Limiting the National Right to Exclude

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This essay argues that the robust right to exclude that nation states currently enjoy will be harder to justify in an era of climate change. Similar to landowners, nation states have virtual monopolies over portions of the earth. However, the right of landowners to control who enters their land is considerably more constrained than the right of nation states to control who enters their territory. Climate change will alter the areas of the earth suitable for human habitation and the broad right of nation states to exclude will be more difficult to justify in this new environment.

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I. INTRODUCTION

Climate change is already contributing to human migration, and more people will move around the world for reasons related to climate change in the future.[1] Unfortunately, however, this is not an auspicious time to argue that the United States should be planning to accept more foreigners affected by climate change. The current administration wants to reduce immigration to the United States, including the numbers of legal and undocumented immigrants and refugees.[2] One of President Trump's earliest executive orders sought

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[1] *See* Jessica Benko, *How a Warming Planet Drives Human Migration*, N.Y. TIMES MAG. (Apr. 19, 2017), https://www.nytimes.com/2017/04/19/magazine/how-a-warming-planet-drives-human-migration.html?_r=0; Kelly M. McFarland & Vanessa Lide, *The Effects of Climate Change Will Force Millions to Migrate. Here's What This Means for Human Security.*, WASH. POST: MONKEY CAGE (Apr. 23, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/23/the-effects-of-climate-change-will-force-millions-to-migrate-heres-what-this-means-for-human-security/?utm_term=.4c018560740b; Coral Davenport & Campbell Robertson, *Resettling the First American 'Climate Refugees,'* N.Y. TIMES (May 2, 2016), https://www.nytimes.com/2016/05/03/us/resettling-the-first-american-climate-refugees.html?_r=0; Mike Ives, *A Remote Pacific Nation, Threatened by Rising Seas*, N.Y. TIMES (July 2, 2016), https://www.nytimes.com/2016/07/03/world/asia/climate-change-kiribati.html; *see also* THE NANSEN INITIATIVE, AGENDA FOR THE PROTECTION OF CROSS-BORDER DISPLACED PERSONS IN THE CONTEXT OF DISASTERS AND CLIMATE CHANGE 6 (2015), https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf; PLATFORM ON DISASTER DISPLACEMENT, http://disasterdisplacement.org/ (last visited Sept. 1, 2017).

In saying that climate change is contributing to migration, it is important to recognize that migration decisions are driven by multiple factors. Climate change is best understood as one of the factors that promote, and will continue to promote, migration within and across national boundaries. Although this essay focuses on cross-border migration, experts predict that most migration influenced by climate change will be internal to countries, especially developing countries. *See* THE GOV'T OFFICE FOR SCI., LONDON, FORESIGHT: MIGRATION AND GLOBAL ENVIRONMENTAL CHANGE 4, 9–10 (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/287717/11-1116-migration-and-global-environmental-change.pdf.

[2] *See* Peter Baker, *Trump Supports Plan to Cut Legal Immigration by Half*, N.Y. TIMES (Aug. 2, 2017), https://www.nytimes.com/2017/08/02/us/politics/trump-immigration.html; Heather Long, *Cutting Legal Immigration 50 Percent Might Be Trump's Worst Economic Idea*, WASH. POST: WONKBLOG (July 17, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/17/cutting-legal-immigration-50-percent-might-be-trumps-worst-economic-policy-yet/?utm_

to suspend the overseas refugee resettlement program and reduce the number of overseas refugees resettled in the United States in 2017.[3] Furthermore, the Trump administration does not appear interested in addressing climate change. While the President may "believe[] the climate is changing" due to human action,[4] his administration has announced that the United States will withdraw from the Paris Agreement[5] and repeal the Clean Power Plan,[6] the Obama administration's signature effort to regulate greenhouse gas emissions from power plants. President Trump also proposes to reduce federal funding for adapting to climate change, including funding to assist impoverished Native Alaskan communities that need to relocate due to melting of permafrost, flooding, and erosion induced by climate

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term=.70327faf5b99; Eliana Johnson & Josh Dawsey, *Trump Crafting Plan to Slash Legal Immigration*, POLITICO (July 12, 2017, 7:07 PM), http://www.politico.com/story/2017/07/12/trump-legal-immigration-cuts-240478.

Most people who need to move across national borders due to climate change will not be considered "refugees" as this term is defined in the Refugee Convention, and under United States law, which incorporates the Refugee Convention definition. JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 42–48 (2012); 8 U.S.C. § 1101(a) (42) (2012).

[3] *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). After this executive order was blocked in court, the administration revoked it and replaced it with Exec. Order No. 13,780, 82 Fed. Reg. 13209 (March 6, 2017). Shortly before a scheduled Supreme Court hearing on the second executive order, the President issued Proclamation No. 9654, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45161 (Sept. 24, 2017). The Supreme Court will hear challenges to this proclamation. Adam Liptak, *Supreme Court to Consider Challenge to Trump's Latest Travel Ban*, N.Y. TIMES (Jan. 19, 2018), https://www.nytimes.com/2018/01/19/us/politics/supreme-court-trump-travel-ban.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news.

[4] Rebecca Morin, *Does Trump Believe in Climate Change? Nikki Haley Says Yes.*, POLITICO (June 3, 2017, 2:22 PM), http://www.politico.com/story/2017/06/03/trump-climate-change-nikki-haley-239097.

[5] Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html.

[6] *See* Coral Davenport & Alissa J. Rubin, *Trump Signs Executive Order Unwinding Obama Climate Policies*, N.Y. TIMES (Mar. 28, 2017), https://www.nytimes.com/2017/03/28/climate/trump-executive-order-climate-change.html?mcubz=0; *see also* Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017); Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48035 (proposed Oct. 16, 2017).

change.[7] All of these reversals of Obama-era policies reflect the new administration's efforts to put America's interests first, which the administration defines as mutually exclusive with increasing immigration and dealing proactively with climate change.[8]

This essay steps back from the current political landscape and, in an era of human-induced climate change, questions the staying power of an important assumption that undergirds the current administration's approach to immigration. The Trump administration, like many others before it, assumes that the United States has the exclusive right to control who enters the United States, much like a private property owner controls who enters their land.[9] Jeremy Waldron labels his idea—that the state, like a private landowner, has the exclusive authority to control entry to its land mass—the "Sovereign Ownership conception" of state authority.[10] Waldron explains the conception as follows:

> Conceiving the sovereign as the owner of [its] territory, it treats the exclusion of an alien like a property-owner's exclusion of an unwelcome guest. After all, the right to exclude is the definitive or one of the definitive incidents of ownership. If it works for me and my house—its being mine means that *I* am entitled to say who may come in and who is excluded— why

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[7] Erica Martinson, *Trump Budget Cuts Deeply into Alaska's Federal Funding*, ALASKA DISPATCH NEWS (Mar. 16, 2017), https://www.adn.com/politics/2017/03/16/trumps-budget-cuts-deep-gash-into-alaskas-federal-funding/; Naomi Klouda, *Denali Commission Directed to Work on Shutdown Plan*, ALASKA J. COM. (Apr. 5, 2017, 1:13 PM), http://www.alaskajournal.com/2017-04-05/denali-commission-directed-work-shutdown-plan#.WWoOECmQw2w.

[8] Shear, *supra* note 5; *see also* Baker, *supra* note 2 (Trump said "[t]his legislation demonstrates our compassion for struggling American families who deserve an immigration system . . . that puts America first.").

[9] *See* Jeremy Waldron, *Exclusion: Property Analogies in the Immigration Debate*, 18 THEORETICAL INQUIRIES L. 469, 470, 473–74 (2017); *see also* JOSEPH H. CARENS, THE ETHICS OF IMMIGRATION 270–71, 271 n.31 (2013).

[10] Waldron, *supra* note 9, at 469–70.

> does it not also work for a sovereign and the territory that the sovereign 'owns'?[11]

Waldron argues that analogizing the state to a private property owner does not reach so far as to justify states excluding foreigners.[12] First, he sees the analogy between the state's and the private owner's right to exclude as giving the state the right to exclude other states, but not foreign individuals who are on a different plane from the state.[13] In his view, there is something like a "category mistake" in saying that the state has a right to exclude foreign individuals from its territory because the state is analogous to a private property owner.[14] Second, he sees the analogy between the state's and the private property owner's right to exclude as problematic because private property is nested within the state.[15] The state and the private owner are not two standalone institutions; private property exists within the boundaries of the state, and the state can limit the rights of private owners.[16]

I am sympathetic to Waldron's effort to undercut the argument that the state has the right to exclude individual foreigners based on the state's control of territory. But in this essay, I pursue the idea that there is a rough analogy between the positions of the state and the private landowner because both have something like a monopoly over a geographical space that allows them to control the movements of people. I argue that once we see the state as a monopolist controlling access to a land mass similar to a private landowner, the robustness of the state's right to exclude in modern times is strikingly extreme. When we look at property law, we see that limits have come to constrain the putative monopoly of the landowner to exclude, especially in the twentieth and twenty-first centuries as

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[11] *Id.* (footnote omitted); *accord* CARENS, *supra* note 9, at 270–71, 271 n.31. Carens also considers the analogy between property and sovereignty. *Id.* Consistent with my argument in this essay, Carens notes that property owners do not have an absolute right to exclude. *Id.*

[12] *See* Waldron, *supra* note 9, at 470.

[13] *Id.* at 476–79.

[14] *Id.* at 479 n.27.

[15] *Id.* at 479–80.

[16] *See id.* at 480.

populations have increased, societies have become more urbanized,[17] and the negative effects of allowing landowners to arbitrarily exclude have increased.[18] By comparison, the authority of the state to exclude has not been curtailed to nearly the same degree.[19]

The question I want to raise is this: should the state's robust authority to exclude remain, or should this right to exclude be curtailed similar to the way that the landowner's right to exclude has given way to a significant degree? Climate change is altering, and will continue to alter, the physical environment of the earth.[20] Sea-level rise in particular will affect what land is habitable because water will cover land where people currently live, making it uninhabitable.[21] Currently, over "10% of the world's population live in the world's low-elevation coastal zones (a contiguous zone along the coast less than 10 m above sea level)."[22] Some may be able to adapt without

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[17] Graeme Hugo, *Future Demographic Change and Its Interactions with Migration and Climate Change*, 21S GLOBAL ENVTL. CHANGE S21, S28 (2011) ("In 2010 the world passed an important milestone when the proportion of the global population living in urban areas exceeded the number living in rural areas for the first time in human history.").

[18] *See generally* Waldron, *supra* note 9, at 469–80.

[19] *Id.* at 479, 481.

[20] *See, e.g.*, Klouda, *supra* note 7 ("Newtok[, Alaska,] is becoming a tiny island between the Ningliq River and a sinking bog to the north because of melting permafrost attributed to climate change.").

[21] *See* Mathew E. Hauer, *Migration Induced by Sea-level Rise Could Reshape the US Population Landscape*, 7 NATURE CLIMATE CHANGE 321, 321 (2017) ("[Sea-level rise] is unique among environmental stressors as the conversion of habitable land to uninhabitable water is expected to lead to widespread human migration without the deployment of costly protective infrastructure.").

[22] Katherine J. Curtis & Annemarie Schneider, *Understanding the Demographic Implications of Climate Change: Estimates of Localized Population Predictions Under Future Scenarios of Sea-Level Rise*, 33 POPULATION & ENV'T 28, 29 (2011) (citing Gordon McGranahan et al., *The Rising Tide: Assessing the Risks of Climate Change and Human Settlements in Low Elevation Coastal Zones*, 19 ENV'T & URBANIZATION 17, 17, 25–26 (2007); BRIAN C. O'NEILL ET AL., POPULATION AND CLIMATE CHANGE 26–27 (2001)). Curtis & Schneider note that "[t]he 10 m low elevation coastal zone defined by McGranahan et al. (2007) represents an upper bound for defining populations at risk for inundation." *Id.* at 29 n.1. For another estimate of the number of coastal residents vulnerable to sea-level rise, see Hauer, *supra* note 21, at 321 (referring to "up to 180 million people directly at risk to [sea-level rise] in the world and over 1 billion living in the lower-elevation coastal zone" (citing Robert J. Nicholls et al., *Sea-level Rise and Its Possible Impacts Given a 'Beyond 4^{0}C World' in the Twenty-First Century*, 369

moving, for instance if governments invest in expensive sea walls; many others will need to move.[23] Researchers are beginning to analyze where coastal residents might relocate to,[24] and to recognize that additional research is needed on the impacts that other "climate stressors"—such as temperature increase—could have on where people will live.[25] A major theme of the existing research is that phenomena, such as sea-level rise, will impact not only people in the directly affected areas, but also people living in the regions where people will relocate to.[26] Over time, as the climate changes and alters the physical surface of the earth, the costs of allowing states to exclude foreigners will rise and become more visible,[27] suggesting

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PHIL. TRANSACTIONS ROYAL SOC'Y A 161, 161–81 (2011); Barbara Neumann et al., *Future Coastal Population Growth and Exposure to Sea-Level Rise and Coastal Flooding – A Global Assessment*, 10 PLOS ONE e0118571 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4367969/pdf/pone.0118571.pdf)).

[23] *See* Hauer, *supra* note 21, at 321–22; *see also* Charles Geisler & Ben Currens, *Impediments to Inland Resettlement Under Conditions of Accelerated Sea Level Rise*, 66 LAND USE POL'Y 322, 323 (2017) ("There is a high likelihood that we face a future of less land and more people due to the colliding forces of human fertility, an ebbing [low-elevation coastal zone], and the retreat of residents from the latter.").

