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Borders by Consent: A Proposal for Reducing Two Kinds of Violence in Immigration Practice

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ABSTRACT

We describe a new consensual theory of borders and immigration that reverses Peter Schuck's and Rogers Smith's notion of citizenship by consent and posits that borders are legitimate—and make sense—only if they are products of consent on the part of both countries on opposite sides of them. Our approach, in turn, leads to differential borders that address the many sovereignty and federalist problems inherent in border design by a close examination of the policies that different borders—for example, the one between California and Mexico—need to serve in light of the populations living nearby. We build on our work on border laws as examples of Jacques Derrida's originary violence. We assert that laws that exhibit a high degree of originary violence lead, almost ineluctably, to actual violence and cruelty, such as that perpetrated by Donald Trump's child-separation policy, and that consensual and relatively open borders are the most promising way to minimize both forms of violence, originary and actual.

INTRODUCTION

Suppose that the underlying basis for a significant area of social regulation fails badly when viewed from the perspective of any of the leading theories of human organization and only holds appeal to those who are indifferent about perpetrating pain and hardship on fellow humans and need a plausible justification for doing so—namely that "they broke the law."[1]

Consider current U.S. border policy, which includes the following elements, among others: a fixation on building long, expensive walls,[2] an unfounded fear of outsiders as bearers of disease, crime, and social disorder,[3] and a willingness to separate children from their parents as a means of discouraging others from trying to enter even for the purpose of seeking asylum.[4]

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1. KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 3 (2007) (observing that this is a common position); DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 6 (2012) (same); Tara Law, *Trump Says He'll Pause Deportation Raids for Two Weeks, Awaiting Immigration 'Solution,'* TIME (June 22, 2019), https://time.com/5612779/trump-deportations-immigration/ [https://perma.cc/GJ8D-V3ER] (observing that unauthorized entrants deserve little respect because "they broke the law").

2. *See* Lucy Rodgers & Dominic Bailey, *Trump's Wall All You Need To Know About US Border in Seven Charts*, BBC NEWS (Sept. 27, 2019), https://www.bbc.com/news/world-us-canada-46824649 [https://perma.cc/V69E-F4LP].

3. *See* Gregory Korte & Alan Gomez, *Trump Ramps Up Rhetoric on Undocumented Aliens: "These Aren't People, These Are Animals,"* U.S.A. TODAY (May 16, 2019), https://www.usatoday.com/story/news/politics/2018/05/16/trump-immigrants-animals-mexico-democrats-sanctuary-cities/617252002/ [https://perma.cc/MU4M-4KLX] (noting the increase in anti-immigrant rhetoric). On the "taboo" against open borders, see JOHNSON, *supra* note 1, at 10–16.

4. *See Family Separation and Detention*, ABA, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/immigration/familyseparation/ [https://perma.cc/BCX8-H7LT] (describing the history and development of this policy); *see also* JOHNSON, *supra* note 1, at 2–3 (same). Other countries are more welcoming in their asylum policies, see STEVEN W. BENDER, RUN FOR THE BORDER: VICE AND VIRTUE IN U.S.-MEXICO BORDER CROSSINGS 1 (2012) (observing that current policy is harsh and aimed at protecting national security in the wake of the 9/11 attacks); Patrick Kingsley, *Is Trump's America Tougher on Asylum than Other Western Countries?*, N.Y. TIMES (Sept. 14, 2019), https://www.nytimes.com/2019/09/14/world/europe/trump-america-asylum-migration.html [https://perma.cc/3JQ3-UWD9] (raising the possibility that some individuals like to exclude others because they are insecure or irrationally fear that other people might hurt them; whereas

Our premise is that this program, or any like it, is untenable under the three dominant theories of social organization or, indeed, almost any other. It is unappealing to many libertarians, who believe in relatively free movement of people and goods.[5] It is anathema to old-style conservatives, for many of the same reasons as well as the large and costly governmental effort needed to maintain it.[6] And it appalls progressives because it inflicts unnecessary pain on foreigners merely seeking a better life.[7]

A body of law that finds little support in existing theory begs for reconsideration. This article examines weaknesses at the heart of current immigration policy, suggests that the policy itself (as opposed to its execution) is responsible for many of these deficiencies, and offers a new direction.

Before proceeding, a preliminary observation about the current state of immigration scholarship: We believe that much work in this area—including our own—has paid too little attention to basic questions of institutional design.[8] Writers have often focused on pointing out defects in particular features of immigration practice such as the plenary power doctrine;[9] demonstrating that certain practices are fueled by animus;[10] or challenging

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many of a different disposition favor including other people because they probably have something to offer).

5. *See* JOHNSON, *supra* note 1, at 9 (making the case for relatively free movement across borders); *infra* Part I.A.

6. *See infra* Part I.B.

7. *See* KANSTROOM, *supra* note 1, at 3–5 (noting the personal cost to those deported and their friends and family); *infra* Part I.C.

8. For example, in Richard Delgado, *Rodrigo's Rebuke: Originary Violence and U.S. Border Policy*, 53 U.C. DAVIS L. REV. ONLINE 33, 39–40 (2019), https://lawreview.law.ucdavis.edu/online/53/files/53-online-Delgado-Rebuke.pdf [https://perma.cc/94YG-4LZ3] [hereinafter *Rebuke*], one of us (Delgado) pointed out two forms of violence that shadow immigration laws and rules but did not go on to explore the role of borders in stoking the two forms of conflict. Nor did his article address why we have borders at all. As we shall see, they are often associated with trouble, cost, violence, and racism. So why not retire them as far as we can? To be sure, a few scholars address borders, but only historically—for the role they have played in various periods—or descriptively, e.g., hard or soft. But few subject them to searching conceptual or functional analysis of the kind we hope to start—that is, an approach that subjects the *frame* to critical analysis, not just the parts.

9. *See* Richard Delgado, *J'Accuse: An Essay on Animus*, 52 U.C. DAVIS. L. REV. ONLINE 119, 142 (2018), https://lawreview.law.ucdavis.edu/online/vol52/52-online-Delgado.pdf [https://perma.cc/7HXA-LLGV] (criticizing this feature in the work of several scholars); JOHNSON, *supra* note 1, at 16–18 (same).

10. Delgado, *supra* note 9, at 127–40 (discussing a number of writers who take a mild, procedural approach to Executive action fueled by animus); *see also* Allegra M. McLeod, *Immigration, Criminalization, and Disobedience*, 70 U. MIAMI L. REV. 556, 556 (2016) (lamenting that "seeking greater procedural protections for immigrants . . . is woefully incomplete

particularly abhorrent measures such as family separation, travel bans, restrictions on seeking asylum, or detention facilities that lack provision for basic human needs.[11] A few have questioned federal supremacy and outlined a role for states in border enforcement.[12]

Although all these efforts are helpful, even valiant, they have not gone deep enough. A program for reforming border policy should begin by positing a framework for borders that makes sense in political and human terms. In other words, examining borders and their reasons for being should carry at least equal weight along with micro-criticism of particular policies.[13]

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as a vision of immigration justice . . . [and is] unlikely to change . . . the plight of the millions of people without a path to lawful status.").

11. *See, e.g.*, Richard Delgado & Jean Stefancic, *Lessons from Mexico Folklore: An Essay on U.S. Immigration Policy, Child Separation, and La Llorona*, 81 U. PITT. L. REV. 287, 294–98 (2020) (criticizing family separation but not examining the conceptual framework whence it derives); Kari Hong, *Weaponizing Misery: The 20-Year Attack on Asylum*, 22 LEWIS & CLARK L. REV. 541 (2018) (finding fault with cutbacks in asylum law and practice); Stacy A. Tovino, *The Grapes of Wrath: On the Health of Immigration Detainees*, 57 B.C. L. REV. 167, 169 (2016) (deploring dangerous conditions in detention facilities); Fatma Marouf et al., *The Overlooked Legal Challenge to Trump's Travel Ban*, HARV. L. REV. BLOG (April 23, 2018), https://blog.harvardlawreview.org/the-overlooked-legal-challenge-to-trumps-travel-ban/ [https://perma.cc/MV6D-ZAKK] (criticizing the travel ban).

12. *See* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 788, 792 (2008) (discussing the role of federalism in immigration policy); JOHNSON, *supra* note 1, at 5 (same). Recently, President Trump has announced that he favors allowing states to take a hardline position on admitting refugees into their territory, Executive Order on Enhancing State and Local Involvement in Refugee Resettlement, 84 Fed. Reg. 52,355 (Sept. 26, 2019), and he threatened to terminate federal grants to states that refused to cooperate with harsh efforts to enforce border policy, including turning over state prisoners to federal immigration authorities. *See* Peter Margulies, *Deconstructing "Sanctuary Cities": The Legality of Federal Grant Conditions that Require State and Local Cooperation on Immigration Enforcement,* 75 WASH. & LEE L. REV. 1507 (2018).

13. For examples of such micro-challenges, see *Rebuke*, *supra* note 8 and accompanying text. Even when successful, challenges that aim only at incremental progress tend to be swallowed up by forces emanating from other parts of the broader regime of which they are a part, or by simple co-optation. *See* Richard Delgado & Jean Stefancic, *The Social Construction of* Brown v. Board of Education*: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547, 549 (1995) (discussing a "reconstructive paradox" that limits gains achieved by a single breakthrough). Recently, scholars and activists have been eschewing reform—of the criminal justice system for example—and aiming at abolition. *See, e.g.*, V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy,* 40 CARDOZO L. REV. 1453 (2019); Dorothy Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Symposium, 105 GEO. L.J. 1405 *passim* (issue 6) (2015–16) (discussing carceral and criminal-justice reform in broad terms). See Gerald P. Lopez, *Transform Don't Just Tinker with Legal Education*, 24 CLINICAL L. REV. 247 (2018) in regards to reform in legal education. In the area of reform in immigration, see Cesar Cuauhtemoc Garcia Hernandez, Opinion, *Abolish Immigration Prisons*, N.Y. TIMES (Dec. 2, 2019), https://www.nytimes.com/2019/12/02/opinion/immigration-detention-

As we hope to show, any searching inquiry is likely to lead to a regime of differentiated and more flexible borders than the current one between the United States and Mexico.[14]

In Part I, we discuss the drawbacks of today's regime of highly guarded borders under three of the most widely held political theories. In Part II, we put forward a theory of borders by consent. In Part III, we discuss two forms of violence, originary and consequential, and show how border regimes, particularly if they are nonconsensual, can easily increase both. Part IV critiques a common argument in favor of majoritarian rule and citizenship by consent, namely that the citizens of an area are entitled to limit admission to whomever they favor. Parts V and VI show how our proposed approach leads to democratic, highly differentiated borders reflecting the wants and needs of the people living on both sides of them, and sketches how this is more or less the current situation regarding the U.S. border with Canada. A short Conclusion summarizes the argument for borders by consent.

