

**IMMIGRATION AND COLLECTIVE  
PROPERTY  
INMIGRACIÓN Y PROPIEDAD  
COLECTIVA**

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### *Abstract*

The notion that immigrants have a right to immigrate to the U.S. appears to conflict with the government or citizens' property rights. Michael Huemer has given one of the most interesting and provocative arguments on immigration in years. It turns the dominant view on its head. Unfortunately, the argument fails. U.S. citizens own land, individually, collectively, and via their government. For immigrants to gain a right to enter it, Huemer must think that the landowners have lost their rights to their land, the landowners' rights are overridden, or the landowners' rights are undermined. He does not show that any of these are true. A separate issue and one not discussed here is whether it is a wise policy to reduce or end immigration to the United States.

*Keywords:* Immigration, Rights, Property, Collective Property, consent.

### *Resumen*

La idea de que los inmigrantes tienen derecho a inmigrar a los EE. UU. parece entrar en conflicto con los derechos de propiedad del gobierno o de los ciudadanos. Michael Huemer ha dado uno de los argumentos más interesantes y provocativos sobre la inmigración en años. Da la vuelta al punto de vista dominante. Desafortunadamente, el argumento falla. Los ciudadanos estadounidenses son dueños de tierras, de forma individual, colectiva y a través de su gobierno. Para que los inmigrantes obtengan el derecho a entrar, Huemer debe pensar que los terratenientes han perdido sus derechos sobre sus tierras, los derechos de los terratenientes están anulados o los derechos de los terratenientes están socavados. Él no muestra que ninguno de estos sea cierto. Un tema aparte y que no se discute

aquí es si es una política sabia reducir o acabar con la inmigración a los Estados Unidos.

*Palabras clave:* Inmigración, derechos, propiedad, propiedad colectiva, consentimiento.

### *Introduction*

Libertarianism and other free-market philosophies are often thought to be committed to a pro-immigration policy on the basis that there should be an unhindered flow of people just as there should be an unhindered flow of goods, ideas, and so on. The problem is that if some of a nation's property and resources are jointly owned, then it seems that owners, acting jointly, may exclude people in the same way that a married couple who own their house jointly may exclude people from it.

A rival approach might focus on the interests of potential immigrants and how these might justify a right to immigrate. These interests might, on some accounts, even lead to a right to immigrate to the United States. A similarly motivated idea can be seen in the Universal Declaration of Human Rights. It recognizes a right to asylum. Specifically, Article 14 states that "Everyone has the right to seek and to enjoy in other countries asylum from persecution." Note this raises much the same issue to the extent that it implies that one person has a right to enter another country despite not previously having been a citizen there or getting the consent of the member state to enter. Given that the moral justification for the declaration is not the agreement of member states, but rather the "inherent dignity and equal and inalienable rights of all members of the human family," this suggests that people have a right to asylum. A similar argument could be made with regard to immigration. In this paper, I look at this approach. This paper focuses on an argument by Michael Huemer because it is the best-developed account of this view.

The argument in this article matters in part because it shows that Michael Huemer's argument fails. His argument is very influential. More importantly, it shows there is no successful right-based argument for open borders. Nor is there a right-

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based argument for a moral right to immigrate. This is true even if some potential immigrants are in desperate shape. Because of their trumping function, rights are the most important features of non-consequentialist morality. As a result, there likely is no all-things-considered non-consequentialist case for open borders or a right to immigrate. This is a big deal.

### *Huemer's Argument*

In "Is There a Right to Immigrate?" Michael Huemer argues that ordinary, non-criminal individuals have a right to immigrate to the United States (Huemer, 2010). His argument is powerful, interesting, and new. In this article, I argue that it fails.

His argument has two parts. First, he argues that individuals have a *prima facie* right to immigrate. This rests on the notion that individuals have a *prima facie* right to be free from harmful coercion and the claim that immigration restrictions are harmful and coercive. Here is his scenario illustrating these claims.

