

Exclusion: Property Analogies in the Immigration Debate

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By what right do sovereign states prohibit migrants from entering their territories? It cannot be assumed that they do, certainly not as a matter of the way we define “sovereignty.” Can the sovereign right to exclude immigrants be derived from the sovereign’s status as owner of the territory it controls? This Article shows that the idea of the sovereign as owner is too problematic to be the basis of any argument for the right to exclude. It also argues against the proposition that communities, considered as informal sovereigns, have a right to exclude based on their communal property in the land they inhabit. In both cases, an “ownership conception” is distinguished from a more attractive “responsibility conception” of sovereignty. The former remains unclear, while the latter leaves open the question of who the sovereign (state or community) is responsible for.

INTRODUCTION

By what right do sovereign states prohibit migrants from entering their territories? What reasons could possibly support the right to impose such prohibitions? In this Article, I wish to explore and criticize one possible basis of an answer to this question. The answer involves associating the sovereignty of a state with the ownership of its territory. Conceiving the sovereign as the owner of the territory, it treats the exclusion of an alien like a property-owner’s exclusion of an unwelcome guest. After all, the right to exclude is

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the definitive or one of the definitive incidents of ownership.¹ If it works for me and my house — its being mine means that *I* am entitled to say who may come in and who is excluded — why does it not also work for a sovereign and the territory that the sovereign “owns”? I will call this “*the Sovereign Ownership conception*.”

Whether we accept the Sovereign Ownership conception as the basis of an answer to our question about immigration will depend on what we think about the analogy — if that is what it is — between sovereignty and private property. If analogies between sovereignty and property fail — and I am going to argue that they mostly do — then we have to find some other basis for saying that sovereigns are entitled to exclude outsiders from entering or remaining in their territory.

Now, sovereign control of territory can be understood in terms of control by a sovereign state or in terms of control by a self-determining community. I think we need to explore the sovereignty/property analogy for both cases. After an excursus (in Parts I and II) into the preliminary question whether the sovereign right to exclude even needs justification, I begin the main argument (in Parts III and IV) with the analogy between property and territorial control by a sovereign state. Then (in Parts V and VI) I proceed to consider whether the argument works when we think about sovereignty in terms of the claims of a human community to the territory in which its members live, and in particular in terms of the communal property that it controls.

In both phases of the argument, my claim is that there is nothing in the idea of property to justify a sovereign right to exclude outsiders from a territory. This does not mean there is no such right. It means only that if there is, it cannot be justified along these lines.

I. DEFAULT POSITIONS

Does the sovereign right to exclude even need a justification? Am I assuming that the default position — absent a justification — is that sovereign states are not entitled to exclude outsiders? I think I am assuming something like this, though it is a weak default, not a strong (and certainly not an irrebuttable) presumption in favor of unrestricted movement.

One could make a case for a weak default the other way. Most people’s intuitions are in favor of states’ having the right to restrict immigration. And this is not an unattractive position given that conceding such a default in favor of the state’s right to restrict does not actually settle the question of immigration

1 For discussion, see J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* ch. 4 (1997).

policy. A sovereign state may have the right to prohibit immigration, but that doesn't mean it will or it should. All the right does is define a space for legitimate policymaking. A state with the right to restrict immigration may maintain open borders if it figures this is beneficial. Indeed, we may even say consistently that a state has the right to prohibit immigration but that it is wrong for it to do so: some ways of exercising one's rights are wrong.² And in practice, almost all states permit some immigration and restrict some immigration; they regulate rather than absolutely prohibit movement into their territory. They reserve the right to prohibit all immigration but they almost never do. What their reserving the entitlement mainly amounts to is that they think themselves within their rights when they choose what immigration to prohibit and when they regulate the immigration that they permit.

Still, we might want to insist nevertheless on a weak presumption *against* states' having the right to exclude. We might do this for two reasons. First of all, most of us believe (1) that there is a presumption against states' restricting *emigration*; and almost all of us believe (2) that there is a strong (if not absolute) presumption against a sovereign state's restricting freedom of movement *within* its territory. The best explanation of the conjunction of (1) and (2) may be something like a general human right to freedom of movement in the world. Relative to this inferred right, the sovereign right to restrict might seem like an anomaly.

Certainly, our political morality should embody some recognition of the point that humans are and always have been migratory animals, and that our natural relation to land and territory includes wandering as well as settlement.³ David Miller has argued that humans do not *need* to wander and migrate; it is not as though there is a compulsion to this effect hardwired into us, like swallows.⁴ But peoples and people do migrate and always have. It is not an unnatural activity. So I believe we have to recognize at the very least a weak presumption in favor of humans having the right to wander and settle where they will — of course, so long as they don't encroach on the legitimate property of other humans. Another connected presumption is in favor of people having the right to be where they find themselves. They have, as Kant puts it, "a right to be wherever nature or chance (apart from their will) has

2 See Jeremy Waldron, *A Right to Do Wrong*, 92 ETHICS 36 (1981).

3 I discuss this in Jeremy Waldron, *Teaching Cosmopolitan Right*, in *EDUCATION AND CITIZENSHIP IN LIBERAL-DEMOCRATIC SOCIETIES: COSMOPOLITAN VALUES AND CULTURAL IDENTITIES* 23 (Kevin McDonough & Walter Feinberg eds., 2003).

