

“A Critical Analysis of ‘Nation-State Sovereignty’ as a Basis for Excluding Unauthorized Migrants from Citizenship”¹

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ABSTRACT: The concept of nation-state sovereignty stands as one of the chief obstacles to the enactment of a “pathway to citizenship” for unauthorized migrants living as residents in the United States. This is so because those representing unauthorized immigrants as “invading aliens” and “criminal foreigners” gain significant political traction from their claim that these migrants have violated the “territorial sovereignty” of the United States. And those supporting a “pathway to citizenship” for unauthorized migrants rarely challenge this bedrock assumption. This paper critically analyzes the nation-state sovereignty obstacle to political membership for unauthorized migrants, and finds that there are multiple grounds on which to challenge the political legitimacy of this obstacle. Nevertheless, on grounds of political prudence, the paper suggests that directly challenging U.S. sovereignty in order to win support for the political inclusion of unauthorized migrants is not likely to gain much political support. At the same time, the paper suggests that this critical analysis provides some degree of support for the legitimation of the “pathway to citizenship” by undermining the assumed moral superiority of the exclusionary argument, and by lending support to the principle that relatively long-term *de facto* membership in the political community creates legitimate grounds for the inclusion of unauthorized immigrants.

One of the most intractable issues in contemporary American politics is the question of what to do about the estimated eleven million unauthorized immigrants residing in the United States. How should the country’s governments respond to this very large fact of life? Politically active respondents to this question tend to cluster around two extremes, while most Americans seem to be genuinely ambivalent about what course of action should be

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taken in response to this large-scale presence of neighbors who are without legal authorization to be in our midst.

At one extreme, those activists I term *exclusionists* believe that the U.S. government has failed in its obligations to protect the borders against a perceived deluge of unauthorized migrants, and that all U.S. governments should find ways to remove these so-called “illegals” as quickly and efficiently as possible. At the other extreme, those I term *inclusionists* believe that, however they got here, most of these millions of unauthorized migrants have made themselves *de facto* members of the community, and they should be authorized – through a legitimating “pathway to citizenship” – to make themselves *de jure* members of the national community. But most Americans, as noted, seem caught between these two poles, finding truth in both positions at the extremes and unable to find the path that seems the obvious best answer. This ambivalence appears to be reflected in the policy stalemate in Congress on this issue, in place for over a decade though it shows some signs of movement in the post-2012 election period as some Republican legislators contemplate their political need to court Latino voters.

In engaging this subject, I have suggested previously (Schmidt, 2011) that the debate between the two activist groups can be understood usefully as a form of *identity politics* in which competing representations of unauthorized immigrants constitute important weapons in the effort to win over the ambivalent middle. Thus, on the one hand, exclusionists represent the unauthorized as *alien invaders, foreign outlaws* who have crossed the border as marauding criminals to take from real Americans what does not belong to them. Basing their representational narrative on a series of assumptions about the nature of the political world in which we live, exclusionists emphasize the alien and

law-breaking character of unauthorized migrants, depicting them as taking advantage of Americans in a number of ways: by taking away “American” jobs; by siphoning off hard-earned tax dollars from real Americans in the forms of law-enforcement costs (policing, adjudication, incarceration), for the schooling of their children, and for health care and a myriad other social services. Moreover, exclusionists represent unauthorized immigrants as a corrupting influence on the political community, this by illegally presuming membership rights and voting privileges, by illegitimately swelling the ranks of Latino political activists in support of policies aimed at undermining American culture and political unity (e.g., policies aimed at supporting and maintaining bilingualism), and by claiming citizenship for their American-born children through a misinterpretation of the Fourteenth Amendment to the U.S. Constitution.

Inclusionists, on the other hand, depict unauthorized immigrants in radically different terms. Rather than invading and dangerous aliens – strange and foreign outlaws seeking to take advantage of Americans – unauthorized immigrants are represented by inclusionists as people who (apart from the fact that they lack the proper papers) are “just like us.” Indeed, they have made themselves *part of us* through their hard work on our behalf and through their *de facto* membership in our communities. Undocumented immigrants do not live segregated lives in refugee camps along our borders or in workers’ quarters at the edges of our cities. Rather, they are individuals and families living among the rest of the population. They live in neighborhoods alongside authorized residents and citizens of the country, they sit in classrooms together with other residents of their neighborhoods and communities, their children play with our children in parks and recreation facilities, they work next to many of us (and sometimes in our homes and

gardens), they serve us food when we eat out and wash our dirty dishes afterward, they harvest and package the food that we eat, they sew our clothes, they pray with us in our places of worship, they pay taxes along with us, sometimes they own property in our cities and neighborhoods, they have opinions about our collective well-being that sometimes call them to try to influence our public decisions (despite not being allowed to vote), and they are members of our families as well. Yet, despite their obvious membership in our communities and nation, they are forced – unjustly – to live in a shadow world of fear and hardship, often subjected to exploitation without recourse and possible deportation, and without the right to political voice and action that lies at the heart of our democratic aspirations as a country.

In this way, the two sides in this debate may be seen as depicting two radically different understandings of the very *identities* of unauthorized immigrants in the United States. And each of these understandings of unauthorized immigrant identity is based on a series of (usually) unarticulated and undefended assumptions about the political world that gives those identities meaning and that shapes the politics and policy proposals of those defending one or the other of these representations. The project to which this paper contributes aims to uncover and critically assess these assumptions and the political claims that derive from them in order to shed light on what is at stake, and for whom, in this highly volatile political conflict.