Marvin is in desperate need of food. Perhaps someone has stolen his food, or perhaps a natural disaster destroyed his crops; whatever the reason, Marvin is in danger of starvation. Fortunately, he has a plan to remedy the problem: he will walk to the local marketplace, where he will buy bread. Assume that in the absence of outside interference, this plan would succeed: the marketplace is open, and there are people there who are willing to trade food to Marvin in exchange for something he has. Another individual, Sam, is aware of all this and is watching Marvin. For some reason, Sam decides to detain Marvin on his way to the marketplace, forcibly preventing him from reaching it. As a result, Marvin returns home empty-handed, where he dies of starvation (Huemer, 2010).

Second, he argues that the *prima facie* right to immigrate is not overridden. In particular, he argues, he argues it is not overridden because of the fiscal burden of providing social services to immigrants, the state's special obligations to its citizens in general, the state's special obligation to its poorest citizens, and the

threat immigrants pose to the nation's culture. Therefore, Huemer concludes, that immigration restrictions are wrongful rights violations.

Huemer faces an argument against his thesis by Stephen Kershnar and Christopher Heath Wellman. They argue against a right to immigration based on an analogy between citizenship and membership in other sorts of organizations (Huemer, 2010; Wellman, 2008). The argument is that a nation-state is similar to a private club in that it may, at its discretion, exclude unwanted members even if it does not have good reasons for doing so. Here is Huemer's analogy.

In general, a private club may choose to exclude those whom it does not want as members, even if the club has no very strong reason for not wanting them. Suppose Sam, Betty, and Mike form a private club to discuss philosophy on the weekends. Marvin asks to join. For no particular reason, Sam, Betty, and Mike decide that they don't feel like having Marvin around, so they refuse. Though their behavior is unfriendly, the club members are within their rights. Marvin may attempt to persuade them to change their minds, but he cannot complain of an injustice or rights violation if he is not invited to the gathering (Huemer, 2010).

Huemer (2010) makes two objections. First, private clubs and nations are not analogous for three reasons. Everyone is compelled to be a citizen of at least one country, but this is not true of private clubs. In addition, states provide extremely important services, but some states are much better than others, such that individuals who belong to worse states are likely to suffer severe and lifelong deprivation or oppression. Also, exclusion from a country generally entails exclusion from any of a vast array of interactions with the citizens of a given country.

Second, if the private club analogy succeeds in showing that foreign individuals have no right to immigrate to the United States and that states have a right to control their membership, then similar arguments can be used to establish that individuals have hardly any rights at all and that states have an almost unlimited right to coerce their members. This is because states have the same sort

of rights to control the conditions for citizenship that private clubs have to control the conditions for membership. A private club is within its rights even when it sets onerous, unwise, and unreasonable conditions (but not immoral conditions).

There are other excellent arguments for open borders. Among them Joseph Carens, Phillip Cole, and Chandran Kukathas (Carens, 2015; Cole, 2000); Kukathas (2021). I focus on Huemer's argument because it occurs in the context of an applied-ethics argument that allows for a direct test of the rights in question.

### *Landowners' Rights*

Huemer's argument fails because it rests on a misunderstanding of rights. On a plausible account of rights, all natural rights are negative rights, in particular negative property rights. Other non-natural rights derive from natural rights when they are conjoined with some commitment or other use of one's body. The commitment might take the form of a promise or consent. The other use of one's body occurs when a person alienates rights through aggression, causes unjust harm, or perhaps merely from being used as an innocent projectile in another's attack.

