

INSTITUTIONAL CONSERVATISM AND THE RIGHT TO EXCLUDE

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IT IS A COMMON VIEW in analytical political theory that many if not most of the normative questions brought about by global migration are ultimately explained by the viability of granting states the “right to exclude.” The main thought is that if states have this right they are entitled to enforce their border regimes over outsiders, despite the fact that those outsiders are also excluded from the institutional structures that authorize that enforcement. Similarly, if states have this right, then they retain the privilege of determining how and in what sequence they reform their border regimes when they fall short of applicable standards of justice. Among those who think that migration ought to be analyzed by reference to the right to exclude, it is also common to see the grounds of that right as shaping the standards of justice that constrain its exercise. States may have the right to exclude, so the thought goes, but they cannot use that right however they want. The right to exclude is thus taken to denote both the rightful claim to regulate a given domain and the standard according to which that domain ought to be regulated: it determines both the legitimacy and justice of immigration restrictions.

There are several sophisticated theories of the right to exclude on offer, seeking to ground the right in the value of national culture, in citizens’ ownership claims, or in their claims to freedom of association.¹ These views face a common challenge, however. Even if they often provide normatively strong grounds for exclusion, they all rely on idealized conceptions of the state. This feature gives rise to a problem of applicability. To describe states in the moralized terms that satisfy the triggering conditions of the right to exclude, these theories must abstract away from central aspects of states as they currently exist. But having idealized the subject of their theories—the state—the challenge is now to explain how and why these accounts can vindicate privileges on the part of the real states that currently claim authority over actual people. In light of the

1 Miller, *Strangers in Our Midst*; Walzer, *Spheres of Justice*; Pevnick, *Immigration and the Constraints of Justice*; Simmons, *Boundaries of Authority*; Wellman, “Immigration and Freedom of Association.”

pervasiveness of this problem across different theories, it is worth taking seriously a recent methodological strategy for grounding the state's right to exclude. According to Michael Blake and Sarah Song, the right to exclude can be derived from a thin descriptive account of the state.² Thus, instead of appealing to moralized conditions that contemporary states only partly fulfill (if at all), Blake and Song appeal to minimal conception of the state as a sovereign jurisdiction.

This article offers a critical discussion of this—as Blake calls it—*institutionally conservative* approach to the right to exclude.³ It argues that, while the move to institutional conservatism convincingly avoids the problem of applicability associated with theories that moralize the state, it faces an applicability problem of its own. This problem, I will show, stems from the fact that institutional conservatism is structurally conditioned to presuppose the legitimacy of border control. Thus, institutional conservative theory cannot explain why states should retain the privilege to unilaterally enforce border control when they fall short of applicable standards of justice in migration. This means, further, that institutional conservatism is incapable of vindicating these privileges on the part of existing states—a crucial problem insofar as its proponents want their theories to shed light on the contemporary politics of migration.

Building on this analysis, the article argues that legitimacy assessments of actual instantiations of border control should be decoupled from state-based accounts of legitimacy. A general upshot of the article is that focusing on the individual state's right to exclude is an unproductive frame for assessing contemporary border regimes. Thus, the article provides further support for the thesis that the ethics of migration requires thinking about the state *system*.⁴ In other words, my critique of institutional conservatism leads to a more general critique of methodologically nationalist approaches to the ethics of migration.⁵

The article is structured as follows. Section 1 introduces the debate on the state's right to exclude, highlighting how that debate gives rise to the related, but importantly distinct, questions of justice in immigration policy and the legitimacy of border control. Section 2 briefly outlines three influential approaches to the right to exclude, shows how these idealize the state, and argues that they therefore face a problem of applicability. Section 3 outlines institutional conservatism and shows how it avoids the problem of applicability that plagues its theoretical competitors. It then argues that institutional conservatives are

2 Blake, "Immigration, Jurisdiction, and Exclusion"; *Justice, Migration and Virtue*; Song, "Why Do States Have the Right to Control Immigration?" and *Immigration and Democracy*.

3 Blake, *Justice, Migration and Virtue*, 10.

4 Bertram, *Do States Have the Right to Control Immigration?*; Brock, *Justice for People On the Move*; Owen, *What Do We Owe to Refugees?*; Sharp, "Relational Equality and Immigration."

5 Sager, "Methodological Nationalism, Migration, and Political Theory."

bound to conflate the concepts of justice and legitimacy, rendering their theories incapable of vindicating the privileges conferred by legitimacy for actually existing states. Section 4 considers an objection to my argument, which seeks to rescue institutional conservatism from the charge of simply stipulating the legitimacy of border control by way of a rational reconstruction of the state system. I argue that, while this response is available to institutional conservatives, it cannot support the kind of authority typically implied by the right to exclude. Section 5 concludes by drawing some general lessons of my discussion for the theoretical debate on the ethics and politics of migration.

1. JUSTICE IN IMMIGRATION POLICY AND THE LEGITIMACY OF BORDER CONTROL

Through their border regimes, states collectively determine who has access to which labor markets, education systems, and social security networks. They also decide who will have their basic human rights protected when other states are unwilling or unable to perform that task. By serving these functions, the institution of border control sustains and reproduces global inequality and ensures that many vulnerable individuals fail to have their human rights protected. Consequently, political philosophers and normative political theorists have scrutinized the institution of border control and asked whether, and if so how, it can be rendered compatible with the demands of political morality. In particular, they have sought to find a justification for the right each state claims to set and enforce its own immigration policy without outside interference. In the literature, this is called the state's right to exclude.⁶ The right to exclude is a Hohfeldian power in that it grants states the capacity to change outsiders' normative relationship—their claims, obligations, and liabilities—to the state itself. It is also a privilege in that states can unilaterally decide how they exercise this power.⁷ This is reflected in how states grant or deny visas, permanent residencies, or citizenship to previous nonmembers; attach distinct bundles of obligations and liabilities to each of these statuses; and unilaterally decide to whom they extend which status.⁸

The right to exclude is so central to standard conceptions of sovereignty that some philosophers have thought that it is definitionally tied to what it means for states to be legitimate. As David Copp emphasizes in his argument to this conclusion, however, having a privilege does not settle the question of