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prison.html?action=click&module=Opinion&pgtype=Homepage [https://perma.cc/Q842-AQ79]; Rachel Levinson-Waldman, *The Abolish ICE Movement Explained*, BRENNAN CTR. FOR JUST. (July 30, 2018), https://www.brennancenter.org/our-work/analysis-opinion/abolish-ice-movement-explained [https://perma.cc/CTP7-VBJL]. With many broad areas, such as immigration, it is easy for the scholar or activist to expend all his or her energy attacking a single feature of a wicked scheme, leaving the framework intact, or even find himself or herself co-opted by a federal system that is perfectly content to find a place for her within the system, which continues as before. *See, e.g.*, Leonard Pitts Jr., Opinion, *Combat the Evil at the Border*, SEATTLE TIMES (Dec. 1, 2019), https://www.seattletimes.com/opinion/combat-the-evil-at-the-border/ [https://perma.cc/T4E4-M4RS] (suggesting that lawyers eager to defend immigrants pro bono sign up for a Justice Department list *maintained by the current administration*); *see infra* Part III.C.4 (positing that scholars and activists who are drawn to challenging the *conditions* of confinement but not the regime of which those conditions are a part may be evincing a "missionary" complex that pays scant heed to the wrongful scheme that repeatedly necessitates the rescues in the first place).

14. *See infra* Parts V and VI; *see also* JOHNSON, *supra* note 1, at 45–86 (reviewing history of U.S. immigration law and highlighting its frequent restrictionist tenor). A number of scholars have put forward the case for *open* borders. *See, e.g.*, TERESA HAYTER, OPEN BORDERS: THE CASE AGAINST IMMIGRATION CONTROLS (2004); JOHNSON, *supra* note 1, at 6. Although we agree with most of what these authors say, their position is not our own, namely that borders should be *consensual*, thus flexible and responsive to the wishes of both political entities on either side of them. The reader interested in how the U.S. border shifted and grew in response to various struggles and pressures during the period of 1830–1910 may wish to consult STEVEN HAHN, A NATION WITHOUT BORDERS: THE UNITED STATES AND ITS WORLD IN AN AGE OF CIVIL WARS, 1830–1910 (2016); JULIAN LIM, POROUS BORDERS: MULTIRACIAL MIGRATIONS AND THE LAW IN THE U.S.-MEXICAN BORDERLANDS (2017) (tracing how early border crossing was both informal and disorderly, especially with the advent of the railroad, which brought immigrants of many types into contact with each other for the first time); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 19–97 (1996) (observing that for much of U.S. history federal control over immigration was lax and sporadic but that the states exercised considerable control via vagrancy law, quarantine laws, and the law of slavery).

I. CITIZENSHIP BY CONSENT: HIGHLY GUARDED BORDERS UNDER THREE THEORIES OF SOCIAL ORGANIZATION

A. Libertarians

In a state of nature, people would wander where their will and destiny took them, without regard for others' pre-existing occupation of nearby land, except for what a respect for privacy and investment in crops, cattle, or residential settlement required.[15] The resulting regime of relatively open borders would also promote economic development inasmuch as it allows people and jobs to find each other without unnecessary obstacles.[16] Most advanced countries, the United States included, have plenty of open land, so that newcomers need not settle where they are not wanted.

Some scholars, such as Peter Schuck and Rogers Smith, have proposed that citizenship presupposes consent, which is true.[17] But they neglect to ask how the right to insist upon consent to someone's mere relocation across a given line arises. Unless the traveler has agreed to grant the residents of a region the right to exclude him, it would seem that the traveler has a pre-existing right to relocate there, just as he has the right to move an arm or a leg to a new position on a bed or couch. Merely repeating that the citizens of a region, by virtue of residing there, have a right to exclude newcomers is to

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15. *See* Bas van der Vossen, *Libertarianism*, *in* STANFORD ENCYCLOPEDIA PHIL. (Edward N. Zalta et al. eds., Spring 2019), https://plato.stanford.edu/entries/libertarianism/ [https://perma.cc/M8WH-N4LA] (defining the term); *see also* David Schmidtz, *Friedrich Hayek*, *in* STANFORD ENCYCLOPEDIA PHIL., (Edward N. Zalta et al. eds., Spring 2019), https://plato.stanford.edu/entries/friedrich-hayek/ [https://perma.cc/9WW7-SSLA] (arguing that social justice is just a mirage); F. A. Hayek, THE ROAD TO SERFDOM *passim* (1944) (same).

16. *See* Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987); Delgado & Stefancic, *supra* note 11, at 296–98; Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES (July 9, 2006), https://www.nytimes.com/2006/07/09/magazine/the-immigration-equation.html [https://perma.cc/B7JB-5CV6]; *see also* JOHNSON, *supra* note 1, at 131–67 (discussing economic benefits of immigration); Emily Badger, *Children of Poor Immigrants Rise, Regardless of Where They Come From*, N.Y. TIMES (Oct. 28, 2019), https://www.nytimes.com/2019/10/28/upshot/immigration-america-rise-poor.html [https://perma.cc/PT7D-UZ2D] (same).

17. PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLICY (1985) (arguing that citizenship is inherently consensual so that the children of undocumented aliens should not receive birthright citizenship); Peter Schuck & Rogers Smith, *Two Yale Professors Argue Against the Concept of Citizenship Without Consent*, SOC. CONT. 19–20 (Fall 1996), https://www.thesocialcontract.com/pdf/seven-one/consent.pdf [https://perma.cc/AE8R-QBKL] (summarizing their argument); *see also* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997) (reviewing early U.S. history of citizenship rules and showing that exclusion and an illiberal impulse dominated much of this period).

beg the question, who gave them that right? Surely not the traveler, but then who? The answer might seem to be the residents themselves. But then the traveler believes he or she has the right to move across a region, too, so unless he is the bearer of a communicable disease, has a history of stealing things, or wants to pitch his tent right next to someone living there so that they would be living cheek to jowl, the two rights—those of the residents and those of the would-be newcomers—would appear to cancel each other out.[18]

And since most emigrants have something to offer—a talent, a trade, a skill—any region that imposed unnecessary limitations on the ability of outsiders to enter would pay a price.[19] Anyone who doubts this is invited to compare regions such as the U.S. South, which has relatively little social mobility and immigration,[20] and the Northeast or California,[21] which have a great deal. There, newcomers eager to make homes in the region readily find jobs, even if only mowing lawns for a living, and send their kids to excellent public schools.[22] Others open small businesses such as a restaurant or a tailor shop. Their children move up. Some of the newcomers help working couples by tending their children or doing housecleaning. The couple's children learn Spanish or another foreign language and become comfortable with people of different backgrounds. A region that believes it has a right to exclude newcomers and exercises it often will find itself lagging behind ones that welcome immigrants—and not in economic terms alone, but in cultural diversity, better food, better music, better services, and a cosmopolitan spirit.

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18. See *infra* notes 32–33 and accompanying text, discussing commonsense limitations to a regime of relatively open borders.

19. JOHNSON, *supra* note 1, at 6–7, 168–99 (discussing the benefits of relatively open immigration). Of course, some would-be entrants would turn out to be hardened criminals and bearers of infectious diseases. *See infra* notes 28–30 and accompanying text (noting that these individuals would be denied entry). Most, however, would benefit the region where they settle. *See* Lowenstein, *supra* note 16 (observing that immigrants generally boost the economy in the regions where they settle); Badger, *supra* note 16 (same); A.K. Sandoval-Strausz, *How Latinos Saved American Cities*, WASH. POST (Nov. 8, 2019), https://www.washingtonpost.com/outlook/2019/11/08/how-latinos-saved-american-cities/ [https://perma.cc/3UGQ-DACF].

20. *See* Jynnah Radford, *Key Findings About U.S. Immigrants*, PEW RES. CTR. (June 17, 2019), https://www.pewresearch.org/fact-tank/2019/06/17/key-findings-about-u-s-immigrants/ [https://perma.cc/EF3A-L2CB] (discussing the distribution of immigrants nationwide); *see also* Alana Semuels, *Why It's So Hard To Get Ahead in the South*, ATLANTIC (Apr. 4, 2017), https://www.theatlantic.com/business/archive/2017/04/south-mobility-charlotte/521763/ [https://perma.cc/6SNY-385G].

21. Radford, *supra* note 20.

22. Excellent, at least, compared to those in the sending countries.

B. Traditional Conservatives

Libertarians, then, preferring as they do human freedom and as little regulation as possible, would seem to incline toward relatively open borders.[23] For the same reason, so would traditional conservatives, who value individual autonomy and distrust big government.[24] Borders require walls, watchtowers, electronic monitoring, and police. They require identity cards and officers to issue, inspect, and validate them. They require rules and inspectors to govern the shipment of goods into and out of the region in question. Tightly regulated borders are not an economic conservative's stock in trade, especially when one adds to this the burden they place on the economy of a region that insists on them.[25] As well, traditional conservatives distrust change that comes too quickly, believing that it can disrupt settled expectations and drive up the costs of transactions and behavior.[26] A program like Trump's that instituted a dozen measures aimed at making immigration harder all in a short period would collide with a basic conservative principle.[27]

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23. *See supra* Part I.A.

24. *See* Andy Hamilton, *Conservatism*, *in* STANFORD ENCYCLOPEDIA PHIL. (Edward N. Zalta et al eds., Spring 2019), https://plato.stanford.edu/entries/conservatism/ [https://perma.cc/6Z9W-XGLC] (defining the term).

25. *See supra* note 6 and accompanying text.