[24] *See, e.g.*, Curtis & Schneider, *supra* note 22 at 46–49; Hauer, *supra* note 21, at 324. Both of these articles analyze the possible destinations of people living in vulnerable coastal areas in the United States, assuming that people will move within the United States. *See* Curtis & Schneider, *supra* note 22, at 46–49; Hauer, *supra* note 21, at 324. The path-breaking character of Curtis and Schneider's and Hauer's work is underscored by Susan Martin's observation that "[t]here is little information about the likely migration corridors—that is, projecting from where and to where people will migrate." SUSAN F. MARTIN, MIGRATION POL'Y INST., ENVIRONMENTAL CHANGE AND MIGRATION: WHAT WE KNOW 7 (2013), http://www.migrationpolicy.org/sites/default/files/publications/Migration-Development-WhatWeKnow.pdf.

[25] Hauer, *supra* note 21, at 324 (suggesting that other researchers could use his approach to modeling destinations for migrants to analyze destinations for people living in the Middle East and North Africa, parts of which "could become uninhabitable by the end of the century" (citing Johannes Lelieveld et al., *Strongly Increasing Heat Extremes in the Middle East and North Africa (MENA) in the 21st Century*, 137 CLIMATIC CHANGE 245 (2016)).

[26] *Id.*; Curtis & Schneider, *supra* note 22, at 42–49.

[27] *See* THE GOV'T OFFICE FOR SCI., *supra* note 1, at 9–10; Curtis & Schneider, *supra* note 22, at 46; Hauer, *supra* note 21, at 324.

that additional limits on the national right to exclude will be justified.

Whether the national right to exclude *will* be limited is a different question, of course, from whether it *should* be limited. Perceptions of national interest, ideology, and emotions determine immigration policy in the world,[28] and as a law professor based in Greenwich Village, I am poorly positioned to predict the future. It is possible that countries will keep their borders closed to foreigners, as they did in the 1930s when Jews desperately needed to leave Nazi Germany and the countries that it controlled.[29] But closing the borders will probably not always be an option, especially if one's country shares a land border with areas that are highly vulnerable to the impacts of climate change.[30] So just as the right of landowners to exclude has been curtailed in recent decades, the right of nation-states to exclude may diminish.[31] Our current assumption that states have the right to exclude may seem less justifiable and less viable in an era of human-induced climate change that reconfigures the environment of the planet.[32]

This essay proceeds as follows. Part II argues that the state is in a roughly similar position to a private landowner and, therefore, that the scope of the landowner's and the state's right to exclude are worth comparing. Part III identifies the categories of limits that exist on the right of landowners to exclude and illustrates the striking breadth of the state's right to exclude by comparison. Part IV argues that a robust national right to exclude will be harder to justify in the new context created by climate change. The essay concludes by acknowledging that right does not necessarily make might, and that

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[28] *See* CARENS, *supra* note 9, at 1–8.

[29] *See id.* at 192–93 (referring to the Evian Conference and to the plight of passengers aboard the *St. Louis*); DANIEL J. TICHENOR, DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA 156–67 (Ira Katznelson et al. eds., 2002) (discussing the United States's response to plight of Jewish refugees); JOHN TORPEY, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE 135–37 (Chris Arup et al. eds., 2000) (discussing the 1938 Evian Conference where only the Dominican Republic offered to admit refugees from Germany and Austria).

[30] *See* CARENS, *supra* note 9, at 225–54.

[31] *Id.*

[32] For a case for open borders, see *id.*

even though there is a case for relaxing the national right to exclude, such relaxation may not occur.

II. THE ANALOGY BETWEEN THE STATE AND THE PRIVATE LANDOWNER

The idea that the state and the private landowner are analogous is not novel.[33] Property owners are often described as sovereigns within their domain.[34] For example, ninety years ago, legal realist Morris Cohen published a famous article titled *Property and Sovereignty*, in which he described property as a "sovereign power" and emphasized that "we must not overlook the actual fact that dominion over things is also *imperium* over our fellow human beings" because of their need for the things that owners control.[35] As Waldron's "Sovereign Ownership conception" indicates, state sovereignty is also compared to private ownership.[36] Going back to feudal times, property and sovereignty were deeply intertwined because, as Cohen put it, "[o]wnership of the land and local political sovereignty were inseparable" in the hands of the "feudal baron."[37]

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[33] *See, e.g.*, CARENS, *supra* note 9, at 270–71, 271 n.31; Waldron, *supra* note 9, at 469–70.

[34] *See* Waldron, *supra* note 9, at 477–79.

[35] Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12–13 (1927). More recently, leading property theorists Thomas Merrill and Henry Smith have also suggested that property owners are like sovereigns. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON. S77, S95 (2011) ("[B]ecause of transaction costs, we delegate to owners a range of sovereign authority over their property, with a presumptive right to repel invasions through some combination of self-help and litigation . . . .").

[36] Waldron, *supra* note 9, at 469–70; *see also* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 7 (1984) ("[T]he classical idea of sovereignty implied a relationship between government and an alien that resembled the relationship in late nineteenth century private law between a landowner and a trespasser.").

[37] Cohen, *supra* note 35, at 9 ("The essence of feudal law . . . is the inseparable connection between land tenure and personal homage involving often rather menial services on the part of the tenant and always genuine sovereignty by the landlord. The feudal baron had, for instance, the right to determine the marriage of the ward, as well as the right to nominate the priest . . . . Likewise was the administration of justice in the baron's court an incident of landownership . . . .").

There are several reasons for analogizing the positions of the private landowner and the state sovereign today, even if the analogy is imperfect. Both the state and the private property owner have virtual monopolies on land, a resource to which every human needs some access because, as Waldron explains in his work on homelessness, "we are embodied beings."[38] That control over land gives the state and the private owner control not only over the inanimate objects on land, but also over the people who want access to the land.[39] The private owner "owns" the land mass under their control and has a right to exclude other individuals and entities—including oftentimes the government—from entering that land.[40] The state controls access to the land mass within its borders by determining who can cross into the state through its borders. It may own large amounts of that land outright and so be a sovereign and an owner; the federal government owns roughly thirty percent of the land mass of the United States.[41] A good deal of the rest of the land within the United States and most Western democracies is privately owned, subject to regulation by governments. In contemporary societies with well-functioning states, private landownership is a governance arrangement, under which the state decentralizes control over land to individuals close to the ground, and therefore well-placed to use the land, while retaining some residual authority to intervene to address issues beyond the ken of individual landowners.[42] The key point of convergence between the state and the private landowner is that both control individual access to land.[43] Indeed, the right to exclude others is often described by courts as the, or an, essential element of private property and state sovereignty.[44]

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[38] Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 296 (1991) ("Everything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere he is free to perform it. Since we are embodied beings, we always have a location.").

[39] *See id.* at 296, 301.

[40] *Id.* at 296–97.

[41] THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 106 (3d ed. 2017).

[42] *See* Larissa Katz, *Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power*, 160 U. PA. L. REV. 2029, 2042–47 (2012).

[43] *See id.* at 2047.

[44] On the significance of the right to exclude for property, see, for example, *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) ("In this case, we

Another reason for analogizing the state to a private property owner is that similar justifications are given for granting states and

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hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." (footnote omitted)); *see also* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) ("[T]he right to exclude others is more than just 'one of the most essential' constituents of property—it is the *sine qua non*."). On the significance of the right to exclude for state sovereignty, see *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 603–04 (1889) ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. As said by this court in the case of [The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812)], speaking by Chief Justice Marshall: 'The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.'"); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." (citing EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS §§ 94, 120 (1797); 1 ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW § 220 (3d ed. 1879))); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("The exclusion of aliens is a fundamental act of sovereignty."); Arizona v. United States, 132 S. Ct. 2492, 2511 (2012) (Scalia, J., concurring and dissenting) ("As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress. That power to exclude has long been recognized as inherent in sovereignty. Emer de Vattel's seminal 1758 treatise on the Law of Nations stated: 'The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state.'" (quoting VATTEL, *supra* note 44, § 94)).

private property owners control over access to land.[45] Private property is often justified on the basis that control over things is necessary to achieve self-actualization as a person.[46] This idea that controlling a thing, such as the land where I live, gives me the space to realize my goals and actualize my identity is associated historically with Hegel[47] and more recently with Margaret Radin.[48] By furnishing my house, controlling who enters it, and choosing the plants for my garden, I can implement my agenda for my life.

The idea that physical things are necessary for self-actualization has a parallel for states.[49] Statehood is said to require a land mass on the basis that collectives need territory to realize their right to self-determination, the collective version of self-actualization.[50] The state's territory helps it develop an identity that binds its members.[51] Land is a source of cultural memory; individuals and groups associate events with specific parcels of land.[52] For example, consider the sites that nations memorialize by putting up plaques—sites of historical battles or birthplaces of well-known historical figures—or the lands, like national seashores, that states set aside. States memorialize these sites and set aside these lands to create spaces for people to commune with nature and one another. Territorial control also enables states to regulate their membership.[53] As sociologist John

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[45] *See* Sarah Song, *Why Does the State Have the Right to Control Immigration?*, *in* NOMOS LVII: IMMIGRATION, EMIGRATION AND MIGRATION 7, 11–13 (Jack Knight ed., 2017) (discussing arguments for why the state has "the right to control immigration").

[46] *See infra* notes 47–48 and accompanying text.

[47] *See* G.W.F. HEGEL, THE PHILOSOPHY OF RIGHT para. 41, at 48 (S.W. Dyde trans., 1896) ("A person must give to his freedom an external sphere, in order that he may reach the completeness implied in the idea."); *see also* Alan Ryan, *Hegel on Work, Ownership and Citizenship*, *in* THE STATE AND CIVIL SOCIETY: STUDIES IN HEGEL'S POLITICAL PHILOSOPHY 178, 185–87 (Z.A. Pelczynski ed., 1984).

[48] Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982) ("The premise underlying the personhood perspective is that to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment.").

[49] *See* Song, *supra* note 45, at 32–43.

[50] *See id.*

[51] MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 44 (1983) ("[T]he link between people and land is a crucial feature of national identity.").

[52] *Id.*

[53] *Id.* at 42–44.

Torpey explains in his history of the passport, states "are territorial *and* membership organizations that must thus be able to distinguish between members and non-members, those with rights of access to the territory and those lacking them."[54] Or to quote President Trump, "a nation without borders is not a nation."[55]

There also are prudential reasons for private property and for allocating spaces of the earth to states. Private property helps to avoid the tragedy of the commons.[56] An owner would have little incentive to nourish her land if she could not exclude others from reaping where she sows. The right to exclude motivates the landowner to invest in her land because the owner knows that she will reap what she has sown. Also, the private owner suffers the consequences of leaving the land untended, such as the decline in its value.

By extension, the state's territorial control enables it to avoid the tragedy of the commons on a larger scale than the private owner. While private property owners internalize the costs and benefits of actions that affect their parcels, private owners have little incentive to consider the costs (or benefits) that their actions confer on others.[57] Thus, a farmer takes into account the income she generates from selling the crops that she grows, but not the water pollution to which her farming contributes miles downstream.[58] The state addresses larger scale externalities like the water pollution by regulat-

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[54] TORPEY, *supra* note 29, at 43.

[55] Bill Chappell et al., *'A Nation Without Borders Is Not a Nation': Trump Moves Forward with U.S.-Mexico Wall*, NPR (Jan. 25, 2017, 7:07 AM), http://www.npr.org/sections/thetwo-way/2017/01/25/511565740/trump-expected-to-order-building-of-u-s-mexico-wall-wednesday.

[56] Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1245 (1968); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348, 351–53 (1967).

[57] Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1323–32 (1993) (analyzing the extent to which private property internalizes events of different scales).

[58] *See* Demsetz, *supra* note 56, at 348 ("What converts a harmful or beneficial effect into an externality is that the cost of bringing the effect to bear on the decisions of one or more of the interacting persons is too high to make it worthwhile . . . ."); *see also* Hardin, *supra* note 56, at 1245 ("The rational man finds that his share of the cost of the wastes he discharges into the commons is less than the cost of purifying his wastes before releasing them.").

ing the activities of landowners and, in so doing, forces them to internalize costs and benefits that they might otherwise avoid.[59] The state is motivated to address externalities because it reaps the benefits of dealing with these issues because the state can exclude foreigners from its land mass.[60] The difficulty of immigrating also incentivizes states and citizens to deal with national-scale externalities because it is not easy to move to another country in the case of state failure.[61]

To be sure, there are differences between the state and the private landowner; the analogy is not perfect. In developed countries with strong states, states and private landowners are in a hierarchical relationship in which states are superior to private landowners; in other words, the state is higher in the food chain than landowners.[62] For example, the state has authority to regulate private lands[63] and even potentially to take those lands through eminent domain.[64] Still,

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[59] *See* JOHN RAWLS, THE LAW OF PEOPLES 38–39 (1999) ("An important role of a people's government, however arbitrary a society's boundaries may appear from a historical point of view, is to be the representative and effective agent of a people as they take responsibility for their territory and its environmental integrity, as well as for the size of their population. As I see it the point of the institution of property is that, unless a definite agent is given responsibility for maintaining an asset and bears the loss for not doing so, that asset tends to deteriorate. In this case the asset is the people's territory and its capacity to support them *in perpetuity*; and the agent is the people themselves as politically organized.").

