

Saving Migrants' Basic Human Rights from Sovereign Rule

LUKAS SCHMID *European University Institute, Italy*

States cannot legitimately enforce their borders against migrants if dominant conceptions of sovereignty inform enforcement because these conceptions undermine sufficient respect for migrants' basic human rights. Instead, such conceptions lead states to assert total control over outsiders' potential cross-border movements to support their in-group's self-rule. Thus, although legitimacy requires states to prioritize universal respect for basic human rights, sovereign states today generally fail to do so when it comes to border enforcement. I contend that this enforcement could only be rendered legitimate if it was predicated on more desirable conceptions of sovereignty that supported the universal prioritization of basic human rights. Specifically, desirable conceptions would not establish and require absolute state sovereignty over borders as a necessary precondition for true popular self-governance.


INTRODUCTION

Political theorists have spent considerable energies debating whether (nation-)states have moral rights to exclude would-be immigrants from their territories (e.g., Carens 1987; Fine 2010; Miller 2007; Song 2019; Wellman and Cole 2011). It is increasingly clear that those who principally answer in the affirmative must have in mind very different *practices* of border control¹ than those we see engulfing the Global North and beyond in the age of securitization. After all, such developments include the militarization of many border regimes around the world, where extraordinary protections for border patrol officers often enable them to abuse, maim, and kill without serious consequences (Cohen 2020, 20; Heyman 2009; Jones 2017, chaps. 1, 3; Sager 2020, chap. 4); the normalization of life-endangering pushbacks in direct violation of international law (cf. Oxfam, Belgrade Centre for Human Rights, and Macedonian Young Lawyers Association 2017); the containment of migrants in authoritarian and failed states where they are habitually subjected to torture and enslavement

(Amnesty International 2020; Liguori 2019); and the banishment of large numbers of migrants to small island states that contain them in concentration camps (cf. Boochani 2018; Nethery and Holman 2016; Shachar 2020b, 46–51).

Presumably, theorists defending the right to exclude would respond that while states have broad rights of closure, they do not have rights to close *like that*. Some groups of immigrants, such as refugees,² may never or only rarely be excluded. Rules always need to be enforced according to basic moral standards of permissibility. Thus, conditions of enforcement affect the *scope* of the right to exclude but not the right itself. In this paper, I argue that things are considerably more complex than that. It is one thing to have the moral right to make sweeping *rules* of exclusion but quite another to have a moral right to *enforce* such rules or to have a claim right to obedience against the subjects of such rules. When, if ever, do states have such enforcement rights against would-be immigrants?

I respond by arguing the following. To legitimately enforce borders on migrant subjects, force-wielding, authoritative institutions of exclusion are, at least, required to be structured according to an imperative of robust respect for migrants' basic human rights. The legitimacy of enforcing exclusion thus depends on institutional structure and capabilities: exclusion can be enforced only by such institutions that are capable of systematically operating based on robust basic human rights respect. The twist is that *dominant* conceptions of sovereignty do not allow states to produce such institutions, which therefore fail to exclude migrants in legitimate ways. This is because on dominant sovereignty conceptions, *state* (external) and *popular* (internal) sovereignty entangle at the border in what I shall term a *sovereignty nexus*. In this nexus, state sovereignty's prerogative to control cross-border movement becomes *functional* for the facilitation of a core tenet of dominant popular sovereignty conceptions: the

Lukas Schmid , Ph.D. Candidate, Department of Political and Social Sciences, European University Institute, Italy, lukas.schmid@eui.eu.

Received: February 05, 2021; revised: July 04, 2021; accepted: January 11, 2022. First published online: February 04, 2022.

¹ I adopt a processual definition of the “border.” Borders are the *sites* of *bordering processes* and exist wherever these take place. Bordering processes are processes by which territorial space is demarcated or existing demarcations are reinforced or developed with potentially authoritative implications for persons' mobility capabilities. As opposed to the static conception of borders as geographical lines, such a processual conception allows us to grasp the extraterritorial and intraterritorial measures put in place to control the mobilities of (would-be) cross-territorial migrants. Moreover, I shall use the terms “border control,” “immigration control,” “border enforcement,” and “immigration enforcement” synonymously to describe force-backed assertion and reproduction of border regimes—a move that allows grasping many different practices as border control (such as immigrant detention and deportation). “Border regimes” or “immigration regimes,” on the other hand, are webs of governmental rules determining the specifics of particular bordering processes.

² From now on, I will not distinguish between “refugees” and “migrants.” Although I acknowledge that this distinction is often thought important, nothing in my argument will turn on it.

people's control over its own constitution and composition. To play this functional role in a consistent and effective manner, the border enforcement institutions of state sovereignty must *prioritize* control and authority. But where control and authority are stringently prioritized, respect for basic human rights is *nonrobust*: at best, contingent on the successful avoidance of situations in which basic human rights respect and authoritative control of migrants' cross-border mobilities clash. I argue further that the only way to render enforcement potentially legitimate is to dismantle the sovereignty nexus. This requires that border governance proceeds based on a rethought conception of popular sovereignty, a conception that ceases to put an imperative of control over self-constitution at its center. Only then will border institutions be able to prioritize their subjects' basic human rights. In the absence of such a transformative shift, states that enforce borders act illegitimately and have no moral claim to migrants' obedience.

I make three further contributions along the way. First, I complement empirical debates about the identification of political mechanisms that affect counterintuitive human rights outcomes for immigrants confronting sovereign states; I provide a theoretical analysis of the underlying institutional skew that conditions such outcomes in the first place. Second, I supply a dynamic understanding of state sovereignty, focusing on its functional role for facilitating ideas of popular sovereignty. Such an understanding, I argue, elucidates the current development of bordering practices better than more static ones. And third, my account stresses that we need ideal democratic theories of popular sovereignty to work in concert with critical accounts that analyze the workings and implications of currently dominant structures. The former accounts are integral for their provision of positive ideals to move beyond current predicaments, whereas the latter facilitate a better understanding of the obstructions diminishing the prospects of realizing such ideal democratic theories of popular sovereignty.

The article proceeds as follows. First, I specify my conception of "basic human rights" and argue that authoritative institutions can wield force legitimately only insofar as they "robustly" respect such rights. I conclude the first section by arguing that the existing normative literature has proposed to resolve tensions between immigration enforcement and basic human rights by advocating either border enforcement *reform* or *abolition*. I then develop my own perspective to complicate these two opposing positions, arguing that borders are not legitimately enforceable where the enforcing institutions operate according to the logic of the sovereignty nexus because such enforcement imperils robust respect for basic human rights. After anticipating and rejecting two pertinent objections, I propose that border enforcement could be rendered legitimate only by dismantling sovereignty nexuses and replacing dominant conceptions of popular sovereignty with radically rethought ones.

BASIC HUMAN RIGHTS, ROBUSTNESS, AND THE REFORMABILITY OF IMMIGRATION ENFORCEMENT

This paper argues that border enforcement practice that is structured according to dominant conceptions of sovereignty is not compatible with a normative imperative of respect for human rights. Accordingly, I begin the first section by specifying the conception of human rights underlying the argument. I then explain what I believe to be the normative demands of my conception. Finally, I provide a quick overview of the existing literature on the tensions between state border enforcement and human rights, indicating why I believe this literature ought to be challenged.

Political theorists all but universally agree that a state's use of force against (would-be) immigrants can be legitimate only on the condition that their non-forfeited moral human rights are respected in the process (even conservative theorists agree; cf. Miller 2013). But human rights discourse is complex and contested. Although there is a list of universal legal human rights—the UDHR—moral-philosophical disagreement on the proper scope, contents, and upshots of human rights discourse rages on. More concretely, there are persisting controversies about which rights ought morally to count as human rights, where they come from, and which corresponding obligations they impose on which parties (cf. Cruft, Liao, and Renzo 2015). My account attempts to circumvent these debates by relying on a conception of the contents and demands of moral human rights that should be acceptable to most, if not all, observers. On this conception, immigration enforcement should, as a matter of legitimate governance, show *robust* respect for *basic* human rights. First, the idea of *basic* human rights identifies as a moral baseline for my argument only those human rights entitlements that are both uncontroversially agreed upon and arguably morally most fundamental. These include, though are not necessarily exhausted by, the human rights to *personal security*. Accordingly, my understanding of "basic human rights" captures the content (rather than the legal dimensions) of the following UDHR stipulations:

Article 3. Everyone has the right to life, liberty, and security of person.

Article 5. No one shall be subjected to torture or to cruel, inhuman, or degrading treatment and punishment.³

I take for granted that all reasonable philosophical positions will agree that all persons are fundamentally entitled to enjoy the content of these stipulations, unless they are forfeited, as may happen for instance in situations of war and self-defense.⁴ I presume that to

³ These are part of the Universal Declaration on Human Rights, U.N. G.A. res. 217A (III), December 10, 1948.