4 David Miller, *Immigration: The Case for Limits*, in *CONTEMPORARY DEBATES IN APPLIED ETHICS* 193 (Andrew I. Cohen & Christopher H. Wellman eds., 2005).

placed them”); this is part of what Kant means by humans’ original common ownership of the earth.⁵

Think about a couple of applications. A child wakes to consciousness in place X; so there is a presumption in favor of the child having the right to be at X, even if the child is not recognized as a citizen by the sovereign state that controls the territory that includes X. Or imagine a whole people who have lived for generations in forest Y, unbeknownst to those who founded and set up a sovereign state that included Y within its territory; even if we continue to recognize the state’s sovereignty over the forested area, the forest people surely have a right to remain in Y after their presence is discovered; the fact that they were not initially counted as citizens of this territory does not entitle the sovereign to expel them or “ethnically cleanse” the territory of their presence.⁶ Reflection upon examples like these argues, I think, in favor of a weak presumption against the sovereign’s right to exclude. Consider also the fact that migration is itself often a settled practice: people until recently took for granted that they could move to other countries and millions of them did, throughout the nineteenth century, for example. Such practices are not of course conclusive, but they help shift us away from any easy assumption that blocking migration is the default position.

The second reason for thinking that a sovereign state needs a justification for excluding outsiders from its territory is that such exclusion is coercive, and all coercion requires justification.⁷ Sovereign states often stop people from

5 IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 353, 414 (Mary Gregor ed., 1996).

6 See also *infra* text accompanying note 41.

7 In David Miller, *Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh*, 38 *POL. THEORY* 111, 112 (2010), Miller has suggested that immigration controls are not necessarily coercive. He says:

It is important not to be misled by the specific (and often unpleasant) activities that may be involved in enforcing a regime of border control. We see people being bundled on to aeroplanes to take them back to their country of origin, or small boats being . . . forced back to their point of departure. These actions are indeed coercive But this is not to say that border controls themselves — the act of preventing somebody from entering a specific territory without authorization — are coercive in the same sense. Consider instead a state that simply erects a physical barrier around its territory, a barrier that is uncrossable unless officials open it to allow authorised persons to pass.

But of course in real-world cases, coercion is used also to stop people approaching the wall and to stop them from trying to climb over it. Miller might be making the point that we ordinarily expect people voluntarily to comply with the laws that apply to them, including immigration laws. But that doesn’t make the immigration laws non-coercive. It is a feature of all laws — including laws

entering their territory: they stop them forcibly; they incarcerate them until they can be deported; and then they forcibly take them out of the country. Coercion is never self-justifying. The closest it comes to being self-justifying is where the activity it is used to stop is itself coercive, as in Kant's "hindering of a hindrance to freedom."⁸ But there is nothing inherently coercive about entering or attempting to enter the territory of a sovereign. Resistance by the officials of the relevant sovereign is usually the first introduction of coercion into the situation. I do not mean that coercive immigration laws can never be justified. All I mean is that there is an onus on those who defend them to come up with a justification.

II. SOVEREIGNS AND THE CONTROL OF BORDERS

Some will say impatiently, in response to our request for justification, that sovereigns, *by definition*, have a right or duty to control their borders. Thomas Friedman said this quite casually in a recent article in the *New York Times*: "Yes, we must control our borders; it is the essence of sovereignty."⁹ (And that was an article in favor of immigration!) We find versions of the same thought expressed by a number of politicians. Former Senator Alan Simpson of Wyoming is famous for having said that "[t]he first duty of a sovereign nation is to control its borders."¹⁰ President Ronald Reagan is supposed to have said: "A nation that cannot control its borders isn't really a nation." Other versions phrase this as "A nation/country that cannot control its borders is no longer sovereign," "A country that can't control its borders lacks sovereignty," and "Philosophically, a nation that cannot police its borders is scarcely a nation at all. It has lost control of its own sovereignty."¹¹

But this is one of those *bons mots* whose intuitive plausibility evaporates under analysis. The phrase used in these definitional axioms about sovereignty — "*to control its borders*" — is ambiguous. No doubt a state has the responsibility to control its borders against the encroachments of other states — against

that no one would hesitate to describe as coercive — that they are expected to operate in the first instance by self-application.

8 KANT, *supra* note 5, at 388.

9 Thomas Friedman, Opinion, *Bonfire of the Assets, with Trump Lighting Matches*, N.Y. TIMES, Aug. 26, 2015, at A19.

10 As quoted in *Bill Outlaws Hiring Illegal Aliens*, N.Y. TIMES, May 19, 1983, at 3.

11 There is an interesting survey of various versions of this saying in Barry Popik, *A Nation That Cannot Hold Its Borders Can't Control Its Destiny*, BARRY POPIK (Apr. 29, 2011), http://www.barrypopik.com/index.php/new_york_city/entry/a_nation_that_cannot_control_its_borders_cant_control_its_destiny.

their armies, for example. That much we may accept; but it is not clear what this implies about immigrants.¹² Many of us insist that the state does not have any sort of right to control the passage of ideas across its borders. Some would say that the state does not even have a right to control movements of capital and investment resources across its borders. As already noted, many of us would say that a state does not have the right to restrict emigration. So: where, in this array of possible things that might or might not be comprised in the claim “a sovereign state has a right or a duty to control its borders,” are we to locate a putative right to exclude outsiders? Is it more like a right to resist encroachments by other states’ armies, or is it more like the movement of capital or ideas? Is it more like keeping out marauders or is it more like keeping in would-be emigrants?