The present paper takes critical aim at one of the most fundamental of the central assumptions underlying the exclusionary position: that the world's population of humans is divided into memberships in discrete nation-states that rightfully claim **sovereignty** over their territories and the peoples within them. This understanding of the political world is

foundational for the exclusionary case because only if the world can be so understood can these migrants be seen rightfully as invasive aliens without legitimate rights and claims of their own. Without the assumption of a world of separate and independent sovereign nation-states, the claims made by exclusionists would lose much of their force. This paper seeks to determine whether this fundamental assumption can be successfully challenged by inclusionists. The paper's analysis finds that there are multiple and persuasive grounds on which to challenge this core assumption of the exclusionary argument, but that nevertheless inclusionists will find it hard to make political headway against the exclusionary position's foundational perspective. Still, the paper concludes by arguing that valuable lessons can be learned from this critical analysis that may buttress the inclusionary position.

1. The Nation-State's Authority to Control Immigration: Sovereignty as Foundational Assumption.

Let me state the following premise about which there is little disagreement. It is the obligation of the Federal Government to secure the borders of the Nation from illegal entry and unauthorized invasion.

Rep. Steven Horn (R-CA), August 9, 1996

This succinct statement by Congressman Horn in opening a Congressional hearing, and quoted by Newton (2008, p. 1), does indeed articulate a premise "about which there is little disagreement" in the political world of international migration. Thus, Congressman Horn's statement reflected a similar degree of certitude on the question as enunciated by the U.S. Supreme Court, in *Chae Ping v. United States* (1889), more than a hundred years earlier: "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 is open to controversy" (p. 603).

Underlying this certainty by top U.S. public officials is a premise, noted above, that is taken for granted by virtually all parties in the controversies over unauthorized immigration: that the world's population of humans is divided into memberships in discrete nation-states that rightfully claim sovereignty over their territories and the peoples within them. Even the 2005 Report of the Global Commission on International Migration, which made strenuous efforts to recommend greater international support and protection of the human rights of international migrants – authorized and unauthorized – articulated its support of the “sovereign right” of states “to determine who enters and remains on their territory” (Global Commission on International Migration, 2005, p. 32).

It is rare to find such unanimity on claims made in political life, but the evident naturalness of a world carved up into sovereign nation-states seems to be one of the few exceptions in contemporary times. And so it appears equally natural to claim, on the basis of this premise, that the U.S. government has both a right and an obligation to control the country's borders against “invasion” by “aliens.”

As long as this claim of national state sovereignty stands in the form in which it is typically expressed and taken for granted, there seems little hope of finding a way through which unauthorized migrants may be understood as people who are truly part of “us,” people to whom we owe obligations of co-membership in our political community. As will be made evident below, there are powerful grounds on which to challenge the bedrock assumption of nation-state sovereignty, but before these are examined, we need to understand the bases for nation-state claims to sovereignty in the contemporary world.

Most discussions of this subject take their bearings from fundamental changes in the European political order in the early modern period, especially in the 16th and 17th

centuries (see, e.g., Jackson, 2007). Prior to this transformation, boundaries and borders in the European political order were much more varied and ambiguous than they have been for the past several centuries. Political authority was mediated through a complex network of personal attachments, obligations, and loyalties that has long been known as the *feudal order*. This network was hierarchical, though not neatly so, as individuals within it might have conflicting and ambiguous obligations to multiple superiors and/or inferiors occupying differing niches in the hierarchy. Political jurisdictions were equally ambiguous, and tended to be organized in relation to individual rulers or offices more than to territorial boundaries. Rulers “owned” and ruled lands that might be scattered across several countries. And those lands might be embedded in larger territorial boundaries with higher-level rulers to whom they owed fealty and who might also be in conflict with each other.

Over most of these multiple European jurisdictions and rulers with overlapping territories was the concept of a universal Christian community that was to be ruled by an emperor (roughly modeled on the Roman empire of the late classical era) and a pope who headed a complex hierarchy of his own with religious officials (bishops, priests, abbots) located throughout the same territories and lands governed by the secular rulers described in the preceding paragraph. These church officials, too, claimed authority to govern the behaviors of individuals and families within their realms.

Individuals living in this pre-modern European world would have been astonished to hear that the human world is “naturally” divided into discrete and separate nation-states, each with its own singular territory and national memberships ruled by sovereign governments. Most of these individuals would have been equally astonished to hear that a

singular national citizenship encompassed the sum total of their political obligations, and was the sole institutional basis for their claim to civil and political rights.

The idea of a world of singular and separate sovereign nation-states emerged in this context, and it did so as a way to resolve conflicts between authorities claiming jurisdiction over the same political decisions, territories, and peoples. Contesting authorities – primarily popes and European kings – engaged in a series of battles that gradually resulted in the victory of the kings as the exclusive *sovereigns* within the territories they controlled. Over time, these kings consolidated their ability to have the “last word” as ultimate authority in their domains. Through this capacity to have the last word in relation to public decisions involving their territories and peoples, these sovereigns came to exercise *sovereignty*. Gradually, this process of political change resulted in what has come to be known as the “Westphalian order,” a term signifying the world of separate nation-states, each of which is sovereign in relation to its own bounded territory.

As numerous writers (see, e.g., Kalmó, 2010; Jackson, 2007) on the subject have pointed out, the concept of sovereignty has two dimensions, one internal and one external. The internal dimension asserts final authority over the public decisions involving a political community’s territory and people. The external dimension asserts the right of a political community to control its own destiny, its territory and its people, in the face of attempts at control by outside forces. With respect to both dimensions, the central criterion has to do with having the “last word”; i.e., having to answer to, or cede control, to any other power means that a political entity lacks complete sovereignty. Jackson summarizes this two-edged meaning of sovereignty as follows: “When a government is said to be sovereign, it

holds supreme authority domestically and independent authority internationally, at one and the same time” (Jackson, 2007, p. 6).