26. *See* Stephen Stromberg, Opinion, *Why Baby Boomers' Grandchildren Will Hate Them*, WASH. POST (Sept. 17, 2019), https://www.washingtonpost.com/opinions/2019/09/17/why-baby-boomers-grandchildren-will-hate-them/?wpisrc=nl_most&wpmm=1 [https://perma.cc/6FAR-DVDY] (observing that "[i]n its most compelling form, conservatism counsels against ambitious reform and for the preservation of economic arrangements, social structures and mores to which people had become accustomed, because trying to sweep away too much, too quickly, results in backlash, disorder and civil conflict—more harm than good. In this view, steady evolution in policy and culture, in part via generational change, is preferable to rapid, large-scale reform. Ascribing this instinct to conservatives who oppose acting aggressively on global warming is one way to give them some benefit of the doubt that they are not knowingly and selfishly condemning future generations to climate hell.").

27. *See* Tyler Anbinder, *Trump Has Spread More Hatred of Immigrants than Any American in History*, WASH. POST (Nov. 7, 2019), https://www.washingtonpost.com/outlook/trump-has-spread-more-hatred-of-immigrants-than-any-american-in-history/2019/11/07/7e253236-ff54-11e9-8bab-0fc209e065a8_story.html [https://perma.cc/E3KQ-67GN]; *supra* note 11 and accompanying text. *But see* SCHUCK & SMITH, *supra* note 17; SMITH, *supra* note 17 (noting that an illiberal impulse dominated much of our history). During both world wars, the U.S. employed "braceros," temporary workers to perform farm labor. *See* KELLY LYTLE HERNÁNDEZ, MIGRA!: A HISTORY OF THE U.S. BORDER PATROL (2010) (discussing this program and noting that it found favor with ranch owners in many farming regions).

C. Progressives

Nor do tightly guarded borders appeal to most progressives or liberals.[28] People want to cross borders for reasons that include urgent human need—to escape violence, to reunite with a family already living on the other side, or to make a better living.[29] Rejecting or locking them up when they enter inflicts acute pain.[30] Progressives naturally want the world to contain as little of this as possible, hence are temperamentally and ideologically inclined toward relatively porous borders, allowing of course for rules restricting the entrance of criminals and those harboring communicable diseases.[31]

If tightly regulated borders are not inherent in the nature of things nor attractive to adherents of any of the most common theories of social regulation, what approach could be better?

II. BORDERS BY CONSENT

Behind a Rawlsian veil of ignorance,[32] one might ponder a regime in which *both* regions on opposite sides of any border strive to maximize their interests and those of their citizens.[33] Because, as we have seen, relatively

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28. *See* DEMOCRATIC PLATFORM COMM., 2016 DEMOCRATIC PARTY PLATFORM, https://democrats.org/wp-content/uploads/2018/10/2016_DNC_Platform.pdf [https://perma.cc/57JD-2KZE].

29. Delgado & Stefancic, *supra* note 11, at 292–94; *see also* HAYTER, *supra* note 14, at 64–133 (asserting that limitations on refugees are particularly indefensible); E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1510 (2010) (noting that colonialism often entails forcible displacement of populations for the benefit of a more powerful colonial society; this displacement "obligates former colonial powers to open their borders to former colonial subjects" because even if these are economic migrants seeking better opportunities they are "political agents exercising equality rights [through] 'decolonial' migration."); *Why Do People Immigrate to the US?*, USAFACTS (May 24, 2018), https://usafacts.org/reports/immigration [https://perma.cc/GC5J-WPA6].

30. JOHNSON, *supra* note 1, at 87–130 (arguing for liberalized immigration rules); Delgado & Stefancic, *supra* note 11, at 291–98.

31. JOHNSON, *supra* note 1, at 87–130 (discussing who would be admitted and who rejected); Delgado & Stefancic, *supra* note 11.

32. *See* JOHN RAWLS, A THEORY OF JUSTICE 12–13 (rev. ed. 2011) (describing the "veil of ignorance," under which lawmakers would enact rules unaware of what position they would occupy under those rules).

33. *See* BENDER, *supra* note 4, at 1–3 (observing that current policy is not a product of mutual negotiation between the United States and Mexico and urging a jointly negotiated one in the future). A certain amount of informal mixing is already happening in regions like El Paso and San Diego, whose economies and cultural life are closely tied with those of their counterparts just over the border. *See, e.g.*, Veronica Escobar, Opinion, *El Paso, Two Weeks Later*, N.Y. TIMES (Aug. 19, 2019), https://www.nytimes.com/2019/08/19/opinion/el-paso-shooting-funeral.html [https://perma.cc/9JPP-U4T4].

open borders are desirable under most political theories[34] and offer economic benefits to both the sending and the receiving nation,[35] the outcome of any such negotiation is likely to be a border that is considerably more porous than the current ones.[36] Because of federalist concerns, border regimes selected

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At times, the informal connection spans thousands of miles, extending from a northern U.S. city all the way to a town in southern Mexico. *See* Nina Shapiro, *Life After Deportation*, SEATTLE TIMES (Sept. 22, 2019), https://www.seattletimes.com/seattle-news/life-after-deportation-a-family-with-roots-in-the-seattle-region-starts-over-in-mexico/?utm_source=marketingcloud&utm_medium=email&utm_campaign=Deportation+Don%27t+Miss+(BUTTON)+09-22-2019_9_22_2019&utm_term=Active%20subscriber#comments [https://perma.cc/YTJ5-C5BP]; *see also* BENDER, *supra* note 4, at 141–93 (discussing the inevitability of U.S.-Mexico economic and cultural integration); RAWLS, *supra* note 32, at 3 ("Policymakers must accept the reality that whatever is needed or desired in one country historically will be supplied by the other, despite government efforts to the contrary."); *infra* Part V (describing how the U.S. border with Canada exhibits a high degree of social and economic integration in communities along both sides of it).

34. *See supra* Part I.

35. *See supra* text accompanying notes 19–22; *see also* ROBERT C. ELLICKSON, ORDER WITHOUT LAW 72 (1991), which notes that Western counties that adopt "open range" rules governing cattle that damage crops, versus "closed range" rules, find that farmers and ranchers generally arrive at the same solution: They cooperate in building and maintaining fences to protect the crops and share the costs. By the same token, fluid borders arrived at by consent and negotiation would seem close to the natural and optimal outcome, both economically and in terms of improving friendly relations. City dwellers often end up sharing driveways or parking spaces by tacit or mutual consent, for much the same reason, sometimes on alternating or agreed-upon days or schedule of hours.

36. *See* EUROPE WITHOUT BORDERS: REMAPPING TERRITORY, CITIZENSHIP, AND IDENTITY IN A TRANSNATIONAL AGE, at vii–viii (Mabel Berezin and Martin Schain eds., 2003) (noting that since the advent of the European Union in 1992, national identity, borders, and sovereignty have been dissolving throughout that continent, more calmly than most people expected). Of course, some seem to be re-establishing themselves, as with England in the age of Brexit. *See* Craig Calhoun, *The Democratic Integration of Europe*, EUROZINE (June 21, 2004), https://www.eurozine.com/the-democratic-integration-of-europe/ [https://perma.cc/PB4Z-M5YF] (observing that when borders between nations dissolve, it is generally a product of choice). Much of modern law has been trending toward negotiation, both in private law—for example, the movement toward mediation in civil dispute resolution—and in public law— for example, the movement toward commercial alliances among nations and, internally, toward the increasing use of referendums to promote a democratic spirit. *See, e.g.*, *Switzerland's Political System and Government*, ALL ABOUT SWITZERLAND, http://swiss-government-politics.all-about-switzerland.info/ [https://perma.cc/6JV2-QFC6]. Why, then, has the United States not opted for negotiated, and relatively more open, borders with its neighbors? *See infra* Part III.A (discussing originary violence as one possible reason); *supra* text accompanying note 5; *infra* text accompanying note 104–12 (discussing racism in the operation of U.S. immigration policy and social life in general). A final reason, for some, is religion and the belief in America's unique divine place and destiny. *See, e.g.*, Eugene Scott, *Why Evangelicals Like Rick Perry Believe that Trump Is God's Messenger*, WASH. POST (Jan. 5, 2019) (noting that some evangelicals believe that America—just as it is—is special and that, presumably, any change in its culture and character would be for the worse); *see also* Vice News, *Trump and His Allies Think He Was Sent by God To Be President*, YOUTUBE (Nov. 27, 2019),

this way would likely vary, with different U.S. states maintaining a degree of autonomy from all the others,[37] and all of them sharing power with the federal government in areas requiring that the nation speak with a single voice.[38]

A. The Rawlsian Negotiation

Let us imagine that one region in Nation A has a surplus of excellent farmers, while a different region just across the border in Nation B has many surgeons and doctors. Both nations of course contain practitioners of many other professions and lines of work, but let us focus for a moment on just these two.[39] Imagine a surgeon from Nation B who performs ten operations a week and mows his lawn on Sunday. If he is able to hire an excellent gardener from Nation A to mow his lawn, he is able to perform an additional operation. His patients, his lawn, and his pocketbook benefit. Nation A benefits as well. The former farmer-turned-gardener is no longer underemployed, is able to send money home to his village and family, and receives an excellent letter of recommendation from the surgeon when, having learned English, he is ready to move on to his next job.

This example, which we have borrowed from a business reporter who, in turn, borrowed it from leading labor economists,[40] shows how relatively open borders can easily benefit both nations on either side of them. The idea is a familiar one in economic thought and builds on the notion of comparative advantage, which is a staple of trade theory.[41]

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https://www.youtube.com/watch?v=jLtfq4blS1I [https://perma.cc/63DY-KVL2] (displaying numerous video clips regarding the belief that Trump was sent by God).

37. *See infra* text accompanying Part II.C.

38. *See infra* text accompanying Part II.C (describing how federalism and federal supremacy limit state autonomy).

39. *See* Lowenstein, *supra* note 16 (discussing a similar example).

40. *Id.*

41. The United States makes excellent TV sets and computers. Mexico produces excellent tomatoes. If both countries are able to sell these products to each other freely, both are better off. Mexico (which is capable of producing electronic products, but only inferior ones at this stage of their development) gets very good TV sets and computers. The United States (which is capable of producing its own tomatoes, but not as good as those Mexico produces) gets excellent tomatoes at a good price. *See Comparative Advantage*, ECON. ONLINE, https://www.economicsonline.co.uk/Global_economics/Comparative_advantage.html [https://perma.cc/836A-9E9J] (explaining the term); *see also* BENDER, *supra* note 4, at 2 (asserting that most immigrants come for compelling reasons and confer benefits on the new country).