It may be hard for us to visualize a world without sovereign states that impose restrictions at their borders. But the Schengen Accords operating in a large part of the EU gave us a glimpse of such a system (at least until recently).¹³ Also, it is probably worth remembering that not so long ago, passports and border controls were not a characteristic of ordinary life in the world. Sovereigns might close their borders in emergencies — usually to stop fugitives. But in ordinary times, people came and went; and if their movement was restricted at all, it was often at the parish rather than the country level.¹⁴ Those left free to move around within a state normally had the right to move between states as well.

Michael Walzer quotes a view entertained by Henry Sidgwick in the 1890s to the effect that the only business of state officials is “to maintain order over [a] particular territory . . . but not in any way to determine who is to inhabit this territory, or to restrict the enjoyment of its natural advantages

12 ANNELISE ANDERSON, *ILLEGAL ALIENS AND EMPLOYER SANCTIONS: SOLVING THE WRONG PROBLEM* 3 (1986) (accusing Senator Simpson of

setting up a false analogy between crossing the border illegally to obtain work and invading a sovereign nation with hostile intent. The sovereign duty to which [Senator Simpson] alludes is that of providing for the common defense, not preventing people looking for work from crossing the border without formal entry documents.).

13 Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, June 14, 1985.

14 See, e.g., William P. Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73, 107-08 (1996).

to any particular portion of the human race.”¹⁵ Maybe it is hard to imagine life without the sovereign state, but is it so hard to imagine life without a migration-blocking state as opposed to a state of this Sidgwickian kind?

Sometimes the terminology we use when we characterize sovereigns leads us into a definitional trap. For example, people sometimes refer to the modern state as “the Westphalian state.” But the Peace of Westphalia (1648) entitled every ruler to enforce his own religion within the borders of his own territory.¹⁶ We utterly reject this notion and if we were to use “Westphalian state” less loosely than we do, we would have to say that Westphalian states, as such, are not entitled to exist. Well, similarly, anyone who uses a definition of the state that entails a right to restrict immigration has to be prepared to confront arguments that states so defined may not be permitted to exist, and that we should promote the existence of political entities that have all or most of the powers that “sovereigns” have on this definition but just not this immigration power. In other words, we should insist, even in the face of such a definitional maneuver, that the legitimacy of the state’s right to restrict immigration must be regarded as an open question, to be settled by argument (of the right kind).

In the end, these maneuvers are unproductive. We must remember that definitions of the necessary functions of sovereign states are often question-begging. Max Weber thought they were useless:

Sociologically, the state cannot be defined in terms of its ends. There is scarcely any task that some political association has not taken in hand, and there is no task that one could say has always been exclusive peculiar to those associations which are designated as political ones: today the state, or historically, those associations which have been the predecessors of the modern state.¹⁷

He proposed to define the state modally, not functionally: “Ultimately, one can define the modern state sociologically only in terms of the specific means peculiar to it,” by which Weber meant its effective claim to a monopoly of

15 MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 37 (1983) (quoting HENRY SIDGWICK, *ELEMENTS OF POLITICS* 308 (2d ed. 1897)). However, neither Walzer nor Sidgwick endorses this view, though Sidgwick points to its plausibility as an ideal.

16 Treaty of Peace between Sweden and the Empire, signed at Osnabruck, Swed.-Empire, Oct. 24, 1648, 1 Consol. T.S. 119-198; Treaty of Peace between France and the Empire, signed at Münster, Fr.-Empire, Oct. 24, 1648, 1 Consol. T.S. 271-319.

17 MAX WEBER, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77 (Hans H. Gerth & Charles W. Mills eds., 1948).

the legitimate use of physical force within a territory.¹⁸ It is possible, I guess, sometimes to infer functional conclusions from modal premises. John Locke inferred the proposition that states cannot command a religion from the inefficacy in this respect of the (coercive) means peculiar to states.¹⁹ But it is hard to see any such argument in the offing so far as immigration is concerned.

Maybe we can fill out the argument by saying that if we set up a sovereign state to solve other social problems and advance other aspects of the common good, what we are setting up is some entity that must also take control of its borders. Or else it cannot do the other work that *is* (plausibly) associated with sovereignty. We might say, for example: in order to do the things that it is entitled to do, a state needs to have some way of keeping track of who is who and who is in its territory. Maybe a modern state needs this knowledge in order to operate legitimate regulatory, welfare, and democratic mechanisms. This may justify a requirement that any outsider who enters the jurisdiction of the state must register with the authorities. And that is a form of controlling its borders, and controlling ingress and egress. Only, it is not in itself the same as an entitlement to restrict or exclude.

III. AN ANALOGY WITH PROPERTY

So we must reject the claim that the right of sovereign states to restrict entry is intuitive or definitional or needs no justification. I turn now to consider what possible justifications there might be. I cannot review them all in this Article. I will concentrate on those that use the Sovereign Ownership conception — that is, those that connect, either directly or by analogy, the concept of sovereignty with the concept of property.

An analogy of this kind certainly looks promising. Landowners control territory; sovereign states control territory. Landowners acquire territory, by occupancy for example, or by transfer from other landowners; and sovereign states acquire territory by discovery and settlement and by transfers such as the Louisiana Purchase of 1803. We use terms like “possession” to refer to the relation between a sovereign and its territory: a sovereign may “take possession” of a territory, it may have “overseas possessions,” and so on. The

18 *Id.* at 78.