It is the international, external dimension of sovereignty that is the basis for a state’s claiming the authority to decide whether, how many, and which specific migrants will be allowed to enter that state’s territory. In explicating the UN Charter’s consecration of the doctrine of “equal sovereignty, territorial integrity, and non-intervention,” Jackson nicely articulates the “real estate” function of nation-state boundaries:

The lines on the political map – international boundaries – mark that political and legal independence of sovereign states from one another. They are the “no trespassing” or “keep out” signs of international politics and law. They delineate and differentiate the most basic “we” and “they”, “ours” and “yours” of global political life. On this side of the line is our place, on that side your place. We are neighbors, and neighbors leave each other alone. The doctrine of non-intervention long has been, and still continues to be, keyed to the idea of state independence and territorial integrity. (Jackson, 2007, pp. 8-9).

It is in this way – both conceptually and under international law – that nation-state governments are said to hold “sovereignty” in relation to the maintenance of their boundaries, thereby exercising authoritative control over the in-migration of peoples. That is, the “no trespassing” and “keep out” signs signified by international boundaries apply to individuals and families seeking to enter countries not “their own” as well as to governments of neighboring states. It is on this conceptual and legal foundation that the entire system of border guards and check-points, passports, guest visas, student visas, temporary worker permits, permanent resident cards, etc., has been built.

By the end of the twentieth century, as noted, virtually the entire globe had been carved into discrete nation-states, each claiming exclusive authority over its people, as well as independence from the control of each other, and all firmly supported by the sanction of

international law. Moreover, the boundaries of the nation-state system seem to have become stabilized in the late twentieth century. While countries may still invade each other and seek to dominate each other, and while countries may still disaggregate into smaller countries (e.g., Sudan, Yugoslavia, Czechoslovakia), Jackson asserts that there have been no instances in which the international boundaries between countries have been moved in the period since mid-twentieth century (Jackson, 2007, pp. 109-111).

The world confronted by prospective migrants, therefore, is a highly bounded world, one in which the freedom to migrate is highly constricted, and dependent on authorities claiming that their countries' sovereignty provides them with the "last word" on whether or not they will be allowed entrance to the countries to which they may seek admittance. Just how solid is this sovereign authority claimed by the world's national rulers?

2. Chinks in Sovereignty's Armor: the Empirical World of Realist Power.

... you know as well as we do that, when these matters are discussed by practical people, the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept.

Thucydides, from "The Melian Dialogue" in *The Peloponnesian War*²

In surveying the actual empirical world in which we live, the first thing we may notice is that despite the proclamations of international law that each nation-state has "equal sovereignty, territorial integrity, and non-intervention" as a matter of right, things don't actually work that way. In the "real world" of day-to-day life, the sovereignty of nation-states is only as real as allowed by the power relations of any given country in relation to other sovereign nations. As Thucydides' Athenian spokesperson responds to the Melians who have decried the injustice of Athenian domination of their country: we dictate

² Thucydides, 1972, p. 402.

terms to you in our own self-interest, and you respond as you must; either submit or we will punish you severely. Considerations of justice, the Athenian says, make sense only when the parties have equal power.

From this realist point of view, the *practice* of sovereignty (having the “last word”) can be understood only in terms of *power relations*. In practice, a country has sovereignty, and therefore territorial integrity, only insofar as it has the power to protect its borders from invasion or other forms of compromise. Thus, sovereignty is, in fact, a *relational*, and not a *categorical*, concept. It is not a fact that all countries in the world simply “possess” something (a category) called sovereignty just by virtue of being “independent” countries. Some have more sovereignty than others, and what distinguishes them from each other is their relative power to compel others to act according to their will.

And closely related to this fact is the further reality that no country is truly “independent.” If the practice of sovereignty is relational in nature, it can only be so because countries are *interdependent*, and not independent in the sense of having impermeable boundaries such as billiard balls bouncing off each other on a table (see, e.g., Kalmo and Skinner, 2010, for a discussion of sovereignty and nation-state interdependencies). The political communities of the world are, in reality, embedded in a web of interdependencies and they practice “sovereignty” through their power relations. The existence of border fences, border guards, immigration courts, passport and visa requirements, etc., does not deny these realities, but is part of them, part of how countries’ *power* to be sovereign is enacted. Citing another scholar, Piirimae summarizes the point as follows:

With regard to long-term developments in Europe as a whole, . . . in international politics ever since Westphalia, most states have lacked the

power to realize their claim to external sovereignty; powerful states, on the other hand, have not only habitually intervened in the affairs of others but have indeed proclaimed their right to do so, for example at the congresses of Vienna and Berlin, in the Treaty of Versailles, or in the doctrines of Monroe and Truman. As a result, 'the external sovereignty of states has not since 1648 been the basis for much of international politics.' (Piirimae, 2010, p. 65)

What are the implications of this set of realities for the debate over unauthorized immigrants in the United States? For present purposes, perhaps the most important implication is that grasping these realities of political life should force us to recalculate the moral authority of the arguments being made by those engaged in the debate. In particular, American immigration *exclusionists* tend to hold sway in the argument over unauthorized immigrants because they are thought to occupy the moral high ground. This is by virtue of the belief – virtually unchallenged, as we have seen – that these immigrants have violated the legitimate boundaries of the “sovereign” United States. They are represented in this discourse as alien law-breakers, outlaws, and criminals who should be treated accordingly. But understanding the realities of the practice of inter-state sovereignty relations and territorial integrity should enable us to see these simple and unquestioned assertions in a new and more morally ambiguous light.