B. Examples: Some Options for California and Mexico

It is impossible to predict specifically what might emerge from the kind of negotiation sketched above; probably each pair of border states would arrive at a slightly different bargain. We invite the reader to speculate on what measures California might consider plausible and desirable if it were able to negotiate those measures with Mexico.[42]

1. California Issues "Blue Cards"

If Mexico agreed, California might issue Mexicans "blue cards" that would entitle them to live and work in that state, own property, run businesses, and do anything else that legal residents (green-card holders) can now do anywhere in the United States. California could use its own standards, which would presumably be set with an eye to its needs and culture.[43]

These cards would operate similarly to the green cards (lawful immigrant status) that federal authorities now issue to immigrants who satisfy certain conditions, including a long waiting period. A California-issued blue card would not, however, enable the holder to leave the state, unless a second state agreed to honor it.

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42. California is a good example for our purposes. First, it has a border with Mexico. That border came about through a war and so exemplifies originary violence, some of which has abated over the years. *See infra* Part III.A. It has deemed itself a sanctuary state and allows immigrants to obtain drivers licenses. Andrea Castillo, *California Driver's License Program for Those Here Illegally Surpasses 1 Million Drivers*, L.A. TIMES (Apr. 5, 2018), https://www.latimes.com/local/lanow/la-me-dmv-illegal-immigration-licenses-20180404-story.html [https://perma.cc/TRP4-9TN3]. It might well, therefore, offer itself for a trial at a new renegotiated border along the lines discussed below.

43. *See* Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869 (2015) (proposing a similar measure); *see also* KENT A. ONO & JOHN L. SLOOP, SHIFTING BORDERS: RHETORIC, IMMIGRATION, AND CALIFORNIA'S PROPOSITION 187 (2002) (acknowledging the tradition of anti-immigrant rhetoric in that state but noting that the concept of the border there shifts and changes over the years); Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CALIF. L. REV. 1395, 1405–06 (1997) (observing that California cities such as Monterey Park exhibit struggles as well as solidarity between and among immigrant minority groups); Gerald Neuman, *Lost Century of American Immigration Law (1776 1875)*, 93 COLUM. L. REV. 1833, 1835 n.7 (1993) (noting that early in our history the colonies regulated immigration and that all immigration during that period was "local"). On the role of states as laboratories for innovation, see New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (Brandeis, J., dissenting).

2. California Recognizes a Local Form of Citizenship

California could recognize an even higher status that would permit holders to vote in state elections and attend local universities on par with U.S. citizens who were also California residents.[44] Mexico would presumably reciprocate by offering favorable terms for Californians seeking a simple document that would allow them to reside in that country—as retirees, tourists, or investors, for example.

3. Federal Powers To Regulate National Taxation, Military Draft, and Rules Relating to Interstate Commerce and Travel

Under either of the two new regimes (blue card, California citizen), all federal rules and prerogatives would remain in effect. The blue card holder or California-Mexico dual citizen would pay U.S. income taxes, register and be subject to the military draft, and be punishable for violating any federal criminal statues, such as for human trafficking or selling illicit substances.

4. Illustration: A Re-drawn Map Illustrating a California "Insert" and Border.

The U.S.-California-Mexico border, then, would look like this:

44. Markowitz, *supra* note 43, at 869–70 (noting that "prevailing interpretations of the Fourteenth Amendment leave[ ] untouched the historic power of the states to define the boundaries of their own political communities more generously than the federal government" and arguing that "such state citizenship schemes could deliver substantial tangible support for the integration of undocumented immigrants [and serve as] a powerful expressive tool for states to reorient our national conversation on immigration").

C. *Differential Borders and State Autonomy—the Role of Federalism*

In an ideal world, then, a state like California would be free to negotiate and bargain for a set of border rules with a foreign neighbor, such as Mexico. Would not the federal government, situated in Washington, D.C., have some say in the matter? Certainly. The federal government would be able to tax every resident of California just as before, including any newcomers who make it into that state under the new regime.[45] The feds would also be able to

45. For example, a law-abiding Mexican passed California's scrutiny and received a "blue card." California, then, would, in effect, have two borders. *See, e.g.*, Karla Adam et al., *Boris Johnson Offers a New Brexit Plan, New Suspension of Parliament*, WASH. POST (Oct. 2, 2019), https://www.washingtonpost.com/world/europe/prime-minister-boris-johnson-to-set-out-take-it-or-leave-it-brexit-proposal/2019/10/02/8ed6dc5c-e45f-11e9-b0a6-3d03721b85ef_story.html?wpisrc=nl_todayworld&wpmm=1 [https://perma.cc/9VJU-GFGV] (describing a Brexit plan under which England and Ireland would have two separate borders). Different U.S. states today may end up having different border regimes by virtue of judicial rulings. *See* Maria Sacchetti, *Federal Court Issues Split Decision, Allowing Trump's Latest Asylum Restrictions To Continue in Texas, New Mexico*, WASH. POST (Aug. 16, 2019), https://www.washingtonpost.com/immigration/federal-court-issues-split-decision-on-trumps-latest-asylum-restrictions-allowing-them-to-continue-in-texas-and-new-

prosecute the newcomers for violating federal laws, such as failure to register for the draft, nonpayment of federal income taxes, or selling illicit drugs,[46] just as Mexico would for American *emigrés* who violate its laws while living there.

In this respect, the border between Mexico and the United States would remain exactly the same. All regulatory roles that the federal authorities previously exercised—taxation, military regulation, policing for federal crimes—would remain in effect. What would change is the right of entry from Mexico to California and vice versa. California would enforce the right under rules it would negotiate with Mexico. Those deemed admissible could live in that state, work, and travel freely. If they wanted to leave the state for Oregon or Nevada, for example, they would need to apply under any rules that the other state negotiated with their country of origin or with California.[47]

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mexico/2019/08/16/cb0b8f0c-c046-11e9-9b73-fd3c65ef8f9c_story.html [https://perma.cc/JP8R-RRR6].

46. In these areas, federal law would remain supreme. Suppose, however, that California and Mexico agreed to a more *restrictive* immigration scheme than the federal one? This seems unlikely, but the resulting scheme would need to survive analysis under existing pre-emption law, which it might easily fail to do if it interfered with a key federal policy, such as free trade or a federally established program to increase the labor supply in specific trades or professions, such as the current EBV (Employment Based Visas) program. *See Employment Based Visas*, EB5 INV., https://www.eb5investors.com/visa-information/employment-based-visas [https://perma.cc/CJS7-PPRU]. For one governor who actually declared that he wished for an even more fortified border between his state (Texas) and Mexico, see Antonia Blumberg, *'Mistakes Were Made' in Immigrant Rhetoric Before El Paso Shooting*, HUFFPOST (Aug. 29, 2019), https://www.huffpost.com/entry/greg-abbott-fundraising-letter-el-paso_n_5d68663ee4b0488c0d11ea19?ncid=newsltushpmgnews__TheMorningEmail__083019&guccounter=2 [https://perma.cc/RUH9-LFWW]. On the possibility that the federal government might attempt to prevent a state like California from adopting a more immigrant-friendly regime—within its own borders—than the one favored by the current Administration, see GILBERT G. GONZALEZ, CULTURE OF EMPIRE: AMERICAN WRITERS, MEXICO, AND MEXICAN IMMIGRANTS, 1880–1930 185 (2004) (noting that powerful corporations and U.S. military detachments throughout much of history set immigration in motion by intervening violently in Latin America); Margulies, *supra* note 12, at 1508–09. If federal authorities attempted to detain Mexicans who had entered California legally under that state's rules, invoking 8 U.S.C. § 1325 (2019) (unlawful entry), California's answer would be either that such an immigrant's settling there was lawful or—more sweepingly—that immigrants had not crossed the U.S. border at all.

47. It might be argued that the federal government would then be responsible for policing California's border with other U.S. states, which is a great deal longer than California's border with Mexico. Additionally, the federal government would have to selectively police federal lands within California, which would present a logistical challenge. These objections are relatively easy to answer. The federal government currently is saddled with policing the western border of California, which is a sea border and fairly hard and expensive to police. After the change we advocate came into play, it would no longer have to police the western (sea) border—that would be California's responsibility—just the land border on California's east. And nothing would prevent the federal government from policing federal lands, such as Yosemite, just as it can now.

III. ORIGINARY VIOLENCE AND ITS CONSEQUENCES

As we have seen, the case for open borders seems straightforward. Major political theories favor them,[48] and they are likely to benefit countries on both sides.[49] And yet, many people find *closed* borders attractive enough that they are willing to accept the hardship and economic inefficiency that they introduce.[50] An examination of border policies in light of an insight by a prominent social theorist explains why this is so and yet why the case for relatively open borders nevertheless remains compelling.

A. Originary—and Ordinary—Violence

Originary violence, a concept introduced by Jacques Derrida and discussed briefly by Derrick Bell, describes a type of threshold coercion that differs from the kind most legal scholars examine.[51] Imagine an everyday example. Suppose that I leave a note on your door one day, identifying myself as a neighbor living down the block. Some of us have become concerned

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As this article was going to press, Donald Trump offered states the option of adopting an even harsher view of at least one category of immigrants, namely those seeking asylum, including the option of refusing to accept them altogether. Chris Witte, *Trump Gave States the Power To Ban Refugees. Conservative Utah Wants More of Them.*, WASH. POST (Dec. 2, 2019), https://www.washingtonpost.com/national/trump-gave-states-the-power-to-ban-refugees-conservative-utah-wants-more-of-them/2019/12/02/d8de7b00-1085-11ea-a533-90a7becf7713_story.html?utm_campaign=politics_am&utm_medium=Email&utm_source=Newsletter&wpisrc=nl_politics&wpmm=1 [https://perma.cc/CS2Z-QBHM]. One state, Utah, replied that it actually wished to have more (not fewer) of them. *Id.*

48. *See supra* Part I.A–C.