[60] *See* VATTEL, *supra* note 44, § 94 ("The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous *to the state*." (emphasis added)).

[61] *See* WALZER, *supra* note 51, at 50–51; *see* CARENS, *supra* note 9, at 262–63 (summarizing what Carens calls "the state responsibility thesis" of Miller and Rawls for the right to exclude); *see also* DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE 73 (2007).

[62] Thank you to Yael Lifshitz for suggesting the "food chain" analogy. *See also* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 371–73 (1954).

[63] *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (holding a municipal corporation's comprehensive zoning ordinance constitutional as "a valid exercise of authority"); *see also* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) ("[T]he authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Village of Euclid v. Ambler Realty Co*." (citation omitted)).

[64] *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for

the state's authority to regulate and expropriate is not unlimited because of the constitutional protections for private property. Another manifestation of the state's higher status is the state's monopoly on the means of violence. This monopoly means that the private landowner's right to exclude other private individuals ultimately depends on the state's willingness to enforce the landowner's right to exclude.[65] Landowners themselves do not have unlimited authority to use force to defend their boundaries against trespassers; landowners may have to call on the police and the courts.[66]

III. THE LIMITS ON LANDOWNERS BUT NOT USUALLY ON STATES

While states and private landowners both control access to defined areas of the earth, there is a striking difference between the degrees of control enjoyed by states relative to the control exerted by private landowners.[67] Put simply, the authority of landowners to exclude individuals is more limited than the state's.[68] The state has been much more willing to limit the authority of private landowners within its jurisdiction to exclude than it has been to subject its own authority to exclude to international—or domestic—legal restrictions.[69] The limits on the private landowner's right to exclude

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public use, without just compensation."); *see also* Kelo v. City of New London, 545 U.S. 469, 477 (2005) ("[I]t is . . . clear that a State may transfer property from one private party to another . . . .").

[65] Cohen, *supra* note 62, at 372–74.

[66] *See id.* at 372. Theoretically, the state has the ability to exclude trespassers—i.e. "illegal aliens"—from its land mass without societal support for its policies, given the state's monopoly on the means of violence. But here again there are limits on the state's authority to go its own way. Just as the private landowner needs the state to back up their right to exclude, so the state depends on the willingness of individuals within society to comply with the state's decisions about who should be admitted. As the Trump Administration is learning in its battles with "sanctuary cities," individuals and other levels of authority may frustrate the federal government's efforts to exclude foreigners. Tessa Stuart, *How Sanctuary Cities Are Plotting to Resist Trump*, ROLLING STONE (Dec. 1, 2016), http://www.rollingstone.com/politics/features/how-sanctuary-cities-are-plotting-to-resist-trump-w453239.

[67] *See* Cohen, *supra* note 62, at 374.

[68] *See id.*

[69] *Cf.* WALZER, *supra* note 51, at 50.

and the comparatively unconstrained authority of the state to exclude are both manifestations of the political dominance of the nation-state in today's state system.[70]

Consider three categories of limitations on the landowner's right to exclude and the limited extent to which there are parallels on the state's right to exclude foreigners.[71]

A. *Necessity-Based Limits*

One longstanding limit on the owner's right to exclude is the right of an individual to come onto the land of another to save their life or property when in imminent danger.[72] This private right of necessity in emergencies is exemplified in *Ploof v. Putnam*, a Vermont Supreme Court decision from the early twentieth century.[73] The Ploofs were out on their sloop on Lake Champlain in Vermont when a storm arose.[74] To save themselves, they tried to secure themselves and their sloop to a dock on a privately owned island in the lake.[75] But the servant of the island's owner detached their sloop, and the Ploofs consequently were hurt and their sloop was damaged.[76] Affirming that the Ploofs had a right to use the property of the island owner in the face of imminent danger, the court allowed the Ploofs to sue the servant's employer for trespass.[77]

The more famous decision in *Vincent v. Lake Erie Transportation Co*. addressed the question of what happens if someone, to save

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[70] *See* TORPEY, *supra* note 29, at 93, 155–57.

[71] I am focusing on restrictions on landowners' right to exclude, not restrictions on the right to use land. So, I do not discuss land use regulations, such as zoning. There is one notable limitation on the right of states to exclude that does not apply to private landowners: "all democratic states, even states that do not see themselves as countries of immigration, recognize moral obligations to admit noncitizens who are immediate members of the family of a current citizen or resident." CARENS, *supra* note 9, at 185. In 1984, Peter Schuck argued, optimistically, that a new communitarian ethos seemed to be taking hold in immigration law, influenced by developments in the private law of contracts and torts. *See* Schuck, *supra* note 36, at 51. Decades later, I am suggesting that the evolution Schuck was observing somehow stalled.

[72] Ploof v. Putnam, 71 A. 188, 189 (Vt. 1908).

[73] *Id.* at 188.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 188–89.

[77] *Id.* at 189–90.

their property, uses the property of another and damages it: must the necessitous trespasser pay the property owner damages for the harm?[78] The court held that the owner of a ship that had remained docked during a storm had to pay the dock owner for the damages that the ship had caused to the dock.[79] But echoing *Ploof*, Vincent insisted that the ship's crew had done nothing wrong in using someone else's property to save the ship during a storm.[80] Still, the Supreme Court of Minnesota affirmed the defendants' liability even though the ship's crew acted "prudently and advisedly . . . for the purpose of preserving its own more valuable property."[81]

There are several rationales for giving someone whose life or property is in danger the right to use the land or other property of another to protect themselves, but I want to highlight one, invoked

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[78] 124 N.W. 221, 221 (Minn. 1910).

[79] *Id.* at 222.

[80] *Id.* at 221–22.

[81] *Id.* at 222. What I term a "right" of necessity is often called a privilege, and in light of *Vincent*, an "incomplete privilege." *See* Stephen D. Sugarman, Vincent v. Lake Erie Transportation Co.*: Liability for Harm Caused by Necessity*, *in* TORTS STORIES 259, 282 (Robert L. Rabin & Stephen D. Sugarman eds., 2003) (tracing the analysis of necessity as an "incomplete privilege" to Professor Francis Bohlen). I am discussing the doctrine of private necessity; there is a separate doctrine of public necessity. *See* RESTATEMENT (SECOND) OF TORTS § 196 (AM. LAW INST. 1965). The RESTATEMENT (SECOND) OF TORTS refers to private necessity as a privilege:

> (1) One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to
> (a) the actor, or his land or chattels, or
> (b) the other or a third person, or the land or chattels of either, unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action.
> (2) Where the entry is for the benefit of the actor or a third person, he is subject to liability for any harm done in the exercise of the privilege stated in Subsection (1) to any legally protected interest of the possessor in the land or connected with it, except where the threat of harm to avert which the entry is made is caused by the tortious conduct or contributory negligence of the possessor.

Id. § 197. Sugarman also notes that there is Anglo-Canadian case law holding, contrary to *Vincent*, that someone using another's property in the case of a necessity is not liable for the damage. Sugarman, *supra* note 81, at 276–77.

at least as far back as Thomas Aquinas, that also justifies limiting the national right to exclude foreigners in exigent circumstances.[82] Private property might be regarded as a tool introduced to enhance individual welfare; as mentioned above, one of the justifications for private land ownership is avoidance of the tragedy of the commons and encouragement of investment.[83] But when private property *threatens* individual welfare, as it would if landowners were allowed to force people like the Ploofs to remain on a lake in a middle of a storm, then private property rights must give way to the ultimate reason that they exist—to promote individual welfare.[84] This logic easily transfers to the national level.

The allocation of the earth to states can be justified as a means of promoting individual welfare.[85] As mentioned above, through public landownership and the regulation of privately owned land, states are well-placed to avoid large-scale tragedies of the commons that exceed the authority of private landowners to address.[86] But the allocation of land to states can threaten individual welfare in some circumstances.[87] If nations have the right to exclude individuals at risk of imminent death, then the welfare-enhancing purpose of the allocation would be undermined.[88] So an analogue to the right of necessity in private law would seem to be justified to override the right of states to exclude foreigners in peril.[89]

Indeed, international law does limit the right of states to exclude individuals at risk of imminent harm, although not comprehensively,

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[82] *See* Sugarman, *supra* note 81, at 275 (discussing Aquinas's contention that extreme necessity allows one to take and use another's property).

[83] *See* Demsetz, *supra* note 56, at 348.

[84] *See* GEORG CAVALLAR, THE RIGHTS OF STRANGERS 66–67, 239 (2002); Istvan Hont & Michael Ignatieff, *Needs and Justice in the* Wealth of Nations*: An Introductory Essay*, *in* WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT 1, 26–27 (Istvan Hont & Michael Ignatieff eds., 1983); John Salter, *Grotius and Pufendorf on the Right of Necessity*, 26 HIST. POL. THOUGHT 284, 284–85 (2005).

[85] *Cf.* Hont & Ignatieff, *supra* note 84, at 26–27.

[86] *See, e.g.*, Hardin, *supra* note 56, at 1245.

[87] *See, e.g.*, TORPEY, *supra* note 29, at 131–43; WALZER, *supra* note 51, at 50–51.

[88] *Cf.* CARENS, *supra* note 9, at 192–93; WALZER, *supra* note 51, at 48–51.

[89] WALZER, *supra* note 51, at 48–51; Mathias Risse, *The Right to Relocation: Disappearing Island Nations and Common Ownership of the Earth*, 23 ETHICS & INT'L AFF. 281, 281 (2009).

in all cases of necessity, where human life is at risk; we see pockets of protections for individuals who find themselves in imminent danger.[90] Under the Refugee Convention, as modified by the 1967 Protocol, an individual outside their home country with a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion"[91] cannot be "expel[led] or return[ed]" to a country "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[92] Several international human rights treaties also provide individuals a complementary right of *non-refoulement* (a right not to be returned) to another country "where they risk certain ill-treatment."[93] Sailors who find themselves caught in a storm also enjoy a right to a safe haven in the ports of foreign countries.[94] The domestic laws

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[90] *See, e.g.*, Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]. Regional arrangements in some parts of the world have broader definitions of "refugee" and therefore may protect some people who may not qualify under the Refugee Convention.

[91] Refugee Convention, *supra* note 90, art. 1; *see also* 1967 Protocol, *supra* note 90, art. 1.

[92] Refugee Convention, *supra* note 90, art. 1, ¶ 1.

[93] VIKRAM ODEDRA KOLMANNSKOG, NORWEGIAN REFUGEE COUNCIL, FUTURE FLOODS OF REFUGEES: A COMMENT ON CLIMATE CHANGE, CONFLICT AND FORCED MIGRATION 28 (2008), https://www.nrc.no/globalassets/pdf/reports/future-floods-of-refugees.pdf; *see also, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221. New Zealand jurisprudence is at the cutting edge in elaborating the implications of complementary protection frameworks for people seeking to leave their home countries due in part to climate change. *See* Jane McAdam, *The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement*, 3 MIGRATION STUD. 131, 133–34 (2015).

[94] *See* Christopher F. Murray, Note, *Any Port in a Storm? The Right of Entry for Reasons of* Force Majeure *or Distress in the Wake of the* Erika *and the* Castor, 63 OHIO ST. L.J. 1465, 1466, 1473 (2002); *see also* John T. Oliver, *Legal and Policy Factors Governing the Imposition of Conditions on Access to and Jurisdiction over Foreign-Flag Vessels in U.S. Ports*, 5 S.C. J. INT'L L. & BUS. 209, 210 (2009); *but see* Lena E. Whitehead, *No Port in a Storm – A Review of Recent History and Legal Concepts Resulting in the Extinction of Ports of Refuge*, 58

of some countries go further and provide additional protections to people requiring a safe haven.[95] For example, the United States Immigration and Nationality Act provides for "temporary protected status," a discretionary form of protection.[96] It allows the Secretary of Homeland Security to designate foreign countries suffering from environmental disasters or other conditions;[97] nationals of these countries who are in the United States at the time of the designation are then entitled to remain in the United States temporarily, even if the nationals previously were in the United States illegally.[98]

Still, the various international and domestic legislative provisions do not add up to a comprehensive right to enter and remain in the territory of another country due to an imminent threat to life comparable to the right that necessity provides against the private landowner. As an example, and as implied in the definition quoted above, to be considered a refugee, one has to already be outside one's home country, facing a well-founded fear of persecution, and that fear of persecution must be for one or more of five listed grounds.[99] The gaps in the scope of the international—and domestic—protections have been highlighted in recent literature arguing that additional legal protections are needed to assist people who will be displaced by the effects of climate change.[100] In one particularly

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NAVAL L. REV. 65, 65 (2009) (arguing that this safe haven for sailors is no longer a universally accepted premise). It has been suggested that state obligations toward persons in distress at sea are a precedent for the idea that states are obligated to foreign victims of sea-level rise. *See* Stephen Tully, *The Contribution of Human Rights as an Additional Perspective on Climate Change Impacts Within the Pacific*, 5 N.Z. J. PUB. & INT'L L. 169, 184–87 (2007); *see also* Katrina Miriam Wyman, *Sinking States*, *in* PROPERTY IN LAND AND OTHER RESOURCES 448 n.29 (Daniel H. Cole & Elinor Ostrom eds., 2011) (referring to these sources and Tully).

95 *See, e.g.*, 8 U.S.C. § 1254a (2012).

96 *See id.*

97 § 1254a(b)(1).

98 § 1254a(a).