⁴ To be clear, these rights are not permissibly subjected to trade-offs with other rights; this resistance to trade-offs is one of the features of their fundamentality. I merely mean to allow that individuals could

come to this conclusion it matters neither whether one thinks human rights entitlements are justified by needs, interests, the necessary conditions for human agency, flourishing, or other properties nor whether one thinks human rights entitlements are innate functions of personhood or manufactured political instruments of moral importance. It is simply the case that one could not imagine a desirable world where all persons would not have entitlements to these basic stipulations (for an overview of the philosophy of human rights, and implicit evidence that basic human rights as outlined here indeed represent an “overlapping consensus,” cf. Nickel 2021).

Second, the idea that legitimacy requires *robust* basic human rights respect specifies the normative demands of basic human rights and introduces concrete institutional obligations. A still unspecified robustness desideratum is often implicit in the relevant literatures. In global justice and democratic theory scholarship, it is generally acknowledged that to have legitimate authority—to generate obligations for individuals to follow their rules—states must be governed such as to avoid inflicting *extreme* injustice on their subjects. And although it is sometimes unclear what precisely is included in this standard of extreme injustice, it is clear at least that one necessary condition for legitimacy is that state institutions systematically respect basic human rights (Buchanan 2003; cf. Rawls 1993, 428). Articulating a similar concern, Carmen Pavel (2015) argues that the international legal and political system should be restructured because under current rules and structures, states have repeatedly proven unable to *reliably* respect and protect their own citizens’ basic human rights. The idea common to these concerns for robustness or reliability is that when we proclaim the fundamentality of some human rights, it makes no moral sense to build institutional structures that cannot offer “adequate guarantees” that such rights will *actually* be protected across a wide range of scenarios (Pavel 2015, 23). Indeed, we can only realize aspirations of universal (basic) human rights if there are guarantees that persons can reliably enjoy the substance of these rights across many situations, and especially when they are confronted by authoritative, force-wielding institutions—in our world, usually those representing state power. Requiring robust basic human rights respect captures this: the larger the class of social and political scenarios in which persons can rely on basic human rights viability, the more robust the rights. For political legitimacy, we require guarantees that force-wielding, authoritative institutions come with a systemic capacity to *prioritize* our basic human rights over other considerations, thereby displaying a commitment to enlarging this class of scenarios as far as possible. Therefore, such institutions must be characterized by inbuilt dynamics suitable to facilitating a

prioritization of rights viability in their relations with subjects. We can express this by insisting on a *Robust Respect Imperative* (RRI): where authoritative institutions govern persons with force, they do so legitimately only if they are structured in a way that facilitates the systematic prioritization of respect for all subjected persons’ nonforfeited basic human rights.

With these clarifications in hand, we may now turn to immigration enforcement. Political theorists have sometimes claimed that immigration restrictions are in normative tension with what they take to be universal human rights. They have argued, *inter alia*, that the exclusion of immigrants impermissibly restricts freedom and autonomy rights, hampers the economic rights of the most deprived and disadvantaged, or contravenes the logic of the already codified human right to free movement within states (e.g., Carens 2013; Oberman 2016). The enforcement of these restrictions, however, has only recently been problematized as a distinct dimension to this tension. Contributions to these debates about enforcement generally reach either of two opposing conclusions, thereby dividing this literature into two opposed camps.

First, there is the *reformist* camp. This camp consists of a range of contributions that respond to states’ violations of basic human rights at borders by theorizing and advocating for solutions that are understood as tweaks conducive to making supposedly liberal democracies live up to their ideational promises. Dominant principles of sovereign state jurisdiction over immigration enforcement thus largely go unchallenged: it is not that our systems of bordering are fundamentally misconceived but that principally adequate systems stand in need of serious repair (e.g., Cohen 2020; Lister 2020; Mendoza 2017). For instance, Elizabeth Cohen (2020, chaps. 1–2) tells of the ever-expanding power of U.S. immigration enforcement agencies, arguing that these regularly violate migrants’ basic human rights with near legal impunity (Cohen 2020, chaps. 1–2). She argues, however, that these issues can be rectified by policy reform—to operate a justifiable immigration regime, the United States needs to liberalize its approach to immigration and reorient its institutions to operate based on rights respect (Cohen 2020, 189–205). Similarly, Mendoza (2017, 106–13) argues that statist immigration regimes ought to adhere to *universal protection and equality of burdens* standards. These standards intend to render the right to operate such regimes conditional on respect for basic human rights and liberties and the citizenry’s egalitarian sharing of the burdens of immigration enforcement. These principles are explicitly meant to guide the construction of frameworks for the internal reform of prevalent sovereign state immigration policy and enforcement, providing a normative foundation “for actual immigration reform in a world like ours” (Mendoza 2017, 117). As in Cohen’s case, the underlying presumption is that states operating on dominant sovereignty conceptions *could* appropriately reform their immigration enforcement practice towards permissible conduct.

A diametrically opposed—*abolitionist*—camp takes widespread border violence and human rights

forfeit some of these rights in situations where they impermissibly threaten other persons’ claims to the very same rights. From now on, I shall refer exclusively to nonforfeited basic human rights.

disrespect in immigration regimes to warrant the total abolition of border enforcement (Jones 2017; Sager 2020). Encompassing both *open* borders and *no* borders views, the abolitionist camp argues that basic human rights disrespecting violence is inherent in immigration enforcement. For instance, Jones (2017, 8–11) argues that the enforcement of border regimes does not allow for a sufficient concern for the general interests of all persons, therefore marking them irreconcilable with (among other things) basic human rights security. Similarly, Sager (2020, 59) insists that the power structures of immigration enforcement are such that “[d]ehumanization and demonization are not aberrations but rather an ever-present potential response.” Conceptually, borders constitute categorical inequalities, functioning to ascribe some fewer rights and protections than others; this conditions, empirically, a culture of violence and degradation.⁵ Immigration enforcement as such is thus hopelessly corrupt and stands in the way of basic human rights security.

Both camps' prescriptions are complicated by an argument that takes seriously the Robust Respect Imperative and the way in which dominant conceptions of sovereignty condition the institutions of state immigration enforcement. We will see that the reformist camp's presumption that immigration enforcement could be legitimately conducted under current or closely reachable conditions becomes untenable once the sovereignty-based mechanisms that persistently and systemically endanger basic human rights at borders are understood properly. But such an understanding also provides grounds for a critical reevaluation of abolition because the culprit of basic human rights insecurity is identified not with border enforcement as such but rather with the dynamics of the dominant sovereignty conceptions that underpin it. To show how dominant conceptions of sovereignty entangle in a sovereignty nexus that conditions illegitimate, RRI-violating immigration enforcement regimes, I begin with a discussion of the concept of sovereignty.

SOVEREIGN DISRESPECT

“Sovereignty” is a discursive construction laden with difficult histories and prone to functional appropriation by all sorts of political projects. In political theory, it is most prominently known to have developed both in association with the social contract theories and as a quasi-theological notion of total dominion in, among others, Bodin and Schmitt (Brown 2010, 68–70). In political practice and international law, we commonly understand sovereignty as a state's “supreme authority within a territory,” a bulwark against external encroachment (Philpott 2020). However, it is increasingly emphasized that the narrative of absolute authority has become largely fictitious in a globalized post-World War II order of multidimensional realignments

of powers and jurisdictions (for discussion, cf. Joppke 1998a, 12–20). What is less often foregrounded is that the legal and political practice of state sovereignty developed (also) as an instrument of colonial subordination, granting inviolability of territory and peoplehood only to racially defined “civilized” populations, and thereby enabled rather than precluded imperial impositions in the colonial era (Anghie 2004; Bonilla 2017). The colonial anchoring of sovereignty praxis coupled with its enduring appeal for the political imagination has led to critical scholarship that seeks to problematize and refashion the concept for decolonial and emancipatory purposes (Bonilla 2017; Nisancioglu 2020). “Sovereignty,” then, is a concept in flux, with its manifold meanings and purposes constructed in response to concrete political practice and social struggles (cf. Bishara 2017). Thus, I do not attempt to define what sovereignty *is* but will instead focus merely on what I take to be the central features of its particularly dominant discursive constructions. I then show that these features entangle conceptually in a sovereignty nexus. This nexus has authoritative implications for real world border governance, structuring the conditions of enforcement in a way that is irreconcilable with the RRI.