This becomes clear in examining critically the causal patterns involved in international migration from a larger, more global and more realistic, perspective. Exclusionists premise their rhetoric from a nationalist, U.S.-centered frame of reference. From that perspective, immigrants are viewed as people from the “outside,” who leave their own countries to come “into” another country and have impacts (mostly negative) *on* it. From this frame of reference, immigrants make up the independent variable, the engine of change, and the United States is the dependent variable, the passive recipient of international migrants. Looking at international migration from a larger perspective,

however, quickly makes it obvious that the United States is *not* a passive victim of external forces but has been one of the most powerful engines of change driving international migration in the world for nearly two centuries.

There is not space to explore this history in detail here, but it is important to note that U.S. foreign policy has repeatedly involved violent interventions in other countries and these interventions have *stimulated* significant numbers of international migration flows, both authorized and unauthorized. Prominent examples include the expansive immigration consequences of the U.S. wars with Spain in 1898 (leading eventually to large numbers of Filipino and Cuban immigrants), and with Vietnam in the 1960s and 1970s (leading to large numbers of Vietnamese, Cambodian, and Hmong immigrants). In addition, U.S. foreign policy has helped to stimulate the migration of large numbers of people from Iran, Nicaragua, Guatemala, Honduras, the Dominican Republic, Chile, Panama, Columbia, and other countries during the mid-to-late twentieth century. In many cases, these foreign policy interventions have destabilized political and social relationships in these countries, leading people within them to seek better conditions in other countries such as the United States. In some cases, moreover, these interventions have led to specific ties with individuals who worked to help U.S. interests, and whose work later led them to seek shelter in the U.S. from retribution by their former compatriots in their home countries.

A similar pattern of causality may be seen in relation to U.S.-based *commercial activities*. Some of this derives from overt efforts to recruit immigrants for American businesses that perceive themselves as suffering from a shortage of labor, a practice that has operated – with ebbs and flows – rather continuously since the early part of the nineteenth century. Within this practice, few businesses are motivated to distinguish

between authorized and unauthorized immigration in order to protect American sovereignty. American business interests abroad (e.g., American owned factories, foreign contractors, service-providers, etc.), in addition, develop ties with individuals and groups in other countries who then seek entry as immigrants. Even more significant, American-based commercial activities in other countries often have disruptive effects on the local economic and social behavior that becomes a causal factor in leading those whose ways of life have been compromised, if not destroyed, to seek opportunities elsewhere through migration. With the reach of the American businesses and American-connected corporations having spread to nearly span the globe, the potential for the U.S. stimulation of immigrants has grown accordingly.

Both of these forms of immigration stimulation by the United States may be seen in full flower in the case of the special relationship between the United States and Mexico, the country whose emigrants make up the largest proportion of unauthorized immigrants in the United States. The story of Mexican-origin immigration must be understood as having its beginnings in the mid-nineteenth century, when American foreign policy led to a war of conquest against Mexico, after which the U.S. compelled Mexico to “sell” nearly one-half of its territory to the United States (including all or part of the following present-day U.S. states: Texas, New Mexico, Arizona, California, Colorado, Utah, Nevada, Oklahoma, Kansas, and Wyoming). After the U.S. incorporated this territory, Mexican citizens were given a choice of uprooting themselves and moving within the boundaries of their now much-smaller homeland, or remaining in their homes in what was now U.S. territory. Under the provisions of the treaty ending the war, most chose the latter, becoming U.S. citizens in the process. However, most of these new U.S. citizens soon found themselves unable to exercise

the rights of citizenship, including voting rights, and they were quickly relegated to second-class citizenship, which often included racial stigmatization, segregation, and discrimination in a multitude of forms (see, e.g., Menchaca, 2001).

In the aftermath of this military conquest, and in addition to periodic U.S. military incursions into Mexico's "sovereign" territory, moreover, U.S. economic interests soon found ways to "open up" Mexico's economy for investment and "development." As a consequence, it was not long before Mexico could be characterized as an informal colony of the United States. That is, even though the United States did not formally take control of Mexico's government through the typical European method of colonial empire, it did, in fact, gain economic and political hegemony over its conquered neighbor to the south, exercising great control over myriad aspects of that country's historical development (see, e.g., Gonzalez and Fernandez, 2003). While the Mexican Revolution of the early twentieth century managed to reverse some aspects of this economic colonization (e.g., the expropriation of Mexico's oil reserves, and restrictions on the ownership of land by non-Mexicans), U.S. economic interests have nevertheless played a very powerful role in Mexico's economic development until the present. Much of the Mexican migration to the U.S. in the last two decades, indeed, can be traced to the economic disruptions and devastation wrought by the North American Free Trade Agreement, negotiated at the end of the twentieth century on terms strongly favorable to dominant U.S. economic interests (see, e.g., Bacon, 2008 and Gonzalez, 2006, for a discussion of the consequences of both NAFTA and U.S. guest worker programs for Mexican migration to the United States).

Finally, there is substantial evidence that U.S. border control agents have worked closely with U.S. business interests over a number of recent decades to informally "manage"

a steady “as-needed” supply of unauthorized Mexican migrant workers in the U.S. to meet employers’ needs for labor in a variety of industries, including agribusiness, meat processing, and construction (see, e.g., Akers Chacon and Davis, 2006; Bacon, 2008). In this case, the sovereign territorial integrity of the United States has been compromised at the behest of U.S. economic interests and by U.S. government agents.