This picture of rights has numerous advantages. This quick listing will likely not convince anyone but will allow the reader to see the overall framework within which this paper is situated. First, it fits with the best accounts of how people come to own previously unowned things and how they transfer these rights to others (that is, justice in acquisition and transfer). For example, it fits with theories of property acquisition based on first occupation, mixing labor, added value, Lockean Proviso satisfaction, and so on. Second, it fits with theories of self-defense, punishment, and compensation through right forfeiture. Third, it explains how governments gain rights through their citizens' commitments. Fourth, it explains why rights need not

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track interests. This is an advantage because it intuitively seems that the fact that someone has an interest in something, and perhaps even the strongest interest in it, is not sufficient to ground a right in it. For example, a person whose kidneys have failed does not have a right to one of a healthy person's kidneys just because he has a greater interest in it.<sup>1</sup> Similarly, the fact that someone has an interest in something, and perhaps even the strongest interest in something, is not necessary for him to have a right in it. For example, a person can own an old coat even though he has no interest in it. Note that this is true whether we are considering an individual case or classes of cases. A rule-utilitarian might consider classes of cases in determining whether a legal rule promotes aggregate interests. Fifth, it can explain other rights and freedoms that people are thought to have, such as the freedom of association, freedom of expression, and right to privacy.<sup>2</sup>

On some accounts, there are positive as well as negative rights. For example, if one person has a duty to save a second and the first person owes it to a second, then the second has a claim against the first. On a common account, a right is a claim. One person has a claim against a second just in case the second owes the first a duty. On another account, a right is a Hohfeldian power over another Hohfeldian element, often a claim. A Hohfeldian power is the standing by which to leave in place, eliminate, or modify another Hohfeldian element. This is usually, if not always, a claim. The endangered person might be seen as having power over the claim to be saved.

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<sup>1</sup> The idea for this example comes from Thomson (1971).

<sup>2</sup> For an instance of a reducible right, see Thomson (1975).



Perhaps the duty to save is a free-floating duty, that is, a duty that is not owed to anyone. Such duties are mysterious because they are justified by the feature of the potential saver and not the person in need of being saved.

If there are negative and positive rights, the negative rights are more stringent. It intuitively seems worse to kill or batter someone than to fail to save him from being killed or battered. Hence, even if rights are not exclusively negative, the argument can be restated in terms of the more stringent rights. The same can be said of free-floating duties. If on the level of a large-scale policy, negative and positive rights must be weighed against one another, it is hard to see how to weigh them and separately weigh the interests (or, perhaps more narrowly, interests in autonomy) they protect without something approximating a consequentialist balance. This moves us far away from the sort of right-based argument on which Huemer and I focus.

An objector might claim that rights are negative, but negative rights are not property rights. Rather, they are rights to association, equality, freedom, humanity, etc.<sup>3</sup> Hence, the objector continues, the below argument succeeds on its own terms, but this is not a theory of rights that is shared by many libertarian and non-libertarian proponents of open borders. The problem with this objection is that, intuitively, rights to property form the boundaries within which these other purported rights operate. For example, a person's control over his body (self-ownership) and his residence constitute moral boundaries against coercion, even when the activities involving these properties frustrate other purported rights. For example, a person who only engages in intra-racial dating may not be coerced into

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<sup>3</sup> For a right to association, see Wellman (2008). For the rights to freedom and humanity, see Kukathas (2004). For the right to equality, see Cole (2000).

inter-racial dating even if his dating pattern worsens economic or social inequality. Similarly, a person's right to his body makes it wrong to forcibly take one of his kidneys even if doing so were necessary to fulfill rights to association, equality, freedom, or humanity.

Again, this quick sketch of the way in which property rights align with negative rights will not convince people who deny rights exist or, instead, see rights as the conclusion of moral reasoning rather than a major justifier in such reasoning. One might think this sketch of rights is too quick and it is.<sup>4</sup> Still, Huemer and I share these assumptions. If one rejects this theory of rights, then the paper should be seen as a debate between people who accept that there are quite stringent negative rights even if there are other rights as well. This is analogous to debates as to whether capital punishment infringes negative rights regarding autonomy, dignity, risk, and so on, but that does not spend much time arguing that people have rights or that negative rights are more stringent than positive ones.