The first move is to distinguish between two types of prevalent sovereignty conceptions: external (*state*) sovereignty and internal (*popular*) sovereignty. While we have already conceded that state sovereignty today is rarely understood in absolutist ways, this does not mean that a traditional conception of state sovereignty does not retain a central place at the heart of international law and politics (cf. Cohen 2004; 2012). In an integrated world increasingly governed by inter-, trans-, and supranational norms and networks, it is argued, the notion of a principled inviolability of state sovereignty is important to preventing the imposition of imperial projects in the name of cosmopolitan rights and norms and enabling and preserving the right to collective self-determination (Benhabib 2011; Cohen 2012). More generally, the idea of state sovereignty as the prerogative for states to conduct their internal affairs without foreign imposition (on the condition that they respect the international *jus cogens* framework) has been construed as a central cornerstone of the international rules of engagement (Cohen 2004). In reality, of course, this rather neat picture is disturbed by ongoing, postcolonial power differentials between states that lets some states enjoy not only unquestionable sovereignty over their own development but also dominance over many of the resources that other states require to fulfil their sovereign aspirations. In practice, sovereign power is unevenly distributed, with some states enjoying supersovereignty, and others left unable to translate formal sovereignty into meaningful self-determination (Getachew 2019, chap. 1; Thomas 2019, 57–9). Nevertheless, the understanding of state sovereignty as the universal prerogative of states to (largely) self-determine matters of territory and population without imposed external interference remains hegemonic in international law and politics, exerting “normative dominance” over the ways in which state

⁵ With thanks to Alex Sager for providing this illuminating clarification in private correspondence.

entitlements are constructed and state behavior is judged (Bonilla 2017, 334). Because I seek to investigate the ways in which predominant constructions of sovereignty condition state behavior, it is this hegemonic conception of sovereignty that I shall refer to whenever speaking of state sovereignty.

If state sovereignty concerns states' relations vis-à-vis the *external* world, popular sovereignty is about the state's *internal* regulatory principles. Popular sovereignty, an idea with a long history reaching back to antiquity, can mean and has meant many things, depending on historical social context. Although the understanding of popular sovereignty dominant in today's politics has retained an ancient Greek notion of "supreme unaccountable rule residing in the people," it has been significantly shaped and developed especially by the theoretical and practical contributions of the modern social contract theories and Atlantic Revolutions (Bourke 2016, 3). Through these developments, popular sovereignty has predominantly come to be understood as the principle that those institutions that formulate and enforce the rules governing a socio-political, territorially bound community discharge such governance in a *legitimate* way only insofar as control over them is held in common by those who are both subjected to this governance and whose interests give rise to it in the first place. In today's prevailing international order, states represent the dominant webs of coercive public institutions governing distinct sets of people on particular pieces of territory and are thus generally seen as popular sovereignty's proper sites.

These paradigmatic understandings of the *demands* and *sites* of popular sovereignty are increasingly challenged. For instance, Achiume (2019) argues that we should rethink how claims to participate in popular sovereignty properly arise, criticizing the prevalent understanding of a "political community" as corresponding to a geographically bounded polity of cocitizens rather than a particular set of relations mediated by political subjection. In another example, the sites of popular sovereignty are being contested in current thought about the possibilities for the self-determination of Indigenous peoples within colonial settler-states. Here, what is at issue is how Indigenous sovereignty can be expressed beyond assimilation into the settler state and secession and Indigenous statehood (Bruyneel 2007; Moreton-Robinson 2020). Nevertheless, the hegemonic understanding of popular sovereignty generally refers to the state-bound conception of self-government as defined with reference to the social contract tradition and Atlantic revolutions. Arguably, this idea of popular sovereignty represents a central justificatory foundation for state-bound democratic governance⁶ and has provided the dominant frame for guiding the regulation of internal state affairs, as evidenced by its relative ubiquity in constitutional texts or other formulations of societies' basic normative

⁶ Even nondemocratic regimes orchestrate some projection of popular sovereignty to maintain the idea that their governance reflects "the will of the people."

orientations (for a problematizing discussion, cf. Galligan 2013).

We are now in a good position to move back to border enforcement and consider how it might become structured and conditioned by a sovereignty nexus. To begin with, migration challenges dominant conceptions of state sovereignty. Where the sovereign imperative to exert territorial control coincides with a state's expressive commitment to human rights, a liberal paradox has been argued to result: immigration is viewed skeptically and heavily restricted, and yet states admit at least some unwanted immigrants and can often accommodate their human rights demands (Joppke 1998b). It is much debated which mechanisms effect this outcome, with some arguing that logics of globalization are primarily responsible for constraining states' capacities to exclude as they wish and others insisting that state-internal rule of law prerogatives most stifle sovereign logics of exclusion (Hollifield, Hunt, and Tichenor 2008; Johannesson 2018; Joppke 1998b). However, although this debate shows that various mechanisms have often kept sovereign states sufficiently in check to thwart at least some of their impulses to exclude and ignore outsiders' claims, a deeper question about the positioning and sturdiness of these claims within systems of sovereign governance has not so far been addressed. Although it is worthwhile to ask what leads to empirically observable human rights outcomes that run counter to seemingly restrictive sovereign logics, such studies ought to be supplemented with a deeper theoretical analysis of the way in which (dominant) sovereign logics fundamentally condition exclusionary institutions' responsiveness to migrants' human rights entitlements to begin with.⁷

This is where we get to the sovereignty nexus. Where both outlined constructions of state and popular sovereignty are dominant, they entangle in a unique way at state borders, creating a normative paradigm for immigration enforcement that flows from the interdependence of these sovereign logics. As noted above, the dominant conception of popular sovereignty concerns the political empowerment of the members of territorially bounded political communities. For such a conception of popular sovereignty, what Arash Abizadeh (2012, 847) calls the "legitimate boundary problem" has long been intractable: there seems to be no procedure or criterion that establishes the civic and territorial boundaries of the sovereign in ways consistent with popular sovereignty's more general aspiration to institutionalize rulemaking *by* and *for* those subjected to it, as exclusion from the sovereign subjects the excluded to rule making supposedly without consultation or consent (see also Goodin 2007; Whelan 1983). In practice,

⁷ In this context, it is worth mentioning Hannah Arendt's ([1951] 2004) famous diagnosis that sovereign logics have often de facto deprived those not associated with sovereigns via citizenship of putatively universally valid rights. This remains the case today, even in the so-called age of rights, particularly where refugees and undocumented migrants are concerned (e.g., Gündoğdu 2015). The account that follows attempts to illuminate the structural bases underlying such outcomes.

of course, dominant constructions of popular sovereignty are nevertheless widely seen to require ongoing civic and territorial boundary-drawing. After all, without continual demarcation between those who belong and those who do not, there is no clear sense in which a group (itself a concept that requires an outside comparison category) can enable itself to commonly strive for territorially bound self-governance. Not only is this boundary-drawing necessary; it is also the self-governing group who is generally seen to have authority over it (cf. Benhabib 2011, 143). For one, deciding over the future bounds of the demos is simply one instance of governance over the existing in-group members and thus a matter of popular sovereignty. Even more importantly, such a decision concerns the future composition of the popular sovereign itself, thereby affecting and potentially threatening the directions a current sovereign envisions for its future trajectories.⁸

To practically achieve such a vision of popular sovereignty, state sovereignty legitimizes authoritative control over borders. Ultimately, state sovereignty as final authority over borders and immigrant admissions is central to facilitating popular sovereignty because the maintenance of a particular sphere of popular sovereignty is generally seen to require its members' collective decision-making power over its own boundaries. The ability to assert final authority over borders, in other words, is construed as central to facilitating the boundary-making seemingly necessary for popular sovereignty to remain a coherent, functional, and attractive ideal. The function of border regimes is to authoritatively include and exclude in order to enable the bounded promise of popular sovereignty, to make possible and maintain the popular sovereign's control over its own constitution. The border becomes the site of a nexus between popular and state sovereignty.

The problem is that the sovereignty nexus thus understood creates a normative paradigm for immigration enforcement that cannot be reconciled with the RRI. The point of the RRI is that a proper commitment to basic human rights must *disqualify* institutional arrangements under which basic human rights respect and protection are subjected to a continuous re- and devaluing commensurate with the changing political tides. But border regimes, insofar as they instantiate a sovereignty nexus, are precisely such arrangements. To see why, remember that the RRI demands that institutions of power must be structured so that they are capable of *prioritizing* respect for basic human rights over counteracting motivations. Institutional commitment to respect basic human rights throughout and across contingencies is what renders basic human rights reliably secure. Therefore, to live up to the RRI, states must govern immigration enforcement based on a *fundamental* principled and policy-instantiated regard for basic human rights, which must in turn create appropriate constraints on action on the ground. But when

final authority over borders is understood as a crucial requirement for the facilitation of popular sovereignty, states must prioritize not outsiders' rights but their own unquestionable authority over immigration and border enforcement. Within such systems of bordering, striving for effective control over territorial boundaries is structurally prioritized over counteracting motivations, including basic human rights respect. Under the sovereignty nexus's logic, then, states are systemically tilted toward prioritizing the maintenance of absolute authority over satisfying the interests of those who confront their borders, *regardless of how morally stringent such interests or obligations to respect them may be* (for a similar diagnosis, cf. Hidalgo 2016, 145–52). Ultimately, what should be a prioritized commitment to the basic human rights of outsiders necessarily becomes a mere possibility, arrived at only through lucky constellations of uncommitted, even biased, political stars.