The point of this discussion, again, is to indicate that the United States is not an innocent and passive recipient of immigrants coming from other countries. The traditional scholarly discourse on the *causes* of immigration (i.e., “push” factors in the home country, and “pull” factors in the destination country) almost completely overlooks the degree to which “push” factors may be the result of direct and indirect contacts between the two countries that are not directly related to immigration per se. Thus, when U.S. discussions on immigration focus on the fact that Mexicans account for nearly one half of immigrants (legal and undocumented) to the United States, they nearly always point to the proximity of the two countries, as well as to the relatively “under-developed” economy of Mexico, as key factors “explaining” the relatively high level of migration from that country. What these discourses miss entirely, however, is the deeply intertwined histories of social, economic, political, military, and cultural interactions that have shaped each country’s development, a history in which the United States has been a dominant force in shaping Mexico’s development as a country. The “Westphalian” model of autonomous, independent, and separate nation-states with sovereign governments that exercise effective control over their borders and authority over the citizens and denizens within – widely recognized by scholars as an increasingly inaccurate and even fictive depiction of reality in the contemporary world (see, e.g., Krasner, 1999; Habermas, 2001; Benhabib, 2004) – has

never been accurate in the case of Mexico and the United States. The reality is that one cannot accurately understand the historical development or present reality of *either* country without understanding the degree to which they are deeply intertwined (see also, Bonilla, et. al., 1998).

In sum, examining these patterns of causality from a realist perspective means that assigning moral blame and criminality to unauthorized immigrants for violating the sovereign independence and territorial integrity of the United States seems highly misplaced. From a larger, and more accurate, global perspective, representing most unauthorized migrants as criminal invaders in violation of U.S. sovereignty can only be done with the greatest hypocrisy. And hypocrisy is not a solid foundation for those claiming to be on the moral high ground in the debate over how best to respond to unauthorized migration.

3. Chinks in Sovereignty's Armor: the Problematic Foundations for Sovereign Authority.

While a realist perspective may render ambiguous the moral standing of both individual migrants and powerful nation-states in relation to unauthorized migration, supporters of using U.S. sovereignty as a foundation for an exclusionary representation of unauthorized migrants retain an important trump card not yet addressed in this analysis. This trump card rests on the distinction between *power* and *authority*. For demonstrating that American state officials and business leaders have violated the sovereignty of weaker countries and played an important role in stimulating unauthorized immigration does not mean that the concept of sovereignty carries weight only in terms of power relations.

Indeed, as Jackson argues (2007, pp. 14-19), the concept of sovereignty is embedded in international law precisely because its meaning rests on the distinction between power

and authority. While power is relational and not categorical, authority *is* categorical, and to “have sovereignty” simply *means* that a political entity is *authorized* to have the “last word” on some particular matter (e.g., on whether or not someone has the right to gain entrance to one’s territory). To say that sovereignty is nothing more than power relations because many countries’ sovereignty is violated by more powerful states is akin to saying that the law against premeditated murder cannot be a valid law unless no murderer goes free of punishment. Because the United States has the power to violate weaker countries’ sovereignty is not a compelling reason to believe that Mexico’s sovereignty should not be recognized and upheld under international law. Putting the argument differently, *power* is the capacity to make something happen that would not otherwise occur, while *authority* means that this capacity to exercise power is legitimate or rightful. To be sovereign, then, means to have the *right* to have the last word over some matter.

As a result, it is quite possible for exclusionists to be persuasive in claiming that whatever culpability U.S. foreign policy and commercial activities have in stimulating unauthorized immigration to the United States, the country has every right to continue to try to seal its border against unauthorized entries by migrants as well as to rid the country of those unauthorized migrants who have managed to evade the country’s legitimate authorities. For purposes of this analysis, therefore, it is necessary to inquire critically into the foundations for sovereignty’s authority in the contemporary world. If a country’s sovereignty rests upon the authority of its claims to have the last word on something like control over migration, what are the foundations for such claims to authority? What follows, then, is a critical examination of the *bases* for any country’s claims that it is *authorized* to be sovereign in relation to its borders.

Once again, it seems helpful to examine the historical development of the concept of sovereignty as a way to approach this subject. More specifically, in the political development of the west (where the concept originated and became so powerful), *who* has claimed to have the last word – to actually exercise sovereignty – and what are the *bases* for these claims?

At the beginning of the modern age in Europe, as noted above, sovereignty was claimed by *kings* engaged in conflict with other political entities, especially the pope and the Holy Roman Emperor. These monarchs asserted the authority to have the last word in regard to the people and the territories they governed. This authority over people and territory, respectively, undergirded the internal and external dimensions of their sovereignty. They were “sovereigns” precisely because they had the *right* to exercise this control over people and territory. But on what bases could these individuals claim such authority?

During the early modern period, this question was answered for most kings through the doctrine of “divine right,” which itself derived from the pre-modern period of a “universal Christian community,” in which church authorities – authorized by God – anointed and invested secular rulers with divinely sanctioned authority. After European monarchs rejected the authority of the pope, they nevertheless sought to continue the claim of divine right as the basis for their sovereign authority. As Jackson summarizes the reasoning behind the doctrine:

In this way of thinking, kings are directly God’s agents on earth; to perform that role they do not have to call upon the church. They are sovereign on earth because God made them so. Henry VIII is sovereign because he is carrying out God’s plan and executing God’s will. Henry must therefore be obeyed absolutely – regardless of what the pope or other religious leaders command – for otherwise one is disobeying God. (Jackson, 2007, p. 57).

It was not long, of course, before the multiplicity of religious communities that followed in the wake of the Protestant Reformation undermined the foundations for these monarchical claims. In England, for example, Oliver Cromwell's "roundheads" challenged the whole notion of monarchs being anointed by God to rule absolutely over their kingdoms. And even after the British monarchy was restored in the seventeenth century, the belief in divinely invested monarchical sovereignty was never fully restored with it. In France, of course, the divine right doctrine was fatally wounded somewhat later, by the 1789 Revolution.