6 For an overview by a key contributor to the debate, see Fine, "The Ethics of Immigration."

7 For an exposition of the Hohfeldian incidents, see Wenar, "The Nature of Rights."

8 Fine, "The Ethics of Immigration," 255.

how that privilege should be exercised. Thus, even if legitimate states have the right to control borders, this does not settle how they ought to regulate immigration.⁹ Since a privilege entails the absence of a claim, it might be thought that justified claims for admittance on the part of some migrants—for example, refugees or members of the global poor—undercuts the existence of a right to exclude. However, even if there are individuals who have claims to migrate from their current state to wealthier and more stable parts of the world, the states in those parts of the world may retain a crucial privilege: to interpret both who has justified claims for emigration and what constitutes their fair share of the collective obligations to discharge them.¹⁰ Thus, in the absence of a claim on the part of *all* potential migrants, the thought goes, the right to exclude follows from state legitimacy. The fact that there are moral constraints on how states exercise their right to make their own policy decisions does not undercut their right to make such decisions.

Given this intuitive view, it unsurprising that the contemporary debate on the right to exclude arose in the wake of arguments seeking to establish that everyone has a claim to immigrate.¹¹ Following Copp's line of argument, the main strategy for proponents of the right to exclude has not been to deny that states may have obligations toward vulnerable migrants. Instead, it has been to show that the power to control borders is generally defensible, so long as states abide by applicable principles of justice in migration.¹² Hence, as the debate has proceeded, participants have sought to explicate the interests that a right to exclude grants a political community in order to test its weightiness vis-à-vis the interests of different categories of migrants—such as refugees and asylum seekers, candidates for family reunification, guest workers, past colonial subjects, racialized individuals, individuals displaced by climate change, members of the global poor, and those who want to move for reasons of cultural or religious affinity. The right to exclude, on this rendering of the debate, determines which migrants can permissibly be excluded. Following Lea Ypi's definition of justice in migration, on this understanding, the right to exclude “identifies permissible and impermissible restrictions on freedom of movement

9 Copp, “The Idea of a Legitimate State,” 23–26.

10 Copp, “The Idea of a Legitimate State,” 25.

11 The seminal piece in this debate is Joseph Carens' first article on immigration and border control, which makes a general case for open borders (Carens, “Aliens and Citizens”). See also Cole, *Philosophies of Exclusion*; and Kukathas, “The Case for Open Borders.”

12 This is true even of Christopher Heath Wellman, who argues that states may permissibly exclude “even refugees desperately seeking asylum”: as Wellman makes clear, that permission is conditional on states successfully “exporting justice” to refugees by assisting them in other ways (“Immigration and Freedom of Association,” 109, 128–30).

and articulates how benefits and responsibilities should be distributed between the affected parties.”¹³ In other words, the right to exclude can easily be interpreted as a standard of *rightful exclusion*.

Yet, notice that principles of justice in migration are functionally distinct from the conditions of the legitimate imposition of border control.¹⁴ Whereas principles of justice evaluate the substantive content of norms, such as laws, principles of legitimacy settle the prior question of which agents have the standing to create and enforce such norms.¹⁵ Hence, even if we could agree that a particular immigration policy engendered a justified distribution of burdens and responsibilities, we would still require an independent account of why states are entitled to enforce that distribution by means of force. This matters for the debate at hand because immigration law is particular in that it directly targets individuals who, by definition, stand outside the state’s structures of authorization.¹⁶ Consequently, standard accounts of the state’s authority cannot explain why states are entitled to enforce border law, simply because these accounts generally locate that authority in relations between the state and those who reside on its territory.¹⁷ This is not simply a theoretical point. Legitimacy matters in practical terms because it confers crucial privileges onto its holder. The first is the privilege to interpret *which* requirements of justice apply in a given domain. This privilege matters under circumstances where there are several competing conceptions of justice in migration on offer and at least some of them qualify as reasonable. Second, legitimacy entails a presumption of reform, so that, even in the case where its rules fall short of applicable standards of justice, the addressees of the institution’s rules have weighty reason to comply with it and others

13 Ypi, “Justice in Migration,” 391.

14 Miller, “Justice in Immigration,” 392; Yong, “Immigration Rights and the Justification of Immigration Restrictions,” 463–64; Ypi, “Justice in Migration,” 408, n38.

15 Pettit, *On the People’s Terms*, 130–31.

16 This is a core insight in Arash Abizadeh’s seminal argument that border control is illegitimate unless and until potential immigrants receive *democratic* justification for exclusion. As Abizadeh writes, “justice in the liberal sense is not a sufficient condition for democratic legitimacy: a set of laws may pass the test of hypothetical justification but still lack democratic legitimacy if the laws were simply the edicts of an enlightened autocrat” (“Democratic Theory and Border Corecion,” 42). Abizadeh’s democratic illegitimacy argument turns on his claim that, because border law subjects all non-citizens and is enforced by means of coercion, it thereby coerces all non-citizens (“Democratic Theory and Border Coercion,” 57–60, and “The Scope of the All-Subjected Principle”). For the purposes of this article, I suspend judgment on this claim: my argument should be read as a further and independent legitimacy-based critique of contemporary border regimes.

17 Hidalgo, “Resistance to Unjust Immigration Law,” 460–66.

from interfering with it.¹⁸ The upshot is that if a state wields legitimate power in the enforcement of its border regime but falls short of applicable requirements of justice, then it retains the privilege to interpret the relevant requirements and decide how to sequence the relevant reforms. To put the same point in a different way, legitimacy generates *content-independent* moral reasons for subjects to comply, and for outsiders reasons not to interfere, with the institution's rules.