Beyond its drastic implications for human rights concerns, thinking about border regimes in terms of sovereignty nexuses yields distinct theoretical insights about real-world bordering mechanisms and practices. Most importantly, it enables us to capture the evolving character of border regimes and urges caution about tying our understanding of sovereignty to their static and traditional forms. For instance, it sheds doubt on Brown's (2010) influential diagnosis that border walls signify the advent of "waning sovereignty," where futile efforts at border protection through walling are interpreted as hail-Mary efforts at signaling sovereign dominion in the face of an erosion of the quasi-theological fiction of sovereignty as absolute power over territory.

For one, even where border walls are ineffective, they may comfort the popular sovereign's self-understanding of self-rule, shoring up fragile popular sovereignty constructions by *projecting* authority and control. To understand this as signaling a waning of "actual" sovereignty is to misunderstand that popular sovereignty is fundamentally a discursive construction, upheld not only by facts on the ground but also by suitable narratives about such facts. And second, to pose that sovereignty's trajectories can be illuminated by focusing on bordering practices and then limiting one's analysis to the phenomenon of border walls is to neglect the more compelling side of the coin. Many states have expanded on the static practice of focusing immigration control efforts on the policing of fixed geographical boundaries, pivoting instead toward intra- and extraterritorial measures. They outsource border control to private companies and third states, decouple the bounds of their legal territories from the parameters of their geographical territories, vest bordering capacities in artificial intelligence systems, and subject successful irregular migrants to heavy state-internal attrition—all to the effect of controlling territorial entry and immigration status both far outside and far inside of the geographical bounds of territory (Longo 2017; Kukathas 2021, chap. 3; Shachar 2020b). Thinking about such "shifting borders" (Shachar 2020b) in terms of sovereignty nexuses makes powerful

⁸ Perhaps this is what Justice Kennedy meant when his majority opinion in *Arizona et al. v. United States*, 567 U.S. 387 (2012, 24) asserted that "[i]mmigration policy shapes the nation."

sense of them. Dominant and powerful sovereignty logics do not necessarily emphasize states' territoriality in static spatial terms, and their relation to bordering processes is not restricted to what happens at fixed territorial lines. Instead, what matters is how prerogatives of state sovereignty can protect the imperatives of entrenched popular sovereignty conceptions most effectively: be it through symbolic walling practices or through the transterritorial reinvention of border governance as a "transportable legal wall that variably shrinks, expands, disappears, and reappears across space and time" (Shachar 2020b, 20). Thinking in terms of sovereignty nexuses yields a critical analytic conception of sovereignty that allows us to track and conceive of the dynamism and evolution of border regimes functionally, without having to tie the fate of sovereignty to spatially static bordering practices.

However, it is important to stress that this sovereignty nexus thesis is not meant to yield specific predictions about, or comprehensive explanations of, concrete basic human rights outcomes. Importantly, the sovereignty nexus's triggering *need not* have any actual detrimental consequences for migrants' basic human rights: migrations need not be perceived as opposed to the in-group's interests, and the popular sovereign may tolerate and even welcome immigration for many reasons. Consider the class-based and racialized dimensions of immigration; rich immigrants are often welcomed with open arms, as they bring wealth and capital to domestic economies (Shachar 2020a, 21–5). In the Global North, it is mostly non-white immigrants who are suspected to subvert cultures or introduce undesirable novelties into their adoptive societies (cf. Fine 2016). Rather than focusing on outcomes, the sovereignty nexus thesis is concerned with explicating the hegemonic conceptual entanglements that lead to paradigmatic interests in authoritative control, paving the way toward a problematization of the way in which these interests condition institutional structure. Because of this, it can also be compatible with real-world examples of more rights-respecting, open, and interconnected border regimes, such as those recently coming to fruition in much of South America (Acosta 2018; Geddes 2021, chap. 4). For as Acosta's detailed analysis of these emerging South American regimes emphasizes time and again, their relative openness and sensitivity to migrants' rights claims remain predicated on matter-of-fact sovereign assertions of final border authority, including executive discretion over entry, regularization, and expulsion. They also remain fundamentally vulnerable to governmental change that can easily reverse hard-won progressive change, as the case of Argentina has demonstrated (Acosta 2018, 130–1, 140–1, 146, 190–2, 196–7; a point made also in Geddes 2021, chap. 4). The notion that the sovereignty nexus effects an institutional skew toward prioritizing authoritative border control fits well with such developments. But such developments also show that empirical debates about liberal paradoxes remain highly relevant: beyond the diagnosed institutional skew, the contextual variable constellations shaping

bordering practices in concrete cases remain integral to understanding particular human rights outcomes.

Where sovereignty nexuses structure border enforcement, migrants' basic human rights are highly insecure and RRI requirements go unmet. If we want answers to the question of whether states have moral rights to exclude migrants, we ought to consider the mechanisms according to which exclusion occurs. Insofar as sovereignty nexuses pervasively condition exclusion, states fail to institutionalize legitimate exclusionary practices and thus cannot be thought to have a right to enforce exclusion. In the last section, I will argue that the sovereignty nexus is not inherent in borders or their governance; rather, it is a particular mode of politics that can be displaced. Before getting there, however, it is worthwhile to show that it is a stubborn mode and, as such, one whose effect of institutional skew is not suitably correctable by putative constraint mechanisms available to politics operating within the framework of dominant sovereignty constructions.

OBJECTIONS: CONSTRAINING THE SOVEREIGNTY NEXUS

One way for reformists to respond to my argument is to hold that although the uninhibited dynamic of borders as sovereignty nexuses may indeed have RRI-imperiling consequences, sovereignty nexuses can be appropriately constrained by counteracting forces. Resources for creating such forces are either already available to our domestic or international legal and political systems or at least in close reach. Thus, reform is much more feasible than I have suggested and sovereignty nexuses need not dominate our bordering systems.

Internal Constraint

A first specification of this sort of objection may argue that liberal-democratic political systems contain *internal constraint mechanisms* designed to prevent the basic human rights insecurity an unbridled sovereignty nexus would otherwise expose migrants to. This argument proceeds as follows. The state can become a mighty and violent Leviathan, saving its subjects from the dangers of the state of nature only by way of its own capacity to oppress, dominate, and violate. This is why a desirable conception of sovereign governance counterbalances security with liberty and guarantees rights by way of *constraining the state through a constitutional order*. In constitutional democracies, as Mendoza (2017, 17–22) argues, sovereignty is more concerned with enabling liberty than with expanding security. While migrants, by virtue of lack of citizenship status, are not constitutionally enfranchised like citizens are and therefore lack a central accountability lever, constitutional democracy sets out important ground rules for the state's conduct vis-à-vis all potential subjects. These include commitments to respect human rights and avenues to hold the state to such commitments,

most importantly through the rule of law, including judicial review over political action.

Accordingly, Mendoza argues that prominent cases of constitutional adjudication in the US-American context show that the constitutional order may also protect the rights and liberties of migrants and immigrants: "Individual freedom and universal equality are not exclusively reserved for citizens, but as was shown in cases such as *Plyer* [sic] v. *Doe*, *Zadvydas* v. *INS*, *Clark* v. *Martinez*, and *Padilla* v. *Commonwealth of Kentucky*, these principles are thought to extend to all persons" (Mendoza 2017, 21). Thus, we might conclude that we could design the sovereign state's superstructure in a way that counteracts its most pernicious tendencies. Indeed, through constitutional protection, we can remove migrants' basic human rights from the scope of politics, fixing the political stars in their favor; we can robustly respect basic human rights by holding our enforcement institutions to a high constitutional standard.

