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SYMPOSIUM ON UNSETTLING THE SOVEREIGN "RIGHT TO EXCLUDE"

SEVERING THE GORDIAN KNOT OF SOVEREIGNTY AND MIGRATION CONTROL

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The claim that states have an unfettered sovereign right to control their borders and exclude non-citizens from their territory is accepted everywhere without contestation. Yet it is anything but a self-evident truth. While taken for granted today, the assumption that control over migration is the "last bastion of sovereignty" represents a radical departure from the norm of freedom of movement (for some, not others, namely, white, "civilized," Christian men) that defined international law's earlier approach. What avenues for reform, resistance, and recalibration open when we revisit the legal foundations and contemporary consequences of the dominant understanding according to which states have near-absolute authority to regulate migration as an incident of sovereignty? In the spirit of asking big questions and addressing topics of lasting relevance, this symposium seeks to problematize the view that each state has unfettered discretion to control its territory and decide who it admits "upon such conditions as it may see fit to prescribe."[1] With a surge of nationalist-populist anger and anti-immigrant sentiment rising across the globe and the corresponding shrinking of rights and protections afforded to those on the move, there is added urgency to challenge the view readily expressed in public debate that migration is an "existential threat to be managed with the full and legally unregulated power of the sovereign state."[2] This view has emboldened governments, operating alone or in concert, to invest unprecedented amounts of resources, political capital, and institutional capacity to "take back control" over borders and migration—as the Brexit slogan memorably put it. With voters across the globe naming immigration a top concern, governments are recalibrating their policies in an increasingly restrictive direction, shutting the gates of admission to would-be migrants and asylum seekers.[3] The deep-seated assumption that states have inherent power over migration provides legal cover for such acts, despite the immense human toll, erosion of rights, and denial of the basic protection and dignity of those who are caught in the increasingly sweeping dragnet of ever-expanding borders and migration control regimes.[4] Laws, regulations, and declarations about the urgency to "sort out the border management situation to ensure that the porous

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[1] Nishimura Ekiu v. U.S., 142 U.S. 651, 659 (1892).

[2] Anja Bossow, *Rethinking the Law and Politics of Migration*, VERFASSUNGSBLOG (Feb. 26, 2024).

[3] On these trends, see e.g., T. ALEXANDER ALIENIKOFF & LEAH ZAMORE, THE ARC OF PROTECTION: REFORMING THE INTERNATIONAL REFUGEE REGIME (2019); ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES & PHILIP G. SCHRAG, THE END OF ASYLUM (2021); AYELET SHACHAR, THE SHIFTING BORDER: LEGAL CARTOGRAPHIES OF MIGRATION AND MOBILITY (2020); E. Tendayi Achiume, *Racial Borders*, 110 GEO. L.J 445 (2022).

[4] SHACHAR, *supra* note 3; *see also* LAWLESS ZONES, RIGHTLESS SUBJECTS: MIGRATION, ASYLUM, AND SHIFTING BORDERS (Seyla Benhabib & Ayelet Shachar eds., forthcoming 2024).

borders are addressed in a way that protects the sovereignty of our state" are nowadays proclaimed as a matter of course by public authorities in established democracies as well as autocracies, spanning the gamut from former imperial powers to post-colonial states.[5] Exploring what has been forgotten or pushed underground with the triumph of the dominant understanding that states have an inherent sovereign right to control their borders—a view so prevalent that we rarely notice how it impairs our ability to imagine alternatives—is the kernel of this inquiry.

What avenues for developing fresh insights grounded in legal, historical, and normative arguments open up when insights from international law, legal history, political philosophy, and post-colonial theory are used to "de-naturalize" the assumption that states have a purported right, or rather power, to exclude? My inquiry is motivated by the belief that we must go to the core of states' authority to regulate the transborder movement of people if we wish to more effectively challenge the current stalemate, a situation which is characterized by a growing obsession with border policing, walls and fortresses, camps and detention centers, transit bans and buffer zones. The broader aim is to contribute to a multidisciplinary effort to revisit afresh the presumed link between sovereignty and migration control.