The question of legitimacy—what grants states the standing to enforce their interpretation of justice in migration—is thus conceptually and practically distinct from the question of what constraints justice puts on a justifiable immigration policy. A successful account of the right to exclude should, therefore, be able to explain why states retain the privilege to interpret the requirements of justice in migration and to make decisions about the sequencing of reform when their border regimes fall short of these requirements. This theoretical desideratum is especially important in light of one core characteristic of much of the philosophical literature on migration: its participants want their accounts to shed light on the contemporary politics of migration. Proponents of the right to exclude thus want their theories to vindicate privileges on the part of actual states, in the real world.¹⁹ However, even by the standards of the most restrictive accounts of the right to exclude, the abysmal track records of contemporary nation-states in the Global North at protecting the most basic human rights of refugees and asylum seekers means that their border regimes fail to qualify as just. Thus, if the legitimacy of border control is tied to a theory of justice in migration, that would undercut the moral claims of Australia, the EU Member States, and the United States to control their borders without outside interference.²⁰

2. MORALIZING THE STATE: THE PROBLEM OF APPLICABILITY

The most important defenses of the state's right to exclude appeal to moral relations that give rise to claims for self-determination. Since having the privilege to decide how to act on one's obligations of justice is a plausible interpretation of what it means to be self-determining, these accounts—if successful—would provide the needed explanation for why contemporary nation-states retain the privilege to enforce border law, even when their regimes fall short of standards

18 Buchanan, "Institutional Legitimacy," 57.

19 See, for example, Blake, *Justice, Migration and Virtue*, 1–6; Miller, *Strangers in Our Midst*, 166–74; Pevnick, *Immigration and the Constraints of Justice*, 1–18; Song, *Immigration and Democracy*, introduction.

20 David Miller has recently argued that the authority of immigration law can be derived from a Rawlsian natural duty to respect just institutions, and explicitly notes that this means that many states will simply not have such authority ("Authority and Immigration," 9, 12).

of justice in migration. However, these accounts depend on idealized conceptions of the state, which make them vulnerable to a problem of applicability: it is unclear how they can vindicate privileges for the states that inhabit the actual world.

One well-known version of this self-determination argument invokes the value of freedom of association. According to Christopher Heath Wellman, citizens associate with one another and, given the central liberal commitment to let them do so freely, they must have the right to make rules about membership.²¹ Like the members of a sports club or an orchestra have central interests in seeing their priorities and values reflected in their organizations, so do citizens have an interest in seeing their priorities and values reflected in their states. Moreover, this interest cannot be protected without granting groups the privilege to control membership rules because this is what secures control over the constitution of the relevant group. Thus, Wellman argues, freedom of association is tied to self-determination and is practically meaningless if it does not include a right to disassociate.

Another version of the self-determination argument appeals to the necessary conditions of upholding valuable cultural ties between citizens. The most sophisticated version of this argument is offered by David Miller, who argues that the function of national culture is to allow citizens to conceive of their political community as a shared project.²² This national *identity* is instrumentally valuable because it fosters the kind of social cohesion and trust that enables the achievement of progressive social justice, and intrinsically valuable because it becomes the vehicle through which collective self-determination is expressed. Since immigration necessarily changes the composition of the citizenry by introducing individuals who may not identify with the state's national culture, the state needs the privilege to control borders in order to uphold the social cohesion that national culture supplies.

A final version of the self-determination argument appeals to ownership over the state's institutions. Ryan Pevnick thus argues that, by creating and maintaining common political institutions, citizens earn ownership claims in those institutions.²³ These ownership claims grant special entitlements to have a say about what the state's institutions should look like in the future, which includes decisions about the composition of membership. Arguments that ignore this

21 Wellman, "Immigration and Freedom of Association."

22 Miller, *Strangers in Our Midst*, ch. 4. For another nationalist argument, see Walzer, *Spheres of Justice*, ch. 2.

23 Pevnick, *Immigration and the Constraints of Justice*. For another argument that appeals to ownership but with an emphasis on individual rather than collective ownership, see Simmons, *Boundaries of Authority*.

historical process, Pevnick argues, “deny the importance of self-determination” because they “unhelpfully abstract from the relationship between state institutions and the concerted collective effort that brought them into existence.”²⁴

These arguments have all faced extensive critical discussion seeking to dislodge the substantive moral grounds—freedom of association, liberal nationalism, and collective ownership—each account supplies as justification for exclusion. However, much of this substantive criticism can be redescribed as turning on an empirical or descriptive objection to how these accounts conceive of the state. Take Wellman’s freedom of association argument. Critics have pointed out that citizens in modern-day states do not associate with one another in the way that is protected by the freedom of association law to which Wellman appeals.²⁵ That law protects intimate and expressive associations, which are the kind of associations whose very purpose would be undermined if they could not control membership. Yet, the same cannot be said for citizens, who neither associate freely nor are likely to ever interact with the vast majority of their compatriots. Now consider the liberal nationalist argument. Critics of liberal nationalism have targeted the argument’s empirical component by questioning the relationship between national culture and social cohesion.²⁶ More generally, critics have pointed out that citizens of modern-day states are not members of single, unitary national cultures. Instead, they often belong to several overlapping cultures—sometimes as a result of the history of colonialism.²⁷ Lastly, critics have pointed out that the histories of colonialism, territorial annexation, and transnational exploitation entail that it is far from obvious that Pevnick’s account can support clean—and equal—ownership claims on the part of citizens in actual states.²⁸ The contributions of noncitizens to the institutions of many old states will mean that there are ownership claims outside of the state’s membership. Conversely, for young states, it will often be unclear whether there is a shared history between its citizens and their current institutions at all, since these institutions were often created by others.

24 Pevnick, *Immigration and the Constraints of Justice*, 39.

25 Blake, *Justice, Migration and Virtue*, 66; Fine, “Freedom of Association Is Not the Answer,” 349–51; Miller, *National Responsibility and Global Justice*, 211; Song, *Immigration and Democracy*, 44–45.

26 Indeed, the liberal nationalist argument has inspired interesting empirical studies, one of which has found that nationalist values *detract from* social cohesion (Breidahl, Holtug, and Kongshøj “Do Shared Values Promote Social Cohesion?”).

27 Amighetti and Nuti, “A Nation’s Right to Exclude and the Colonies”; Erez, “Liberal Nationalism, Immigration, and the Problem of Multiple National Identities”; Fine, “Migration, Political Philosophy, and the Real World”; Song, *Immigration and Democracy*, 34.