Despite many eddies and swirls in the evolution of the bases for sovereign authority in Europe, what ultimately came to replace the divine right of kings was the notion of *popular sovereignty*. As Jackson put it: "What proved to be morally decisive in defying the king, or at least curbing royal authority and power, was the claim that sovereignty was a trust from the people" (Jackson, 2007, p. 58). Central to this transition were two more key concepts: *state* and *nation*. More fully, the ideas that facilitated the transition were, first, that the king's sovereignty actually rested on the fact that he personified the authority of the *state* (the institutional embodiment of the political community); and second, that the political community institutionalized in the state came to be understood as the *nation*. The result of these conceptual moves meant that a "people" – understood as a nation – exercised sovereign power through a state apparatus in which that sovereignty was delegated to authorized representatives (e.g., absolute and limited monarchs, elected executives, legislatures, judiciaries, etc.). Thus emerged the doctrine of *popular sovereignty*, and it has been the dominant foundation for nation-state authority in the western world

since the eighteenth century, and more recently may be said to be the dominant basis for nation-state authority throughout the globe.

Despite the clarity of this dominant fact, as an authoritative foundation for contemporary nation-state sovereignty the idea of popular sovereignty leaves many questions unanswered. Most important, it begs two key questions. First, who are *the people*? And second, how did a given “people” acquire the right to hold sovereign authority over a specified territory?

The simple answer to the first question, of course, is that a nation-state’s *citizens* constitute its *people*. This is the formal, legal answer: “the people” are those who have gained the categorical status of membership in the body politic either through birthright (*jus sanguinis* and *jus soli*) or through a naturalization process. But this answer is not only simple; it is also simplistic. In relation to the *sovereign authority* of the people, the real question is how these methods of acquiring citizenship were authorized, and on what bases? And in relation to birthright citizenship – which is the method through which nearly all citizens acquire their status – Shachar (2009) has persuasively pointed out that the acquisition of citizenship through birthright is morally arbitrary, since it is derived from an accident of birth (a “birthright lottery”) that has no meaningful relationship to moral desert. As individual humans, none of us *deserves* to have the specific citizenship we acquire by birth. So what can give a group of people who recognize each other as co-members of a political community – and most of whom acquired that membership by accident of birth – the *right* to exclude others who may wish to belong, or simply to share the same geographic space?

Some political theorists argue that democracy – the institutionalization of popular sovereignty – is the only legitimate form of government and that democratic government cannot exist unless membership is bounded. These theorists argue further that those boundaries are rightfully constructed and maintained by the pre-existing members. Democratic government is uniquely legitimate because it rests on the consent of the governed, and – in more robust, participatory versions of the doctrine – because only in democracy are the laws that bind us created by the very people being bound by them. In the absence of certain knowledge of “the good” or unanimity regarding the grounds of authoritative collective action, only democracy provides to each member of the political community the opportunity to help shape those collective decisions that will impinge upon that person’s freedom to live according to her own understanding of the good. Without this opportunity to help shape the laws, binding rules on how we are to live together cannot help but be experienced as imposed on us from the outside – by “them” rather than by “us” – thereby violating our self-determination as autonomous beings.

But because we (and our forebears) have invested so much of our own efforts in developing the rules by which we live, and because as a result of our common involvements we have come to certain understandings of how we should live together that are embedded in our laws and ways of life, “outsiders” who want to be a part of our political community cannot simply invite themselves in and make themselves at home in our place. They need to be invited in, and before they are allowed to become part of us, they must agree to play by the rules we have previously agreed upon (see, e.g., Benhabib, 2004; Walzer, 1983; and Wellman, 2011, for variations on this rationale for legitimating democracy’s exclusion of

foreigners from membership). In this way, “the people” who are the basis for legitimate popular sovereignty are self-constituted, and necessarily self-constituting.

There are a variety of ways to critique this line of argument from democratic theorists, but here I will limit my discussion to two examples, one based on democratic principles, and one based on liberal principles. The first, democratic, argument is made by Abizadeh (2008), and is based on Joseph Raz’ (1986) articulation of the right to personal autonomy. The crux of Abizadeh’s argument is that border control – excluding outsiders from access to “our” political community – is coercive in nature and accordingly violates democratic principles unless those outsiders have a political role in helping to shape those very border control policies. Abizadeh articulates the central democratic principles as follows:

First, a democratic theory of popular sovereignty requires that the coercive exercise of political power be democratically justified to all those over whom it is exercised, that is, justification is owed to all those subject to state coercion. Second, the regime of border control of a bounded political community subjects both members *and nonmembers* to the state’s coercive exercise of power. Therefore, the justification for a particular regime of border control is owed not just to those whom the boundary marks as members, but to nonmembers as well. (Abizadeh, 2008, p. 45)

While Abizadeh’s argument has many unexamined implications and has been criticized by other scholars (see, e.g., Miller, 2010; but see also Abizadeh’s response, 2010), his analysis does point to certain unresolved and perhaps unresolvable dilemmas in relation to the legitimate authority of a self-constituting and exclusive political community to police its own boundaries.

Joseph Carens (1987) has made what is perhaps the best-known critique of closed borders from a *liberal* perspective. Drawing on the work of Rawls, Nozick, and the utilitarians, Carens argued that, despite their manifest differences, all three approaches

stem from the same assumption that all persons are of equal moral worth. Starting from this universalist premise about the nature of human beings and the bases for their rights, Carens argues that there can be few, if any, justified reasons for any political community to assert its right to exclude outsiders through border controls:

I will argue that all three approaches lead to the same basic conclusion: there is little justification for restricting immigration. Each of these theories begins with some kind of assumption about the equal moral worth of individuals. In one way or another, each treats the individual as prior to the community. These foundations provide little basis for drawing fundamental distinctions between citizens and aliens who seek to become citizens. (Carens, 1987, p. 252).