19 See JOHN LOCKE, A LETTER CONCERNING TOLERATION 18-19 (Patrick Romanell ed., 1950). I have attempted to delineate Locke’s “Weberian” argument for toleration in Jeremy Waldron, *Locke, Toleration, and the Rationality of Persecution*, in JUSTIFYING TOLERATION: CONCEPTUAL AND HISTORICAL PERSPECTIVES 61 (Susan Mendus ed., 1988), reprinted in JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, at 88 (1993).

analogies seem to persist even when we go more deeply into the philosophy of property. Theories of labor and/or immemorial occupancy in the case of property seem to have their counterparts in the idea that a whole people, organized as a state, may make a territory their own by investing themselves in it and associating their identity and history with it. Or consider a more complicated theme. Individual acquisitions of property do need to be recognized and perhaps ratified by a system of positive law; this is the burden of Kant's argument about property in *The Metaphysics of Morals*.²⁰ But there is something similar for sovereign rights as well: each sovereign, with its territory, needs to be recognized by the global community of sovereigns and international law regulates disputes about frontiers, etc.

Some eminent authorities in the history of international jurisprudence have made use of the Sovereign Ownership conception or something like it. Emer de Vattel maintains that when a nation acquires a country it acquires not only "empire" over it (the right of sovereign command) but also "domain," by virtue of which it may make free use of it "for the supply of its necessities."²¹ Domain seems to be like property in Vattel's conception, although sometimes he describes domain and empire together as property.²² At any rate, it involves an exclusive power that must be respected by all other nations.²³ According to Vattel, domain is perhaps divisible into "useful domain" and "high domain." The former can be assigned to particular subjects, in effect as their private property, and thus may be separated from sovereignty; but "the high domain, which is nothing but the domain of the body of the nation or of the sovereign who represents it, is everywhere considered as inseparable from the sovereignty."²⁴ Vattel associates high domain with jurisdiction and the right to do justice in a territory, but he does not explain how high domain, so understood, differs from what he previously described as "empire." For our purposes, the key thing is Vattel's claim that domain implies a right of exclusion, not only of the encroachment of other sovereigns, but also of foreign individuals:

The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the

20 See KANT, *supra* note 5, at 401-21, 450-56.

21 EMER DE VATTEL, *THE LAW OF NATIONS* 213-14, bk. I, ch. 18, §§ 204-205 (Béla Kapossy & Richard Whatmore eds., 2008) (1758).

22 *Id.* at 301, bk. II, ch. 7, § 79.

23 *Id.* at 302. Vattel also says in this passage that sovereign property necessarily is not regulated and restricted in the way that individual property in a state is; it is full and absolute. *Id.*

24 *Id.* at 303, bk. II, ch. 7, § 83.

state. There is nothing in all this, that does not flow from the rights of domain and sovereignty Since the lord of the territory may, whenever he thinks proper forbid its being entered, he has no doubt a power to annex what conditions he pleases to the permission to enter. This, as we have already said, is a consequence of the right of domain.²⁵

This certainly sounds like a version of the Sovereign Ownership conception, though I guess it is also possible to read it as an unargued assertion of the right to exclude from the mere fact of “empire” or “high domain.” That convoluted aside, however, the Sovereign Ownership conception sounds all very natural in Vattel’s voice.

IV. DIFFICULTIES WITH SOVEREIGN OWNERSHIP

So, in light of all this, why not treat sovereign rights as property rights and use this as a basis for understanding sovereign rights with respect to outsiders? Why not adopt the Sovereign Ownership conception? Two immediate responses spring to mind.

First, if we pursue the Sovereign Ownership conception, it looks like it involves an analogy in which the idea of ownership operates at two different levels. At one level, there is my individual property and the rights that it gives me vis-à-vis other individuals. At another level, there is sovereign property and the rights that that gives a particular sovereign vis-à-vis — well, *who*? Presumably, in the first instance, it gives the sovereign “owner” rights against other sovereigns. But how does this stand with the individual exclusions that private property also involves? Person P’s control of Blackacre means that person Q’s control of it is excluded; and normally Q may not interfere with

25 *Id.* at 309, bk. II, ch. 7, § 94; *see also id.* at 312, bk. II, ch. 8, § 100. For encroachments by other sovereigns, *see id.* at 308, bk. II, ch. 7, § 93. We should note also that Vattel seems quite happy with the idea that the sovereign holder of the high domain may also prohibit people from leaving the territory:

Those workmen that are useful ought to be retained in the state; to succeed in retaining them, the public authority has certainly a right to use constraint, if necessary. Every citizen owes his personal services to his country; and a mechanic, in particular, who has been reared, educated, and instructed in its bosom, cannot lawfully leave it, and carry to a foreign land that industry which he acquired at home, unless his country has no occasion for him, or he cannot there obtain the just fruit of his labour and abilities.

Id. at 127, bk. I, ch. 6, § 74. This in itself distinguishes Vattel’s conception so much from our own as to cast doubt on any extrapolation from his writing of a position for us to adopt.

P's management of Blackacre; certainly, P may exclude Q from coming onto Blackacre. That is (part of) what private property means.²⁶ By analogy, sovereign S's control of Freedonia means that sovereign T's control of Freedonia is excluded; and normally Sovereign T may not interfere in what sovereign S does with respect to Freedonia. That is (part of) what sovereignty amounts to. But it is not clear whether we are entitled to drop down from one level to the other by saying that Sovereign S's rights against other sovereigns also give S exclusionary rights against natural individuals.²⁷ True, S may have rights against individuals who come onto its territory acting as the representatives of sovereign T. And S certainly has rights against any individuals, whether insiders or outsiders, who seek to destabilize S's sovereignty; individuals everywhere have a natural duty not to undermine the legitimate work of any sovereign.²⁸ S's rights are primarily rights against other sovereigns, and its rights against individuals are all rights in respect of its sovereignty. Unless there is an *independent* argument for saying that merely entering Freedonia and seeking to settle there is a derogation of S's sovereignty, then the structure of the analogy does not seem to allow us to infer a sovereign right to restrict entry based on sovereign "ownership."