28 Blake, *Justice, Migration and Virtue*, 63–64; Kukathas, “Why Open Borders?”

These various lines of critique can be condensed into a general objection, which goes as follows. One could accept the substantive normative premises of these accounts but deny that they extend to the states that inhabit the actual world. Although they are all internally consistent, and may even supply normatively appealing grounds for exclusion, each account idealizes the subject of their theory: the state. Thus, the objection is not that they present morally implausible cases for exclusion, but rather that these cases do not apply to contemporary states. Hence, they cannot vindicate the privileges conferred by the right to exclude *for* states because their accounts turn on descriptive premises that states only fulfill partly (if at all). Thus, they face a problem of applicability: they assume predicates as a condition for the applicability of their theories that cannot be reintroduced at the level of application without thereby changing the substantive normative content of their theories.²⁹ Consequently, these theories face a steep *empirical* challenge if they are to provide a successful explanation for why the legitimacy of border control follows from state legitimacy more generally.

3. INSTITUTIONAL CONSERVATISM AND THE STATE

The common problem faced by the accounts above is that they invoke moralized and idealized conceptions of the state. That this problem is common across a range of influential theories makes a recent theoretical development especially noteworthy. According to two recent arguments by Michael Blake and Sarah Song, the right to exclude can be derived from a minimal descriptive account of the state.³⁰ More specifically, both accounts hold that the privilege to control borders follows from facts that are entailed by sharing a jurisdiction. The appeal of this methodological strategy should be obvious: if the right to exclude can be supported by an appeal to relations that uncontroversially obtain between citizens of actually existing states, then we have an explanation for why these states retain the privilege to control borders even when they fall short of applicable standards of justice in migration. In line with the arguments rehearsed above, Blake and Song both find that the existing general theories of the right to exclude are insufficiently attuned to the political nature of states.³¹ As Blake puts it in a critical appraisal of Song, “Most defenses of the right spend too little time on what a state is, *qua* state—a political community,

29 O’Neill, *Towards Justice and Virtue*, 40–41; Valentini, “On the Apparent Paradox of Ideal Theory,” 351–55.

30 Blake, “Immigration, Jurisdiction, and Exclusion”; *Justice, Migration and Virtue*; Song, “Why Do States Have the Right to Control Immigration?” and *Immigration and Democracy*.

31 Blake, *Justice, Migration and Virtue*, 56, 59, 66; Song, *Immigration and Democracy*, 31–46.

with a defined jurisdictional reach.”³² To rectify this lack, they both point to minimal conditions that unite citizens living under the same state.

For Blake, “states exist whenever there is an effective government able to exert political and legal control over a particular jurisdiction.”³³ At a minimum, therefore, the state is “a jurisdictional project, in that it is defined with reference to a particular sort of power held over a particular sort of place.”³⁴ If there is a right to exclude, then it must be grounded in what is distinctive about sharing a jurisdiction. According to Blake, this distinctiveness lies in the fact that everyone who shares a jurisdiction becomes collectively responsible for each other’s rights (71). When a new person enters that jurisdiction, they gain a claim against those who were there from before. The right to exclude is grounded, Blake argues, in the claim to be free from being so obliged. According to this (as we might call it) “unwanted obligations principle,” “we have a presumptive right to be free from others imposing obligations onto us without our consent” (74).

For Song, the right to exclude is grounded in the value of self-determination. But, unlike the theorists reviewed above, Song’s account of the “self” that holds this right to self-determination is made by reference to a “people,” which in turn is defined along the thin descriptive lines advocated by Blake. More precisely, Song’s peoples are defined by three conditions. Peoples (i) are “engaged in a common project that aims at collective self-rule,” (ii) share “a history of political participation and contestation,” and (iii) have “the capacity to establish and maintain political institutions.”³⁵ It is important to emphasize that Song explicitly distinguishes her account from what she calls the “strong statist” view, which she associates with Blake’s early work, and that holds that “the state is prior to and necessary and sufficient for a people.”³⁶ This is because she wants to open space for the possibility that peoples can exist below the state level and thus might incur rights of jurisdiction by themselves. However, while living under the same state is not a necessary condition for qualifying as a people on Song’s view, the triggering conditions of her three participation requirements are so low that it is certainly sufficient: individuals participate in the practice of peoplehood when they support a common political project, which for Song

32 Blake, “Jurisdiction and Exclusion,” 70.

33 Blake, “Immigration, Jurisdiction, and Exclusion,” 110.

34 Blake, *Justice, Migration and Virtue*, 68. From here, I will refer to Blake’s book by page numbers in the main body of text.

35 Song, *Immigration and Democracy*, 58–59.

36 Song, *Immigration and Democracy*, 57. For Blake’s “strong statism,” see his “Distributive Justice, State Coercion, and Autonomy.”

involves “observing traffic laws, responding to jury summons, paying taxes, and respecting the legal rights of others.”³⁷

For Blake and Song alike, the right to exclude is, as Song puts it, “a jurisdictional right.”³⁸ Their accounts are functionally equivalent in that they grant privileges to states, as they currently exist, by way of the state’s structuring of the relationship between citizens and residents.³⁹ There is much that can be said about the substantive normative basis of both accounts.⁴⁰ However, what is interesting for the present discussion is the structure their shared methodological strategy gives their theories. Since Blake has defended this—as he calls it—“institutionally conservative” strategy most elaborately, I will mostly focus on his arguments below. However, insofar as she relies on the same reasoning, my arguments will be equally applicable to Song. As I will try to show, institutionally conservative theories are bound to presuppose the legitimacy of border control.