Both Carens and Azibadeh, then, provide reasons for questioning the legitimate authority of “the people” in liberal democratic states to decide on their own who will be allowed to become part of “their” political community. It turns out that popular sovereignty’s moral authority may be as problematic as that of the divine right of monarchs in the late middle ages.

Not only is the authority of “the people” to control the borders to their political community problematic, but in turning to *our second question* we find that “the people’s” right to restrict access to a specific national territory is equally problematic. It is important to recall here that we are focusing on the authoritative foundation for territorial boundaries in the contemporary political world, and not on simple power relations. As Jackson notes: “Sovereignty is a territorial definition of political authority. Territoriality became the foundation principle of sovereign statehood in the early-modern period, and it has remained so ever since” (Jackson, 2007, p. 104). So what gives the citizens of the United States, or any other country, the sovereign right to claim authority over the specific

territory they claim to be their own? How do any country's borders become fixed and "sovereign" in relation to other countries? What makes a state's borders legitimate?

Using the United States as our primary example to address this question, we encounter a variety of answers that have been given in the country's history. There is not space to review all of those answers here, but it is important to remember at the outset of this discussion that not one square mile of North American territory was not already claimed by "the people" of some political community when the European settlers arrived in the sixteenth and seventeenth centuries. How, then, did those who founded the colonies that evolved into the United States justify their intrusion into other peoples' territories? There are complex answers to this question, but for our purposes it suffices to say that most of the European settlers of North America claimed a version of "divine right" to justify their move into other peoples' territories to establish their own political communities. That is, like the kings they obeyed, and ultimately rejected, the settlers from Britain, as those from Spain, France, the Netherlands, and from other European countries, claimed that they served divine purposes in getting native peoples to relinquish control over their territory to them.

Over time, the rationale for territorial expansion in the United States became less imbued with religiosity, and more embedded in a discourse of racial superiority. In important ways, the underlying rationales for the relentless push toward westward expansion, the Monroe Doctrine in relation to Latin America, and later dreams of an American empire, were undergirded by the same understandings of racial superiority and territorial integrity that made the theme of Manifest Destiny so popular in American political life in the nineteenth century and later. That is, early Americans – like other

European settlers in other lands – believed they embodied a superior civilization and “race,” and that they were destined to rule over other, lesser peoples. And by the late nineteenth and early twentieth centuries, these racist rationales had become a full-blown ideology with pretensions of scientific validation (see, e.g., Horsman, 1981; Takaki, 1982).

Moreover, in the case of the United States, these beliefs were accompanied by the assumption that if the previous peoples of these now American territories could not be assimilated into the dominant, superior cultural community, then they were destined for extinction. In most cases, there was no expectation on the part of the American territories’ rulers that there would be long-term multiple ethno-cultural communities living in the same territories. In any case, it is important to note that “the people” who lived in the area acquired by Jefferson’s famous Louisiana Purchase in 1803 were not consulted as to their terms of membership in a new political community. Similarly, as noted above, after the United States “purchased” nearly half of Mexico following its invasion and conquest of that country’s capital in 1848, “the people” acquired in that new territory who were Mexican citizens were given the forced choice of becoming U.S. citizens or moving to Mexico after that country’s boundaries were moved far to the south. And, of course, the territories of the first peoples of North America were acquired by the Americans through coercive means that stretched over several centuries, despite the fact that the U.S. government made treaties with these “sovereign nations,” every one of which was later violated at will by the superior power.

In short, as a “settler state” that later expanded its terrain exponentially, every part of the territory of the United States was acquired through coercive means. Further, the original justifications for these territories were either “divine right” or divinely ordained

racial superiority, neither of which are considered legitimate in today's world. So on what basis does the U.S. government of today claim sovereign authority over its specific territorial boundaries that were acquired coercively?

In trying to address this question from a larger, global perspective, Jackson inquires into the authoritative foundations for nation-states' territorial boundaries throughout the contemporary world. Aware that nearly all states' boundaries are derived from bloody conflicts and conquests in the past that turned more on the exercise of power than of legitimate authority, he looks to international law as the legitimating agent for sovereign territorial authority. Implicitly acknowledging that international law tends to reflect the desires of the most powerful states in the world, Jackson notes that the boundaries of states have been remarkably stable since the mid-twentieth century: "We are living at a time when existing territorial jurisdictions are vested with exceptional international validity. The principle involved is that of *uti possidetis juris* ('as you have, so may you hold')" (Jackson, 2007, p. 110). And he highlights *two values* that seem to undergird the actions of those who make international law in the contemporary world:

The first value, and the most fundamental, is the high realist premium they place on international order, and their evident willingness to sacrifice the right of national self-determination of particular peoples or nationalities for that over-riding prudential goal. The second is their Burkean regard for the certainty and stability of international law, and their very great reluctance to tamper with it, even in the face of localized disruptions and difficulties . . . (Jackson, 2007, p 111)

So, despite the fact that power relations – and not popular sovereignty realized through national self-determination in territorial states that match the boundaries of the world's "nations" – are responsible for the extant nation-state boundaries in the contemporary world, it is the *stability* and *order* generated through current boundaries that in fact

legitimate the world's political borders. Two world wars, along with the tensions of a post-war nuclear stalemate, may have sated the tolerance of the most powerful political leaders in the contemporary world for further efforts to match *national* and *state* boundaries in order to further the cause of sovereign authority through popular rule.

Thus, even Jackson, who seems to want very much to maintain the legitimate authority of sovereignty's role in the political world, finds that authority rests more on instrumental valuations than on substantive authoritative criteria. In the contemporary world, sovereign territory, as much as sovereign rule, rests on foundations that can easily be seen as lacking in substantiated criteria for legitimation.