The "Regressive Precedent"

Whereas the United States has witnessed bitter controversy over whether jurists should cite decisions of supreme courts in other countries, the "migration of constitutional ideas" has been celebrated elsewhere. Courts in the world of new constitutionalism regularly "borrow" legal arguments, concepts, and interpretation techniques from one another as a matter of persuasive authority.[6] Through this transnational dialogue, judges have developed an expanded catalogue of rights protections for citizens and non-citizens alike. But there is a darker side to this increased judicial dialogue across borders.[7] If progressive ideas about the scope and extent of rights protections can travel quickly, so can restrictive lines of authority. To capture this dynamic, I introduced elsewhere the concept of the "regressive precedent."[8] Once a reputable court develops a doctrinal rationale that upholds restrictive policies, other jurisdictions take guidance by treating the regressive precedent as a "model" to follow in their own subsequent choices limiting substantive rights or procedural protections. The greater the prestige of the court issuing a regressive precedent, the greater the legitimacy it grants to exclusionary measures, even if they are otherwise legally or morally contentious. A classic example of this pattern is the transregional influence of the U.S. Supreme Court decision in *Sale v. Haitian Centers Council* in which the Court ruled that no legal remedy could be offered to asylum seekers interdicted on the high seas.[9] Although several national and international courts and tribunals critically rebuked the *Sale* ruling, it has proven resilient and emerged as a classic regressive precedent. Other jurisdictions—Australia is a prime example—seeking to legitimize a policy of pre-emptive maritime interdiction saw the fact that the U.S. Supreme Court had already provided justification for this policy as "license" to follow suit.[10] As commentators have noted, "[w]hat made *Sale* particularly damaging was not only the judgment

[5] *ANC Calls for Immigration Policy Overhaul*, ENCA (July 18, 2023).

[6] On the golden age of comparative constitutional law, see e.g., Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law (2014); Vlad F. Perju, *Constitutional Transplants, Borrowing, and Migrations*, *in* Oxford Handbook of Comparative Constitutional Law 1304, 1305 (Michel Rosenfeld & András Sajó eds., 2012).

[7] Rosalind Dixon & David Landau, Abusive Constitutional Borrowing (2021); Gráinne de Búrca & Katherine Young, *The (Mis)Appropriation of Human Rights by the New Global Right*, 21 Int'l J. Const. L. 205 (2023).

[8] Ayelet Shachar, *Instruments of Evasion: The Global Dispersion of Rights-Restricting Migration Policies*, 110 Cal. L. Rev. 967 (2022).

[9] Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993). For a differing interpretation, see Jamaa v. Italy, App. No. 27765/09, 2012 Eur. Ct. H.R. 198–200.

[10] As in the United States, Australian courts have determined that practices of interdicting migrants and asylum seekers on the high seas does not violate *non-refoulement*. *See, e.g.*, Ruddock v. Vadarlis [2001] 110 FCR 491 (Austl.).

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per se, but the fact that it came from the United States, the erstwhile leader of the modern refugee regimes."[11] A regressive precedent can thus "travel" the world and become more restrictive with each iteration, transforming legal landscapes far beyond the constituency in which it was decided.

Fusing Sovereignty and the "Right to Exclude"

Less familiar to us today is the earlier history of transnational dialogue among apex courts interpreting and applying exclusionary immigration legislation. Then, as now, courts faced certain constraints, grounded at the time not in international human rights accords but in bilateral treaties and diplomatic considerations limiting the ability of governments to enact overtly discriminatory laws.[12] Accordingly, governments in the United States and the self-governing authorities in Australia, Canada, and other settler colonies of the British Empire initially sought to restrict mobility by measures such as landing taxes and passenger-per-ship restrictions as well as "continuous journey" requirements.[13] By the late nineteenth century, however, courts in the United States were asked to consider openly race-based immigration legislation: the so-called Chinese exclusion laws. In a trilogy of cases, the U.S. Supreme Court asserted that the power to exclude foreigners is an incident of sovereignty. The opening salvo in this restrictionist line of authority is found in the 1889 *Chae Chang Ping v. U.S. (Chinese Exclusion Case)*. Although no specific clause in the Constitution gave Congress a power over immigration, the Court pronounced "[t]hat 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."[14] The Court further asserted that "[j]urisdiction over its own territory to that extent is an incident of every independent nation. It is part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power."[15] Using the same strategy of creating a direct linkage between the right to exclude and sovereignty, the decision holds that: "the right to expel from its territory persons who are dangerous to the peace of the states, are too clearly within the essential attributes of sovereignty to be seriously contested."[16] Two years later, in 1891, the United Kingdom's Privy Council ruled, in similar spirit, in the case of *Musgrove v. Chun Teeong Toy*, that "every state has a right to make laws for the exclusion or expulsion of a foreigner was not questioned."[17] Remarkably, only three years after the Supreme Court pronounced control over migration as inherent in sovereignty in the *Chinese Exclusion Case*, the "right to exclude" is reaffirmed in the 1892 *Ekiu* case and presented by the Court as an "accepted maxim of international law that every sovereign nation has the power, 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."[18] In *Ting*, the final decision in the trilogy, the majority