As Blake describes it, the core of institutional conservatism is that the theorist takes an existing social institution as their starting point and asks what it would take for this institution to be justified.⁴¹ The reason why this institutionally conservative method is called for, he argues, is both pragmatic and normative: “if we can adjust what we have and meet the tests of justice, then we should do so—where that *should* refers both to the conceptual difficulties in building new institutional forms and to the practical difficulties engendered by revolutionary changes in institutional framework” (10). Only if our current institutions are structurally incompatible with the demands of justice do we have reason to think of new institutional forms. This seems to make institutional conservatism vulnerable to the problem of second best, according to which theories err when they assume that, when one or more conditions of optimal arrangements are missing, one should still try to approximate those arrangements instead of looking to alternatives.⁴² Against such appearance,

37 Song, *Immigration and Democracy*, 60.

38 Song, “Why Do States Have the Right to Control Immigration?” 42.

39 For a comparison between their views, see Blake, “Jurisdiction and Exclusion.”

40 In Blake’s case, the unwanted obligations principle is controversial because, by implying that it is generally wrong to bring about the triggering conditions of moral norms, the principle can seem to cut against the very purpose of moral norms (see Hidalgo, “Immigration Restrictions and the Right to Avoid Unwanted Obligations”; and Kates and Pevnick, “Immigration, Jurisdiction, and History”). For Song, the main challenge will be to explain why the *interest* of peoples to be self-determining provides content-independent moral reasons for outsiders to respect their border laws (see Blake *Justice, Migration and Virtue*, 56–60).

41 In his earlier work, Blake referred to this method simply as “institutional theory” (“Distributive Justice, State Coercion, and Autonomy,” 261–65).

42 In David Estlund’s definition, theories commit a “fallacy of approximation” when they “infer (*à la* Superset) from the value-contributing conditions of any model scenario, that

however, Blake argues that questions of migration and borders are not only especially well-suited for an institutionally conservative analysis, but that they positively demand it:

Indeed, it seems to me that the very question of immigration itself makes sense only under where this assumption holds true; if the world contained only one government, ruling over all habitable land, the concept of immigration would seem to be inapplicable. (70)

Thus, on the institutional conservative approach, political theorists should presuppose the existence of states and ask what it would require for a state to wield its current powers defensibly.

Notice that institutional conservative theory on border control resembles John Rawls's approach to questions of justice. As Aaron James has convincingly argued, the seeming tension between Rawls's egalitarian conception of social justice and his sufficientarian conception of global justice can be resolved by assigning to Rawls a particular practice-based methodology. James demonstrates that Rawls identified principles of justice with rules applying to specific practices and that, although he held that individuals held moral priority, Rawls was clear that participants to such practices could also be nations, churches, corporations, and so on.⁴³ Thus, instead of misapplying his own normative logic, Rawls refrained from extending the individualist interpretation of his Original Position to the global realm because, in that realm, the relevant subject to which principles of justice apply is relations between peoples, not individuals.⁴⁴ This practice interpretation of Rawls, James argues further, helps explain another novel feature of the Rawlsian approach to justice: it contains no optimality condition according to which some institution can always be rendered more just, for example, by becoming more equal.⁴⁵ This suggests that, on the Rawlsian view, justice functions as a moral constraint on actions taking place within predetermined practices.

Blake, in fact, identifies Rawls as an institutional conservative but without further elaboration (228n10). The practice interpretation of Rawls can explain why. On both approaches, we identify some existing practice and ask what it would require for that practice to become substantially justified. Further, as both Blake and James emphasize, invoking practices in this sense cuts across Rawls's well-known distinction between ideal and nonideal theory because the

among alternatives that lack at least some of those conditions, supersets of those subsets are better" (Estlund, *Utophobia*, 275).

43 James, "Constructing Justice for Existing Practice," 283.

44 James, "Constructing Justice for Existing Practice," 299. Compare Valentini, "Global Justice and Practice-Dependence," 405–6.

45 James, "Constructing Justice for Existing Practice," 294.

theoretical subject can be described in more or less idealized terms.⁴⁶ The point is to draw on moral values to give a rational reconstruction of the subject of our theory and—if that subject is not fundamentally incompatible with those values—thereby provide a normative benchmark against which we can identify permissible and impermissible actions within our currently existing practice. Hence, the commitment to reform of existing institutions over institutional innovation. Institutional conservatism is a form of the “practice-dependent” methodology James assigns to Rawls.⁴⁷

The constraint interpretation of Rawlsian principles of justice, which follows from his practice dependence, coheres well with many of Blake’s substantial normative claims. Take, for example, Blake’s argument that states cannot permissibly exclude refugees: on his view, the right to exclude places constraints on the kind of policies states may permissibly adopt when they set their immigration policies.⁴⁸ This explains the following passage:

Even if legitimate states have a right to exclude unwanted would-be immigrants, much work needs to be done to figure out . . . the contours of that right. It is possible to have the right to exclude, after all, and still question whether or not that right is able to ground a particular exclusionary policy. (79)

Here, the term “right” is clearly invoked in the sense of “rightfulness” that is associated with justice. However, the cited passage also raises a question: Can institutionally conservative theories like Blake’s establish the sense of “right” that is associated with legitimacy—namely, of the privilege to retain control over borders when obligations of justice in migration are not met? Or will the legitimacy of border control simply have to be assumed to follow from state legitimacy more generally? Despite suggestions to the contrary, Blake ultimately ends up having to stipulate that border control follows from legitimacy more generally. This becomes explicit in his discussion of irregular migration:

46 Blake, “Distributive Justice, State Coercion, and Autonomy,” 263n7; James, “Constructing Justice for Existing Practice,” 291–93.

47 On practice dependence as a meta-normative position about the grounding of principles of political morality, see Sangiovanni, “Justice and the Priority of Politics to Morality”; and James, *Fairness in Practice*, ch. 4.

48 The constraint interpretation also coheres well with the other part of Blake’s overall project, which is to make conceptual space for evaluating immigration policy in terms of whether it is *merciful* (chapter 10). The central thought is that, even if an immigration policy is just, we might still find it objectionable because it is unmerciful (213). Thus, on Blake’s final view, justice places baseline constraints on morally *acceptable* policy, whereas mercy places further constraints on morally *virtuous* policy. The scope of the latter is narrower than the scope of the former.

I will assume that the state trying to exclude is the sort of state to issue authoritative commands; however we identify the line of decency below which states lose the right to expect obligation, our state is above that line. . . . I will not assume . . . that the law mandating exclusion is itself just; I will merely assume that the state is the sort of entity that might create an obligation to obey the law, regardless of whether or not that law is just. (167)

Although Blake's defense of the right to exclude does not assume that immigration restrictions are just, it does assume that states wield legitimate power in the enforcement of their border regimes. It thus fails to provide an *explanation* for why states should be entitled to regulate migration even when they fail to discharge the applicable principles of justice in migration.