4. Concluding Analysis.

How are we to assess the story unearthed in this search for the bases of nation-state sovereignty as a bar to the political incorporation of unauthorized immigrants in the United States? While there are many more aspects of the story that need further critical examination, it seems clear that nation-state sovereignty – taken as “given” by virtually all participants in the debate over unauthorized immigration in the U.S. – is far from the bedrock legitimation for excluding the undocumented that it is assumed to be. We can summarize the analysis leading to this conclusion as follows:

First, nation-state sovereignty is not a given fact that is part of a timeless “natural” order of political reality. Sovereignty is a relatively recent invention, and its meaning has evolved over time. Just as it was invented and shaped by powerful political actors for their own political ends, it can be reshaped, or even eliminated, for other political ends that seem more appropriate to another time.

Second, the actual *practice* of nation-state sovereignty has more to do with power relations than it does with the maintenance of a moral and legal order of political reality. Claiming that unauthorized migrants are too morally deficient for political membership on the grounds that they have violated the country's sovereignty is unwarranted and hypocritical.

Third, even granting that sovereignty's meaning rests upon an important and valuable distinction between *power* and *authority* does not mean that the claims of actual nation-states to sovereign authority can be validated in the contemporary political world. The moral foundations for political authority have been shredded in the contemporary world in many ways and by many forces, and any clear-eyed observer must acknowledge that making claims to legitimate authority today is problematic for even the most virtuous of political actors. This is manifestly true even for political actors claiming to represent the democratic right of "the people" to exclude those from political membership who do not have the proper documents to "prove" their right to belong.

However, despite these shaky foundations for nation-state sovereignty as the ultimate bulwark against the claims of unauthorized immigrants to membership in the American polity, my own considered reflections on the matter lead me to recommend that those seeking an inclusive policy for these migrants *not* center their efforts on a critique of sovereignty. This recommendation has more to do with political prudence than with political understanding. The main reason for this conclusion is that the politics of the present in the United States continues to be dominated by a hyper-nationalist sensibility among most Americans that seems to have received a substantial boost in the post 9/11 era. And this sensibility shows no signs of diminishing in the near future (see, e.g., Brown,

2010, and Arnold, 2011, for two interesting interpretations of this hyper-nationalism in relation to U.S. immigration policy). As a consequence, it seems highly unlikely that proponents of enacting a “pathway to citizenship” for unauthorized immigrants will find political purchase in trying to convince American voters or American political leaders that U.S. sovereignty should be put aside as a criterion for resolving this political debate.

Still, I think the foregoing analysis is useful in several ways. First, it should help proponents of an inclusionary approach to unauthorized migrants come to a more realistic and nuanced understanding of the role that sovereignty plays in obstructing their aims. This means that proponents of inclusion have no good reason to allow themselves to be put on the defensive by accepting interpretations of their efforts as somehow morally defective or unpatriotic because they are advocating rewards for “alien invaders” who have violated U.S. sovereignty. The role of sovereignty in these debates should be recognized for what it is: a highly effective rhetorical and legal tool used by political elites to further their own exclusionary political interests.

Second, reflection on the analysis of sovereignty sketched above leads me to believe that a deeper understanding of the ways that sovereignty claims are legitimated in the political world lends support to a seemingly unrelated line of political argument for granting membership/citizenship rights to long-term undocumented residents of the United States. Joseph Carens has described the basic principle underlying the argument as follows:

The general principle with which I began—the longer the stay, the stronger the claim—applies even in the case of those who have settled without authorization, and for the same reasons. When people settle in a country they form connections and attachments that over time make them members of the society. After a while, the conditions of admission become irrelevant. (Carens, 2005, p. 10)

Elizabeth Cohen (2011) has recently dubbed this the “temporal principle of citizenship” (*jus temporalis*). In both cases, the argument is that after a considerable period of time (Carens suggests five years) during which unauthorized migrants have lived and acted as members of a community, they have become *de facto* members of the community and justice requires that this status be formalized. This is so for a variety of reasons that will not be pursued here (but see Cohen’s 2011 analysis for a fine overview and further development of the argument).

Rather, my point is that this line of argument on behalf of a “pathway to citizenship” for the unauthorized is supported by my critical analysis of sovereignty above. This is so because, as we have seen, the historical grounds for claims to sovereign authority – both for those holding political power and for the territorial boundaries of political communities – can often be shown to be a reflection of raw power more than of genuine legitimation criteria. How can political leaders in the United States claim to exercise genuine democratic authority based on “consent of the governed” when the vast majority of American citizens have never consented to be governed in any self-conscious way, and when the Constitution that governs the American polity had its origins in a “coup” led by a self-selected political elite in the eighteenth century? Still, most Americans would be aghast at the idea that their political order has its roots in anything that might undermine its genuine legitimate authority.

Similarly, as we have seen, the territorial boundaries of the United States were established through acts of violent aggression led by American political elites that would hardly be seen as legitimate by contemporary standards of justice. Still, we see few political leaders or activists recommending that justice requires we give the country’s First Nations

“their” lands back, or that Mexico be given its territories that were acquired through violence in 1848. How can that be so? It seems that, while it cannot be established that “time heals all wounds,” the passage of time – accompanied by political stability – does seem to grant legitimacy to claims of authority and to claims of territorial sovereignty in the hearts and minds of most people.

There are, of course, exceptions to this notion, but it does seem that very often people come to accept as legitimate both rulers and boundaries that have been in place over a long period of time. If this is so, perhaps the best political “lesson” that might be derived from the above critical analysis of the role of sovereignty in the debate over unauthorized immigrants is that those pursuing an inclusionary political solution should concentrate more efforts on further developing a frame analysis that would lend further support to the “temporal principle of citizenship.”

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