The problem with this argument is that it fails to see that the ability of liberal-democratic governance to displace or sufficiently constrain the sovereignty nexus's structuring power is ultimately dependent on a radical transformation of what we take popular sovereignty to be. To begin with, it is quite clear that the constitutionalist model of sovereignty espoused by Mendoza has historically not been thoroughly institutionalized in the US, the context Mendoza works in. After all, US-American legal history has at times tolerated or even sanctioned slavery, ethnic cleansing, racial segregation and discrimination, the blanket exclusion and deportation of Chinese immigrants, forced internment for Japanese Americans, and so on. Even today, regarding migrants in particular, this model faces grim realities. The US immigration enforcement apparatus demonstrably operates against and violently transgresses constitutional constraints, steadily bending the interpretation and enforcement of constitutional rules in its favor, and standardly fails to comply with judicial review where its abuses are not legally tolerated (Cohen 2020, chaps. 1–2, esp. 34–6, 47–8).

More to the point, though, these persisting perils for migrants' basic human rights are suggestive of a deeper and more general problem. This problem is that there cannot be internal constraints rendering border regimes RRI-compliant within political systems that continue to rely on dominant conceptions of popular sovereignty.

Consider that constitutional law is, by its very nature, subject to interpretation and contestation; it does not exist in a vacuum, sealed off from the realities of social and political influence. In liberal democracies, constitutional rules are responsive to evolving moral and political principles, widespread convictions, and organized pressure (picture the ongoing US constitutional fight about women's reproductive rights). But under dominant popular sovereignty conceptions, these deliberative processes of mutual justification and norm development include only a clearly demarcated set of participants—those individuals deemed part of the

popular sovereign. The people negotiate the norms they bind themselves to in a process of mutual justification, but the main institutional fora in which this justification takes place are neither paradigmatically accessible to outsiders nor conceived and operated on the principle that there should be serious and reliable procedures guaranteeing that outsiders' interests are given due consideration. In effect, the possibility of successfully and *reliably* establishing any claim against the popular sovereign's authoritative power, including that of demanding robust respect for one's basic human rights, depends on claimants' capabilities to act as recognized bearers of a right to justification, as part of the set of individuals positioned to influentially contend their claims on the relevant playing field. In a legal and political reality in which rights realization significantly depends on one's contestatory and deliberative subjecthood and the presumption of enjoying such subjecthood is a privilege restricted to those deemed part of the popular sovereign, outsiders are not meant to be positioned to successfully claim anything against the popular sovereign's intentions.⁹ Aspirations to constitutional safeguards under dominant conceptions of popular sovereignty are thus insufficient. While constitutional rule may sometimes extend its benefits to migrants, migrants are not positioned to effectively *demand* justification. Not only is the systematicity of the sovereignty nexus left untouched, but the introduction and maintenance of constraints remain a matter entirely and exclusively subject to the sovereign's will and thus exposed to the changing political tides and itself constrained by the persistence of the sovereignty nexus's conditioning power. Internal constraints appropriate to the task of rendering border governance RRI-compliant would require radical institutional commitments to the realization that sufficiently affected outsiders are bearers of strong rights of justification. However, this would make the legitimacy of our exclusionary practices dependent in large part on the interests of others, a state of affairs that cannot be squared with a conception of popular sovereignty based on the sovereign's strong authority to determine its own composition. Under dominant popular sovereignty conceptions, then, systemic in-group bias is kept in place and internal constraints fail to secure border regimes' RRI compliance.

External Constraint

Another way for reformists to doubt the significance of the sovereignty nexus thesis is to insist that the

⁹ The impressive historical achievements of myriad emancipatory social movements demonstrate that even those outside of the popular sovereign may sometimes successfully contest the treatment insiders subject them to. I merely mean to say that such power is not reliably bestowable upon outsiders by constitutional rule on dominant popular sovereignty conceptions. Indeed, the purposiveness of the kind of emancipatory movement striving for the institutional recognition of an outside group's claims to justification is directed precisely *against* adversarial institutional arrangements, rather than being accommodated by such arrangements' constitutional underwriting.

dynamics of dominant popular sovereignty conceptions can be *externally* constrained to effect RRI-compliant border enforcement governance. This argument from external constraint contends that we live in a world of increasing international interdependence, which could provide legal and political means to force border regimes to reliably respect migrants' basic human rights without having to displace the border as sovereignty nexus. While internal constraints flounder because dominant popular sovereignty conceptions fail to allow the liberal-democratic state to make outsiders proper subjects of justification, external constraints can do just that. One might first point to transnational legal developments, most importantly the increasing relevance of transnational human rights courts such as the European Court of Human Rights (ECtHR) or the Inter-American Court of Human Rights (IACtHR), which have produced important legal victories for migrant claimants who saw their basic human rights violated.¹⁰ Alternatively, one might look to current developments in international criminal law, where attempts at imposing accountability on states that conduct human-rights-violating border enforcement are freshly emerging (Kalpouzos 2020).

Unfortunately, such legal constraints are insufficiently equipped to enforce RRI compliance on sovereignty-nexus-based border enforcement. Although there are various reasons for this—transnational human rights courts are known to be difficult to access, have severe case backlogs, and generally procure individual remedies rather than attempting to effect structural change, whereas international criminal suits about bordering behavior face high procedural hurdles (Costello and Mann 2020, 328–9; European Court of Human Rights 2020)—the fundamental problem is once again found in the significance of dominant popular sovereignty conceptions. For one, transnational human rights courts ultimately remain under statist oversight, with states largely in control over their constituent frameworks. This has kept such courts' decisional autonomy in check and produces "excessive deference to states' sovereign prerogatives" (Costello 2015, 316; cf. El-Enany 2020, 172–4). For example, the ECtHR has been criticized for marshaling sovereigntist interpretations of human rights norms, even where basic human rights are concerned, and especially in migration contexts (e.g., Carrera 2020). A deeper look at the Court's recent views on immigration detention, for instance, makes clear that it has provided broad cover for states' incarceration practices by greenlighting evasive and unusual interpretations of legal protections against arbitrary detention practices. Consequently, it has been credibly accused of undermining the basic human rights to personal security codified also in the ECHR's Articles Three and Five

and muddying established international human rights law standards (cf. Costello 2015, chap. 7).

For another thing, such courts lack robust enforcement mechanisms. Even in the cases in which the ECtHR "requires" offending states to change legislation in order to prevent future transgressions, noncompliance is the standard outcome, about which the Court can do little (Fikfak 2018, 1093–5; Hafner-Burton 2008). Proving the applicability of international criminal law to border enforcement transgressions, on the other hand, faces almost insurmountable interpretative hurdles, geared in favor of states' interests (cf. Costello and Mann 2020, 328–9). Far from sufficiently constraining the sovereignty nexus's conditioning effect on border enforcement, then, external legal constraints fall victim to the nexus's very power. Where dominant conceptions of popular sovereignty persist as the rationale for authoritative border control and dominant conceptions of state sovereignty limit the institutional reach of transnational legal arrangements, state sovereignty's functional role for enabling popular sovereignty includes its capability to minimize the significance of external legal constraints on border governance by retaining the monopoly for norm enforcement.

However, one might argue that there is a richer conception of external constraints, one where legal constraints are integrated with and empowered by concurrent *political* constraints. This way, perhaps, the external sovereignties of many states could become interdependent in ways that disentangle them from their popular-sovereignty-facilitating functions, with border regimes becoming mutually constrained in RRI-enabling ways. The most obvious example of such external complications of states' sovereignty regimes is the European Union (EU)—a simultaneously intergovernmental, transnational, and supranational political project of multilayered institutional design that has managed to significantly constrain, curb, and communalize states' bordering practices. Through its *sui generis* legal and political constraints, the EU has managed to largely displace states' prerogatives of external sovereignty: borders are not generally enforced, and when they are, enforcement is constrained by a multilevel legal and political framework in which member states are responsive to each other's demands. Importantly, Union citizens enjoy transnational citizenship, which grants them enforceable rights and political entitlements throughout the territory, thereby rendering them proper subjects of justification. And finally, free movement has long constituted a fundamental part of common political culture within the Union, rendering sovereign border discourse adversarial to the very project itself. As a result, Union citizens not only generally enjoy free movement, but borders also reliably refrain from endangering their basic human rights. Legal-political external constraints significantly alter dominant sovereignty practices to bring border regimes in line with the RRI.

There are two things to highlight in response. First, it is doubtful whether EU-style evolution of states' external sovereignty conceptions can generally be placed

¹⁰ Noteworthy cases include *Hirsi Jamaa and Others v. Italy* (27765/09), European Court of Human Rights, February 23, 2012; and *Pacheco Tineo Family v. Plurinational State of Bolivia*, Series C No. 272, Inter-American Court of Human Rights, November 25, 2013.

within the argumentative reach of reformism. After all, such evolution involves fundamental, large-scale, and entrenched aberrations from predominant state sovereignty models that were incepted at a critical junction in European history, developed over many decades, and remain controversial in Europe today. The efforts of those who have striven for projects of similar integratory reach have often been frustrated.¹¹ Many states would not consider such projects desirable. And internationalization of this sort and degree is arguably not what the reformist camp anticipates as necessary for appropriate border governance reform, focusing instead on more feasible measures. Even if such legal-political external constraint mechanisms constituted adequate solutions, it is not clear that they are grasped by 'reformist' ideas.