99 *See* Refugee Convention, *supra* note 90, art. 1; *see also* 1967 Protocol, *supra* note 90, art. 1.

100 *See, e.g.*, MARTIN, *supra* note 24, at 7; Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, 10 GLOBAL ENVTL. POL. 60, 78 (2010); Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 357–61 (2009); David Hodgkinson et al., *'The Hour When the Ship Comes In': A Convention for Persons*

novel proposal, political theorist Mathias Risse argues that individual inhabitants of the island nations whose continued existence is threatened by the effects of climate change should have a right to relocate to other countries, based on something like a right of necessity.[101] Invoking Grotius, Risse argues that the earth notionally belongs to all humans because none of us created it, and each of us needs its resources.[102] When state borders become a hindrance to human self-preservation, those borders must give way, much as the landowner's fence should not prevent someone whose life is in danger from using the land to save themselves.[103] Risse's proposal underscores how far existing international and domestic law are from providing a comprehensive right to safe haven if one is facing imminent peril in one's home country.[104]

B. *Anti-Discrimination Limits*

The landowner's right to exclude is not only curtailed in the case of necessity, but also to reduce discrimination. While private landowners retain a broad right to determine who is allowed onto their land, the right of landowners to exclude is severely constrained if they are public accommodations such as inns, stores, or restaurants.[105] As a matter of common law, public accommodations are required to provide "reasonable access" to all members of the public; they are allowed to "exclude from their premises those whose actions 'disrupt the regular and essential operations of the [premises].'"[106] Under Title II of the Civil Rights Act of 1964, businesses

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Displaced by Climate Change, 36 MONASH U. L. REV. 69, 75–76 (2010); *see also* THE NANSEN INITIATIVE, *supra* note 1, at 6.

101 Risse, *supra* note 89, at 285, 293–94.

102 *Id.* at 284–89.

103 *Id.* at 285.

104 *Id.* at 296.

105 MERRILL & SMITH, *supra* note 41, at 373–74. With respect to the position of the private landowner, Merrill and Smith explain that "even to this day, there is no general legal principle that prohibits a homeowner or tenant from announcing that persons of a particular race or other protected category will be systematically excluded from her home or apartment. To that extent, a significant degree of owner sovereignty remains immune from antidiscrimination duties." *Id.* at 392. The Supreme Court has never held that a court's application of trespass doctrine to a discriminating property owner is prohibited state action. *Id.* at 403.

106 Uston v. Resorts Int'l Hotel, Inc., 445 A.2d 370, 375 (N.J. 1982) (alteration in original) (quoting State v. Schmid, 423 A.2d 615, 631 (N.J. 1980)).

meeting the statute's definition of "public accommodations" cannot exclude individuals based on their "race, color, religion or national origin."[107] Many states and local governments have anti-discrimination statutes or ordinances that even further curtail the authority of public accommodations to exclude, including by prohibiting discrimination based on grounds not listed in Title II such as sexual orientation.[108]

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[107] 42 U.S.C. § 2000a(a) (2012) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin."). Public accommodations are defined as follows:

> Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
> (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

§ 2000a(b).

[108] *See*, *e.g.*, N.Y. EXEC. LAW § 296(2)(a) (McKinney 2016) ("It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof . . . ."); New York City Commission on Human Rights, N.Y.C., N.Y., ADMIN CODE tit. 8, ch. 1, § 8-107(4)(a) (2017), http://www1.nyc.gov/assets/cchr/downloads/pdf/Updated%20NYCHRL%206.12.17.pdf ("It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or

Limits on the authority of public accommodations to exclude reflect societal commitments to equal treatment.[109] Historically, there also may have been an economic rationale for the common law restriction on the authority of public accommodations to exclude.[110] According to one theory, the duty to serve historically was imposed on some businesses but not others because those businesses were monopolies, and thus the duty was a means of regulating monopoly power.[111]

States are similar to "public accommodations" because they open their borders for trade, including trade with other nations and foreigners who travel to buy and sell goods and services, and for tourists to simply visit.[112] The commitments to equality and con-

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employee of any place or provider of public accommodation because of the actual or perceived race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof . . . ."). These state and local laws also may cover more actors than Title II because these laws may define public accommodations more expansively.

[109] *See* TICHENOR, *supra* note 29, at 215 (Vice President Hubert Humphrey stated: "We have removed all elements of second-class citizenship from our laws by the Civil Rights Act.").

[110] *See* James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 254–56 (2002).

[111] MERRILL & SMITH, *supra* note 41, at 374–75 (excerpting Speta, *supra* note 110, at 255–56). I am referencing Bruce Wyman's theory (no relation), mentioned in the text included in Merrill and Smith.

[112] I say that states are "similar," not identical, because, unlike the businesses that are deemed "public accommodations," states are not in the business of making money. Alternatively, states might be analogized to clubs, because states are membership organizations who choose their members; indeed, Walzer briefly analogizes states to clubs, but then rejects the analogy. WALZER, *supra* note 51, at 40–41. Some clubs are covered by antidiscrimination laws while others are not. Title II does not prohibit discrimination by "private clubs." *See* 42 U.S.C. § 2000a(e). The New York State Human Rights Law does not apply to "distinctly private" clubs but the statute also states that

> [i]n no event shall an institution, club or place of accommodation be considered in its nature distinctly private if it has more than one hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or

cerns about monopoly power that undergird restrictions on the authority of public accommodations to exclude certainly transfer to the state level. Liberalism understands individuals as deserving of equal treatment by the state because of their humanity.[113] States are monopolists in the sense that they control territory for which there is not always an adequate substitute. Think of a Mexican victim of gang violence[114]—the United States may be the only jurisdiction to which he or she can flee on foot to escape the violence.

But reflecting the breadth of state authority to exclude, international law imposes no comparable restrictions on the authority of states to discriminate in making admissions decisions. Domestic law may internally restrict countries from discriminating on some

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> on behalf of a nonmember for the furtherance of trade or business. An institution, club, or place of accommodation which is not deemed distinctly private pursuant to this subdivision may nevertheless apply such selective criteria as it chooses in the use of its facilities, in evaluating applicants for membership and in the conduct of its activities, so long as such selective criteria do not constitute discriminatory practices under this article or any other provision of law.

N.Y. EXEC. LAW § 292(9) (McKinney 2016). The New York City Human Rights Law also does not apply to "distinctly private" clubs, providing that "A club shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business." New York City Commission on Human Rights, N.Y.C., N.Y., ADMIN CODE tit. 8, ch. 1, § 8-102(9) (2017). However, the City ordinance has an exemption from the exemption: "No club which sponsors or conducts any amateur athletic contest or sparring exhibition and advertises or bills such contest or exhibition as a New York state championship contest or uses the words "New York State" in its announcement shall be deemed a private exhibition within the meaning of this section." *Id.*

[113] Schuck, *supra* note 36, at 2, 7, 49 (referring to the implications of the liberal tradition for immigration policy).

[114] Reuters, *Mexico: Surge in Drug Gang Violence Leaves 35 Dead in One Weekend*, GUARDIAN (Apr. 24, 2017, 12:27 AM), https://www.theguardian.com/world/2017/apr/24/mexico-surge-in-drug-gang-violence-leaves-35-dead-in-one-weekend; Kirk Semple, *Fleeing Gangs, Central American Families Surge Toward U.S.*, N.Y. TIMES (Nov. 12, 2016), https://www.nytimes.com/2016/11/13/world/americas/fleeing-gangs-central-american-families-surge-toward-us.html?mcubz=0.

grounds, such as race or religion.[115] The United States Immigration and Nationality Act prohibits discrimination in the issuance of immigrant visas "because of the person's race, sex, nationality, place of birth, or place of residence."[116] As the Ninth Circuit recently noted, this provision became law in 1965, when Congress legislated landmark immigration reform abolishing the racially discriminatory national origins quota system created in the 1920s.[117] Passed the year after Title II barring discrimination by public accommodations,[118] the 1965 immigration reform was of a piece with other civil rights reforms of that period.[119] By its own wording, however, the

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[115] *See, e.g.*, 8 U.S.C. § 1152 (2012).

[116] § 1152(a)(1)(A) ("Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.").

[117] Hawaii v. Trump, 859 F.3d 741, 776 (9th Cir. 2017), *vacated*, 874 F.3d 1112 (9th Cir. 2017) (mem.). The 1952 McCarran-Walter Act retained a racially restrictive immigration regime, but, in what "the bill's sponsors viewed as a gesture of egalitarian tokenism," "established that 'the right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married.'" TICHENOR, *supra* note 29, at 196. This prohibition on discrimination in naturalization later "help[ed] make Asian and Latin American immigrants an important political force in the United States." *Id.*

[118] *Trump*, 859 F.3d at 776 ("Contemporaneous to enacting the Civil Rights Act of 1964 and the Voting Rights Act of 1965, Congress passed the INA of 1965 . . . ."); *see also* CARENS, *supra* note 9, at 174 ("It is important to remember that countries like Canada, the United States, and Australia have all used explicitly racial criteria to exclude potential immigrants in the past. These criteria were not officially abandoned until the 1960s." (footnote omitted)).

[119] The national origins system stringently capped the overall number of immigrants, assigned quotas of immigrants to countries based on the origins of the American population to preserve its existing racial cast, and prohibited immigration from an "Asiatic barred zone." TICHENOR, *supra* note 29, at 145–46. In 1965, Vice President Hubert Humphrey stated: "We have removed all elements of second-class citizenship from our laws by the Civil Rights Act . . . . We must in 1965 remove all elements in our immigration law which suggest that there are second-class people . . . . We want to bring our immigration law into line with the spirit of the Civil Rights Act of 1964." *Id.* at 215. Presidents Truman, Kennedy and Johnson and other immigration law reformers emphasized the links between eliminating the national origins system at the heart of U.S. immigration policy, civil rights for African-Americans, and American foreign policy goals during the Cold War. *See id.* at 194–98, 208, 213, 215.

prohibition applies only to discrimination in the issuance of "immigrant visa[s]" and does not prohibit discrimination in every aspect of the admission process, such as the issuance of nonimmigrant visas.[120]

Then, there are constitutional limitations on the ability of the federal government to discriminate in making admissions decisions. The scope of these limitations is currently at issue in the United States in the challenges to the administration's "travel ban" on Establishment Clause grounds.[121] It is very difficult for non-citizens outside the United States to challenge admissions decisions, such as the denial of a visa, on constitutional grounds because they are regarded as lacking standing.[122] But United States citizens, green card holders, and states have had some success in obtaining standing to challenge admissions decisions affecting such non-citizens on constitutional grounds, including in the recent travel ban litigation. If standing is established, a challenger must still confront the deference that the Supreme Court has held is owed to admissions decisions under "the political branches' plenary power over immigration,"[123] provided there is a "facially legitimate and bona fide" reason for the

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[120] *See, e.g.*, *Trump*, 859 F.3d at 786 n.24 ("The Government also argues that to the extent § 1152(a)(1)(A) cabins executive authority, the injunction entered by the district court can only apply to immigrant visas and should not apply to *nonimmigrant* visas."). *But see id.* at 778 ("In prohibiting nationality-based discrimination in the issuance of immigrant visas, Congress also in effect prohibited nationality-based discrimination in the admission of aliens . . . . [V]isa holders cannot be discriminated against on the basis of 'race, sex, nationality, place of birth, or place of residence' throughout the visa process, whether during the issuance of a visa or at the port of entry."). For references to discrimination in the administration of immigration policy, see Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 413–14 (2004) (referring to discrimination against Muslims after 9/11); CARENS, *supra* note 9, at 175 ("In the wake of 9/11, Muslims found it much harder to gain entry to states in Europe and North America, especially the United States.").

[121] Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 591 (4th Cir. 2017), *vacated and remanded*, 138 S. Ct. 353 (2017) (mem.) (instructing the Fourth Circuit to dismiss the challenge as moot).

[122] *See* Cox, *supra* note 120, at 386 ("[C]ourts largely insulate immigration laws from constitutional attack by aliens on the ground that they do not have the right to seek judicial review of those laws.").

[123] *Int'l Refugee Assistance Project*, 857 F.3d at 590.

government's action.[124] Unless the challenger can show that the government had no legitimate reason for refusing admission or acted in bad faith—a showing that the plaintiffs made to the satisfaction of the Fourth Circuit in the challenge to the second travel ban[125]—then the court will not engage in analysis of whether there has been a constitutional violation.[126]

These hurdles suggest that in the United States, the constitutional constraints on discrimination in admissions decisions are themselves constrained. For example, the standing doctrine implies that there is discrimination based on nationality and location embedded within the application of constitutional protections against discrimination: a government decision to refuse to admit a group of people because of their religion may not be challengeable if there is no impact on someone within the United States.[127] Nonetheless, the constitutional jurisprudence is still noteworthy because it could be a stepping stone toward the development of a domestic jurisprudence curtailing discrimination more broadly by the state in admissions

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[124] *Id.* (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)); *see also* Kerry v. Din, 135 S. Ct. 2128, 2139–41 (2015) (Kennedy, J., concurring).

[125] *Int'l Refugee Assistance Project*, 857 F.3d at 592 ("Based on this evidence, we find that Plaintiffs have more than plausibly alleged that EO-2's stated national security interest was provided in bad faith, as a pretext for its religious purpose. And having concluded that the 'facially legitimate' reason proffered by the government is not 'bona fide,' we no longer defer to that reason and instead may 'look behind' EO-2." (citing *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring))).