This problem is not, I argue, local to Blake's particular theory. It is a structural problem that derives from his reliance on institutional conservatism.⁴⁹ Employing the language of practice dependence, we can see why. For any political theory, we can ask: Does the theory aim to identify principles for regulating a given practice; to justify that practice; or, more fundamentally, to identify an existing practice as subject for justification and/or regulation? This systematization is useful because it allows us to see how theories that, in a Rawlsian mode, seek to answer the first of these questions do not contain the resources for justifying the practices that they take as their starting point. The principles they generate are importantly limited because, as James points out, if "a principle applies to the world only insofar as an appropriate kind of social practice exists, that principle cannot itself be used to criticize either the existence or the non-existence of the kind of practice that conditions its application."⁵⁰ The problem with institutionally conservative approaches to the right to exclude—as with all approaches that analyze that right only in terms of justice in migration—is that they treat their theories as *also* responding to the second question when they only contain the resources for responding to the first.

Therefore, institutionally conservative approaches to the right to exclude do not explain why the states that inhabit the actual world wield legitimate power in the enforcement of their border control. Arguments for legitimacy must explain why subjects of rules have content-independent moral reasons

49 A parallel argument can be made against Song on the grounds of her stipulation of territorial rights (*Immigration and Democracy*, 61–65). As Blake puts it in his critical discussion, Song's argument can explain why it is *good* for individuals who share a territorial jurisdiction to hold unilateral control over their borders, but it cannot explain why they have a *right* ("Jurisdiction and Exclusion," 74–75; *Justice, Migration and Virtue*, 57–60).

50 James, "Constructing Justice for Existing Practice," 313.

for compliance, and outsiders have reasons for noninterference, with the actual institutions that seek to regulate their actions.⁵¹ Constructing an argument to the effect that these institutions *could* be rendered compatible with the demands of justice if they were organized differently provides an unconvincing answer to that question. Thus, institutional conservatism turns out to lack a key function that its proponents need their theories to perform: to explain why states are entitled to enforce border control when their border regimes fall short of the requirements of justice in migration.

Two important objections to my argument can be made on the part of institutional conservatives. The first is to argue that one can draw on the resources of institutional conservatism to evaluate the practice of border control itself, as distinct from the rules that ought to regulate that practice. The second is to argue that considerations of feasibility justify the institutionally conservative stance. In the next section, I tackle both objections by arguing that, although an evaluation of border control is perfectly coherent on a practice-based methodology, it cannot plausibly deliver the strict unilateral kind of control over borders supported by Blake and Song.

4. PRACTICE DEPENDENCE AND STATE-SYSTEM LEGITIMACY

To summarize the argument thus far, I have shown that institutional conservatism is an appealing approach to the ethics of migration because it straightforwardly avoids a core problem facing approaches that moralize the state. However, I have argued that institutional conservatism cannot yield a plausible account of the legitimacy of border control, as distinct from a theory of justice in migration, because it cannot explain why states retain the privilege to control borders when their regimes fall short of applicable requirements of justice. To make this argument, I argued that institutional conservatism is a form of the practice-dependent method developed by James and others. This section draws on the resources of practice dependence with the aim of demonstrating that a reconstructed version of institutional conservatism that seeks to evaluate the practice of border control itself, while perfectly coherent, cannot yield strict unilateralism over borders.

Having read my argument above, a reader might wonder why those who are sympathetic to institutional conservatism could not draw on the resources of practice dependence to offer a defense of border control. On this view, the only mistake institutional conservative writing on migration has made is to conduct their discussions at the wrong level of analysis. Instead of evaluating the practices

51 Buchanan, "Institutional Legitimacy."

of each individual state, so this argument goes, one could vindicate the privileges held by states by engaging in an analysis of the “practice of statehood.” Hence, if we gave a rational reconstruction of the *state system* and convincingly showed that unilateral border control would be part of such a system, then we would seemingly have an account that could confer legitimacy onto border control. Thus, is this a viable strategy for vindicating the legitimacy of border control?

Although it is perfectly possible to offer a rational reconstruction of the state system along the lines envisaged by the practice-dependent methodology, it is unlikely to deliver the substantial conclusion that institutional conservatives are after. Indeed, it has become increasingly popular to draw on precisely this kind of argument to show that strict territorial sovereignty as it currently exists is indefensible.⁵² The reasoning behind these accounts is straightforward and based on a widely shared normative premise: that the function of the state system is to determine who is responsible for protecting whose human rights. This premise is institutionally enshrined in international law and forms the basis of international refugee law, where it is recognized that states are obligated to assist individuals whose states are no longer willing or able to protect their rights from persecution.⁵³ To recall, the premise also forms the basis of Blake’s substantive normative account, since the fact that the state system allocates responsibility for human rights protection is precisely the reason why a person who enters a new jurisdiction imposes obligations on those already present in that jurisdiction (36). It is also accepted by Song, who argues that the core legitimacy criterion for states is the maintenance of order and protection of human rights of inhabitants.⁵⁴

However, whereas Blake goes on to argue that the fact that the state system assigns human rights protection through territorial presence can ground the right to exclude (by way of the right to *avoid* being responsible for human rights), a group of authors has recently drawn on the logic of this way of assigning responsibility for human rights to argue for a different conclusion. Gillian Brock and David Owen thus argue that, given the state system’s normative core function of allocating responsibility for human rights, the justification of the system itself turns on successful human rights protection.⁵⁵ In other words, when individuals fail to have their human rights protected, the state system falls short of its purpose. These “state system legitimacy” theories, as Daniel

52 See, for example, Pavel, *Divided Sovereignty*.

53 Criddle and Fox-Decent, “The Authority of International Refugee Law.”

54 Song, *Immigration and Democracy*, 55, 62. Song also invokes the human rights-based logic of the state system when she points to international human rights law to motivate her case for collective self-determination (*Immigration and Democracy*, 53). See also Song, “Political Theories of Migration,” 395.