49. *Id.*

50. *See, e.g.*, Donald Trump, President of the United States, Address on Modernizing Our Immigration System for a Stronger America (May 16, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-modernizing-immigration-system-stronger-america/ [https://perma.cc/29S4-4G7G]; *see also* NICK VAUGHAN-WILLIAMS, BORDER POLITICS: THE LIMITS OF SOVEREIGN POWER 32–34, 65–91 (2009) (noting the resistance many feel to altering the idea of a fixed territorial border that is the basis of national sovereignty and security); SCHUCK & SMITH, *supra* note 17, at 90–103 (same); SMITH, *supra* note 17, at 470–504 (noting the same resistance).

51. *Jacques Derrida (1930–2004)*, ENCYCLOPEDIA PHILOS., https://www.iep.utm.edu/derrida/ [https://perma.cc/3U9N-CJWV]; 1 WALTER BENJAMIN, *Critique of Violence*, *in* WALTER BENJAMIN SELECTED WRITINGS 236, 236–52 (1921) (discussing the authority of law as an assertion of originary violence). Derrick Bell mentions the concept in the last edition of his casebook. *See* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 600 (6th ed. 2008). Other authors have commented on much the same idea but employing differing terminology. *See* SIMONE WEIL, THE ILIAD OR THE POEM OF FORCE: A CRITICAL EDITION 71–105 (James P. Holoka ed. & trans., 2003) (analyzing the famous poem to show that its true lesson is that force enslaves man, shrinks his flesh, blinds the perpetrator, and deforms the spirit of everyone in the vicinity).

about crime in our area and have formed a neighborhood watch with the aim of combating it. One of the measures we are trying to get everyone to carry out is cutting back hedges sharply so that criminals casing the area or pondering a break-in won't be able to hide. We tell you that your hedges are too high and offer to come back tomorrow and trim them ourselves if you don't want to do it. We make plain that somebody has to do it or trouble will follow.[52]

The first act—my note announcing the neighborhood watch with designs on your hedges—is a case of originary violence. You become aware of it when we declare that you must do what we have said or trouble will follow. A different kind of violence may set in later, when we do show up at your yard and start cutting.[53]

Immigration laws and policies are aspects of *originary* violence.[54] Border enforcement pursuant to those laws and policies is a case of *ordinary* violence.

Legal agents perform ordinary violence when they cut down your hedges without your permission, or fine you for not registering a bicycle, or vaccinating your dog against rabies. They also perform a kind of psychological violence when they hold the threat of punishment over you, even if you are a law-abiding citizen who has no objection to doing any of these things.[55]

Originary violence is different. It arises when a government agent of some kind announces an intention to rule—to enforce rules of one kind or another for everyone in a certain region. In the example of the neighborhood watch, it arises when I leave you the abovementioned note advising you of our

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52. *See Rebuke*, *supra* note 8, at 40.

53. *See id.*

54. *See* Richard Delgado, *Law's Violence: Derrick Bell's Next Article*, 75 U. PITT. L. REV. 435, 436 (2014) (discussing a similar example) [hereinafter *Violence*]; *Rebuke*, *supra* note 8 (same); *see also* SARAH SONG, IMMIGRATION AND DEMOCRACY 56–57 (2019) (noting that "the state creates a people by exercising its coercive power over individuals in a territory"); VAUGHAN-WILLIAMS, *supra* note 50, at 66–72 (taking issue with the view that borders between states are "harmless 'fences between neighbors'" and observing that a root word for territory is "terrere, which means to frighten or terrorize," so that a territory is "land occupied by and bounded by violence," directed both at those who are ruled within and those who are excluded). Our example of hedges is a stand-in for borders. Both impede free choice, excite dissension, and invite efforts to penetrate them by those who feel excluded.

55. The violence arises when the citizen thinks "I cannot do that anymore the way I used to." The citizen suffers loss of autonomy as well as fear over the consequences of a breach, even an inadvertent one.

intention to modify everyone's hedges, including yours, because they are too tall.[56]

Acts of this type (*originary* violence) precede the kind of coercion (*ordinary* violence) that officials visit on those who violate their edicts. And in most legal systems, the trappings of what we call due process—hearings, transcripts, rights to an attorney, and so on—arise only in connection with this second (*ordinary*) type of violence.[57] And one of the purposes of these trappings is to turn attention away from the initial act (*originary*) of violence and persuade everyone to go along with it, as uncomplainingly as possible and believing themselves good citizens for doing so.[58]

From this perspective, then, violence comes first and legality (what we call justice) later, and not the other way around.[59] To see how this is so, consider an account (only partly allegorical) of how countries come into being.

B. Originary Violence

Immigration regimes come into play only once a group of people decide to declare themselves a country. Often this happens once they win a war against a neighboring group or, if they start out as colonies, against the home country. The new nation marks its border with a line on a map and signs, barriers, and watchtowers on the ground. Often they deploy men with guns at the ready to fend off anyone trying to enter without permission.[60] They also

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56. *See Violence*, *supra* note 54, at 437 (positing that originary violence sets in "when the law first announces itself and [explains] . . . its intentions," namely to rule the populace); *supra* notes 50–51 and accompanying text (explaining the contents of my note).

57. *Rebuke*, *supra* note 8, at 40.

58. *Id.*

59. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (observing that much of legal interpretation is violent). Violence of both kinds is deplorable, often inexcusable, and damages the spirit of both its victims and those who perpetrate it. *See* WEIL, *supra* note 51 (describing the role of force in structuring and demeaning human relations). Are the two forms of violence—originary and ordinary—connected? Not conceptually, we think; one could, theoretically, have the one without the other. But originary violence that takes the form of harsh rhetoric—"the border is here, damn it!"—almost always leads to laws ("don't you dare try crossing without our permission") or policies ("no Asians need apply"), followed by actual violence ("you broke our law—put your hands behind your back"), in connection with enforcement of the laws. As ordinary citizens witness the above, one will likely see a rise in hate crimes and hate speech against Latinos or other demonized groups—which we have seen in the Trump era—increasing the amount of ordinary violence expended on the targeted group.

60. *Violence*, *supra* note 54, at 444; *Rebuke*, *supra* note 8, at 41 (recounting much the same story of origin); VAUGHAN-WILLIAMS, *supra* note 50, at 51–61 (noting much the same

make plain to domestic groups dissatisfied with the new regime—indigenous people, for example—that the authorities will use force to move them out of the way if they cause trouble.[61] Control over the borders strikes everyone as a vital ingredient of nationhood and cultural identity—as Donald Trump keeps reminding us.[62]

After constituting themselves as countries, some nations, like Switzerland or Chile, have been relatively peaceful and did not make war on their neighbors or seek to expand their borders,[63] while others behaved more aggressively toward their neighbors or their own domestic minorities.[64] But each, even the peaceable ones, was violent in its inception—that is, in its originary act.[65] Those nations whose originary acts were unusually violent—overriding tacit understandings about space, for example, or local ethnic or religious enclaves—often exhibit subsequent histories of turmoil and

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phenomenon). With colonialism, of course, an outside force dictates the lines. *See* Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 36 BROOK. J. INT'L L. 1 (2010) (discussing the "Durand line"); Lauren Markham, *Expat, Immigrant, Migrant, Refugee: Why 'This Land Is Our Land' No Matter the Label*, N.Y. TIMES (June 4, 2019), https://www.nytimes.com/2019/06/04/books/review/suketu-mehta-this-land-is-our-land.html [https://perma.cc/W664-ND8N] (book review) (noting that "forty percent of all the national borders in the entire world today were made by just two countries: Britain and France").

61. *Terra nullius* is a good example. *See Mabo v Queensland [No 2]* (1992) 175 CLR 1 (Austl.) (repudiating the longstanding basis for English dispossession of native land rights in Crown territories); *Rebuke*, *supra* note 8, at 41 (discussing *terra nullius* and similar policies).

62. *See* David Flint, *No Borders, No Country*, SPECTATOR (Feb. 23, 2019), https://retro.spectator.co.uk/2019/02/no-borders-no-country/ [https://perma.cc/NJV3-EJ3Q] (attributing this saying to Donald Trump). Trump's absolutist view stands in tension with the idea of dual citizenship, a status that many in the United States have traditionally enjoyed. JOHNSON, *supra* note 1, at 8.

63. Jennifer Latson, *Switzerland Takes a Side for Neutrality*, TIME (Feb. 13, 2015), https://time.com/3695334/switzerland-neutrality-history/ [https://perma.cc/YSW5-SY3X]; Luca Ventura, *The Most Peaceful Countries in the World 2019*, GLOB. FIN. (June 21, 2019), https://www.gfmag.com/global-data/non-economic-data/most-peaceful-countries [https://perma.cc/H36V-CJYN]; *see also Rebuke*, *supra* note 8, at 41. While Chile has not waged war against its neighbors, like a number of South American countries, it has treated its internal minorities, such as indigenous people or ones of African descent, in less than exemplary fashion. Rodrigo Espinoza-Troncoso & Michael Wilson-Becerril, Opinion, *What Is Behind State Violence in Chile?*, ALJAZEERA (Dec. 3, 2019), https://www.aljazeera.com/indepth/opinion/state-violence-chile-191202110752549.html [https://perma.cc/SCR3-Q89Q].

64. E.g., Germany during the Nazi years, see *German Exhibit Shows Appeal of Nazi Ideology*, NPR (Nov. 8, 2010), https://www.npr.org/templates/transcript/transcript.php?storyId=131039806 [https://perma.cc/45GZ-V4MY], or South Africa under Apartheid, see Ventura, *supra* note 63; *Rebuke*, *supra* note 8, at 41–42.

