 20, 2016), <https://www.detroitnews.com/story/news/local/detroit-city/2016/05/19/detroit-population-rank-lowest-since/84574198/>.

¹¹¹ See J.D. VANCE, *HILLBILLY ELEGY* (2016). I discuss Vance’s story in SOMIN, *supra* note 2, at 6–7.

¹¹² See J.D. Vance, *Why I’m Moving Home*, N.Y. TIMES, (Mar. 16, 2017), <https://www.nytimes.com/2017/03/16/opinion/why-im-moving-home.html> [https://perma.cc/3XG4-PRAH]. For a more detailed response to Vance, see Ilya Somin, *Why Successful People Should Not Feel Guilty About Voting With Their Feet, But Should Instead Make It Easier For Others To Do The Same*, VOLOKH CONSPIRACY: WASH. POST (Mar. 30, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/30/why-successful-people-should-not-feel-guilty-about-voting-with-their-feet-but-should-instead-make-it-easier-for-others-to-do-the-same/> [https://perma.cc/8F82-DBJS]. My response to Vance attracted a critique by political scientist Mark Chou. See Mark Chou, *Foot Voting and the Dilemma of Two Americas*, GOVERNING (Apr. 24, 2017), <https://www.governing.com/gov-institute/voices/col-j-d-vance-hillbilly-legacy-foot-voting-dilemma-two-americas.html> [https://perma.cc/DP3S-53GJ]. I responded to Chou in Ilya Somin, *Is Voting with Your Feet Selfish? Does it Matter if it Is*, VOLOKH CONSPIRACY: WASH. POST (Apr. 25, 2017) <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/25/is-voting-with-your-feet-selfish-does-it-matter-if-it-is/> [https://perma.cc/TRW2-JPR7].

¹¹³ Vance, *supra* note 112.

Vance's concern for disadvantaged communities is admirable. But the advice he offers civic-minded, successful people may not be the best way for them to help those communities. In most cases, they can best serve society by living wherever they can be most productive. If an engineer or a computer programmer can produce more and better innovations in Silicon Valley than in her hometown in Appalachia, she might benefit society more by moving than by staying put or returning "home" after a stint in another part of the country. The ideas and products she develops will not only help people in Silicon Valley, but also those back in Appalachia, as well. Over time, even people who stay put benefit greatly from the achievements of those who move in search of opportunity.

It is notable that Vance himself did not actually move back to the depressed community where he grew up, but to Columbus, a thriving city whose economy has done very well in recent years.¹¹⁴ He likely concluded that he and his family would be happier, more productive, and better able to serve society there than in a less successful part of the state. This, of course—in some ways—mirrors the situation of migrants from poor countries who can often better serve their homes and families by moving to more productive areas.¹¹⁵

Michael Blake's argument from "unwanted obligations" also implies that internal migration can be restricted, a point that Blake himself concedes.¹¹⁶ For example, if a U.S. citizen moves from one state to another, authorities in the migrant's new home will now have a duty to protect her "basic rights," an obligation that the existing inhabitants of that state might prefer to avoid.

David Miller argues that restrictions on internal migration are less justifiable than those on international migration because governments can adjust policies to reduce the differences in relative attractiveness between regions within their own countries.¹¹⁷ Furthermore, constraints on internal migration might enable a government to impose discriminatory restrictions on vulnerable minorities.¹¹⁸

These distinctions are much less impressive than they may at first seem. While governments can *potentially* manage interregional differences in the way Miller suggests, in reality, major differences in economic and social conditions often persist for decades. Consider the long-lasting differences between the American South and many northern states, or those between northern and southern Italy.¹¹⁹ Such differences may be the result of deeply entrenched institutions or political culture that take a long time to eliminate, assuming it is even possible to do so.

The problem of discriminatory targeting of vulnerable minorities arises with international migration, as well. Governments can and often do impose discriminatory

¹¹⁴ Sonari Ginton, "A Diversified Economy Cushions Columbus, Ohio, from Downturns," NPR (Sept. 19, 2016) <https://www.npr.org/2016/09/19/494561019/a-diversified-economy-cushions-columbus-ohio-from-downturns> [<https://perma.cc/9ASK-5V4A>]. Vance himself notes that it is "one of the fastest-growing cities in the country." VANCE, *supra* note 111, at 179.