55 Brock, *Justice for People on the Move*; Owen, *What Do We Owe to Refugees?*

Sharp has usefully labeled them, then point out that this insight has important implications when it comes to migration.⁵⁶ If the purpose of the state system is to ensure that each individual has some political authority that is in charge for the protection of her basic rights, then emigration becomes an important remedy for individuals when the political authority that is currently responsible for those rights fails to discharge its responsibility.

Based on this link between the function of the state system and migration, state system legitimacy theories make the following argument.⁵⁷ States, as a matter of moral principle, depend for their privileges on a state system that is premised on protecting human rights. When states fail their task of protecting the rights of those for whom they have been allocated responsibility, this creates a problem for the system as a whole and, by extension, for the individual states that depend for their privileges on the justifiability of the state system. This legitimacy problem can be solved by erecting effective institutions that ensure that those who require protection through migration receive that protection—hence, Owen’s description of the refugee regime as a “legitimacy repair mechanism.”⁵⁸ This means, Brock and Owen argue, that the various privileges associated with sovereignty—including and especially control over borders—is conditional on the creation and maintenance of supranational institutions for securing migrants’ rights.⁵⁹

Sharp has recently provided a different argument in support of Brock’s and Owen’s conclusion.⁶⁰ On his view, the erection of supranational institutions is not required on human rights grounds, but to rectify the problematic discrepancy in power between citizens of wealthy states and individuals who could significantly better their lot by immigrating to them. This power could be rectified, Sharp argues, if these individuals were granted access to institutions that would give them a say in the border policies of wealthy states in the Global North. Such procedural inclusion would be desirable because it would help ameliorate the

56 Sharp, “Immigration and State System Legitimacy.” Sharp also attaches the “state system legitimacy theory” label to Christopher Bertram. However, as Sharp emphasizes, although Bertram also invokes the concept of legitimacy to discuss border control and ends up endorsing conclusions similar to Brock and Owen, his account is distinct from theirs in that he does not rely on the reconstruction of the state system (Sharp, “Immigration and State System Legitimacy,” 6). Instead, Bertram identifies the legitimacy problem in contemporary border controls with the power each state claims over each potential immigrant (*Do States Have the Right to Control Immigration?* 52–53).

57 Brock, *Justice for People on the Move*, 38–40; Owen, *What Do We Owe to Refugees?* 45–47; Sharp, “Immigration and State System Legitimacy,” 3–6.

58 Owen, “In Loco Civitatis,” 275, and *What Do We Owe to Refugees?* 47.

59 Brock, *Justice for People on the Move*, 226–27; Owen, *What Do We Owe to Refugees?* 107.

60 Sharp, “Relational Equality and Immigration,” 673–75.

problematic relationship of inequality that exists between the rich and poor and because it would, by ensuring ongoing exit options, ameliorate the problematic relationship the latter group stands in with their current states of residence.⁶¹

These arguments in favor of the necessity of supranational institutions for regulating migration point in the opposite direction than the one that institutional conservatives need them to. Far from providing a straightforward justification for the sovereign privileges states currently enjoy, these arguments entail that a rational reconstruction of the state system would include institutional mechanisms that would guarantee the possibility of migration in the face of a state that fails to discharge its responsibilities toward those who reside within its jurisdiction. Yet, this guarantee would necessarily revoke the privilege to unilaterally decide on all immigration policy. For at least some vulnerable migrants, political communities might be *made* to take responsibility for their human rights by the institutions regulating global migration. Thus, while the practice-based methodology can certainly be used to evaluate border control, it is not clear that it can support the legitimacy of full unilateral control over borders. Quite to the contrary, these sophisticated arguments point in a different direction: for at least some immigration decisions, the interpretation of applicable principles of justice, and the sequence of the reform to which they give rise, would be determined by a supranational institution.

Institutional conservatives can object to this line of argument by pointing to the infeasibility of moving away from the state system. According to this objection, I have misunderstood the main point of institutional conservatism—namely, that it takes seriously that there are “conceptual and practical” difficulties associated with creating new institutional forms (9–10).⁶² Thus, given these difficulties, it will always be better to prioritize the reform of states than to advocate the delegation of parts of their competences to new institutions above (or below) the state level. This appeal to feasibility is unsatisfactory as it stands, however. This is because it is vulnerable to the following countercharge. Since institutional conservatives accept that human rights are a baseline constraint on state actions, and that this gives rise to obligations toward

61 Sharp, “Relational Equality and Immigration,” 669. This procedural proposal is distinct from Abizadeh’s because it does not imply a need for a global democratic constituency: only members of the global poor would be entitled to a say and only in the border policies of wealthy states (Sharp, “Relational Equality and Immigration,” 674). Compare Abizadeh, “Democratic Legitimacy and Border Coercion.”

62 It is worth noting that, when making this argument, Blake only considers the creation of a world state as the alternative to the current state system (228n30). As the argument above demonstrates, however, a world state is not the only relevant alternative to our current arrangements.

refugees and asylum seekers, the appeal to feasibility cannot simply be that it is easier to keep things as they are: that position would amount to a simple endorsement of the status quo. Instead, it must be that it is *more* feasible to secure human rights protection under the current state system than under alternative arrangements.

However, the claim that it would be more feasible to secure human rights protection under our current system of unilaterally enforced borders than under some alternative system involving supranational institutions is a controversial claim that requires justification. Its controversy stems from the incentive structure inherent to our current system. In particular, the fact that governments have far more to gain from pandering to anti-immigration sentiments in their own populations than they have from taking steps to protect refugees and asylum seekers, entails that a system of unilateral control over borders licenses short-sighted and poorly informed decisions in the regulation of global migration. For example, Brock reviews empirical literature that suggests that citizens in Western democracies hold beliefs that immigration is bad for citizens' economic prospects; that immigrants have negative effects on public finances; and that immigrants increase crime.⁶³ These beliefs are, at best, contingent on the policy choices that receiving states make and, in many cases, they are straightforwardly false.⁶⁴ In conjunction with the structural bias that governments have toward their own citizens, these contingent or false beliefs create strict immigration regimes that predictably exclude migrants with justified claims for protection under international law.⁶⁵

One institutional expression of the perverse incentives engendered by our current system is the externalization of border control. Over the past decades, states in the Global North have made a decisive shift in how they conceive of the practice of border control. Instead of a mere concern with controlling their territorial borders, states are increasingly preoccupied with controlling "migration flows" heading toward their territories.⁶⁶ Thus, in

63 Brock, *Justice for People on the Move*, 204.

64 Brock, *Justice for People on the Move*, 205.

65 Brock and Hidalgo use these premises in an *epistemic* argument for the supranational regulation of migration (Brock, *Justice for People on the Move*, 202–9; Hidalgo, "The Case for the International Governance of Immigration," 144–52). As Hidalgo puts it, "if an agent has biases that impair this agent's capacity to make morally risky decisions in reliable ways, this agent has moral reason to transfer decision-making authority to a more reliable party" ("The Case for the International Governance of Immigration," 152). What matters for my purposes, however, is the more minimal claim that these structural biases make reliable human rights protection less feasible than under a different system.