65. *Violence*, *supra* note 54, at 444–46 (discussing founding acts).

oppression of minority groups.[66] One thinks of South Africa,[67] modern-day Yugoslavia,[68] or the U.S. during the period of westward expansion.[69]

1. Immigration Practice and the Role of Laws

When new nations enact laws to control their borders, this enactment presents a second example of originary violence. For immigration laws cannot justify themselves. Justificatory measures such as due process, hearings, national quotas, and executive decrees follow the announcement of the laws rather than precede them.[70] This announcement arrives by fiat. We declare the arrival of the new country and its border and rules, and let everyone know that they are expected to go along with the new order. If they don't, we'll try them as lawbreakers or if they are really obnoxious, "traitors."[71]

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66. The Balkans, with their unstable borders, endless feuds and massacres of tribal enemies, are a prime example. *See, e.g.*, *The City Star*, KARLOVAC, https://www.karlovac.hr/the-city-star-3034/3034 [https://perma.cc/3SEB-5AY6] (describing a tiny walled city that changed hands many times owing to struggles between one empire or another over trade routes and access to a small river); *see also* GEOPOLITICS OF EUROPEAN UNION ENLARGEMENT: THE FORTRESS EMPIRE (Warwick Armstrong & James Anderson eds., 2007) (discussing the politics of the new internal and external borders, largely peaceful, of the European commonwealth). On the example of the Kashmir region, a much-disputed region on the India-Pakistan border, see, for example, Nikhil Kumar, *India Parliament Votes To Change Kashmir's Status and Give New Delhi More Control over Contested Region*, CNN (Aug. 7, 2019), https://www.cnn.com/2019/08/06/asia/india-kashmir-union-territory-intl-hnk/index.html?ncid=newsltushpmgnews [https://perma.cc/SGX3-LEP9]. On the long-running disputes over national sovereignty and borders in the former Yugoslavia, see Blaž Zgaga, *Exposing Slovenia's Dark History in the Yugoslav Conflict*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Mar. 3, 2014), https://www.icij.org/blog/2014/03/exposing-slovenias-dark-history-yugoslav-conflict/ [https://perma.cc/X7YH-F5V8].

67. *See Rebuke*, *supra* note 8, at 41–42.

68. *See, e.g.*, Zgaga, *supra* note 66.

69. *See* VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS (1988) (discussing treatment of Indians during Westward expansion and afterward); *infra* note 86 and accompanying text (discussing the War with Mexico).

70. *Violence*, *supra* note 54, at 446 (discussing this order of priority).

71. *See* Aaron Blake, *Trump Keeps Throwing Around the Word 'Treason' Which May Not Be a Great Idea*, WASH. POST. (May 15, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/05/15/trump-keeps-lowering-the-bar-for-what-constitutes-treason-which-may-not-be-a-great-idea/?utm_term=.7e46d6a7ce20 [https://perma.cc/NK8H-WLTV] (discussing recent rhetorical excesses); *Whig and Tory*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Whig-Party-England [https://perma.cc/LRC5-KP74] (noting that in the colonies, the term came to be attached to colonists who were attached to King George and opposed the American Revolution); *see also* KARLOVAC, *supra* note 66 (where national loyalties seemed to have shifted many times, according to which empire had incorporated a certain region).

Naturally, we provide them with an attorney, copies of the charges against them, and the rules we will use during their trial.[72] That makes the exercise of force appear legitimate, even consensual.[73] With luck, everyone will internalize the new rules ("stay out unless you have our permission") so that we don't have to coerce them every time. They coerce themselves, believing that in doing so they are being model citizens.[74]

2. Immigration Practice and Ordinary (Consequential) Violence

The law, then, performs *ordinary* (consequential) violence when it sentences someone to prison, reinforces a civil judgment, deports someone, or demands travel papers at the border.[75] It also does so when it holds the threat of punishment over the heads of average citizens, even those who are inclined to comply with its commands.[76] Each of these is a case of *ordinary* violence.[77]

But, as we saw, another type of violence (*originary*) sets in much earlier when a lawgiver of some kind, usually self-appointed, announces itself and begins issuing edicts.[78] In the case of the troubled neighborhood, it occurs when I leave a note announcing the neighborhood watch and explaining my designs on your hedges.[79] With immigration, it occurs when a nation tells the rest of the world that they cannot enter its territory without asking permission in any of a large number of very complex ways.[80] If they fail to do this to our

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72. *Rebuke*, *supra* note 8, at 43.

73. ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Quintin Hoare ed., 1989 reprint) (discussing the idea of false consciousness, in which an oppressed people begin to identify with their oppressors); *see also* GEORG LUKÁCS, HISTORY AND CLASS CONSCIOUSNESS 72 (Rodney Livingstone trans., Merlin Press 1971) (same); Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32, 36–37 (1982); *False Consciousness*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/social-sciences-and-law/sociology-and-social-reform/sociology-general-terms-and-concepts/false-consciousness [https://perma.cc/2UM8-QKC5] (defining the term).

74. GRAMSCI, *supra* note 73; ENCYCLOPEDIA.COM, *supra* note 73 (discussing hegemony and false consciousness); *see Rebuke*, *supra* note 8, at 43; *see also* GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949) (discussing how easily an authoritarian leader can control consciousness in a population); VAUGHAN-WILLIAMS, *supra* note 50, at 71 (declaring that the authority of the state to exert power over its citizens rests on their forgetting how contingent was the origin of that power and how it comes cloaked with the "mystique" of special occasions and celebrations).

75. *Violence*, *supra* note 544, at 437 (discussing ordinary violence).

76. *Id.*

77. *Id.*

78. *Id.* (highlighting how originary violence sets in when the law first announces itself and explains its intentions, namely to rule the populace).

79. *See supra* notes 51–52 and accompanying text.

80. *Violence*, *supra* note 52, at 437 passim.

satisfaction, we will order them to appear before one of our tribunals and impose a penalty, generally either detention or removal.[81] But, as with the hedges, the purpose of doing all this pursuant to law is to conceal the initial act of violence that accompanied the announcement and persuade ordinary citizens to go along with it.[82] If they do not, we explain to them that they must put on an orange jumpsuit and live in a detention center.[83] Their family members will grieve and reconcile themselves to life without them.[84] Other appalling consequences can ensue, all perfectly legal, in cases of the second kind of violence—the ordinary or consequential kind.[85] But in every such case, most of us will consider it a matter of due process. After all, he was "illegal."

C. How Originary Violence Foreshadows the Other Kind

To see how fluid borders can be in a state of nature and how ones that are violent in the originary sense (i.e., enactment) very often turn violent later (ordinary violence), consider three examples from U.S. history, two from the mid-1800s, the other very recent.

1. "America's Wicked War" and Its Consequences

Prior to the outbreak of war with Mexico, the border between the two nations had been in dispute.[86] In a mood for expansion, President Polk sent a detachment of U.S. troops to a disputed region between two rivers.[87] When the Mexican Army obligingly opened fire on them, several columns of U.S. soldiers drove their way to Mexico City, slaughtering as they went.[88] On arriving there, they dictated peace terms requiring Mexico to cede roughly

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81. *See generally id.*

82. *See generally id.*

83. *See generally id.*

84. *Id.* at 437 (noting that most citizens, on learning what the law is, immediately concede its authority); *see* MICHEL FOUCAULT, POWER/KNOWLEDGE (1980) (describing power as circulating among lives and bodies, as in a system of capillaries, but always requiring a space and boundaries); VAUGHAN-WILLIAMS, *supra* note 50, at 81; *see also* JOHNSON, *supra* note 1, at 7 (calling attention to border-drawing as an exercise of power).

85. See Part III.C, immediately following.

86. *See* Richard Delgado & Juan Perea, *Racial Templates*, 112 MICH. L. REV. 1133, 1133 (2014) (discussing the pre-war period and the outbreak). Even earlier, the border was informal and fluid, with a lot of unremarked crossing. *See supra* notes 14, 33, 35; *infra*, notes 131–133.

87. Delgado & Perea, *supra* note 86, at 1133–40.

88. *Id.* at 1133.

one-half of its territory to the United States, including all of California and much of present-day New Mexico, Arizona, Nevada, Utah, and Colorado.[89]

America's "wicked war" left a residue of hard feelings. Mexican schoolchildren learn to call it "the mutilation,"[90] and even within the ceded territory, the new Mexican-Americans fared poorly, denied first-class citizenship by the U.S. authorities[91] and subjected to land grabs by greedy *Yanquis* and unscrupulous attorneys and land agents.[92] Today, Latinos are the largest minority of color and in many ways, the most marginalized and disadvantaged.[93] Unlike the Italians, Irish, Greeks, and other immigrant groups that have risen up the ladder in successive generations, Latinos, especially Mexican-Americans, seem mired at the bottom.

Contributing mightily to the present state of the undocumented Latino in the United States was NAFTA (North American Free Trade Agreement), which in 1994 allowed for the free movement of goods and capital between the United States, Canada, and Mexico.[94] What it did not address was labor—specifically rural workers whose small farm livelihood could not compete with imported foodstuffs from the North; this, in turn, precipitated the influx of millions of Mexicans, without the freedom of movement or legal status, to cross and re-cross the U.S.-Mexico border to seek employment.[95]

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89. *See* Juan Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283, 284–85 (2003) (discussing the territorial accession).

90. Tim Weiner, *Mexico City Journal; Of Gringos and Old Grudges: This Land is Their Land*, N.Y. TIMES (Jan. 9, 2004), https://www.nytimes.com/2004/01/09/world/mexico-city-journal-of-gringos-and-old-grudges-this-land-is-their-land.html [https://perma.cc/S8HT-PFCR] (discussing long-simmering resentment over Yankee encroachment).

91. *See* JUAN PEREA ET AL., LATINOS AND THE LAW 8–14 (2008) (discussing the residue of the War, including the Treaty of Guadalupe-Hidalgo that ended it); Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a "Naked Knife"*, 4 MICH. J. RACE & L. 39 (1998) (same).

92. PEREA ET AL., *supra* note 91, at 23–36 (discussing land claims).

93. *Hispanics in the United States Fast Facts*, CNN (Mar. 6, 2019), https://www.cnn.com/2013/09/20/us/hispanics-in-the-u-s-/index.html [https://perma.cc/5YWZ-24AA]; *see also* UNITED NATIONS, UNITED NATIONS HUMAN DEVELOPMENT REPORT 2001, at 15, 141–42 (2001), http://hdr.undp.org/sites/default/files/reports/262/hdr_2001_en.pdf [https://perma.cc/BHY9-4WA6] (providing human development indexes for African Americans and Hispanic Americans that would place them, if they were nations, 46th in the world and 68th in the world, respectively).

94. María Josefina Saldaña-Portillo, *In the Shadow of NAFTA:* Y Tu Mamá También *Revisits the National Allegory of Mexican Sovereignty*, 57 AM. Q. 751, 753 (2005).

95. *See id.* at 753, 756; BENDER, *supra* note 4, at 3, 114–30 (discussing the role of labor supply and demand in border crossings and regulation).