If this is correct and if the land in the United States is owned by private individuals, groups of private individuals, or the government, there is no way for the immigrant to gain a right to use it, whether his use consists of walking on it, eating the crops growing on it, staying in the house located on it, and so on. The mere fact that an immigrant has an interest in doing so does not establish that he has a right to do so any more than the fact that a person whose kidneys have failed has a right to one of a healthy person's kidneys because he can make better use of it. Huemer does not give us any reason to think that immigrants have a right to cross people's lands other than the fact that it is in their interest to do so.

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<sup>4</sup> For a developed discussion of rights, see Kershnar (2018).  
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Note that the above argument does not assume that the citizens or the government owns people's private lands or bodies. I do not believe they do. However, in so far as accessing private lands and bodies almost invariably involves crossing collectively owned land, the ownership of collectively owned land is important. The same is true for the consumption of collectively owned resources.

If people in the United States own land in a moral-rights sense, then Huemer must think that (1) the landowners have lost their rights to their land, (2) immigrants have competing rights, (3) the landowners' rights are overridden, (4) the landowners' rights are undermined, or (5) the landowners' and immigrants' rights are compatible. Option (1) can be ruled out because we are assuming that landowners own land. Options (2) and (3) differ in that (2) assumes that landowners' and immigrants' right conflict. (3) makes the same assumption and adds to it that the immigrants' rights consistently override the landowners' rights.

These options exhaust the logical possibilities. If Huemer does not think they own land in this sense, then his essay is misleading because it adopts a framework radically different from that assumed by most readers. Consider the following case.

Al's daughter badly injures her arm and the only way to save her arm is to hotwire Bob's car and drive her to the hospital. It might be permissible for Al to infringe on the car owner's (Bob's) right and do so. Perhaps it is even obligatory for Al to do so. This, however, involves an overriding of a right, rather than a competing right to the car. This can be seen in that Bob neither transferred nor forfeited his right to the car. Forfeiture might occur if Bob used the car as a weapon and thereby forfeited his right to it, perhaps in the context of self-defense or punishment. It might also occur if Bob ran up a debt against Al and the only way he can pay it off is if Al takes the car. None of this happened here. Thus, there is no way for Al to

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have gained a right to it. In a similar way, if Bob owns some land and part of owning the land includes controlling who goes on it, then he can exclude Al from going on it.

A similar thing is true for a group (Charlene, Dick, and Eric) who jointly own a car and when purchasing it agree that the majority vote will determine who may use the car. Their right to the car might be overridden by an emergency, but unless they have alienated the right to it, they retain it. The same is true if they own land. This pattern holds whether the group is a private club, a collection of individuals bound by contract, or government officials.

Huemer does not show that landowning Americans have lost their right through a commitment or forfeiture. Nor does he show that their rights are overridden. Even if he were to show this, this would not support his thesis because the fact that immigrants have interests that override others' rights to their land does not establish that the immigrants have a right to it. Perhaps he wants to argue that they have a competing right, but the only evidence he provides is that they have an interest in using it. Unless one thinks that interests ground rights, this argument fails.

Consider the notion that the right is undermined. Perhaps there is a way that the right to a car can cease to exist. Perhaps if the owner were to die without any inheritance plan, so the right goes out of existence. However, this did not happen in the cases of Marvin, Al, or the landowners. Nor did it happen when immigrants try to come to the United States. Hence, Huemer does not establish (1) through (4) and his argument fails.

The right Huemer identifies, the right against harmful coercion, is not a right. By “harm,” I mean “a setback to a person’s interest” (see Feinberg, 1984). By “coercion,” I mean “an act or, perhaps, a condition that makes an individual’s act involuntary.” There is no prima facie right against harmful coercion. In a case of legitimate self-defense, one person harmfully coerces a second, but this does not infringe on the aggressor’s prima facie right. This is because when one person infringes on a second person’s prima facie right, a residue duty is generated. The residue duty might take the form of a duty to compensate the injured person or merely to apologize to him, but neither is generated in the case of legitimate self-defense. The same is true for punishment. This is because aggressors and criminals forfeit a right or rights rather than having them overridden.