Second, and more importantly, such legal-political external constraints might increase the number of migrants whose basic human rights are robustly respected in the real world, but they fail to address the core of the matter. They fail to provide *univer-salizable* solutions to displace the sovereignty nexus or constrain its RRI-imperiling conditioning of border enforcement. Instead, the sovereignty nexus is merely pushed outward. It has become increasingly clear that the EU is hell-bent on prioritizing sovereign control over its external borders. Enforcement prioritizes efficiency and authority over basic human rights, enhanced by the ability to discharge the considerable might of its members' combined resources. At its outer bounds, the EU discharges the politics of the sovereignty nexus on its own and its member states' behalf; dominant conceptions of sovereignty have not in fact shifted. Immigration-related features of dominant external sovereignty prerogatives have largely been moved to more outer bounds, yet they remain functional for the facilitation of an unexamined, dominant popular sovereignty conception. In projects such as the EU, separate, territorially neighboring demoi might consent to come together to form a new, more expansive demos. But the underlying popular sovereignty conception may well remain the same. In that case, control over one's territorially based composition remains at the heart of popular sovereignty, and a sovereignty nexus continues to condition the governance of territorial boundaries, wherever they may now be conceived to properly lie. Where the popular sovereignty principle of control over territorially based self-composition remains dominant and external sovereignty can be effectively mobilized to support it, sovereignty nexuses will manifest wherever the relevant boundaries are placed. Thus legal-political external constraints, too, fail to ensure RRI compliance where sovereignty nexuses structure borders.

¹¹ See, for instance, Acosta's (2018, chap. 7) remarks on the development of the Union of South American Nations (UNASUR), Southern Common Market (MERCOSUR), and Andean Community (CAN).

DISMANTLING THE SOVEREIGNTY NEXUS

Given this bleak outlook, should we simply join the abolitionist camp? Arguably, ideas and practices of bordering are normatively problematic from a wide variety of perspectives, which may well warrant border abolition for reasons not negotiated here.¹² I want to show, however, that the particular problem posed in this paper—that of border enforcement's incapability to comply with the RRI when structured by certain sovereign logics—does not require border abolition as a *theoretical* solution. It locates RRI-imperiling mechanisms not in bordering as such but in the dominant conceptions of sovereignty that underlie and condition it. Such conceptions can be theoretically dismantled; and rethought understandings could take hold in political practice.

Because wielding authoritative state sovereignty against migrants has transpired as functional to enabling dominant conceptions of popular sovereignty, dismantling sovereignty nexuses requires a serious rethinking of popular sovereignty. A suitable conception of popular sovereignty will represent a radical departure from current hegemonies while having to retain its central ideal of self-governance. More precisely, moving beyond the mode of the border as sovereignty nexus necessitates a severing of the functional interconnection between popular sovereignty and authoritative state sovereignty. In a word, sovereignty as self-governance needs to be reoriented to reject the idea that the "current" popular sovereign's absolute control over its future makeup is required for a desirable ideal of popular sovereignty to function.

In fact, many societies' normative frames and practices already imply neither agreement with the idea that such control is required to achieve popular sovereignty nor that there is a right to exercise it. After all, it is widely accepted that we cannot permissibly dictate to people how many children they are allowed to have or who gets to reproduce. A society that takes itself to be progressive, for instance, is not morally permitted to deny the right to procreation to its scarce conservative members in order to control and keep stable the makeup of their popular sovereign. Neither is a predominantly white society allowed to ensure the stability of its racial makeup by prohibiting nonwhites from procreating. Similarly, it is a widely accepted rule that existing members (that is, citizens) cannot generally permissibly be expelled from the makeup of the sovereign, even if a great majority should wish it so (cf. Fine 2010, 353; Walzer 1983, 34–5). We may have interests in preserving the historical, political, cultural, social, and even ethnic characters of our communities, but we readily accept that we face significant constraints on the means our more general commitments allow us to discharge in pursuit of such interests. It is not in dispute, moreover, that these constraints against coercively regulating procreation or enforcing the

¹² For instance, some see borders as functional to the facilitation of capitalist oppression. See Anderson, Sharma, and Wright (2009).

expulsion of members do not diminish our ambitions and abilities to govern ourselves as the sovereigns of our respective communities.

Of course, it is not accepted that such lack of absolute control over self-constitution should extend to the regulation of outsiders' movement over "our" territorial boundaries. One may give a range of reasons to account for this discrepancy—for example, that expulsion of members would amount to a denial of the general right of membership in some political community or that authoritative regulation of procreation would fail to show members of the cooperative venture that is the political sovereign sufficient respect, reasons that do not apply to the regulation of would-be immigrants' cross-border mobilities. Still, we lack a principled explanation for the idea that nonabsolute control over outsiders' cross-border mobilities should have a more seriously detrimental effect on the ability to maintain popular sovereignty than the lack of control insiders already accept when it comes to the treatment of their compatriots.

One does well here to remember that "popular sovereignty" is discursively constructed and upheld. Its dominant meanings are not defined simply by whatever the most convincing philosophical arguments produce. Rather, what we understand its contents to be is heavily shaped by histories of discourse imbued with and functional toward the achievement of particular sociopolitical objectives. Popular sovereignty is an idea with a history much older than the modern state's prerogative to coercively exclude outsiders and aggressively border its boundaries. Where it has been constructed to interlock with Westphalian notions of state sovereignty via the purported need for control over the composition of a territorially bounded in-group, chances are such developments have aided the Global North's fever dreams of "domestic" racial and ethnic homogeneity in times of concurrent imperialist conquest and colonial domination (cf. El-Enany 2020, chap. 2). Where these conceptions persist today, chances are they function to mask institutionally entrenched and racially selective xenophobia while facilitating and rationalizing the postcolonial monopolization of illegitimately won and unjustly retained spoils (cf. El-Enany 2020, chap. 3; Nisancioglu 2020).

Whatever set of historical motivations and contingencies is ultimately behind the reconstruction of popular sovereignty as proper grounds for authoritative border enforcement, discursive hegemonies can be unsettled and dismantled, and so can dominant constructions of what popular sovereignty ought to contain and entail. An appropriate conception of popular sovereignty will continue to represent the foundation of democracy as self-governance while allowing for border governance that accords with the RRI. Therefore, an appropriate conception of popular sovereignty must ultimately be reconcilable with effectively *porous* borders: borders whose respect for migrants' basic human rights is institutionally prioritized, and which can thus only be enforced to certain extents and under appropriate institutional regimes. Such border governance will resolve any arising tensions between control over

migrants' mobility and respect for their basic human rights in the latter's favor, thereby displaying the institutional capability to dispense with border enforcement altogether when the circumstances do not allow guarantees that enforcement can be reconciled with basic human rights respect.

If dissolution of the sovereignty nexus is required and popular sovereignty must be reconcilable with porous borders, what do suitable conceptions of popular sovereignty look like more specifically? They must (a) shed the idea that popular sovereignty entails the current populace's absolute control over its self-constitution and (b) marshal a regulatory ideal of governance that decenters authoritative border enforcement in favor of more dynamic and reflexive conceptions of the self.

Democratic theory has produced and developed various proposals specifying the precise contents, purposes, and merits of popular sovereignty so conceived. For instance, Ochoa Espejo (2011, 137) argues for a processual conception of the people, where popular sovereignty consists in the self-governance of all individuals partaking in a people defined as "an unfolding series of events coordinated by the practices of constituting, governing, and changing a set of institutions [that] are the highest authority for all those individuals intensely affected by these events and these institutions." This framework's conception of a people as a process rather than a set of individuals attempts to reconceive of popular sovereignty as an ideal coherently pursuable in realities in which the relevant in-group's composition is in constant change (Ochoa Espejo 2011, 13). Thus, popular sovereignty is liberated from the practice whereby any change in the in-group's composition needs to be legitimated by the "current" set of in-group members. Instead, whoever is "intensely affected" by the ongoing processes constituting a people participates in peoplehood; this lifts the conceptual need for drawing hard boundaries that "exclude immigrants, ethnicities, classes, or future generations" (Ochoa Espejo 2011, 159, 194). Similar resources can be drawn from deliberative models of democratic legitimacy, such as Benhabib's (2004, chap. 5; 2011, chap. 8) conception of popular sovereignty as the reflexive self-rule of a demos in accordance with its duties of justification. While *demos* remain principally bound on this model, their authority over outsiders is legitimate only insofar as they are capable of continually justifying their coercion to all those subjected to it in a series of transnational "democratic iterations." These iterations constitute processes of democratic deliberation that negotiate when and how particularist objectives of specific *demos* can be legitimated in view of their more universal duties of justification. On this view, it is not that a people's exercise of popular sovereignty should be *constrained* by ongoing duties of justification to insiders and outsiders alike. Instead, the very idea of the *demos* is taken to describe a model of self-rule that understands the ongoing and *potentially unbounded practice* of legitimation-as-justification of coercive force as an integral part of its normative *raison d'être*. In this sense, the rule to use only such coercive force that can

be legitimated in a constant deliberative process directed at justification is simply a constitutive part of popular sovereignty properly conceived.