66 FitzGerald, *Refuge beyond Reach*; Gammeltoft-Hansen, *Access to Asylum*; Longo, *The Politics of Borders*; Shachar, *The Shifting Border*.

addition to exercising power *at* their territorial borders, states are employing a host of techniques to exercise power over potential immigrants far beyond their physical territory. Important measures include the imposition of carrier sanctions and of uniform visas, the administration of which is often externalized to private contractors.⁶⁷ In addition, states create so-called migration compacts, where poorer third countries agree to host asylum seekers and to police known routes of emigration in exchange for political and financial benefits. Lastly, states create and uphold deep information-sharing networks that let them track migrants even as they move far beyond their own borders. The EU's "Integrated Border Management" strategy, for example, explicitly aims to track "the movement of third-country nationals from the point of departure in countries of origin, all throughout transit, and up to their arrival in the EU"—and to deploy the measures above to deter the movement of those migrants at each possible juncture.⁶⁸

The main reason that states choose to externalize their border regimes in these ways is grounded in the norms of territorial sovereignty. Since responsibility for human rights protection is triggered by territorial presence, the externalization of border-controlling measures allows wealthy states to wield power over vulnerable migrants without incurring the responsibilities they otherwise would incur if they had exercised that power within their own jurisdictions. It has been robustly demonstrated in legal and empirical literatures that these practices create forms of overlapping power and functional jurisdiction that lead to responsibility gaps.⁶⁹ Practically, it is often unclear who is responsible for whose rights in this new bordering landscape—is it the state on whose orders migrants are constrained or detained? Or is it the state on whose territory the constraining and detaining occurs? The overall effect has been to weaken protection for vulnerable migrants and to create an effect where these migrants are pushed to take increasingly dangerous routes to reach a state that can reliably protect their rights so that they can launch an asylum claim once territorially present. The sociologist David Scott FitzGerald describes this as the "catch-22" of modern migration control: rich states respect the principle of *non-refoulement*, which means that those who reach their physical territories

67 To his credit, Blake offers an interesting discussion of carrier sanctions and makes a convincing argument that the practice often involves violation of a positive duty to assist needy migrants (102). However, he also argues that the practice is generally permissible because it fails to be coercive and does not consider its broader implications for reliable human rights protection.

68 Moreno-Lax, *Accessing Asylum in Europe*, 3.

69 Gammeltoft-Hansen, *Access to Asylum*; Moreno-Lax, *Accessing Asylum in Europe*; Shachar, *The Shifting Border*.

will be able to depend on their protection, but at the same time create conditions where it is exceedingly dangerous to reach their territories.⁷⁰

These practices, and the incentives underlying them, are fully explained by our current norms of strict territorial sovereignty. Moreover, their effect on human rights protection is clear.⁷¹ Therefore, I argue, the feasibility calculation does not pull in the favor of the preferred conclusions of institutional conservatives. Rather, a rational reconstruction of the state system would plausibly entail that states should be stripped of their privilege to *full* unilateral discretion over immigration policies: for at least some groups of migrants, the privilege to interpret the requirements of justice in migration and to sequence reforms should be wielded by supranational institutions. In conclusion, then, it is perfectly possible to construct a practice-dependent evaluation of the state system, but it does not provide a plausible defense of the privileges associated with legitimacy.

5. CONCLUDING REMARKS

Where does this leave us? The first conclusion that can be drawn from the above is that, for all its strengths as a methodology for constructing theories of justice in migration, institutional conservatives seem forced to scale back their ambitions to vindicate the privileges claimed by the states in the actual world. One possibility for institutional conservatives would, of course, be to tie the legitimacy of border control to their preferred standards of justice in migration and argue that all border regimes that fall short of that standard thereby fail to generate reasons for compliance and noninterference. However, this is not a palatable option for institutional conservatives, since it would undercut their ambition of vindicating privileges on the part of the states that inhabit the actual world since most of these regimes fall short of even very permissive standards of justice in migration. This is especially true for the states that theorists in the analytical tradition, either implicitly or explicitly, assume as their subjects of concern: wealthy democracies in the Global North.

The more general lesson I think can be drawn from my discussion above is methodological. The ethics of migration has long been characterized by a *methodologically nationalist* approach, which centers individual states in their normative analyses and asks what makes the claims of individuals who live within them weighty enough to ground rights to exclude outsiders.⁷² But since this

70 FitzGerald, *Refuge beyond Reach*, 10.

71 For a comprehensive normative critique of these developments in contemporary border control, see my “The Practice and Legitimacy of Border Control.”

72 Sager, “Methodological Nationalism, Migration, and Political Theory.”

approach has led theorists to either moralize the state or stipulate the legitimacy of its claim to regulate immigration, a more fruitful analysis of the ethics and politics of migration should take systemic effects into account. In particular, I have sought to offer further support for the view that normative accounts would do well to think about the state system and the incentives (not) to protect vulnerable migrants that it engenders. Engaging in such an analysis does not run counter to Copp's claim that the concept of legitimate statehood invoked by political theorists and philosophers—and scholars in other disciplines—has included control over borders. However, it does entail that the sovereign privileges entailed by such a concept of legitimate statehood cannot be evaluated as one bundle. Instead, we should disaggregate the analysis of the distinct claims to authority that states make over their citizens, and over potential immigrants.⁷³

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