A second point is that the comparison of territorial sovereignty with landed property cannot just be an analogy, because *both* have to be accommodated within the same conception. If sovereigns are property-owners of their territory, what becomes of individual property-ownership within the territory? Blackacre, let us suppose, is located in the territory of Freedonia: so who is its true owner, sovereign S or individual P? (Vattel has to resort to the "useful domain"/"high domain" distinction to solve this problem, with the possibility that through the near-identification of the latter with sovereignty itself, he is not really making a property-based argument for the right to exclude migrants after all.²⁹) Certainly sovereign S, on our ordinary understanding, can restrict what happens on Blackacre. S can enact laws prohibiting the smoking of marijuana on Blackacre (or anywhere) and laws requiring P to maintain environmental

26 For this account of private property as involving an owner's right to exclude, see Arthur Ripstein, *Property and Sovereignty: How to Tell the Difference*, 18 THEORETICAL INQUIRIES L. 243 (2017); and Larissa Katz, *Property's Sovereignty*, 18 THEORETICAL INQUIRIES L. 299 (2017).

27 I don't think we should overuse the term "category mistake," but something along those lines may be involved. For "category mistake," see GILBERT RYLE, *THE CONCEPT OF MIND* 16 (1949).

28 I have argued this in the context of a Rawlsian theory of the natural duty to support just institutions in Jeremy Waldron, *Special Ties and Natural Duties*, 22 PHIL. & PUB. AFF. 3 (1993).

29 See *supra* text accompanying notes 22-27.

standards so far as streams flowing through Blackacre are concerned. In these ways, it looks as though sovereign S may supervise P's use and management of Blackacre; in times of emergency, S may even override P's exclusionary authority, by billeting displaced persons on P's property. Does this mean that S is the true owner of Blackacre and indeed of all the land in Freedonia over which it has this sort of authority? Does it mean that P's rights over Blackacre are held on sufferance from S?

Well, it may. In some legal systems, there may in effect be no private property. In any community, *some* property is state-owned. The state owns military bases and perhaps also it is the owner of parks, roads, and sidewalks, even though it makes these available to everyone for their use.³⁰ In a communist society, the state owns all or almost all important productive resources including land. But perhaps, in a sense, all systems of property are communist in the last analysis. Perhaps we should say that, even in a capitalist society, all property is ultimately state-owned and some of this is just leased back by the state-owner to individuals (and may be taken back by the state under a power of eminent domain for public purposes). Or never mind communism or capitalism: perhaps there is a feudal system, in which no property rights are absolute, and all are held in fee or otherwise from an overarching feudal lord (the sovereign).

Or, on a more primitive model, perhaps all land in a territory is communally-owned and the sovereign acts as representative of the community. The Maori chiefs who transferred their respective sovereign rights over various parts of Aotearoa/New Zealand in 1840 represented societies in which there was nothing but communal ownership of land in their respective territories; there was no private property.³¹ In these cases we are not really dealing with an

30 See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 37-46 (1988).

31 But when the chiefs transferred their sovereignty, *the communal property rights did not go with it*. On the contrary, the Treaty of Waitangi contained a clause guaranteeing the communal property of the entities over which the chiefs had ruled as sovereigns. Compare Articles 1 and 2 of *Treaty of Waitangi*, NEW ZEALAND HISTORY, <http://www.nzhistory.net.nz/politics/treaty/read-the-treaty/english-text> (last visited Feb. 26, 2017):

1. The Chiefs . . . cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said . . . Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.
2. Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively

analogy between property and sovereignty: we are saying directly that the sovereign is the property-owner and we are denigrating individual ownership to that extent.

I will explore these various possibilities in more detail below (in Parts V-VII). But first, we should notice that there is an alternative way of characterizing the reality of sovereign control. The sovereign of a territory has responsibility for organizing the law and legal system for that territory. The sovereign decides whether or not there will be private property in a society, which resources will be owned privately (and which owned by the state), and how extensive rights of private ownership will be. The sovereign controls the distribution of property in various ways. The sovereign may lay down certain restrictions for the common good that affect the use of property; certainly, the sovereign will lay down background rules of conduct for the society (like the marijuana laws I mentioned) that apply to the whole society, including landowners and their property.³² And the sovereign may reserve the right to take and sometimes to redistribute property when this is in the public interest. The sovereign does none of this *as an owner*; it does it as part of its broad overall responsibility for the running of the society and for its legal arrangements. Sovereign responsibility certainly affects property, and it frames the property system; but I believe it is not in itself the exercise of property rights. I will call this “*the Sovereign Responsibility conception*.” This conception leaves the responsibility of sovereigns as a freestanding idea; it does not attempt to derive such responsibility from any thoughts about ownership in the way that the Sovereign Ownership conception does.