The point of mentioning these two approaches to reconceiving popular sovereignty is not to prescribe either one of them as precisely the right solution for our sovereignty issues. These theories are considerably complex and deserve a longer examination of their relative merits and drawbacks. Rather, the purpose here is simply to point out that there are existing ways of thinking about popular sovereignty that dispense with the idea that a current sovereign—conceived of as a fixed group of people—must have the capability to authoritatively determine its future composition in order to properly govern itself, even while hanging on to the idea that *demos* can or should have jurisdictional boundaries. In Ochoa Espejo's (2011) account, this need is voided by the ontological move to conceive of the people as a series of events connected by their relevance to authoritative institutions. This move abandons the thought of a sovereign set of individuals in favor of a dynamic notion of a set of particular institutionally mediated relations. The idea of authoritative borders for migrants is thereby stripped of its salience while the individuation of peoples with less rigidly demarcated boundaries is still allowed for. In Benhabib's deliberative account, too, boundaries remain jurisdictionally important, but the legitimacy of exclusionary acts becomes dependent on honoring the outcomes of the deliberative processes of democratic iterations. These iterations, the practice of which is placed at the core of popular sovereignty, target the justification of coercive force to those subjected and can thus be expected to produce legitimation only for such bordering structures that can meet stringent standards, including the RRI. By making the deliberative processes of democratic iterations fundamental to popular sovereignty, Benhabib develops a conception that incorporates migrants' concerns from the start, thus displacing the irreflexive prioritization of authoritative control over self-composition as a task central to the facilitation of popular sovereignty.

The insight that sovereignty nexuses widely structure border regimes in our current world complements these accounts. It provides a crucial specification of the entrenched structures that stand in the way of the realization of their democratic prescriptions. In Benhabib's work especially, establishing democratic iterations as a suitable procedure for the proper consideration of outsiders' rights claims has, at times, been understood as a process well on its way, and apparent in the development of liberal democracies (cf. Benhabib 2004, chap. 5). Yet, more recently, Benhabib has lamented that such a process seems to be moving out of reach in a world still marked by the power of sovereigntist prerogatives (Benhabib 2020). The present account helps us understand the prematurity of the first position and underwrites the latter with an explanation of what stands in the way of a comprehensive reimagining "of sovereign jurisdiction and renewed respect for human lives and rights" (Benhabib 2020, 96). It is necessary to understand the

workings of the sovereignty nexus to begin forming a fuller picture of why the realization of radically rethought conceptions of popular sovereignty is currently out of reach and to have a solid theoretical foundation for beginning our endeavors of attaining them.

Understanding the necessity and possibility of developing and establishing such novel understandings of popular sovereignty also unearths significant complexities that both reformists and abolitionists about border enforcement have failed to sufficiently consider. In the absence of further damning evidence, reformists are right to presume that there *could* be institutions of border control systematically respectful of migrants' basic human rights but wrong to believe that this can be achieved by efforts to implement more favorable policies, design constitutions with strong individual rights safeguards, extend the reach of transnational court systems, or even push borders more outward. Attempts at constraining border enforcement by enacting *exogenous* policies and institutional structures to try to contain the sway dominant popular sovereignty conceptions hold on border regimes are insufficient. Instead, *endogenous* change in our conceptions of what it means to self-govern is needed; a change that would, presumably, also require a radical reorientation of our basic institutions of self-governance. Because of the highly aspirational character of such prescriptions, abolitionists rightly observe that optimism about systematically ending illegitimate border violence seems wildly misplaced. But they overlook that where the locus of concern is on the principled suitability of institutions to robustly respect the basic human rights of migrants, the obstacle is not border enforcement as such but rather the displaceable underlying dynamics that have come to shape its realities.

CONCLUSION

The question of whether states have moral rights to exclude would-be immigrants, then, is even more complex than previously appreciated. Even if they are permitted to make sweeping rules of exclusion, this does not entail that they are permitted to enforce such rules. Rendering the forced exclusion of migrants legitimate will require, at the very least, that enforcement institutions have the capacity to systematically act in accordance with robust respect for basic human rights. However, meeting this condition requires dismantling the sovereignty nexuses that structure bordering processes, which demands rethought conceptions of popular sovereignty to take hold. It is the job of political theorists to demonstrate that we can *think* popular sovereignty anew. The practical task of effecting the transformative change required to achieve the widespread adoption of more desirable popular sovereignty conceptions will be more challenging. Until such efforts succeed, migrants facing sovereignty nexuses at borders will be under no moral obligations to yield to institutions with no systematic capability of robustly respecting their basic human rights.

ACKNOWLEDGMENTS

I have acquired many debts writing multiple versions of this paper. I am particularly grateful for the guidance provided by two mentors: David V. Axelsen and Andrea Sangiovanni. I am also indebted to extensive feedback and probing criticisms provided by Richard Child, Andrew Geddes, Vincent Harting, Jeffrey Howard, Michael Luoma, Saladin Meckled-Garcia, José Jorge Mendoza, Miriam Ronzoni, and Alex Sager. I am also grateful to audiences at the 2020 ECPR General Conference, the 2020 Pavia Graduate Conference in Political Philosophy, the Migration Ethics Workshop (with special thanks to its organizers, Mollie Gerver, Kieran Oberman, and Alec Ross), the 2021 Philosophy of Migration and Asylum Workshop at NOVA University of Lisbon, and the editors of as well as at least three anonymous referees for *APSR*.

FUNDING STATEMENT

Research funding was provided by scholarships from the German Academic Exchange Service, Award Number 91649540, and the ZEIT-Stiftung Ebelin and Gerd Bucerius, under its “Beyond Borders” program.

CONFLICT OF INTEREST

The author declares no ethical issues or conflicts of interest in this research.

ETHICAL STANDARDS

The author affirms this research did not involve human subjects.