Huemer might argue that the prima facie right is a complex one so that it has content something like the following: a person has a prima facie right not-to-be-harmfully-coerced-unless-he-does-something-to-justify-defensive-or-punitive-coercion ...<sup>5</sup> However, on this account, rights would not explain when coercion is permissible, but would be explained by it, and this intuitively seems to get the order of explanation wrong. It makes it so rights do not explain the boundaries of how individuals may be treated, and this intuitively seems mistaken. Even if the word or concept “justify” is dropped from the formulation, a right would still not explain why self-defense, punishment, and so on are justified.

I argue that there is no right against harmful coercion. First, there is no right against harm. If one suitor wins a woman’s love and breaks another suitor’s heart, thereby harming him, the first has not infringed the second’s right. Second, there is

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<sup>5</sup> The notion that self-defense involves a narrowly bounded right (e.g., a right to life-except-where-necessary-to-save-someone’s-life) is discussed in Thomson (1990).

no against coercion per se. Consider, for example, just defensive violence. If there is no right against harm and no right against coercion per se, it intuitively seems that there is no right against the combination of them. Rather, there is a right against unjust coercion. Unjust coercion is coercion that infringes another moral right, such as a body- or property-right. This presupposes that people have more specific rights, such as rights to body and property. This account of specific rights aligns with the most plausible theories of justice-in-acquisition.

Right forfeiture occurs only if an unjust attacker infringes a right other than the one against harmful coercion. This is because both the attacker and defender use harmful coercion. For the defender alone to be justified, we need another right – a more specific one – that the attacker infringes and that explains why the attacker forfeits a right and the defender does not. The more specific right addresses an individual's legitimate realm of interest, a realm demarcated by specific rights.

### *More on Landowners' Rights*

Other theorists, such as Phillip Cole, might also argue that my argument assumes that the state's relationship to its territory is precisely the ownership of private property in this moral-rights sense. He might claim that there is a problem in trying to establish this. Either the argument will be too strong because it will entail that all territory is owned by the state and not by individuals or collections of individuals. Alternatively, not all territory is owned by the state and hence the state's control over its territory is too weak to include a right to exclude

immigrants.<sup>6</sup> Perhaps, a critic might claim, that private property owners (for example, employers) may grant access to immigrants.

This objection also fails because as long as a potential immigrant will inevitably trespass on state property or take state resources (consider, for example, roads or emergency medical services), then the owner of these resources has a right to exclude them. In the same way, a person may defend against someone who is preparing to steal from him or rob him and need not wait for the injustice to commence. Depending on whether the state is different from the collection of citizens, the party with the right to exclude might be the state, if it differs from the collection of citizens or the collection. That the trespass will occur depends on the degree to which public roads and land (whether federal, state, or local) make it practically impossible to enter and stay in the U.S. without crossing over these properties. A similar issue arises concerning emergency medical services. Because policy must be made based on generalities, the likelihood of the class of immigrants trespassing on state land and using emergency medical services is extremely high.

On one account, the state is distinct from the collection of individuals who compose it because the state might have been composed of a different collection of individuals from those who actually composed it. On some theories of persons, they consist of both matter and form. On this account, then, a person is not reducible to his parts. Perhaps a similar argument could be given with regard to groups or states. A different argument in support of collective responsibility is that

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<sup>6</sup> The idea for this objection comes from Cole (2000). I also wish to thank Phillip Cole for bringing this objection to my attention.

group actions are not reducible to individual actions because the relations between individuals are essential to the action.

There is also a third option that is neither too strong nor too weak. Individuals retain their ownership of land but bind their usage of it according to an agreement either with other citizens or with the state. This is analogous to the way in which members of a community can agree to mutually restrictive covenants. Just as such individuals agree not to house enemy soldiers or weapons on their property, they similarly agree to allow the state to control the influx of immigrants. This generates a right to exclude some or all immigrants in the state or other citizens, without any landowner transferring ownership of his property to another.