V. STATE PROPERTY

I am not saying that we can altogether exclude the idea of genuine Sovereign Ownership. We cannot. In times past, the territory, population, and resources of certain states were treated as the patrimony of the state’s monarch. They were *his* entirely to do with as he pleased, for his own benefit and that of his family. But the distance between a patrimonial conception and modern conceptions of the sovereignty of the state is enormous. (If we had to revert to patrimonial ideas in order to sustain the Sovereign Ownership conception, I think that would count decisively against the Sovereign Ownership conception.) The

or individually possess so long as it is their wish and desire to retain the same in their possession.

See also F.M. BROOKFIELD, *WAITANGI AND INDIGENOUS RIGHTS: REVOLUTION, LAW AND LEGITIMATION* ch. 4 (2007).

32 See WALDRON, *supra* note 30, at 32-33.

Sovereign Responsibility conception seems much more acceptable: it fits with a broadly republican rather than patrimonial understanding.³³ Sovereigns have powers, rights, privileges, and duties: all of these they exercise for the sake of the (ever-changing set of) people who are subject to their authority. They are stewards of those people's interests and — at least in our modern understanding — broadly accountable to them.³⁴ It is for their sake that they maintain order, secure public goods, frame and regulate the system of property, and enact and enforce laws. These are public matters; they are not like the rights of private owners. Sovereign responsibility may reference and cover private law, but it is *public* responsibility for private law and in that respect it is quite unlike the rights and duties of a private person.

I have acknowledged that in every society, some of the land will be owned specifically by the state: palaces, buildings housing government agencies, army bases, prisons, fortresses, and firing ranges are clear examples. In communist countries, factories, mines, and agricultural land may fall into this category too. There is no doubt that the state is entitled to exclude people from these pieces of land; indeed, it may exclude its own citizens as well as foreigners. Equally, however, unless we are reverting to a patrimonial understanding, we have to say that such property is held and rights over it are exercised for the public good and to enable the state to perform its sovereign functions. A republican conception of sovereignty will emphasize this.

What about property in roads and sidewalks, in parks and beaches? Nominally, these are likely to be regarded as state property too from the technical point of view of the law. But property rights over them are held by the state in order to secure their free availability to anyone. They are held in effect as common property and they provide a foothold in the territory for those of its citizens who have no private property of their own as well as a means for property-owning members of the community to move from one piece of property to another (not to mention relaxing in public and so on).³⁵ Tolls (on certain highways) and user fees (in certain parks and beaches) may

33 By “republicanism,” I mean the broad acknowledgement that the business conducted by government is the public business of the realm and everyone in it rather than the patrimony of any privileged individual or family.

34 See JEREMY WALDRON, *POLITICAL THEORY: ESSAYS ON INSTITUTIONS* ch. 8 (2016) (titled *Accountability and Insolence*).

35 For an exploration of some implications of this and the contrast/complementarity between this common property and private property, see Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 *UCLA L. REV.* 295 (1991); and Jeremy Waldron, *Homelessness and Community*, 50 *U. TORONTO L.J.* 371 (2000).

require potential exclusion of those who will not pay.³⁶ But they are usually shadowed by roads and places where there are no fees and no exclusion, so that no-one is left without a public place to be or in which to move.

This is particularly important for immigrants. Assuming (as we should) that immigrants do not arrive in a destination country seeking to squat on property that is already privately owned or intending to dispossess or seize resources from existing inhabitants, they will find themselves on the beaches, docks, airports, streets, and sidewalks. That will be their foothold, and from there they will seek temporary accommodation and employment from the many people in the open economy of the destination country who are willing to deal with them. They come not because they want to seize resources; they come because they want to be in the vicinity of, and to associate themselves with, the open economic networks that characterize a prosperous modern society. But if the sidewalks etc. are formally owned by the sovereign, then maybe this is the basis of the sovereign right to exclude migrants. Maybe this is how (and where) the Sovereign Ownership conception is supposed to work.

In fact, I doubt whether this line of argument can work to support a sovereign right to exclude — at least not without more. Sovereign “ownership” of the sidewalks etc. is, on the republican conception of sovereignty, to be oriented specifically to their openness for use by anybody. Maybe there are grounds for saying that the sovereign has a right to prohibit foreigners from entering or remaining in the country that the sovereign rules, and this may make it an offense *a fortiori* for the prohibited foreigner to be or languish on the sidewalks — he is not entitled to be in Freedonia at all so he is not entitled to be on Freedonia’s sidewalks — and it may provide a basis for the Freedonian sovereign to exclude him therefrom. But that does not make the sovereign’s ownership of the sidewalks the ground of the sovereign’s right to exclude.

Some American municipalities make some of their parks and beaches available only to people who are residents of the municipalities. They exclude all others. If this were done more comprehensively (by which I mean in a way that covered the whole territory of a municipality or province), could it be the basis of a Sovereign Ownership approach to immigration? I am not sure, first of all, that it *could* legitimately be done more comprehensively. The legitimacy of these municipal exclusions probably rests on their being relatively limited. Secondly, it seems to me that the possibility of such exclusion does not depend on municipal *ownership* of the beaches or parks in question, but on the plenary authority of the municipality over the territory of the town.

36 I will say something about the exclusion of nonresidents from certain resident-only facilities in a moment (at the end of this Part).