[126] *See Mandel*, 408 U.S. at 770 ("We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."); *see also Int'l Refugee Assistance Project*, 857 F.3d at 590 ("The government need only show that the challenged action is 'facially legitimate and bona fide' to defeat a constitutional challenge." (citing *Mandel*, 408 U.S. at 770)).

[127] *See* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (per curiam) ("We grant the Government's applications to stay the injunctions, to the extent the injunctions prevent enforcement of § 2(c) with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States."). For an analysis of the possible meanings of the majority's per curiam opinion in *Trump v. Int'l Refugee Assistance Project*, which emphasizes that it is susceptible to multiple interpretations, see Adam Cox, *Did the Supreme Court Tip Its Hand on How It Will Rule on the Travel Ban?*, JUST SECURITY (June 26, 2017, 3:11 PM), https://www.justsecurity.org/42566/supreme-court-tip-hand-rule-travel-ban/.

decisions. For the time being, however, the state is much freer to discriminate in admissions decision-making than operators of public accommodations are to decide who may enter their businesses.[128]

C. *Eminent Domain*

The state's authority to expropriate land through eminent domain is a third kind of restriction on the private landowner's right to exclude.[129] Exercising its power of eminent domain, the state may expropriate privately owned land for a public purpose provided it compensates the landowner.[130] When the state does so, it completely eviscerates the landowner's right to exclude because the state forcibly acquires the land, regardless of whether the landowner would like to sell the land.[131] The standard rationale for empowering states to use eminent domain is that it is necessary for the state to be able to compulsorily acquire land from owners who are abusing their monopoly power to exclude.[132] Think of the landowner whose parcel is needed to build a highway but who demands an exorbitant sum from the government to transfer the land because they recognize their strategic position.[133]

There is no comparable right on the part of a foreign state to expropriate land in another country. If the United States wanted to build a highway through Canada to get to Alaska, there is no legal mechanism that would allow the United States to buy out Canadian territory or privately owned land within Canada without consent, in the same way that the United States could compulsorily purchase

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[128] *Compare Mandel*, 408 U.S. at 766–67, *with* 42 U.S.C. § 2000a(a) (2012); *see also* CARENS, *supra* note 9, 181 ("Germany, Italy, Japan, and a number of other states" still give preference to "immigrants with ethnic ties to the dominant group(s)."). *But see id.* at 243 ("[D]espite the general claim to a right to discretionary control over admissions, no democratic state today treats it as morally acceptable to discriminate (openly) on the basis of race or religion in admissions.").

[129] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–36 (1982).

[130] U.S. CONST. amend V; Eric A. Posner & E. Glen Weyl, *Property Is Only Another Name for Monopoly*, 9 J. LEGAL ANALYSIS 51,103 (2017).

[131] *See* MERRILL & SMITH, *supra* note 41, at 1172; *see also Loretto*, 458 U.S. at 435–36; Posner & Weyl, *supra* note 130, at 103.

[132] THOMAS J. MICELI, ECONOMICS OF THE LAW: TORTS, CONTRACTS, PROPERTY, LITIGATION 138 (1997) ("The real justification for eminent domain, then, is the need to prevent holdouts . . . .").

[133] *Id.*

land if it wanted to build a new highway to link Miami and Albany.[134] Arguably, the same monopoly power rationale for empowering states to expropriate land within their borders might suggest that states should be allowed to buy land or territory in other countries without the consent of the foreign owner or power. The land-seeking state may have a project that will enhance the welfare of the international community, or several states in it; the owner or country whose land is required may not object to the project, but simply want to extract a higher price for the required land or territory.

The idea that states could compel land transfers by foreign states or private landowners in others countries likely will strike most readers as a highly objectionable throwback to the era of European colonization, when European countries effectively compelled indigenous peoples to transfer land and territory.[135] But notwithstanding our greater sensitivity today to forcible transfers, a few academics recently have argued that island countries in the Pacific and the Indian Oceans whose land masses may become uninhabitable due to climate change should have a right to displace existing countries from some of their territory, thereby enabling the countries to resettle and reconstitute themselves.[136] These proposals would grant a right analogous to eminent domain to states such as Kiribati, Maldives, the Republic of the Marshall Islands, and Tuvalu, which Cara Nine calls "ecological refugee states."[137] Nine's rationale for allow-

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[134] *Cf.* Waldron, *supra* note 9, at 473, 479 ("No doubt a state has the responsibility to control its borders against the encroachment of other states . . . . [S]overeign S's control of Freedonia means that sovereign T's control of Freedonia is excluded; and normally Sovereign T may not interfere in what sovereign S does with respect to Freedonia.").

[135] *Cf.* STUART BANNER, HOW THE INDIANS LOST THEIR LAND 4 (2005) ("Whites always acquired Indian land within a legal framework of their own construction. Law was always present, but so was power. The more powerful whites became relative to Indians, the more they were able to mold the legal system to produce outcomes in their favor—more sales, of larger tracts, at lower prices than would have existed had power relationships been more equal.").

[136] *See* Avery Kolers, *Floating Provisos and Sinking Islands*, 29 J. APPLIED PHIL. 333, 340 (2012); Cara Nine, *Ecological Refugees, States Borders, and the Lockean Proviso*, 27 J. APPLIED PHIL. 359, 366 (2010).

[137] Nine, *supra* note 136, at 359, 366 ("Tuvalu, the Maldives, and to a certain extent, Bangladesh are predicted to be ecological refugee states in the near fu-

ing ecological refugee states to take territory from other states applies Locke's sufficiency proviso to territorial holdings.[138] She starts from the premise that communities have a right to self-determination.[139] She argues that the allocation of territory to countries enables them to pursue self-determination.[140] If a country's land mass disappears due to climate change, it is entitled to a new territory to

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ture."). "An ecological refugee state is a state whose entire territory is lost to ecological disaster." *Id.* at 360. Nine and Kolers do not specify whether the states (and the individuals within them) that would be displaced would be compensated. Dietrich and Wündisch, on the other hand, contemplate compensation for displaced communities, but they envisage that these communities would volunteer to be displaced, rather than forcibly moved for newcomers. *See* Frank Dietrich & Joachim Wündisch, *Territory Lost – Climate Change and the Violation of Self-Determination Rights*, 2 MORAL PHIL. & POL. 83, 98 (2015).

[138] Nine interprets the proviso this way:

> A basic and natural reading of the Lockean proviso, then, is that when the holding or acquisition of property rights unnecessarily threatens human life, we should change something about property dispositions to avoid the unnecessary death caused by these property dispositions. The Lockean proviso is a mechanism that works within theories of exclusive rights over goods. The mechanism works to ensure that the rights do not leave agents who are excluded from the goods disadvantaged, in a way relevant to the system of exclusive rights over goods. That is, an exclusive right over goods is justified because the right protects and promotes some value(s). According to the Lockean proviso mechanism, when those value(s) that the right is meant to protect and promote are threatened by the exercise of the right, then the right should be changed so that it no longer undermines those values.

Nine, *supra* note 136, at 361–62 (footnote omitted); *see also id.* at 363 (linking her interpretation to Locke's "enough and as good" proviso). Under Nine's formulation, the Lockean proviso is similar to the right of necessity because both generate a right to override existing holdings to preserve life. Jörgen Ödalen, The Collective Rights of Environmental Refugees 5 (unpublished first draft), http://pol.gu.se/digitalAssets/1315/1315968_--dalen_collective-rights-of-environmental-refugees.pdf; *see also* Michael Blake & Mathias Risse, *Immigration and Original Ownership of the Earth*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 133, 145 (2009) ("In a manner parallel to the Lockean proviso, Common Ownership gives individuals a claim to have exclusion justified to them." (footnote omitted)).

[139] Nine, *supra* note 136, at 359–60.

[140] *Id.* at 362.

enable it to continue to realize its right to self-determination.[141] In other words, existing state borders must give way in the face of the need of ecological refugee states to reestablish themselves, much as the private landowner's right to exclude is curtailed when an individual needs shelter to avoid imminent harm.[142]

In addition to thinking of a country taking land from another as a collective exercise of the right of necessity, we might, as I suggested above, think of a country taking land from another as analogous to a government using eminent domain to overcome a holdout problem.[143] We might consider the survival of nation-states as yielding global benefits because individuals derive benefits from membership in longstanding communities and the existence of a diverse array of communities in the world. The states that refuse to yield their territory to a state that otherwise would disappear from the earth due to climate change might be seen as holdouts, blocking the perpetuation of communities whose survival would be globally beneficial.[144] Allowing the ecological refugee state to take some of the land of another state (or other states) allows the refugee state to overcome the monopoly/holdout problem that otherwise would block its survival.[145] Regardless of whether we see the proposals of Nine and others that climate-threatened states be allowed to take territory from existing states as implementing a collective version of the right of necessity or eminent domain, the proposals are animated by the same concern that undergirds this essay: climate change necessitates revisiting the robust right of states to determine who enters their territory.[146]

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[141] *See id.* at 366. Recognizing that there is no unallocated territory in the world, Nine suggests that the ecological refugee state's claim to new territory might be satisfied through "nested self-determination . . . within another state's territory." *Id.* at 372; *see also* Kolers, *supra* note 136, at 340 ("two states can share the same land base while occupying distinct territories").

[142] *Compare* Nine, *supra* note 136, at 366, *with* RESTATEMENT (SECOND) OF TORTS § 197 (AM. LAW. INST. 1965).

[143] *Cf.* MICELI, *supra* note 132, at 138.

[144] *See* Nine, *supra* note 136, at 366; *see also* MICELI, *supra* note 132, at 138.

[145] *See id.*

[146] *See* Dietrich & Wündisch, *supra* note 137, at 83–84, 86–89; Risse, *supra* note 89, at 282–84.

IV. THE NORMATIVE QUESTION

My goal in Part III was to show that the right to exclude does not have to be as broad as that currently enjoyed by nation-states. Although the right to exclude is central to private property, there are important constraints on the landowner's right to exclude.[147] Should we now further constrain the right of nation-states to exclude too?[148] For example, should the pockets of protection giving individuals in dire straits a right to a safe haven be expanded to something closer to the comprehensive right of necessity in property law?[149] Should state authority to discriminate in admissions decisions be further curtailed? And, even more controversially, should countries like the ecological refugee states, or an international authority on their behalf, have the right to expropriate the territory of other states?[150]

These ideas are political nonstarters today, but that fact should not stop us from analyzing them and others that would reduce the discretion of states to control who crosses their borders.[151] The current division of the earth into states that strictly control their borders is a human construct of relatively recent origin,[152] and it is not inevitable that countries will have a robust right to exclude.[153]

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147 *See supra* Part III.

148 *Cf.* Nine, *supra* note 136, at 366.

149 *Cf. id.*

150 *Cf. id.*

151 *See* CARENS, *supra* note 9, at 229–30 (explaining how we should consider his proposal for open borders even though it is "a nonstarter" politically).

152 *See* TORPEY, *supra* note 29, at 159 ("Most familiar to and accepted by people today is the right of states to control *entry*, a prerogative that has come to be understood as one of the quintessential features of sovereignty. It is important to note, however, that the widespread recognition of this prerogative is a fairly recent development . . . . [I]n his survey of the international legal opinion prevailing during the period immediately preceding the First World War, a German analyst of the international passport system, Werner Bertelsmann, was unable to muster any consensus for the view that states had an unequivocal right to bar foreigners from entry into their territory."); *see also* CARENS, *supra* note 9, at.260, 275, 283 (referring to division of the world into states with "discretionary control over immigration" as a "human construction").

153 *See* CARENS, *supra* note 9, at 229–30 (arguing that open borders are what justice demands, though conceding that the idea is a "nonstarter" politically today).

As recently as the nineteenth century, borders in Western Europe and the United States were comparatively open.[154] World War I put an abrupt end to "the laissez-faire era"[155] of immigration in Western Europe and the United States, marking the advent of strict enforcement of requirements for passports and visas to cross national boundaries in Western Europe and into the United States.[156] Restrictions on entry increased after World War I.[157] The United States had already started limiting Chinese immigration in the 1880s.[158] In the 1920s, Congress legislated the racially discriminatory national-origins quota regime to curtail southern and eastern European immigration and bar Asian immigration.[159]

In the decades after World War II, the pendulum swung the other way toward greater openness.[160] Western European countries re-

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[154] *See* TICHENOR, *supra* note 29, at 2, 11, 12, 48–49, 60, 67–69, 293 ("Save for the fleeting Alien and Sedition Acts, the national government embraced an essentially laissez-faire approach to immigration for many decades after the founding. Immigration reforms of the late-nineteenth century brought both sweeping Chinese exclusion policies and limited screening of other immigrant groups; entry for most white European newcomers remained unfettered at the close of the Gilded Age." (footnote omitted)); TORPEY, *supra* note 29, at 91–99, 105–07, 115, 121, 159; Schuck, *supra* note 36, at 2, 7. Before immigration policy was nationalized in the United States in the nineteenth century, states regulated immigration, although their regulations were not especially restrictive of European immigration. *See* TICHENOR, *supra* note 29, at 46, 52, 58–59, 67; *see also* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1834, 1837, 1841–84 (1993).

[155] TORPEY, *supra* note 29, at 117 (quoting ALAN DOWTY, CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT 83 (1987)).