An objector might argue that the access rules for a publicly owned property are disanalogous to privately-owned property. If the property is owned by a collection of private citizens, then this objection does not get off the ground. The property would then be analogous to the way in which another joint property is owned, for example, ownership by a married couple. This clearly includes exclusion. This is true whether the right to exclude others (specifically, the claim to non-trespass) is all of a property right or merely part of the bundle of Hohfeldian elements.

A property right is a collection of particular rights that relate to the control of an object. When held by an individual the right is a private one. The essential feature of the right to control an entity is the moral standing by which to exclude others from the use of it and to determine within limits whether and how it is used, changed, or destroyed. Exclusion itself is a multi-faceted relation that relates to the type of object in question. For example, one might be able to exclude another person from walking on or salting her grape fields, but not from enjoying the sight



and smell of them from a nearby hill or from viewing them from the sky. A different sense of exclusion may be relevant where the entity is a chemical structure, a dog, or a person's body. Whether the relation extends to abstract objects like songs and machine designs will depend at least in part on whether there are particular abstract things. That the exclusion relation has many parts does not prevent the central aspect to it, the standing by which to exclude others, from picking out the central moral relation.<sup>7</sup>

The exclusion relation is a structurally complex moral relation that often involves a claim against others not to interfere with the possession or use of an object, a power over that claim, and an absence of a time limitation on these elements. A person has a claim against another if the second owes the first a duty. A power is the standing to waive or demand the satisfaction of another Hohfeldian element, e.g., a claim. The standing is moral or legal depending on the type of right that is involved. The elements of the exclusion relation are usually held against all others. There are often other elements that are also part of this complex such as the liberty (absence of a claim in others) to use the property as one sees fit. Also, these structural complexes often include the right to use, derive income from, transfer to another, etc. Justificatory features are somewhat independent of the concept of a private property right; this independence is what allows us to ask whether persons have such rights. The justification of the right also determines whether private property rights are special (i.e., arising out of some particular

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<sup>7</sup> For influential statements of idea that ownership is a complex bundle of relations, see Honore (1961) and Grey (1980). For the view that it is unified by exclusion (albeit exclusive agenda setter rather than excluding boundaries), see Katz (2008). Note that Honore and Grey support the notion that property is a bundle of Hohfeldian relations rather than it being relations focused on control or exclusion.

transaction or relationship) or general (i.e., not special but arising out of a generally held feature, e.g., personhood).

Even if the state is distinct from the collection of citizens, it is still false that it has exclusive ownership of something and yet may not exclude others from it. If in the context of a parcel of land, a person lacks a claim against trespass, a liberty to use the land as he sees fit, and a power over that claim and liberty, it is not clear in what sense he owns the land. He might have a moral or legal interest in it, but this is not enough for ownership.

### *The Private-Club Argument and Exploitation*

Huemer's argument against the private club theory is also unconvincing. He argues that if the private-club argument were correct, then states would have an almost unlimited right to exclude their members because a free club has the right to choose whatever conditions it wants for members. Thus, for example, it might require sexual service, organ donation, temporary servitude, and so on. It might also require irrational conditions such as flushing \$1,000 down the toilet every month (Huemer, 2010).

Huemer is running together what is permissible versus what a person has a right to do. If one person has a right to something, then he has a right to set the conditions on its use, however unreasonable. This right, however, does not make it morally permissible to do so. Consider the following cases.

*The Boat Case.* B's boat has capsized, and he has been swimming for hours near the center of a large and seldom frequented lake. He is nearing exhaustion when A's boat

approaches. A says to B: "You may climb into my boat and avoid drowning only if you promise to pay me \$50,000 within three days."<sup>8</sup>

*Lecherous Millionaire.* A Pakistani businessman pays for the life-saving surgery of five Pakistani children each year. An attractive Indian woman wants him to pay for her daughter rather than a Pakistani girl. They agree that the businessman will pay for the expensive surgery that alone can save the child's life provided that the woman becomes his mistress for six months. No one else will pay for the life-saving surgery.