VI. DO INDIVIDUALS HAVE THE RIGHT TO DRIVE STRANGERS AWAY?

It is helpful sometimes in legal and political theory to transform a question about the rights of states or sovereigns into a question about the rights of people. Instead of asking whether it is permissible for *sovereigns* to exclude foreigners, perhaps sometimes we should ask whether it is permissible for *the people of a state* to advocate the passage of laws to prohibit migrants (or particular classes of migrants) from entering their territories. What kinds of reasons could possibly justify such advocacy? After all, if prohibiting immigration is something that states have no right to do, then arguably it is something that citizens have no right to pressure their governments into doing.³⁷

Consider also the converse point. Instead of deriving the reasons which govern citizen advocacy in this matter from the reasons which govern state action, we might approach things the other way around. Maybe the reasons which make it either permissible or illegitimate for the state to restrict immigration

37 It is not common for political philosophers to transform a question about the legitimacy of state action into a question about the legitimacy of citizen advocacy. We sometimes feel more uneasy than we should about bringing to bear on *citizens'* political behavior the normative force of negative arguments concerning what their state has a right to do. We may feel uneasy about this because we are inclined to think that — whatever states have a right to do — citizens have a free speech right to advocate whatever policies they like and also a democratic right to exercise their vote however they please. But in certain areas where the legitimacy of state action is restricted, it is actually not inappropriate to infer restrictions on citizen advocacy. The logic of human rights seems to imply this: if it is wrong for the state to torture terrorist detainees, then it is wrong for citizens to pressure the state to torture terrorist detainees. In some areas — international human rights law, for example — it is said explicitly that certain legal restrictions apply to citizens' advocacy. In the *International Covenant on Civil and Political Rights*, Article 20 stipulates that “[a]ny propaganda for war shall be prohibited by law” and that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Also, we should remember that in most advanced democracies a lot of immigration law is driven very strongly and directly by citizens' sentiments and by legislators' fears of seeming “out of touch” with citizens' sentiments on this matter. Those who oppose such policies are accused more often of being out of touch with what ordinary citizens feel on this matter than of any particular failing in their policy calculations. All of which goes to show that we have to consider not just the legitimacy of government action but the legitimacy of citizen pressure on immigration. See G.A. Res. 2200A (XXI), *International Covenant on Civil and Political Rights* (Dec. 16, 1966).

derive from reasons that apply, in the first instance, to people considered apart from the state. So maybe the following question is a good way of approaching the question whether states have the right in question: *if there were no state or system of positive law, would individuals have the right to drive away strangers who approached their vicinity?* With this question, we contemplate the possibility that states have this right because individuals and communities would have this right independently of the existence of states, and the individuals and communities who already have this right confer it on states to exercise it as their agents. In other words, we contemplate a roughly Lockean approach — an approach that attempts to trace the rights of the state to the rights of those who form the state in a social contract. Such an approach uses a state-of-nature perspective as a way of figuring out the legitimacy of certain state powers.³⁸

Now it is not possible to pursue this question about individuals very far in the context of the present Article, which is supposed to be about sovereignty and immigration restrictions based on property.³⁹ But we can ask questions about sovereign *communities* and the way they are entitled to operate in the absence of a state. So: quite apart from the state, what can we say about the exclusionary rights of a community, when it is in some sense in possession of a territory?

38 In John Locke's political theory, the power to punish is approached in this way. The state has the power to punish because individuals have transferred to the state the power to punish that they had, by virtue of natural law, in the absence of a state. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 271-76, 352-53, §§ 7-13, 128-130 (Peter Laslett ed., 1988) (1689). By contrast, a state's power to impose religious coercion cannot be justified in this way: individuals have no right to exercise coercion over their neighbors in matters of religion, since one man's salvation or perdition is no prejudice to any other man's affairs; and therefore, individuals have no power of this kind to transfer to the state. See LOCKE, *supra* note 19, at 24-27, 46. So which of these is the better analogue to the alleged power to restrict immigration? Is it a right that people had but which (like the power to punish) they transferred to the state for its better administration? Or is it a power (like the power of religious coercion) which ordinary people cannot be supposed to have had apart from the state and so cannot be supposed to have been transferred by the people to the state?

39 Suffice it to say that the view that an individual P is entitled to drive Q away from where P has settled can be justified only if Q poses some sort of threat to P's acquisition, or only if the private acquisition of a piece of land (Blackacre) allows the acquirer also to control *the vicinity* of Blackacre. Neither line is easy to pursue. See Waldron, *supra* note 2, for a full discussion.

In the literature one finds all sorts of arguments about a community's rights to control its own culture, to ensure the integrity of the culture that binds its members together and that gives structure and substance to their lives. Perhaps it makes no sense to say that a community can protect its culture from change, but the argument is often made that communities have a right to control the pace and direction of the changes that their constitutive cultures undergo.⁴⁰ And it is often thought that this may provide a ground for a community to take control of who enters or remains in the territory the community occupies so that its culture is not compromised or not compromised haphazardly. Fortunately, we are not required to assess this argument,⁴¹ since it is not derived from any premise about a sovereign community's ownership of their territory. It might presuppose such a premise: a community is not entitled to fence off a territory in order to protect its culture unless it already has rights (including rights of exclusion) over that territory. But then that presupposition must be established independently.

40 See, e.g., Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439 (1990); see also Miller, *supra* note 4, at 198:

[T]he public culture of their country is something that people have an interest in controlling: they want to be able to shape the way that their nation develops, including the values that are contained in the public culture. They may not of course succeed: valued cultural features can be eroded by economic and other forces that evade political control. But they may certainly have good reason to try, and in particular to try to maintain cultural continuity over time, so that they can see themselves as the bearers of an identifiable cultural tradition that stretches backward historically.