[11] Bill Frelick, *YLS* Sale *Symposium: Limiting the Damage-Global Refugee Rights After* Sale, Opinio Juris (Mar. 14, 2014). In turn, Australia's hardline approach has been directly invoked by other countries, including, most recently, the United Kingdom in adopting a controversial (and ultimately rescinded) plan to transfer certain asylum seekers that reached the UK for offshoring processing in Rwanda. For further discussion, see Ayelet Shachar & Daniel Ghezelbash, *How and Why "Ideas Travel" in Migration Law and Policy*, *in* The Oxford Handbook of Comparative Immigration Law (Kevin Cope et al. eds., forthcoming 2024).

[12] Shachar & Ghezelbash, *supra* note 11.

[13] For a fascinating account of this pattern at work, see Daniel Ghezelbash, *Legal Transfers of Restrictive Immigration Laws: A Historical Perspective*, 66 Int'l Comp. L. Q. 235 (2017); Radhika Mongia, *Colonialism and the "Right to Exclude,"* 118 AJIL Unbound 198.

[14] Chae Chan Ping v. U.S. (Chinese Exclusion Case), 130 U.S. 581, 603 (1889).

[15] *Id.* at 603–04.

[16] *Id.* at 607.

[17] Musgrove v. Chun Teeong Toy (Victoria) [1891] AC 272, at 282 (UKPC).

[18] *Nishimura Ekiu v. U.S.*, *supra* note 1, at 659.

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of the Court again gives effect to its proposition that "[t]he right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions . . . [is] an inherent and inalienable right of every sovereign and independent nation."[19] Soon thereafter, in adjudicating a case emanating from Canada, the Privy Council affirmed that "[o]ne of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State," drawing almost verbatim on the language found in the U.S. jurisprudence in holding that the sovereign right to exclude entails absolute authority "to annex what conditions it pleases" to such permission to enter or to expel a foreigner.[20] The regressive precedent from the *Chinese Exclusion Case* thus quickly diffused into the jurisprudence of other parts of the imperial British universe, cementing the idea that states possess the exclusive power to turn migrants away and unilaterally control their borders.

While the world map has dramatically changed since the early twentieth century, the Gordian knot between migration and sovereignty established by these formative cases has remained largely uncontested. And whereas the explicit race-based legislation these cases upheld has since been disavowed and officially removed from the law books, the exclusionary legal principles they forged remain with us. Indeed, over time, this restrictive line of authority—these regressive precedents—"migrated" across the globe and became accepted everywhere.

Rethinking the Past, Reimagining the Future

With tensions over borders and immigration reaching a boiling point, it is vital to go back to the basics and offer deep reflection on the groundswell assumptions about the connection between migration and sovereignty informing the debate. The essay by Vincent Chetail sets the stage for challenging the positivist orthodoxy of the field. He reminds us that an absolutist conception of sovereignty has no grounding in international law—then and now. Building on his trailblazing work on the intellectual history of hospitality from Vitoria to Vattel, Chetail characterizes the view that sovereignty is associated with the power to exclude as an "enduring myth of international law," an invention that lawyers have perpetuated since the inaugurating age of immigration control in the late nineteenth century. Treating immigration control as an attribute of sovereignty, he argues, blinds us to the earlier endorsement of freedom of movement by international law as a privilege of white men in the age of conquest, colonialism, and imperialism, just as it erases the racial underpinnings of the "right to exclude."

Like Chetail, Radhika Mongia, a critical theorist working in the tradition of feminist and colonial studies, brings a historical lens to the debate. She, too, demonstrates that despite claims to the contrary, the suture between sovereignty and the right to exclude has a relatively recent provenance. Drawing on historical examples detailing the regulation of Indian immigration in the context of empire, Mongia argues that the rise of the modern state, with territorial *closure* as its salient definitional element, reverses the previous logic of colonialism and imperialism which revolved around territorial *expansion*. Reversing the arrows of the traditional account, she powerfully claims that the prevalent view of states having inviolable sovereign authority in regulating migration might be better understood as an *outcome* of the consolidation by national governments of the authority to regulate movement, rather than its source.