Both cases arguably involve wrongful exploitation. On one account of wrongful exploitation, one person wrongfully exploits a second if and only if the first uses his superior bargaining position to take an unfair share of the transaction surplus.<sup>9</sup> A party's bargaining position consists of a party's resources and circumstances. These include both objective features (for example, other options) and subjective features (for example, needs and wants). A transaction is an exchange, and the transaction surplus is the benefit that accrues to the two transacting parties. On some accounts, the boat owner and Pakistani businessman act wrongfully, but they do not infringe on anyone's rights. This is because A has no right to B's boat and the Indian woman has no right to the businessman's money. Similarly, the private club that uses the desperation of prospective members to set one-sided or irrational conditions for membership might act wrongly but does not infringe on the rights of the prospective members.

For people who think that rights alone exhaust the non-consequentialist considerations, at least as relating to morally permissible actions, this distinction will not be available. The idea here is that a moral right is a claim (a duty one person owes a second) and that non-consequentialist considerations, at least regarding permissible actions, consist solely of two-person (or, perhaps, n-person) duties.

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<sup>8</sup> The idea for this case comes from Nozick (1969).

<sup>9</sup> My account is heavily influenced by Wertheimer (1996).

This conflicts with the notion that there are moral considerations such as exploitation, fairness, equality, desert, and virtue that are distinct from the realm of rights and that affect the permissibility of an act. Unless Huemer accepts the notion that rights have this exhaustive role, his objection to the private-club argument does not succeed.

On the private club analogy and the *reductio ad absurdum* argument, an objector might claim that the above argument misses Huemer's point.<sup>10</sup> The objector might continue, the examples discussed in his paper—not voting if you are female, cutting off your arm, etc.—were supposed to be examples of things that, intuitively, a private club *has* the right to demand, but the government *does not* have the right to demand. Problems with exploitation, or other values such as fairness, desert, etc., are unrelated to his argument. The objector claims that Huemer was not relying on the fact that a private club would be exploitative (or whatever) if it imposed the kind of conditions mentioned above on membership. Rather, the objector continues, Huemer was only relying on the intuition that the club *would not be violating anyone's rights* in having those membership conditions. Huemer was appealing to an intuition that the government *would* be violating its citizens' rights if it imposed those conditions (for instance, if it prohibited women from voting, or required all citizens to cut off their arms, etc.). From these two intuitions, it follows that there is a disanalogy between clubs and the government, with the government having fewer rights than private clubs.

This objection is unsuccessful if both clubs and governments gain all of their rights from individuals via consent. In the case of the United States, the terms of

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<sup>10</sup> I owe the idea for these two objections to Michael Huemer. *Analítica* (2), oct. 2022- sept. 2023, ISSN-L 2805-1815

the Constitution limit the conditions that may be placed on membership. If clubs' rights depend on consent and governments' rights do not, they differ. On some accounts, although ones I find implausible, governments' rights (and legitimacy) depend on the duty of fair play, rationality, hypothetical consent, or Kantian respect. Huemer would still need to show why this other source of rights limits the conditions that can be required of potential citizens. He would also need to show that the conditions cannot be ones that many, if not all, potential immigrants would be unable to satisfy. He provides no such argument. In addition, Huemer would need a picture of rights that differs from the account of negative natural rights sketched above. Again, he does not do so.

Note the claim that the scope of club members' rights is determined by consent is not in tension with the notion that all basic rights are natural. People can waive their rights, or portions of them, through promises or consent. This is what I am claiming is happening in the context of immigration. For example, a woman who agrees to have sex with a man has temporarily waived her natural right against others touching her.

Nor is the claim in tension with the notion that initial-acquisition rights are not promise-based or contractual. This notion does run into trouble explaining how unilateral acts can bind others (Waldron, 1988). It is not clear if this objection succeeds. It threatened to undermine far too many non-consequentialist property rights as well as other rights. Even if initial-acquisition rights rest on a promise or agreement, the acquired rights might still allow landowners to exclude immigrants from their land and from others' land via an agreement with them.