¹¹⁵ See discussion earlier in this article.

¹¹⁶ Blake, *supra* note 79, at 122–23. Though he does note that many federal systems will forbid such restrictions, for economic and political reasons, *id.*, he recognizes that such a ban is not required under his theory.

¹¹⁷ MILLER, *supra* note 12, at 54–56.

¹¹⁸ *Id.*

¹¹⁹ For a classic work on the latter, see ROBERT D. PUTNAM, MAKING DEMOCRACY WORK (1993).

immigration restrictions on minorities who have little or no ability to find refuge elsewhere, thanks to immigration restrictions imposed by other nations. Historically, those restrictions themselves have often been, in large part, motivated by racial or ethnic prejudice,¹²⁰ as in the case of Australia’s longstanding “White Australia” policy, or various U.S. laws motivated by prejudice against Asian and Southern and Eastern European immigrants.¹²¹

Miller notes that discriminatory barriers to entry imposed by one country may not prevent oppressed groups from seeking to migrate to other nations.¹²² For example, Syrian or Venezuelan refugees barred from the United States might still be able to escape to Canada or vice versa. Thus, they may still have a way to escape injustice and are not “trapped” in the way that discriminated-against internal minorities are. For that reason, the United States can bar them as long as Canada or some other refuge remains open

But one could offer the same defense for a system in which minority groups are forbidden to move to some regions within a given country but permitted to settle in others. For example, the United States could potentially have adopted a policy under which African-Americans fleeing the Jim Crow-era South were permitted to move to some northern states, but not others. On Miller’s logic, so long as they still had the right to move to at least one (relatively) discrimination-free jurisdiction, they would still have access to a location where they could “exercise their human rights.”¹²³

Miller could perhaps respond by arguing that governments can eliminate invidious racial and ethnic discrimination from immigration policy while still maintaining a broad power to exclude on other grounds. For example, exclusion based on race and ethnicity might be forbidden but would still be permitted on the basis of education, occupation, and various other non-ethnic and non-racial classifications.

But, of course, the same can be said for internal migration restrictions: the state can, at least in theory, bar those internal migration restrictions that discriminate against particular types of minorities, while maintaining broad power to impose other constraints on movement.¹²⁴ For example, an American state could be forbidden to exclude African-Americans who seek to migrate from elsewhere in the U.S, but permitted to exclude would-be internal migrants who lack a college degree.

In sum, Miller’s effort to distinguish internal migration restrictions from international ones fails much in the same way that other attempts have and for very similar reasons. The price of accepting standard rationales for restricting international migration is the acceptance of similar justifications for restricting domestic freedom of movement.

¹²⁰ Joseph Carens makes a similar point. See CARENS, *supra* note 16, at 243.

¹²¹ On the white Australia policy, *see. e.g.*, Gavin Jones, *White Australia, National Identity, and Population Change*, in LEGACIES OF WHITE AUSTRALIA: RACE, CULTURE, AND NATION, (Laksiri Jayasuriya et al. eds., 2003). On US immigration policy discriminating against Asians, *see, e.g.*, Gabriel J. Chin, *Segregation’s Last Stronghold: Racial Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of the Plenary Power*, in IMMIGRATION LAW STORIES, (2005). For a detailed recent account of the role of ethnic prejudice in the enactment of the landmark 1924 Immigration Act, which radically curtailed European migration to the United States, *see* DANIEL OKRENT, *THE GUARDED GATE: BIGOTRY, EUGENICS, AND THE LAW THAT KEPT TWO GENERATIONS OF JEWS, ITALIANS, AND OTHER EUROPEAN IMMIGRANTS OUT OF AMERICA* (2019).

¹²² MILLER, *supra* note 12, at 56.

¹²³ *Id.*

¹²⁴ For a very similar point, *see* CARENS, *supra* note 16, at 243.

CONCLUSION

A wide variety of self-determination arguments have been made to justify restrictions on international migration and—to a lesser extent—even internal migration. But they suffer from serious flaws. In many cases, accepting them would have deeply illiberal implications for native-born citizens, not just migrants. At least in the vast majority of situations, migrants' freedom to vote with their feet does not undermine any defensible conception of political freedom for natives.