There is a very sophisticated and insightful discussion of all this in Samuel Scheffler, *Immigration and the Significance of Culture*, 35 PHIL. PUB. AFF. 93 (2007).

41 If we were, there would be all sorts of things to say, ranging from the undesirability of attempting to define each community in terms of a single culture, to the implausibility of the claim that people individually need a single culture (which they share with all others in their vicinity) to frame their lives, not to mention the ethically dangerous character of theories that involve the hardening of particular identities and the heightening of the claims that can be made in behalf of them in modern politics. There would also be hard questions to ask about whether a community's self-interest in this regard (such as it is) rises to a sufficient level to justify the use of coercion.

VII. COMMUNAL PROPERTY

Let us consider a different tack. Stateless (acephalous) societies often have systems of communal ownership. All the land of a territory is owned communally by the entity (a tribe, for example) that inhabits the territory. Might this be the basis of the community's sovereign right to exclude outsiders? We may assume that such communal property is legitimate. I do not mean it is self-justifying: Immanuel Kant and Robert Nozick in their different ways have insisted that there is nothing "natural" about such communal rights, especially if they are asserted adversely to the rights of other communities and individuals.⁴² But maybe a justification is available.

The problem, however, is this. Communal property at this level can be understood in two ways: (a) it can be understood as held by, in the name of, and for the benefit of the whole community, considered as an enduring and in some respects a changing entity comprising all the people who have a life to make in the relevant territory; or (b) it can be understood as the property of a delineated set of people, identified (as it might be) by name. If communal property is understood in sense (b), and if it is — somehow — justified under that description, then it looks as though the named members of the relevant community, acting through whatever collective decision-procedures they have, do have an entitlement to exclude nonmembers (just as private property-holders would). Only, it seems to me that (b) cannot be described as communal *sovereign* property: it is just a large and exclusive club. Communal sovereign property would answer, I think, to description (a): it is property in a given territory held communally by and in the name of and for the benefit of all the inhabitants of that territory, whoever they are. On both conceptions, community membership may change through birth, death, etc. On (b), such changes are simply understood under the auspices of succession to particular coownership rights. In conception (a), by contrast, such changes are understood as changes in the constituency of persons who are under the jurisdiction of the relevant sovereign.

The character of communal property sometimes changes from (a) to (b). I think this happened in Aotearoa/New Zealand with the Treaty of Waitangi. Before February 1840, each particular Maori tribe (*iwi*) was in possession of the territory it inhabited; its communal ownership was sovereign ownership

42 See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 178 (1974); KANT, *supra* note 5, at 405n. Kant's version of this point is distinct from his thesis about mankind's original common possession of the earth, alluded to above in text accompanying note 5. See KANT, *supra* note 5, at 414-15.

under conception (a). But as I have already indicated,⁴³ each *iwi* signed away its sovereignty to the Queen of England but kept its communal property. That property is now held for the benefit of *iwi*-members conceived, I think, as co-owners under conception (b).⁴⁴

The differences between (a) and (b) can be quite considerable. If new inhabitants of the territory are discovered (as in my earlier forest example⁴⁵), a sovereign community must take responsibility for them too and treat them as engaged in whatever communal ownership it sponsors. But this will not be the case with conception (b) of communal ownership, because the newly discovered forest-dwellers will not be among the designated members of the communal ownership club. And similarly, if new people come in and settle the territory from the outside, a sovereign community must take care of them and include them in its communal arrangements, whereas the exclusive club with its named list of co-owners will not think of itself as having any such obligation. This is because it is not really performing the tasks and shouldering the burdens of genuine sovereignty.

I am not saying that under conception (a) the sovereign community has an obligation to admit newcomers. It may exclude them if a justification can be found for the proposition that it has a right to do so. All I am saying is that such justification does not arise out of the community's status as sovereign communal property-owner. It has to be independent of that. If there are newcomers whom the sovereign community is not entitled to exclude, it must give them the benefit of whatever communal ownership it sponsors and organizes as a sovereign.

So, we are back with what by now should be a familiar dilemma. Either the alleged sovereign entity with a property-based right to exclude is not a real sovereign (according to modern understandings) because it is understood patrimonially or as some sort of exclusive club. Or — if it *is* a real sovereign — any right that it has to exclude outsiders must be based on grounds independent of its status as property-owner. Its status as communal property owner is exercised for the benefit of whoever is entitled to be or remain in the territory. And who that is — and how it is determined — is a matter to be settled on grounds that are separate from the Sovereign Ownership conception.

43 See *supra* note 30 and accompanying text.

44 This transition continues to generate confusion in New Zealand. *Iwi* argue that their communal property includes the beaches (at least the wet foreshore) which are to be held and exploited for the benefit of their members; common law however treats these pieces of land as sovereign assets (which passed to the Crown in 1840) to be held for the benefit of the whole community.

45 See *supra* text accompanying note 6.

CONCLUSION

The analogy between private property and sovereign territory is a seductive one, and it requires very careful examination. In this Article, I have tried to show that we are better off separating the two concepts and noticing the different work that they do in considering the rights that a people have to the land they inhabit. I have tried to argue, too, that it is not just a conceptual matter. It affects the way we think about practical issues like immigration. The territory/property analogy deals with the issue of immigration too quickly and too peremptorily. We can't just assume that a sovereign has the exclusionary rights of an owner. We have to examine what sovereignty is, so far as territory is concerned, and see whether the right to exclude follows from our best understanding of sovereign rights over territory and our best understanding of what such rights are for.