Moria Paz, a scholar of international law centering her research on the rights and experiences of minorities, migrants, and refugees, sharply observes that while international law scholars of the late nineteenth and early twentieth century came to cohere with the exclusionary view expressed by the restrictionist line of authority reviewed above, these jurists nevertheless saw these restrictions as applying primarily to those deemed "unassimilable." In contrast, those perceived as belonging to a common "civilization"—defined as it was along European cultural, linguistic, and racialized categorizations—largely maintained the privilege of mobility. With the

[19] Fong Yue Ting v. U.S., 149 U.S. 698, 705 (1893).

[20] Attorney General for Canada v. Cain [1906] AC 542, at 546 (UKPC).

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emergence of universal human rights regimes in the post-World War II era, such distinctions were no longer valid in law (although their impact has far from disappeared).[21] All individuals are now formally entitled to the freedom to leave and return to their "own country," but have no similar right of entry to be activated against the rest of the world.[22] This transition, argus Paz, ultimately solidified states' power to exclude would-be immigrants.

Shifting the gaze to the present, Jürgen Bast draws on his comprehensive expertise as a scholar of public law, sociology of law, and international law to re-examine the legacy of exceptionalism in immigration law by tracing developments in the European legal space since the 1990s. He emphasizes the importance of bottom-up mobilization efforts of migrants, lawyers, and other societal actors in developing a script of "humanrightization" of the migration discourse. Accompanied by a commitment to a maximalist reading of the corpus of human rights protected by international law and regional instruments, this strategy yielded significant legal victories for asylum seekers and migrants. While in recent years commentators have identified a retreat from the jurisprudence expanding the rights of migrants, the key point for Bast is that institutions such as the European Court of Human Rights have not sanctioned a return to a legal universe whereby states have unfettered discretion in exercising their migration power as a matter of sovereign control.

Taking the script of the "humanrightization" as the starting point for her analysis, Janna Wessels, whose work combines legal doctrine, qualitative empirical investigation, and feminist/queer theory, examines how governments are responding to this trend. Wessels argues that states are now proactively engaging in "reverse strategic litigation": that is, they attempt to appropriate, often successfully, the language of human rights to *legitimize* migration control. Seeing states as "doctrinal entrepreneurs," Wessels demonstrates how governments rely on various legal techniques to speed up or postpone litigation challenging their public authority over migration control. Like the regressive precedent, the tacit mechanisms governments use to influence the development of legal doctrine through litigation in front of regional (or other) courts reveal that they are far more savvy legal actors than is commonly assumed. If states succeed in shaping the very meaning of human rights law to exclude certain categories of migrants, they gain legitimacy for restrictive migration control policies all the while proclaiming commitment to human rights values and instruments.

The symposium closes with an essay that squarely adopts the perspective of normative political theory. Lukas Schmid, a political theorist whose work has perceptively explored the interaction between border controls and migrants' basic rights, contributes to an ongoing scholarly debate on whether states have legitimate authority to enforce the exclusion of (would be) immigrants. He argues that in light of structural features of the sociohistorical circumstances in which the "right to exclude" was established, there is reason to doubt the legitimacy of self-determining political communities' authority to engage in boundary management that reproduces conditions of exclusion that breach the basic condition of respect for the moral equality of would-be immigrants. Schmid's account serves as a poignant reminder that current frameworks on offer, which sanctify the authority of states to control migration as a matter of unconstrained discretion, fall short of offering viable answers for a world where mobility is expected to rise, and significantly so, due to massive human- and climate-induced displacement and despair.

Today, it seems intuitive to treat the right to exclude as an incident of sovereignty, with the two concepts tied together by an inscrutable Gordian knot. Read collectively, however, these essays have attempted to sever that knot from different angles. Contrary to common perception, the association between sovereignty and migration control is far more tenuous than assumed and of surprisingly recent origin. By looking back in time, by re-examining the current moment, and by trying to reimagine the future, this inquiry generates surprising and fruitful lessons for conceiving alternatives to the stubborn assertion that the right to exclude is an attribute of sovereignty—one which, as the regressive precedent has it, cannot be seriously contested. Not only can it be contested, it should be.

[21] For a neo-colonial account of borders and migration regimes, see e.g., Achiume, *supra* note 3. *See also* Chantal Thomas, *Race as a Technology of Global Economic Governance*, 67 UCLA L. Rev. 1860 (2021).

[22] The narrow exception here is the situation of refugees in border situations who seek to activate a protection claim.

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