[156] *Id.* at 111–21. In the United States, the Passport Control Act of 1918 required aliens "to first obtain a visa from American consuls or accredited representatives abroad" before arriving at "American immigration stations." TICHENOR, *supra* note 29, at 153–54. Initially intended as a wartime measure to protect the United States from "enemy agents," the "consular inspections and visa requirements" were retained after World War I. *Id.* at 154. "The 1924 Quota Act mandated on a permanent basis that all European immigrants obtain an entry visa and pass a consular inspection overseas prior to their embarkation to the United States." *Id.* at 155.

[157] *See* TORPEY, *supra* note 29, at 111.

[158] *See* TICHENOR *supra* note 29, at 106–107.

[159] *See id.* at 144–46, 171.

[160] *See* TORPEY, *supra* note 29, at 143–57.

verted to opening their borders, at least to fellow Western Europeans.[161] In the 1960s, the United States abolished the national origins system and replaced it with a regime that significantly increased immigration, and brought immigrants from Asia, South America, and the Caribbean.[162] Although it is always risky to characterize the times in which you live, we now seem to be in a period of retreat, returning to more restrictive approaches to immigration. Britain's vote to exit the European Union may curtail movement in Europe;[163] the Trump Administration is seeking to restrain legal (as well as undocumented) immigration to the United States, perhaps by half.[164] Nevertheless, the current preoccupation with restricting immigration flows should not blind us to the possibility that people could be able to move more freely across national borders in the future.[165] As recently as 1980, another Republican, Ronald Reagan, supported the free movement of workers (as well as goods and services) between the United States, Canada, and Mexico;[166] this vision was partially implemented by his successors in the North American Free Trade Agreement, which created greater cross-border employment mobility for professionals.[167]

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[161] *Id.* at 144–45, 152–53 (referring to Schengen Accords of 1985), 155.

[162] TICHENOR, *supra* note 29, at 215–16, 218–19. *But see* Schuck, *supra* note 36, at 13 (noting limits imposed by 1965 reform and 1978 changes).

[163] *See* WILL SOMERVILLE, MIGRATION POL'Y INST., WHEN THE DUST SETTLES: MIGRATION POLICY AFTER BREXIT (2016), http://www.migrationpolicy.org/news/when-dust-settles-migration-policy-after-brexit.

[164] *See* Baker, *supra* note 2.

[165] *See, e.g.*, Frank Jordans, *Merkel Stands by Her 2015 Decision to Open German Borders*, WASH. POST (Aug. 20, 2017), https://www.washingtonpost.com/world/europe/merkel-ally-drops-call-for-cap-on-refugees-entering-germany/2017/08/20/ad0a6064-85a6-11e7-96a7-d178cf3524eb_story.html?utm_term=.f11d10324155.

[166] TICHENOR, *supra* note 29, at 255 ("During his 1980 presidential campaign, Reagan endorsed the notion of a North American free trade zone in which goods, services, technology, and workers could move freely across U.S., Canadian, and Mexican borders. Key members of the campaign team recall that Reagan, who had strong ties to California growers, originally was persuaded that the best way to redress illegal immigration was to create an open border with Mexico.").

[167] *TN NAFTA Professionals*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-united-states/temporary-workers/tn-nafta-professionals (last updated Mar. 7, 2017).

The status quo—under which states enjoy a robust right to exclude—has already prompted well-established critiques.[168] For example, prominent political theorist Joseph Carens argues that justice requires "open borders" with some limited caveats to protect national security, public order, the welfare state, and perhaps even national cultures.[169] His arguments are rooted in commitments to freedom and equality.[170] According to Carens, the freedom to move across borders is a human right, regardless of whether the borders are intra- or inter-state.[171] Carens further argues that open borders would reduce inequalities and promote equality of opportunity.[172] There are also well-established defenses of robust national rights to exclude, many of which Carens addresses in defending his argument that justice favors open borders.[173] Some argue that "justice is primarily about relationships inside the state."[174] Michael Walzer famously argues that national control of admissions decisions is a precondition for "communities of character."[175] Carens also recognizes arguments that such control is necessary to enable countries to realize their right to self-determination,[176] to give priority to one's compatriots,[177] or to protect national security, public order, the welfare state, or national cultures.[178]

I do not want to revisit the debate about whether national borders should be open. Rather, my argument is that the needs for greater human mobility that climate change will generate should prompt us to rethink the robustness of the right to exclude that states currently enjoy. The current state of affairs, where states enjoy virtually un-

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168 *See, e.g.*, CARENS, *supra* note 9, at 276–86.

169 *Id.*

170 *Id.* at 233.

171 *Id.* at 237.

172 *Id.* at 234. He concedes that freedom to move across national borders by itself will not be sufficient to promote global distributive justice because the poor may not be well-positioned to move. Thus, he also supports significant reductions in "international inequalities." *Id.*

173 *Id.* at 270–83.

174 *Id.* at 256 (referring to this objection to open borders, but rejecting it).

175 WALZER, *supra* note 51, at 62; *see also* CARENS, *supra* note 9, at 261–62 (quoting same passage).

176 CARENS, *supra* note 9, at 262.

177 *Id.* at 273.

178 *Id.* at 276–87.

constrained authority to exclude others, emerged in a specific physical context.[179] But climate change is already altering, and will continue to alter, the current context in important respects.[180] In this new climate, some of the arguments against freedom of movement are recast in a different light and may actually favor a greater permeability of national borders, if not completely open borders.[181]

Globally, climate change will alter the areas of the earth that are conducive to human habitation, and consequently where people will live.[182] Many low-lying coastal areas likely will become uninhabitable due to sea-level rise in the absence of investments in expensive infrastructure to protect their coastlines. As already mentioned, 10% of the world's population lives in low-lying coastal areas, "with a larger share of the population (14%) in developing countries living in [such] area[s] compared to more developed regions."[183] Other climate stressors, such as temperature increase, will make it difficult for humans to live in other types of environments.[184] For example, a 2016 article concludes that due to projected temperature increases, the Middle East and North Africa, which is home to "about 550 million people,"[185] "is a climate change hotspot that could turn into a scorching area in the summer."[186] Under a scenario where greenhouse gas emissions continue to rise in this century, "part of the [Middle East and North Africa] may become uninhabitable for some species, including humans."[187] People affected by sea-level rise and

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179 *See* TORPEY, *supra* note 29, at 117–21.

180 *See* MARTIN, *supra* note 24, at 3.

181 *See* Richard Black et al., *Migration as Adaptation*, 478 NATURE 447, 448–49 (2011); *see also* CARENS, *supra* note 9, at 225–54.

182 *See* MARTIN, *supra* note 24, at 2–5.

183 Curtis & Schneider, *supra* note 22, at 29 (citing McGranahan et al., *supra* note 22, at 17, 25–26; O'NEILL ET AL., *supra* note 22, at 26–27).

184 *See* Lelieveld et al., *supra* note 25, at 245–47; *see also* MARTIN, *supra* note 24, at 3 (analyzing "four paths . . . by which environmental change may affect migration either directly, or, more likely, in combination with other factors: [l]onger-term drying trends[,] . . . [r]ising sea levels[,] . . . [w]eather-related acute natural hazards, [and] . . . [c]ompetition over natural resources").

185 Lelieveld et al., *supra* note 25, at 247.

186 *Id.* at 257.

187 *Id.* (citing Jeremey S. Pal & Elfatih A.B. Eltahir, *Future Temperature in Southwest Asia Projected to Exceed a Threshold for Human Adaptability*, 6 NATURE CLIMATE CHANGE 197, 197 (2016)). Pal and Eltahir conclude that, if

other consequences of climate change may not move across an international boundary; experience suggests that people who move due to environmental change often move internally within their home countries.[188] People also likely will try to avoid moving, given the human preference for remaining in place.[189] But some people will need to move across national borders.[190] It is therefore not surprising that research focusing on the implications of climate change on migration sometimes argues explicitly for greater freedom of movement between countries as well as within them.[191] Climate

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emissions continue to rise under a business-as-usual-scenario, "[a] plausible analogy of future climate for many locations in Southwest Asia is the current climate of the desert of Northern Afar on the African side of the Red Sea, a region with no permanent human settlements owing to its extreme climate." Pal & Eltahir, *supra* note 187, at 199. For a thought-provoking analysis of the implications of sea-level rise for UNESCO world heritage sites, and the land masses of different countries over a 2000-year period, see Ben Marzeion & Anders Levermann, *Loss of Cultural World Heritage and Currently Inhabited Places to Sea-Level Rise*, 9 ENVTL. RES. LETTERS 1, 4–6 (2014). On the other hand, "climate change might result in northern lands in Canada, Russia and Greenland that are currently sparsely populated, becoming more hospitable environments." Allan M. Findlay, *Migrant Destinations in an Era of Environmental Change*, 21S GLOBAL ENVTL. CHANGE S50, S52 (2011).

188 *See* MARTIN, *supra* note 24, at 2 ("Given that most movements are likely to be within countries, much of the attention to date has focused legitimately on internal migration, and policymakers have paid particular attention to adaptation policies that reduce the need for individuals to move out of harm's way, or alternatively, involve internal mobility as an adaptation strategy that allows households to cope with environmental changes."). For articles warning that it is important not to exaggerate the international migration that will result from climate change, especially the migration from developing to developed countries, see Findlay, *supra* note 187, at S52; Black et al., *supra* note 181, at 448–49.

189 *See* Hugo, *supra* note 17, at S29 ("*In situ* adaptations are by far the most common responses to demographic and environmental changes."); Findlay, *supra* note 187, at S53 ("*Rootedness and immobility* are dominant features of the mobility literature . . . .").

190 *See* MARTIN, *supra* note 24, at 2.

191 *See* Black et al., *supra* note 181, at 448–49 ("Migration may be the most effective way to allow people to diversify income and build resilience where environmental change threatens livelihoods. It is therefore necessary to make channels for voluntary migration available. Within countries, this implies removing arbitrary restrictions on movement, and providing basic infrastructure to enable relocation and resettlement in urban areas, ideally sustainably. Internationally, this might include the extension of regional economic communities to cover the free movement of people as well as money and goods."); Findlay, *supra* note 187,

change will impact not only the people in regions highly vulnerable to its consequences, such as coastal areas, but also those living in the destination areas to which displaced people will seek to move.[192]

Earlier, I suggested that there are two important categories of arguments for countries having robust rights to exclude, both of which mirror the arguments for giving private landowners a right to exclude: identity-based and prudential arguments.[193]

A. *The Identity-Based Arguments in the New Climate*

Consider how climate change gives rise to identity-based arguments for limiting, rather than maintaining, the rights of states to exclude foreigners. As mentioned above, climate change threatens the continued existence of several small island nations in the Pacific and Indian Oceans.[194] These are low-lying countries that are expected to become uninhabitable due to flooding from rising sea levels, the destruction of their sources of freshwater from "saltwater intrusion," and the destruction of infrastructure in more frequent and more extreme weather events related to climate change.[195] As dis-

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at S57 ("Rather than being concerned with forced environmental mobility, perhaps a greater concern for policy makers should be the inability of the most vulnerable populations to adapt to climate change in situ. The resistance of wealthier nations to consider international mobility alternatives for these groups is in many ways very problematic."); Hugo, *supra* note 17, at S31 ("[T]here *will* be increasingly stark contrasts between labour shortage and labour surplus countries. There is an urgent need for an international migration regime which recognises this reality and provides a basis for safe, effective and equitable migration from low income countries to meet the needs of high income countries. Effects of climate change may be factored in to the development of such a regime. The fact is that demographic differences, quite apart from other drivers, mean that there will be significant labour shortages in high income countries. In providing this labour, can low income areas and countries which are facing the greatest threat of negative climate change impact be given special consideration as source areas for migrants?").

192 *See* Hauer, *supra* note 21, at 324; *see also* Curtis & Schneider, *supra* note 22, at 46–49.

193 *See supra* Part I.

194 *See* Risse, *supra* note 89, at 281–82.

195 U.S. DEP'T OF DEF., NATIONAL SECURITY IMPLICATIONS OF CLIMATE-RELATED RISKS AND A CHANGING CLIMATE 4–5 (2015), http://archive.de-

cussed above, Nine argues that if we take seriously the right of national self-determination, these "ecological refugee states" have a right to territory within the borders of existing states to reconstitute themselves.[196] Without explicitly saying so, Nine recasts self-determination as an argument for curtailing the right to exclude, rather than preserving it.[197] Instead of saying that nations have a right to self-determination and that this right grounds a right to exclude foreigners—as Walzer argues, for example[198]—Nine is arguing that the right of self-determination justifies undermining the territorial integrity of existing states in the new context of climate change.[199]

Although Nine does not make this argument explicitly, one might also say that the threatened island nations have a right to territory to protect their national cultures.[200] This would transform preserving national cultures from an argument for national control over borders to an argument for undermining the right of existing nations to exclude.[201] Walzer's argument that protecting "communities of character" requires giving states the right to define their membership would similarly be transformed into an argument for undermining the right of states to refuse entry to foreigners.[202] The threatened island nations—unable to protect their existing communities of character within their existing land masses—would presumably have rights to persist on territory that currently belongs to other countries for the sake of preserving those communities of character.[203] Walzer himself seems to recognize that when territory is fully allocated, countries' rights to exclude might be overridden and that countries with plentiful land may be required to cede some of it to those in

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fense.gov/pubs/150724-congressional-report-on-national-implications-of-climate-change.pdf?source=govdelivery; *see also* Curtis & Schneider, *supra* note 22, at 31–41.