2. Hard Times in the South and Southwest

By the mid-1990s, Latinos, most of them from Mexico, began migrating to the South in large numbers.[96] The weather was mild and familiar, and jobs were plentiful in industries such as food preparation, construction, and agriculture.[97] Southern business leaders welcomed the new arrivals, but the men in the street did not, prevailing on their legislatures to enact harsh laws penalizing practically anything that an unauthorized entrant might want to do.[98] Some communities engaged in "roundups" of Mexican-looking people; many of whom were citizens.[99] By 2012 or so, the immigrant population of most of these states was in sharp decline, with many moving to greener pastures elsewhere.[100]

Why would the citizens of a labor-strapped region turn against a group that promised (and for a short time delivered) economic salvation? Recent studies link the harsh attitude to a period just before the Civil War, when southern militia attempted to counter growing Yankee political might by privately funded expeditionary forces that attempted to conquer Latin American and Caribbean countries with the aim of creating new states, which would of course be pro-slavery.[101]

During this expeditionary or "filibuster" period, Southern newspapers, civil organizations, and speakers whipped up public animosity toward Latin American nations with the aim of justifying the movement to seize control over them.[102] Fighting and disputes over sovereign control thus left a residue

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96. *See* Richard Delgado & Jean Stefancic, *Southern Dreams and a New Theory of First Amendment Legal Realism*, 65 EMORY L.J. 305, 334–36 (2014) (discussing this period and the lead-up to it).

97. *Id.* at 335. *See also* Saldaña-Portillo, *supra* note 94 (discussing reasons for increased rates of migration to the United States from Mexico).

98. Delgado & Stefancic, *supra* note 96, at 318, 336 (discussing Alabama's anti-immigrant statute, HB 56, and noting Arizona's similar statute, SB 1070).

99. *Id.* at 338; *see also* JOHNSON, *supra* note 1, at 110 (describing one such roundup in Chandler, Arizona in 1997).

100. Pamela Constable, *Alabama Law Drives Out Illegal Immigrants but Also Has Unexpected Consequences*, WASH. POST (June 17, 2012), https://www.washingtonpost.com/local/alabama-law-drives-out-illegal-immigrants-but-also-has-unexpected-consequences/2012/06/17/gJQA3Rm0jV_story.html [https://perma.cc/9A68-8ZTH].

101. ROBERT E. MAY, THE SOUTHERN DREAM OF A CARIBBEAN EMPIRE, 1854-1861 (1973) (discussing the expeditionary or filibustering period); Delgado & Stefancic, *supra* note 96, at 324–32.

102. Delgado & Stefancic, *supra* note 96, at 327–29.

of ill will toward brown-skinned people that made it seem natural to marginalize and burden them with unfair laws a century later.[103]

3. Trump's Anti-Immigrant Laws

Even more recently, the Trump administration has been whipping up fervor among its base by inveighing against Latino immigrants, whom he terms rapists and murderers out to lead lives of luxury in the U.S. supported by lavish welfare payments funded by unwitting U.S. taxpayers.[104] Among the measures his administration has enacted are family separation,[105] travel bans,[106] detention facilities with grossly substandard living conditions,[107] and sharp cutbacks on asylum.[108] His drumbeat of anti-immigrant rhetoric has caused a predictable rise in nativism,[109] bullying in schools,[110] police harassment,[111] and hate crime.[112]

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103. *Id.* at 344–46 (tracing how this animus survived in Southern song, literature, myth, and even roadside signs for more than a century).

104. Delgado & Stefancic, *supra* note 11, at 292–94 (discussing Trump's harsh policy). Trump also revised NAFTA to make it even more punitive and one-sided; *see* Stan Greenberg, Opinion, *Trump Promised a New Trade Policy. But His New NAFTA Might Be Worse than the Old One*, WASH. POST (Apr. 10, 2019), https://www.washingtonpost.com/opinions/2019/04/10/trump-promised-new-trade-policy-his-new-nafta-might-be-worse-than-old-one/ [https://perma.cc/596F-PFN3] (same).

105. Delgado & Stefancic, *supra* note 11, at 299.

106. *Id.* at 292.

107. *Id.* at 299.

108. *Id.* at 292.

109. *Id.* at 294.

110. Rosemary Sword & Philip Zimbardo, *The Trump Effect: An Update*, PSYCHOL. TODAY (Jan. 30, 2018), https://www.psychologytoday.com/us/blog/the-time-cure/201801/the-trump-effect-update [https://perma.cc/WDJ5-MVBD] (discussing fallout from Trump's acts).

111. Press Release, Latino Justice, National Poll Shows Latinos Are Concerned About Police Violence, Feel Less Safe Under Trump but Insist on Increased Spending on Rehabilitation Instead of More Funding for Prisons or Police (Jan. 10, 2017), https://www.latinojustice.org/es/news/national-poll-shows-latinos-are-concerned-about-police-violence-feel-less-safe-under-trump [https://perma.cc/B86N-GRDY].

112. Griffin Sims Edwards & Stephen Rushin, The Effect of President Trump's Election on Hate Crimes (Jan. 31, 2019) (unpublished manuscript), https://dx.doi.org/10.2139/ssrn.3102652 [https://perma.cc/SVD3-GKAR] (observing that hate crimes are increasing). Trump's unusually violent behavior toward immigrants thus provides a prime example of how originary violence (here, the War with Mexico ending in an unfair treaty under which Mexico lost nearly half its land) trickles down in the form of ordinary violence, even years later. Even though the originary kind targets nations—usually weaker ones—and ordinary violence individuals, the first sets up conditions that often lead to the second in a form of trickle-down retribution.

4. Tackling Isolated Examples of Consequential Violence: The Missionary Complex and the Frequent Rescuer

If the current system of highly fortified borders is both unjustified and senseless, one might ask why scholars and activists do not attack it frontally. Many hasten to the defense of those who are detained in appalling conditions or rise to challenge obstacles that the administration places in the way of those seeking asylum.[113] Others deplore the failure of the immigration system to provide counsel to those charged with immigration offenses or accuse ICE of heavy-handed tactics in attempting to locate and detain those who are here without authorization.[114] But few question the system itself that visits these cruelties. Might it be because "fighting the power" is arduous and may easily damage one's career, while taking the part of the benevolent rescuer feels good and evokes admiration? We are reminded of the story of two friends who were walking along a river.[115] Spotting a baby floating downstream in a basket, both friends waded into the river and rescued it.[116] After setting it safely on the bank, they noticed a second baby in a basket, then a third.[117] They rescued both. On spotting a fourth drifting downstream, one of the friends set off determinedly upstream. The remaining friend asked, "Here comes another one. Aren't you going to help me rescue it?" To which the other replied, "I'll be back. But first, I want to find out who is putting all those babies in the river."[118]

The point of the allegory is that sometimes one must consider the frame inside which iniquitous acts take place, and not just the individual acts

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113. *E.g.*, Anneliese Hermann, *Asylum in the Trump Era*, CTR. FOR AM. PROGRESS (June 13, 2018), https://www.americanprogress.org/issues/immigration/reports/2018/06/13/452025/asylum-trump-era/ [https://perma.cc/RFM5-4D8U]; Mary Papenfuss, *Appalling Conditions in Immigrant Child Centers Akin to 'Torture Facilities,' Doctor Says*, HUFFPOST (June 24, 2019), https://www.huffpost.com/entry/torture-facilities-immigrant-children-detention-dolly-lucio-sevier_n_5d11623fe4b07ae90da2393b [https://perma.cc/D6RR-FEHX].

114. Ahilan Arulanantham, *Immigrant Children Do Not Have the Right to an Attorney Unless They Can Pay, Rules Appeals Court*, ACLU (Feb. 6, 2018, 4:00 PM), https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/immigrant-children-do-not-have-right-attorney [https://perma.cc/B6AL-XU7R]; Caitlin Dickerson & Zolan Kanno-Youngs, *Thousands Are Targeted as ICE Prepares To Raid Undocumented Migrant Families*, N.Y. TIMES (July 11, 2019), https://www.nytimes.com/2019/07/11/us/politics/ice-families-deport.html [https://perma.cc/U98D-F8AD].

115. *Cf.* Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for 'Impermanence'*, 34 CAP. U. L. REV. 405, 405 n.2 (2005) (depicting the "The Parable of the River" or "The Parable of Good Works").

116. *Id.*

117. *Id.*

118. *Id.*

themselves. The next section (Part IV) counters a powerful argument on behalf of that very same frame. Part VI proposes a new frame that lacks many of the drawbacks of the current one.

IV. THE ARGUMENT THAT THE INHABITANTS OF A REGION HAVE A RIGHT TO DETERMINE WHO MAY ENTER

Recently, philosophical thought has offered a seemingly powerful rebuttal to the idea of open borders. It is that those living in a region have a right, based on the freedom of association, to determine who is fit to live there.[119] Since an outsider is not a current member of the community in question, he or she cannot insist upon this right. At best, this person has a right to travel. But the would-be immigrant could just as easily travel in a different direction, including inside his or her own homeland. Hence, the idea that he or she should be free to travel across *another country's borders* and take up residence there stands on a very weak foundation.

This argument is similar to one that Herbert Wechsler levelled against *Brown v. Board of Education*.[120] In an article entitled *Toward Neutral Principles of Constitutional Law*, Wechsler reasoned that "if the freedom of association is denied by segregation, integration forces an association upon those to whom it is . . . repugnant."[121] And given a choice "between denying the association to those who wish it or imposing it on those who would avoid it," he was unable to find a principle that would justify preferring the one over the other.[122]

History has not treated this argument kindly. Many pointed out that the right of a black child to attend an integrated school supersedes by far the right of a white parent to send his kids to a school that is all-white.[123] Much the same would hold true with respect to borders. The right of a nation to exclude

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119. *See* CHRISTOPHER HEATH WELLMAN & PHILIP COLE, DEBATING THE ETHICS OF IMMIGRATION: IS THERE A RIGHT TO EXCLUDE? 2–3, 13, 155 (2011) (discussing the pros and cons of a right to exclude immigrants); *see also* SONG, *supra* note 54, at 56–82 (arguing that sovereignty is necessary to statehood and includes the right to close borders, opening them only to those it chooses).

120. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32–34 (1959); *see* Brown v. Board of Education, 347 U.S. 483 (1954).