REFERENCES

- Abizadeh, Arash. 2012. “On the Demos and Its Kin: Nationalism, Democracy, and the Boundary Problem.” *American Political Science Review* 106 (4): 867–82.
- Achieme, E. Tendayi. 2019. “Migration as Decolonization.” *Stanford Law Review* 71: 1509–74.
- Acosta, Diego. 2018. *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law*. Cambridge: Cambridge University Press.
- Amnesty International. 2020. “Libya: ‘between Life and Death’: Refugees and Migrants Trapped in Libya’s Cycle of Abuse.” Amnesty.org. September 24. <https://www.amnesty.org/en/documents/mde19/3084/2020/en/>.
- Anderson, Bridget, Nandita Sharma, and Cynthia Wright. 2009. “Editorial: Why No Borders?” *Refuge: Canada’s Journal on Refugees* 26 (2): 5–18.
- Anghie, Antony. 2004. *Imperialism, Sovereignty and the Making of International Law*. Cambridge: Cambridge University Press.
- Arendt, Hannah. [1951] 2004. *The Origins of Totalitarianism*. New York: Schocken Books.
- Benhabib, Seyla. 2004. *The Rights of Others*. Cambridge: Cambridge University Press.
- Benhabib, Seyla. 2011. *Dignity in Adversity: Human Rights in Troubled Times*. Cambridge: Polity.
- Benhabib, Seyla. 2020. “The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights.” *Jus Cogens* 2 (1): 75–100.
- Bishara, Amahl. 2017. “Sovereignty and Popular Sovereignty for Palestinians and beyond.” *Cultural Anthropology* 32 (3): 349–58.
- Bonilla, Yarimar. 2017. “Unsettling Sovereignty.” *Cultural Anthropology* 32 (3): 330–39.
- Boochani, Behrouz. 2018. *No Friend but the Mountains: The True Story of an Illegally Imprisoned Refugee*. Sydney: Picador.
- Bourke, Richard. 2016. “Introduction.” In *Popular Sovereignty in Historical Perspective*, eds. Richard Bourke and Quentin Skinner, 1–14. Cambridge: Cambridge University Press.
- Brown, Wendy. 2010. *Walled States, Waning Sovereignty*. New York: Zone Books.
- Bruyneel, Kevin. 2007. *The Third Space of Sovereignty: The Postcolonial Politics of US-Indigenous Relations*. Minneapolis: University of Minnesota Press.
- Buchanan, Allen. 2003. *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*. Oxford: Oxford University Press.
- Carens, Joseph H. 1987. “Aliens and Citizens: The Case for Open Borders.” *The Review of Politics* 49 (2): 251–73.
- Carens, Joseph H. 2013. *The Ethics of Immigration*. New York: Oxford University Press.
- Carrera, Sergio. 2020. “The Strasbourg Court Judgement N.D. and N.T. v. Spain. A Carte Blanche to Push Backs at EU External Borders?” *EUI RSCAS 2020/21 Migration Policy Centre*. <http://hdl.handle.net/1814/66629>.
- Cohen, Elizabeth F. 2020. *Illegal: How America’s Lawless Immigration Regime Threatens Us All*. New York: Basic Books.
- Cohen, Jean L. 2004. “Whose Sovereignty? Empire versus International Law.” *Ethics & International Affairs* 18 (3): 1–24.
- Cohen, Jean L. 2012. *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*. Cambridge: Cambridge University Press.
- Costello, Cathryn. 2015. *The Human Rights of Migrants and Refugees in European Law*. Oxford: Oxford University Press.
- Costello, Cathryn, and Itamar Mann. 2020. “Border Justice: Migration and Accountability for Human Rights Violations.” *German Law Journal* 21 (3): 311–34.
- Cruft, Rowan, S. Matthew Liao, and Massimo Renzo, eds. 2015. *Philosophical Foundations of Human Rights*. Oxford: Oxford University Press.
- El-Enany, Nadine. 2020. *(B)ordering Britain: Law, Race and Empire*. Manchester: Manchester University Press.
- European Court of Human Rights. 2020. “Pending Applications Allocated to a Judicial Formation.” https://www.echr.coe.int/Documents/Stats_pending_month_2020_BIL.PDF.
- Fikfak, Veronika. 2018. “Changing State Behaviour: Damages before the European Court of Human Rights.” *European Journal of International Law* 29 (4): 1091–125.
- Fine, Sarah. 2010. “Freedom of Association Is Not the Answer.” *Ethics* 120 (2): 338–56.
- Fine, Sarah. 2016. “Immigration and Discrimination.” In *Migration in Political Theory: The Ethics of Movement and Membership*, eds. Sarah Fine and Lea Ypi, 125–50. Oxford: Oxford University Press.
- Galligan, D. J. 2013. “The Sovereignty Deficit of Modern Constitutions.” *Oxford Journal of Legal Studies* 33 (4): 703–32.
- Geddes, Andrew. 2021. *Governing Migration beyond the State: Europe, North America, South America, and Southeast Asia in a Global Context*. Oxford: Oxford University Press.
- Getachew, Adom. 2019. *Worldmaking after Empire: The Rise and Fall of Self-Determination*. Princeton, NJ: Princeton University Press.
- Goodin, Robert E. 2007. “Enfranchising All Affected Interests, and Its Alternatives.” *Philosophy & Public Affairs* 35 (1): 40–68.
- Gündogdu, Aytan. 2015. *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants*. Oxford: Oxford University Press.
- Hafner-Burton, Emilie M. 2008. “Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem.” *International Organization* 62 (2): 689–716.
- Heyman, Josiah McConell. 2009. “Trust, Privilege, and Discretion in the Governance of the US Borderlands with Mexico.” *Canadian Journal of Law and Society* 24 (3): 367–90.

- Hidalgo, Javier. 2016. "The Case for the International Governance of Immigration." *International Theory* 8 (1): 140–70.
- Hollifield, James F., Valerie F. Hunt, and Daniel J. Tichenor. 2008. "The Liberal Paradox: Immigrants, Markets and Rights in the United States." *SMU LAW REVIEW* 61 (1): 67–98.
- Johannesson, Livia. 2018. "Exploring the 'Liberal Paradox' from the Inside: Evidence from the Swedish Migration Courts." *International Migration Review* 52 (4): 1162–85.
- Jones, Reece. 2017. *Violent Borders: Refugees and the Right to Move*. New York: Verso.
- Joppke, Christian. 1998a. "Immigration Challenges the Nation-State." In *Challenge to the Nation-State: Immigration in Western Europe and the United States*, ed. Christian Joppke, 5–46. Oxford: Oxford University Press.
- Joppke, Christian. 1998b. "Why Liberal States Accept Unwanted Immigration." *World Politics* 50 (2): 266–93.
- Kalpouzos, Ioannis. 2020. "International Criminal Law and the Violence against Migrants." *German Law Journal* 21 (3): 571–97.
- Kukathas, Chandran. 2021. *Immigration and Freedom*. Princeton, NJ: Princeton University Press.
- Liguori, Anna. 2019. *Migration Law and the Externalization of Border Controls: European State Responsibility*. New York: Routledge.
- Lister, Matthew. 2020. "Enforcing Immigration Law." *Philosophy Compass* 15 (3): e12653.
- Longo, Matthew. 2017. *The Politics of Borders: Sovereignty, Security, and the Citizen after 9/11*. Cambridge: Cambridge University Press.
- Mendoza, José Jorge. 2017. *The Moral and Political Philosophy of Immigration: Liberty, Security, and Equality*. London: Lexington Books.
- Miller, David. 2007. *National Responsibility and Global Justice*. Oxford: Oxford University Press.
- Miller, David. 2013. "Border Regimes and Human Rights." *Law & Ethics of Human Rights* 7 (1): 1–23.
- Moreton-Robinson, Aileen. 2020. *Sovereign Subjects: Indigenous Sovereignty Matters*. London: Routledge.
- Nethery, Amy, and Rosa Holman. 2016. "Secrecy and Human Rights Abuse in Australia's Offshore Immigration Detention Centres." *The International Journal of Human Rights* 20 (7): 1018–38.
- Nickel, James. 2021. "Human Rights." In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Fall 2021. <https://plato.stanford.edu/archives/fall2021/entries/rights-human/>.
- Nisancioglu, Kerem. 2020. "Racial Sovereignty." *European Journal of International Relations* 26 (1_suppl): 39–63.
- Oberman, Kieran. 2016. "Immigration as a Human Right." In *Migration in Political Theory: The Ethics of Movement and Membership*, eds. Sarah Fine and Lea Ypi, 32–56. Oxford: Oxford University Press.
- Ochoa Espejo, Paulina. 2011. *The Time of Popular Sovereignty: Process and the Democratic State*. University Park: Pennsylvania State University Press.
- Oxfam, Belgrade Centre for Human Rights, and Macedonian Young Lawyers Association. 2017. "A Dangerous 'Game': The Pushback of Migrants, Including Refugees, at Europe's Borders." Joint Agency Briefing Paper. https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp-dangerous-game-pushback-migrants-refugees-060417-en_0.pdf.
- Pavel, Carmen. 2015. *Divided Sovereignty: International Institutions and the Limits of State Authority*. Oxford: Oxford University Press.
- Philpott, Daniel. 2020. "Sovereignty." In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Fall 2020 Edition. <https://plato.stanford.edu/archives/fall2020/entries/sovereignty/>.
- Rawls, John. 1993. *Political Liberalism*. Cambridge, MA: Harvard University Press.
- Sager, Alex. 2020. *Against Borders: Why the World Needs Free Movement of People*. Lanham, MD: Rowman & Littlefield International.
- Shachar, Ayelet. 2020a. "Beyond Open and Closed Borders: The Grand Transformation of Citizenship." *Jurisprudence* 11 (1): 1–27.
- Shachar, Ayelet. 2020b. *The Shifting Border: Legal Cartographies of Migration and Mobility*. Ayelet Shachar in Dialogue. Manchester: Manchester University Press.
- Song, Sarah. 2019. *Immigration and Democracy*. Oxford: Oxford University Press.
- Thomas, Chantal. 2019. "The Struggle against Empire Continues: Reflections on Migration as Decolonization." *Stanford Law Review Online* 72: 53–60.
- Walzer, Michael. 1983. *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books.
- Wellman, Christopher Heath, and Phillip Cole. 2011. *Debating the Ethics of Immigration: Is There a Right to Exclude?* Oxford: Oxford University Press.
- Whelan, Frederick G. 1983. "Prologue: Democratic Theory and the Boundary Problem." *NOMOS: American Society for Political and Legal Philosophy* 25 (1983): 13–47.