196 *See* Nine, *supra* note 136, at 366.

197 *See id.* at 361–62.

198 *See* WALZER, *supra* note 51, at 42–46.

199 *See* Nine, *supra* note 136, at 366.

200 *Cf. id.* at 362 ("Essentially, territorial rights establish a practical foundation upon which a group can exercise its right to self-determination . . . . For a group to be self-determining, they must have some sense of internal identity that is uniquely advanced by the self-determining powers of the group.").

201 *Compare* CARENS, *supra* note 9, at 283–87, *with* Nine, *supra* note 136, at 366.

202 *Cf.* WALZER, *supra* note 51, at 62.

203 *Cf.* Nine, *supra* note 136, at 366.

need of land—or to grant the "necessitous" membership in their political communities, an alternative I discuss further below.[204]

One possible response to these identity-based arguments for restricting the right to exclude is that they only justify minimal curtailment of the right to exclude to protect the right of self-determination of the small number of "ecological refugee states," which combined have a population of under 600,000 people.[205] Because these are the only countries for which climate change presents an existential threat, some may argue that these are the only countries that should be entitled to acquire territory from existing states and thus, no grand relaxation of the right to exclude is required. The difficulty with this argument is that climate change and its international implications are not limited to the small island nations.[206] Yes, those islands may be the only countries whose entire land masses are vulnerable to becoming uninhabitable, but they will not be the only countries whose national options and cultures will be fundamentally harmed by climate change.[207]

Think of Bangladesh, a low-lying country with a population of over 160 million;[208] it is regarded as one of the countries "most vulnerable" to climate change.[209] Robert Glennon recently wrote that

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[204] WALZER, *supra* note 51, at 46–48. I am referring to a controversial passage, in which Walzer seems to indicate that a country could legitimately pursue a racist immigration policy like "the 'White Australia' policy" that bans non-white immigration, provided the country was willing to give up some of its territory to the individuals that it refused to admit on racist grounds.

[205] Clare Heyward & Jörgen Ödalen, *A New Nansen Passport for the Territorially Dispossessed* 17 (Uppsala Universitet, Working Paper No. 3, 2013), http://www.statsvet.uu.se/digitalAssets/443/c_443604-l_3-k_2013_3.pdf ("The four states most commonly cited as being at risk of submersion, the Maldives, the Marshall Islands, Kiribati and Tuvalu have a combined population of approximately 576000—less than 1% of the UK's population.").

[206] *See* Hauer, *supra* note 21, at 324; *see also* Curtis & Schneider, *supra* note 22, at 46–49.

[207] *See* Hauer, *supra* note 21, at 324; *see also* Curtis & Schneider, *supra* note 22, at 46–49.

[208] Robert Glennon, *The Unfolding Tragedy of Climate Change in Bangladesh*, SCI. AM.: GUEST BLOG (Apr. 21, 2017), https://blogs.scientificamerican.com/guest-blog/the-unfolding-tragedy-of-climate-change-in-bangladesh/.

[209] IPCC, REPORT ON BANGLADESH LAUNCH OF THE FIFTH ASSESSMENT REPORT (AR5) OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), 3 (2014), https://cdkn.org/wp-content/uploads/2014/05/Report-on-IPCC-

"[a] three-foot rise in sea level would submerge almost 20 percent of the entire country and displace more than 30 million people. Some scientists project a five-to-six foot rise by 2100, which would displace perhaps 50 million people."[210] While Bangladesh may not disappear entirely, perhaps it also should be entitled to additional territory from other states to house its large population and limit the potentially devastating effects of climate change on its national culture as well as the right to self-determination of millions of its citizens who stand to become refugees.

From the opposite perspective, one might argue that the identity-based arguments are too indeterminate to justify even minimally curtailing other states' rights to exclude, even if done to protect the ecological refugee states.[211] Displacing one country from some of its territory to enable the persistence of an ecological refugee state will affect the self-determination and the culture of the state that loses part of its territory to the refugee state.[212] Doesn't a "donor" state also have a right to self-determination on par with the refugee state? Moreover, what metric will be used to determine which countries are displaced from some of their territory for refugee states? In the nineteenth century, as the United States displaced Native Americans from their lands, Native Americans were faulted for not using their lands productively.[213] Forcing states to give up some of their territory because they are not using it according to some externally determined standard would evince a profound disregard for the

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outreach-events-Bangladesh-.pdf; *cf.* Hugo, *supra* note 17, at S29–31 (discussing the vulnerability of the Mekong Delta in Vietnam).

210 Glennon, *supra* note 208; *see also* Damian Carrington, *Climate Change Will Stir 'Unimaginable' Refugee Crisis, Says Military*, GUARDIAN (Dec. 1, 2016, 1:00 AM), https://www.theguardian.com/environment/2016/dec/01/climate-change-trigger-unimaginable-refugee-crisis-senior-military (quoting former military adviser to the President of Bangladesh).

211 *See* WALZER, *supra* note 51, at 50 ("On the one hand, everyone must have a place to live, and a place where a reasonably secure life is possible. On the other hand, this is not a right that can be enforced against particular host states.").

212 *See id.* at 44 ("[T]he link between people and land is a crucial feature of national identity.").

213 BANNER, *supra* note 135, at 160 ("Conventional thought about Indians changed in the early nineteenth century, as the common perception of the Indian gradually transformed from farmer to hunter, and that had the effect of weakening support among educated Americans for recognizing Indian property rights."); *see also id.* at 153, 159, 165, 168, 172–73, 206.

rights of those existing states to self-determination and repeat the mistakes of colonization. This time, however, the territorial surrenders would often be on behalf of descendants of communities that Europeans colonized, as a number of the ecological refugee states are former colonies.[214] Instead of forcing countries to surrender territory on the basis that it is under-populated, or insufficiently productive, the ecological refugee states or an international body might buy territory from existing states on behalf of the refugee states.[215] But, under this approach, the international community would need to develop protections to ensure that the communities whose land is ceded genuinely consent to the cession and to avoid undermining the donor states' rights to self-determination.

An underlying issue with the national identity-based arguments for limiting the national right to exclude is that these arguments presume that national identities are worth protecting.[216] It may be that individuals—not countries, national cultures, or political communities—should be the focus of concern.[217] If so, the right to self-determination might be reformulated as a right that individuals enjoy to be members of a self-defining community in which they can pursue their own interests.[218] Under this understanding, individuals would have a right to be part of a community, though not necessarily their community of birth.[219] If their community were to scatter because

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[214] Wyman, *supra* note 94, at 440 ("For example, the Maldives was a British protected area and then a protectorate from 1796 until it gained independence in 1965, and earlier the islands were under the influence of the Portuguese and the Dutch.").

[215] *See* Dietrich & Wündisch, *supra* note 137, at 97. Indeed, Kiribati has already bought land in Fiji in anticipation of eventual resettlement. Laurence Caramel, *Besieged by the Rising Tides of Climate Change, Kiribati Buys Land in Fiji*, GUARDIAN (June 30, 2014, 8:00 PM), https://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu.

[216] CARENS, *supra* note 9, at 284–86 (arguing that there are important limits on the rights of states to limit immigration to protect national cultures, but noting that others go further and reject the goal of protecting cultures).

[217] *See* Mathew Lister, *Climate Change Refugees*, 17 CRITICAL REV. INT'L SOC. & POL. PHIL. 618, 627 (2014) ("What is plausibly owed to those displaced by climate change is a right, held by individuals, to be able to be full members in a polity that respects them and allows them sufficient autonomy.").

[218] *See id.* at 628.

[219] *See id.* at 627 ("[R]especting minority rights and protecting the rights of the displaced individuals . . . . may all be done without granting new territories to governments of no longer inhabitable states." (footnote omitted)).

its land mass disappeared, they would have a right to join another community; their original community would not have a right to take someone else's territory and recreate itself there.[220] In addition to having an individual right to resettle elsewhere and become part of another community, individuals might have rights to retain an affinity with the remaining population from their (now deterritorialized) home state similar to the way that individuals can have multiple citizenships today.[221] This individualistic formulation of the right of self-determination still would weaken the right of countries to exclude foreigners, but in a different way as countries would have to integrate people who lose their existing communities, not cede territory to those disappearing communities.[222]

B. *Prudential Arguments in the New Climate*

There are also prudential arguments for limiting the right to exclude when people need to change where they live due to climate change.[223] As mentioned above, a prudential argument for allowing countries a wide berth to exclude foreigners is that discretionary national control over borders incentivizes countries to take care of their

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[220] *See id.* ("[I]t is a non-sequitur to suppose that [the right to a minimally just government] means, in the case of a destroyed state, that the old government should be given new territory. Rather, the relevant sort of self-determination can be fully supplied within the individual protections approach, as each individual would be provided the same sort of self-determination rights that anyone anywhere has—the right to take part in a just society."). Matthew Lister argues that "[c]orporate accounts such as Nine's and Kolers" represent an "extreme" view of the right to self-determination because they require "not just the reorganization of an existing state among its current inhabitants, but the transfer of territory from one group to another, completely alien group." *Id.* at 626–27. Walzer's mention of the possibility of nations admitting the necessitous, instead of granting the necessitous territory, might be understood as an implicit acknowledgement that the right to self-determination could be formulated as a right to be part of a community in which one can pursue one's own interests. *See* WALZER, *supra* note 51, at 41–42. Nine attributes such an individualistic formulation of the right to self-determination to Tamar Meisels. Nine, *supra* note 136, at 366–67.

[221] *See* Lister, *supra* note 217, at 627, 632 n.36. Some authors have proposed that countries that lose their land mass due to climate change could continue to be recognized as "deterritorialized states." Jörgen Ödalen, *Underwater Self-Determination: Sea-Level Rise and Deterritorialized Small Island States*, 17 ETHICS, POL'Y & ENV'T 225, 225–26 (2014).

[222] *Cf.* WALZER, *supra* note 51, at 46–48.

[223] *Cf.* Demsetz, *supra* note 56, 347–48, 351–53.

land mass and citizens.[224] Because they can control who crosses their borders, countries know that they can keep for themselves the benefits of the investments that they make in conserving their soil and educating their populations.[225] Countries also know that they will bear the costs of poor governance because their citizens cannot easily move elsewhere due to the right to exclude that all countries enjoy.[226] These arguments presume that countries will internalize the negative and positive consequences of their decisions.[227]

Climate change, however, is unlike the national-scale externality problems that countries are incentivized to address by the right to exclude; it is a global commons problem that no single country can mitigate on its own.[228] It is the cumulative level of greenhouse gas emissions that will determine how much the climate will change, not how much any individual country emits.[229] The right to exclude does not motivate countries to mitigate global externality problems like climate change because the ability of country A to exclude foreigners will not enable country A to reap any special rewards from reducing its greenhouse gas emissions that it can deny to others. Even if A reduces its emissions, it may remain vulnerable to climate change because other countries can continue to emit greenhouse gases, possibly at levels that swamp any of the benefits of A's emission reductions.[230] Moreover, the fact that it is difficult for the citizens of country A to immigrate to country B because of the national right to exclude does not provide country A with any stronger incentive to reduce its emissions because, as just stated, no matter how much country A invests in reducing its greenhouse gas emissions, the amount of climate change will be determined by the global

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224 *See supra* Part II.

225 *See* CARENS, *supra* note 9, at 256–60, 273–74.

226 *See* TORPEY, *supra* note 29, at 162.

227 *Cf.* Demsetz, *supra* note 56, at 348–49.

228 *See* Glennon, *supra* note 208 ("[Impacts of climate change] are happening *to* the people of Bangladesh, not caused *by* them . . . . the unfolding calamity demands a response from the international community. Wealthy countries have generated most of the greenhouse gases that are harming Bangladesh.").

229 *See* Robyn Eckersley, *The Common but Differentiated Responsibilities of States to Assist and Receive 'Climate Refugees,'* 14 EUR. J. POL. THEORY 481, 485 (2015).

230 *Cf. id.* at 486 (noting that China's aggregate emissions are now larger than the United States and its cumulative emissions are growing).

amount of greenhouse emissions.[231] So, the right to exclude does nothing to incentivize countries to address climate change. Indeed, the state system may complicate mitigating the effects of climate change. With over 190 states, each with the right to exclude foreigners and set the agenda for its territory and population, coordinating an international arrangement to reduce greenhouse gas emissions has been difficult.[232]

In addition to doing nothing to encourage countries to reduce their greenhouse gas emissions, an unfettered national right to exclude also may make countries more vulnerable to the effects of climate change.[233] When the landscape suitable for human habitation is changing, national security and public order might be better protected if the right to exclude were constrained and it were easier to move across national borders. More open borders would enable people to more easily escape the "flooding, drought, and higher temperatures" that the Department of Defense warned in a 2015 report to Congress will multiply the threats facing "fragile states and vulnerable populations by dampening economic activity and burdening public health."[234] Immigration from fragile states might act as a

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[231] *See id.* at 485.

[232] Brad Plumer, *Meeting the Paris Climate Goals Was Always Hard. Without the U.S., It Is Far Harder.*, N.Y. TIMES (June 2, 2017), https://www.nytimes.com/2017/06/02/climate/climate-goals-paris-accord.html?_r=0. I am not suggesting that we should have a world government on top of national governments; such a government likely would have negative consequences that would outweigh any benefits it might yield, including a loss in democratic participation in governance.