121. Wechsler, *supra* note 120, at 1, 34.

122. *Id.* at 34–35. *But see* Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (noting that white self-interest ("interest convergence") supplied the missing principle).

123. *See* Stanley Fish, *When Principles Get in the Way*, PBS, https://www.pbs.org/shattering/sfish.html [https://perma.cc/EZ9M-GQU3] (discussing fallacies inherent in the neutral principles argument).

nonwhite immigrants, for example, would smack of racism[124] and would, under almost any conceivable political theory,[125] be entitled to less respect than the right of a traveler to seek entry, particularly for the purpose of securing asylum.[126]

Does that do justice to the philosopher's claim? Perhaps discrimination in connection with entry is not based on skin color at all (highly reprehensible and hard to justify), but economics and culture (where the case is arguably stronger). To evaluate this suggestion, let us compare the border with Mexico to the Canadian one.

V. AN EXAMPLE: THE U.S. BORDER WITH CANADA

The border between these two countries is not antagonistic or violent but based on a degree of trust and friendliness.[127] Except for the Chinese during an earlier period, skin color seems to play little role in determining the ability of a Canadian traveler to cross in order to visit family or friends or perform a brief errand.[128] Black Canadians cross readily to U.S. border towns, and Black Americans do the same in the opposite direction.[129] The two regions often work cooperatively on necessary repair or construction of common

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124. *See* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan Perea ed., 1997) (discussing the role of race and racism in the opposition to immigration).

125. Behind Rawls' veil of ignorance (*see supra* note 32), for example, most of us, if unaware whether we would be white or nonwhite, would opt for freedom of travel. By the same token, policymakers bent on maximizing act or rule utility would opt for nondiscriminatory and relatively open borders to promote cultural variety and strong labor markets.

126. *See Asylum & The Rights of Refugees*, INT'L JUST. RESOURCE CTR., https://ijrcenter.org/refugee-law/ [https://perma.cc/KH98-Z8MG] (reviewing international conventions and cases declaring the high place this right holds in the law of nation); *see also* Greg Sargent, Opinion, *Trump's Latest Tweetstorm Is Worse than It Appears*, WASH. POST (Apr. 2, 2018), https://www.washingtonpost.com/blogs/plum-line/wp/2018/04/02/trumps-latest-unhinged-tweetstorm-is-worse-than-it-appears/ [https://perma.cc/JG4Z-N4BL] (noting that "law and popular culture have come to accept that asylum seekers are unlike other unauthorized migrants," in accordance with "humanitarian obligations" that are rooted in post-World War II international conventions and norms, and attributing the remark to Professor Hiroshi Motomura).

127. *See* DOROTHEE SCHNEIDER, CROSSING BORDERS: MIGRATION AND CITIZENSHIP IN THE TWENTIETH-CENTURY UNITED STATES 88 (2011) (discussing border relations with Canada).

128. *Id.* at 69, 91 (observing that the Chinese Exclusion Act of 1882 for many years barred almost all immigration from China into the United States. Thus, the U.S. Bureau of Immigration examined all immigrants arriving by train at U.S.-Canada railway border crossings to determine whether they belonged to an excluded class, i.e. diseased, criminals, or Chinese).

129. *Id.*

infrastructure projects such as bridges and roadways.[130] Many secondary roads leading into and out of Canada are unguarded, a simple sign marking the end of one country and the start of another.[131]

One likely reason for this relatively tranquil border, compared to the one with Mexico, lies simply in the different circumstances of their creation or origination. To put it plainly, the Mexican border has often been a site of contestation.[132] Like the Balkans or other troubled areas, it has a history replete with originary violence;[133] the Canadian border does not.[134] Of course, other differences mark the two boundaries. The one with Mexico ends a Spanish-speaking region and starts an English-speaking one; the one with Canada does not. The region ending at the border with Mexico traces its culture, history, and law to Spain, the other (U.S. and Canada) traces theirs to England and France. Still, the main differences seem rooted in struggle, war, and turmoil: originary violence, in short. Without that, they might resemble the borders between, say England, Scotland, and Wales, or Venezuela and Brazil, relatively peaceable borders among longtime friends.[135]

In short, the U.S. border with Mexico has been chaotic, confused, and marked with violence and contention for some time. The one with Canada has not. What lessons can we draw from these diverging experiences?

VI. MODIFYING BORDER POLICY EXPERIMENTALLY: A STATE-BY-STATE APPROACH

If one state, such as California, introduced a new, consensual border policy along the lines described above, it is very likely to prove successful. Because the degree of originary violence surrounding its enactment would be low,

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130. *E.g.*, *Project Profile: Gordie Howe International Bridge*, U.S. DEPT. TRANSP., https://www.fhwa.dot.gov/ipd/project_profiles/mi_gordie_howe_int_bridge.aspx [https://perma.cc/6YQD-FLXG] (discussing one such large joint project).

131. John Dankowsky, *Travelling Along America's 'Forgotten Border*,' NPR (Sept. 28, 2018), https://www.wnpr.org/post/traveling-along-americas-forgotten-border [https://perma.cc/K7AK-VLF3]; *see also* SCHNEIDER, *supra* note 127, at 89.

132. SCHNEIDER, *supra* note 127, at 95–96.

133. *Id.* at 95; *see also* BENDER, *supra* note 4 (discussing crime and drug dealing in this region). *But see* LIM, *supra* note 14 (noting that very early in the two countries' history, the border between the two was informal and porous, and not policed at all rigorously).

134. SCHNEIDER, *supra* note 127, at 89–93.

135. *Id.* at 93–96. On the late nineteenth century attempt to establish the western end of the U.S. border with Mexico, see INT'L BOUNDARY COMM'N OF THE UNITED STATES AND MEXICO, REPORT OF THE BOUNDARY COMMISSION UPON THE SURVEY AND RE-MARKING OF THE BOUNDARY BETWEEN THE UNITED STATES AND MEXICO WEST OF THE RIO GRANDE, 1891–1896 (1898).

populations on both sides are unlikely to resent it. The two regions could probably police their border with a relative lack of weaponry or fortifications. California might even offer to extend any such new regime to adjacent U.S. states, such as Nevada and Oregon. The new arrangement might, in turn, motivate those other states to seek agreements with their neighbors on other sides. Oregon might wish to make immigration easy for Canadians willing to teach math and science in grade schools or Mexicans capable of serving as fire fighters during the fire season. Nevada might want to facilitate settlement in small hamlets in danger of turning into ghost towns. By the same token, Mexico might opt to make border crossing easy for Americans from any of those states interested in enjoying retirement in a peaceful village or opening a business or school.[136] The border between the United States and Mexico is already integrated, culturally and economically, especially in regions such as El Paso.[137] The proposal outlined here would allow it to become even more so.[138]

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136. *See* Richard Delgado, *A U.S.-Mexican Law School for Deportees*, 70 FLA. L. REV. F. 108 (2018) (discussing one such proposal); *see also* Shapiro, *supra* note 33 (discussing how, following the deportation of the father, a family from one U.S. city is making their home and a decent living in a distant Mexican city where their young American-looking children are attending public schools and learning to be bilingual).

137. *See, e.g.*, Escobar, *supra* note 33.

138. On states as laboratories of invention, see New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (Brandeis, J., dissenting). *See also* LIM, *supra* note 14 (same). In the regime outlined above, the border with Mexico would revert somewhat in the direction of the regime that prevailed early in the countries' histories, when passage back and forth was fluid, informal, and not rigorously policed. For the argument that "mestizo democracy," in which immigrant and native cultures mix and blend, would improve both freedom and democracy anywhere in the United States that proved willing to try it, see JOHN FRANCIS BURKE, MESTIZO DEMOCRACY: THE POLITICS OF CROSSING BORDERS (2002). If California renders its border with Mexico consensual—its terms agreeable to both its own citizens and to Mexico—the new border regime would presumably be much less violent, in both senses (originary and ordinary) than it is now. Would this mean that California merely shifts the violence that formerly attended its border, to other states so that their borders became more violent? Probably not. If, as we suspect, California prospers because of the new energy, labor, and culture of the newcomers, other states are apt to follow its example, to everyone's good—even, perhaps, Arizona, which until recent has been virulently anti-Mexican. *See, e.g.*, Richard Delgado, *Precious Knowledge: State Bans on Ethnic Studies, Book Traffickers (Librotraficantes), and a New Type of Race Trial*, 91 N.C. L. REV. 1513 (2013). If Mexico were cautious, it might propose that Baja California try out the new arrangement first and see how it worked out. Since the basis for the agreements we have been describing is contractual—the theory being *consent*—three-way agreements should be theoretically possible, just as they are in the world of corporate contracting.

Above, we posited that states on either side of California are unlikely to resent its experiment with consensual borders between itself and Mexico. But might the federal government resent the arrangement? Possibly so, especially under a regime like Donald Trump's. After all, the move from federal regulation of immigration to regulation by the individual states could seem jarring, and especially so to a federal government hostile to immigration in general. Why should states be

CONCLUSION

Could the U.S. border with Mexico ever be as peaceful as, for example, that with Canada? In terms of originary violence, the two stand on quite different footings, so that the greater degree of turbulence surrounding the former should come as no surprise. But many border regions, such as El Paso, are relatively happily integrated, even if on a federal level the two nations are often at each other's throats. This article puts forward a new basis for cross-border political relationships, namely that the states and regions on both sides be permitted and urged to draw up the terms of their own relationship, such as who can enter and remain and for how long. Consensual borders would reduce violence of two kinds and would enable regions to take advantage of talent, labor, skill, and culture available close at hand, to the benefit of all.

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in charge of immigration, it might ask; the U.S. government has been in charge of this area for much of our history. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581 (1889); *see also* U.S. CONST. art 1, § 10, cl. 1 (prohibiting states from entering into foreign treaties or alliances). State regulation of admission and removal would thus seem to require an explanation. But this article has offered several reasons in support of such an experiment. For the reader who might like California's negotiated border arrangement, but not one like South Carolina's, our answer is that federal preemption would seem to block any effort by a state to introduce an immigration regime harsher than the current one. Arizona v. United States, 567 U.S. 387 (2012). And, in any event, if South Carolina proposed a set of onerous terms ("send us just your light-skinned Mexicans," or "just ones who speak English with a Southern accent"), Mexico would be free to reject them, probably indignantly.