[233] *See, e.g.*, Glennon, *supra* note 208 ("'Climate refugees, mostly rural farmers and fisherman, are moving into the slums of the country's two largest cities, Dhaka and Chittagong. As conditions deteriorate, the capacity of these areas to absorb more people is nearing the end. The sad reality offers limited options to those displaced. Climate refugees from Bangladesh, a predominantly Muslim country, are not welcome in the neighboring countries of India and Myanmar. India is building its version of a border wall, a barbed-wire fence . . . . It is exceedingly unlikely that the Trump Administration either will welcome Bangladeshi refugees or provide financial support to underwrite costs of relocation to other countries. Opportunities for resettlement in the rest of the world are dwindling.").

[234] *Cf.* U.S. DEP'T OF DEF., *supra* note 195, at 4. The Department of Defense has been analyzing the impacts of climate change for many years, since even before the Obama Administration. *See, e.g.*, Mark Townsend & Paul Harris, *Now the Pentagon Tells Bush: Climate Change Will Destroy Us*, GUARDIAN (Feb. 21,

"safety valve" to reduce social tensions and conflicts within those states, similar to the way that emigration from Britain to the United States (and Canada) did in the nineteenth century.[235] In sending countries, departures may reduce demands for increasingly scarce resources such as land or drinking water;[236] immigrants also might send remittances back home that could help to diversify the incomes of those who remain and help them to adapt to climate change.[237]

One argument sometimes made against using immigration to alleviate tensions in the sending country is that the safety valve creates a risk of moral hazard by reducing the incentives for sending countries to address the underlying causes of their social tensions.[238] In the early 1950s, for example, United States officials debated whether encouraging defections from Communist countries would reduce or increase internal resistance to the Communist governments.[239] But this risk of moral hazard does not apply when climate change is exacerbating, or giving rise to, those tensions. Again, because climate change is a global commons problem resulting from the total level of worldwide emissions, this reduces the amount that countries can do on their own to reduce their impacts, and so punishing the victims of climate change by confining them to their home countries is not going to lead to less climate change.[240] However, countries have greater control over the degree to which they adapt

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2004, 8:33 PM), https://www.theguardian.com/environment/2004/feb/22/usnews.theobserver.

[235] *See* W.W. KNOX, *Migration: Scotland's Shifting Population 1840-1940*, *in* A HISTORY OF THE SCOTTISH PEOPLE 1, 2 (2014), http://www.scran.ac.uk/scotland/pdf/SP2_7migration.pdf; *see also* TORPEY, *supra* note 29, at 68; MICHELLE LEIGHTON & MEREDITH BYRNE, MIGRATION POL'Y INST., WITH MILLIONS DISPLACED BY CLIMATE CHANGE OR EXTREME WEATHER, IS THERE A ROLE FOR LABOR MIGRATION PATHWAYS? (2017), http://www.migrationpolicy.org/article/millions-displaced-climate-change-or-extreme-weather-there-role-labor-migration-pathways.

[236] *See* LEIGHTON & BYRNE, *supra* note 235.

[237] *See* Jana Kasperkevic, *Immigrants Around the World Sent $445 Billion Back to Their Home Countries Last Year*, MARKETPLACE (June 15, 2017, 2:54 PM), https://www.marketplace.org/2017/06/15/world/immigrants-around-world-sent-445-billion-back-their-home-countries.

[238] *See, e.g.*, Joseph Laughon, *Immigration: A Safety Valve for Corruption?*, CAFE CON LECHE REPUBLICANS (Jan. 16, 2014) (on file with author).

[239] *See* GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT 37 (1986).

[240] *See* Eckersley, *supra* note 229, at 482.

to the effects of climate change to the extent that they decide if and how to invest in their citizens and infrastructure to promote resilience to the effects of climate change; so one might ask if countries will under-invest in adaption if their populations can exit to other countries.

Thus far, I have emphasized how the national security of sending countries would be enhanced through more open borders, but increasing immigration is also in the interests of potential receiving countries. Receiving countries might benefit economically from the immigration.[241] Moreover, if there are more legal avenues for orderly immigration to receiving countries, they will have the opportunity to screen immigrants for security and other concerns and stand a greater chance of avoiding sudden mass influxes of people that overwhelm receiving country resources, like the Syrian refugee crisis in Europe.[242] Thus, protecting national security and public order, which often are presented today as reasons for closing national

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[241] For a balanced assessment of the research on the economics of immigration for receiving countries, see Peter H. Schuck, *Immigration Reform: Hard, but Not Impossible*, AM. INT. (Apr. 18, 2017), https://www.the-american-interest.com/2017/04/18/immigration-reform-hard-but-not-impossible/.

[242] *See* TORPEY, *supra* note 29, at 162–63, 166–67; *see also Germany Spent 20 Billion Euros on Refugees in 2016*, DEUTSCHE WELLE (Germany) (May 24, 2017), http://m.dw.com/en/germany-spent-20-billion-euros-on-refugees-in-2016/a-38963299. Indeed, there are suggestions that a drought linked to human-induced climate change, and migration from rural to urban areas stemming from this drought, were some of the factors behind the Syrian uprising that started in 2011. *See* Colin P. Kelley et al., *Climate Change in the Fertile Crescent and Implications of the Recent Syrian Drought*, 112 PROC. NAT'L ACAD. SCI. U.S. 3241, 3241 (2015); Still, Kelley et al. acknowledge that "civil unrest can never be said to have a simple or unique cause." *Id.* at 3245. The history of Mexican migration to the United States also demonstrates that when the legal avenues for migration are curtailed, illegal immigration may increase if there is demand for labor in the receiving country. *See* TICHENOR, *supra* note 29, at 218 (concluding that the United States' immigration reforms in the 1960s that ended the Bracero program and established "new caps on Western Hemisphere immigration both contributed to new waves of illegal entries, creating public policy dilemmas that bedevil national political leaders to the present day"); Douglas S. Massey, *How a 1965 Immigration Reform Created Illegal Immigration*, WASH. POST: POST EVERYTHING (Sept. 25, 2015), https://www.washingtonpost.com/posteverything/wp/2015/09/25/how-a-1965-immigration-reform-created-illegal-immigration/?umt_term=.31c275fc283a&utm_term=.e81f8b1dc25c (arguing that 1965 immigration reforms created more illegal immigration to the United States from Central and South America by reducing the opportunities for legal immigration). Michael Gerrard argued in 2015

borders to immigration,[243] actually might be better served in an era of climate change by relaxing restrictions on immigration.[244] We might think of more open borders as an insurance mechanism for dealing with the effects of climate change that would provide individuals in vulnerable countries with a way out and receiving countries with an orderly way to plan for their integration.[245]

C. *Other Arguments for Limiting the Right to Exclude*

I have argued that the identity and prudential arguments often advanced on behalf of robust national control over immigration support curtailing the national right to exclude under the changed circumstances of climate change.[246] As a postscript, it is worth noting that the longstanding arguments for more open immigration policies also continue to be relevant in an era of human induced climate change. Carens's appeals to equality and liberty[247] retain their validity (and their drawbacks), as do the economic arguments that immigration increases economic growth and human welfare.[248]

Then there are the existing targeted arguments for selective exceptions to the national right to exclude. Appeals to necessity support expanding the protections available to people in imminent danger, by enlarging upon existing protections for refugees.[249] As mentioned above, a number of the political theorists who have written about climate change and immigration have returned to the principle

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that the Syrian refugee crisis foreshadows the kind of mass migration that could be triggered by climate-related impacts. Michael B. Gerrard, *America Is the Worst Polluter in the History of the World. We Should Let Climate Change Refugees Resettle Here.*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/opinions/america-is-the-worst-polluter-in-the-history-of-the-world-we-should-let-climate-change-refugees-resettle-here/2015/06/25/28a55238-1a9c-11e5-ab92-c75ae6ab94b5_story.html?utm_term=.8890072f0460.

243 *See* CARENS, *supra* note 9, at 276–77.

244 *Cf.* TICHENOR, *supra* note 29, at 218.

245 *See* Wyman, *supra* note 94, at 451–52 & n.37; *see also* Ellickson, *supra* note 57, at 1341–44 (analyzing "group ownership" of land as a "risk-spreading device").

246 *See supra* Sections IV.A, IV.B.

247 *See* CARENS, *supra* note 9, at 233–36.

248 *See, e.g.*, Howard F. Chang, *The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory*, 41 CORNELL INT'L L.J. 1, 2–3 (2008).

249 *See, e.g.*, Lister, *supra* note 217, at 619–25.

of necessity in Grotius—and Locke's sufficiency proviso—to ground arguments that countries are morally obligated to admit people fleeing their home countries because of climate change.[250] Corrective justice also provides some individuals with a claim to be admitted to a foreign country.[251] The theory is that countries whose actions put others at risk have an obligation to admit those people to their societies.[252] After the Vietnam War, American officials felt a responsibility to accept Vietnamese refugees; today, there is a special refugee program for admitting Iraqis endangered by their work with the United States.[253] Along these lines, a number of scholars argue that countries, especially wealthy developed countries, are morally obligated to admit people displaced by climate change based on the countries' histories of greenhouse gas emissions.[254] Strictly construed, these arguments would provide a right to immigrate to only those migrants who can prove their migration is attributable to climate change, a tall order given that climate change usually will be one of a number of factors behind someone's decision to move.[255]

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[250] *See* Kolers, *supra* note 136, at 334–340; Nine, *supra* note 136, at 359, 366; Risse, *supra* note 89, at 282–83.

[251] *See* Katrina Miriam Wyman, *Responses to Climate Migration*, 37 HARV. ENVTL. L. REV. 167, 191 n.142 (2013) (identifying sources arguing that developed countries are obligated to assist climate migrants as a matter of corrective justice).

[252] *See id.* at 191–92.

[253] *See* CARENS, *supra* note 9, at 195; LOESCHER & SCANLAN, *supra* note 239, at 113–14, 120, 123; TICHENOR, *supra* note 29, at 223; BUREAU OF POPULATION, REFUGEES, & MIGRATION, U.S. DEP'T OF STATE, *U.S. Refugee Admissions Program (USRAP) Direct Access Program for U.S.-Affiliated Iraqis* (Mar. 11, 2016), https://www.state.gov/j/prm/releases/factsheets/2016/254650.htm.

[254] *See* Peter Penz, *International Ethical Responsibilities to 'Climate Change Refugees*,' *in* CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES 151, 161 (Jane McAdam ed., 2010); Sujatha Byravan & Sudhir Chella Rajan, *The Ethical Implications of Sea-Level Rise Due to Climate Change*, 24 ETHICS & INT'L AFF. 239, 243–44 (2010); Eckersley, *supra* note 229, at 485. On immigration benefits as restitution, see generally James Souter, Comment, *Towards a Theory of Asylum as Reparation for Past Injustice*, 62 POL. STUD. 326, 327, 329, 334–35 (2014).

[255] *See, e.g.*, Ives, *supra* note 1.

V. CONCLUSION

State sovereigns and private landowners both control access to land, but the scope of the state's right to exclude currently is strikingly broader than that of private landowners.[256] This state of affairs reflects the political dominance of modern states, which, at least in the developed world, have the internal authority to curtail the rights of landowners and the external authority to hold foreigners at bay.[257] There are well-articulated arguments, such as Carens's, that the state's virtually unconstrained authority to exclude foreigners is too broad under current conditions.[258] Regardless of what we think of Carens's liberty and equality based arguments for open borders, climate change will strengthen the case that the breadth of the state's current authority to exclude is excessive.[259] It will alter the areas that are suitable for human habitation and lead to changes in the places people live.[260] In this new context, the arguments that the right to exclude protects self-determination and national security hold less sway. Fostering self-determination might require states to give up part of their territory or grant citizenship to citizens of other states.[261] Nations also might be better protected against threats to their national security by creating more legal avenues for immigration, because these might provide an orderly safety valve for people to leave fragile states that lack the resources to adapt to climate change.[262] Still, climate change may not necessitate completely opening national borders; the constrained nature of the private landowner's right to exclude shows that there are intermediate possibilities between the largely unconstrained authority to exclude that states currently enjoy and the elimination of the right to exclude.[263]

There is a tension at the heart of the current administration's approaches to climate change and immigration: in refusing to join

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256 *See* Cohen, *supra* note 62, at 374.

257 *See supra* Part III.

258 *See generally* CARENS, *supra* note 9, at 225–54.

259 *See supra* Part IV.

260 *See* MARTIN, *supra* note 24, at 2.

261 *See supra* Section IV.A.

262 *See supra* Section IV.B.

263 *See* CARENS, *supra* note 9, at 251–52 (there are other ways of structuring the immigration process that would represent a great advance in human freedom even while falling short of open borders).

other countries in reducing greenhouse gas emissions, the administration may be undermining the long-term viability of its isolationist immigration agenda. It is true that the right of nations such as the United States to exclude may not be relaxed just because the force of the arguments for a robust right will diminish as the consequences of climate change are felt around the world. As political scientist Daniel Tichenor argues in his history of United States immigration policy, Americans "remain profoundly ambivalent about immigra[tion]," even though "they have woven immigration narratives and iconography into their collective cultural identity."[264] Chinese exclusion starting in the nineteenth century, and the national origins quota system that endured for four decades from the 1920s to the 1960s, are some of the more prominent manifestations of that ambivalence.[265] But the United States and many other countries will not easily be able to close themselves off from peoples that will be harmed by climate change.

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264 TICHENOR, *supra* note 29, at 289.

265 *See id.* at 87–113.