Another objector might respond that immigration restrictions are wrong, but are not right-infringements, they are wrong in another way. The objector might

continue that this is a relatively fine point in this debate. However, if Huemer aims to defend the notion that immigrants have a right to immigrate to the United States, then this distinction is crucial to his argument. In addition, Huemer does not try to show the way in which the restrictions are wrong for other reasons (for example, they are exploitative, unfair, unequal, undeserved, or vicious), so this concession would not fit well with his overall strategy.

Even if the above argument is incorrect and rights are constrained by moral considerations (for example, considerations against exploitative, unfair, unequal, undeserved, or vicious treatment), the refusal to benefit someone whom one has not previously wronged and with whom one is not currently transacting will likely run afoul of these considerations. The considerations depend on the agent doing something to another rather than merely allowing something to occur to her. For example, exploitation requires a transaction that need not occur. Vicious treatment depends on the excluder having an objectionable attitude that she need not have. If excluding is, by itself, a doing, then owners' rights would be strange. For example, if this were correct, then were poor people, with whom I have had no contact, to march into my house and steal food from my daughter's plate during dinner, my rights over my land and the food on her plate would not necessarily be infringed. This sort of thinking requires a radical restriction of property rights.

### *Some Objections*

One objector, perhaps Michael Huemer, might argue, the government also violates the rights of potential immigrants. The general right to property includes the right to acquire property in the normal ways, for example, by engaging in

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voluntary transactions with people who want to sell you the property. Imagine that the government made a law saying that women cannot acquire land. No one is permitted to sell a woman's land. This would violate the rights of women. Similarly, Huemer might conclude, that a law that prevents people who own land from granting access to certain immigrants violates the rights of both the landowners and the immigrants.

This objection does not work because the rights of landowners can be bound by consent or promise. For example, if a person buys a condominium, his ownership might be morally limited by an agreement he makes with other condominium owners. Similarly, a landowner can morally waive or trade away certain rights (for example, an easement or other restriction on use). For example, he might do so for money. If government authority in the United States comes from citizens' consent and if one of the conditions to which they consent is a restriction on land use, then landowners' rights are not infringed. In the U.S., there are Constitutional permissions for the government to restrict land use for certain enumerated purposes and, on a consent theory, this is a condition to which citizens consent. If government authority in the U.S., or in general, were to depend on the duty of fair play, rationality, hypothetical contract, or Kantian fairness, and if these justifications do not also justify restricting property rights, then the landowners' rights would be infringed.

The notion that potential immigrants' rights are infringed is less plausible. For example, if A, B, and C all want to buy D's car and E blows it up before any of them can do so, E has infringed on D's right. However, it is hard to see how A's right has been infringed. There is nothing (person, body, or other objects) to which A had a claim before the explosion and to which he no longer had one after it, thus none

of his rights were infringed. A similar thing is true if A, B, and C all want to buy a right to cross D's property and E prevents D from agreeing to let them do so.

Alternatively, Huemer might argue that a believer in positive rights, or some other kinds of rights that I do not recognize, would not be persuaded by the above discussion. Most of these points do not really address why one could not introduce a few additional positive rights. One might think there is some right to receive humanitarian assistance, as illustrated by Singer's Shallow Pond story. In this case, a child drowning in a shallow pond intuitively seems to have a right to be saved even against strangers with whom she has no special relation (Singer, 1972). Huemer might argue that most people's intuition, in that case, is not explained by purely negative rights or property rights and hence these do not exhaust the realm of natural rights.

If persons own their own bodies and if ownership of one's body includes the claim to control what goes in it and what it does, then it is hard to see how others can have a natural right to be saved against a stranger. A critic might respond that the right to use one's body does not include the right to harm another and failing to save someone harms her (at least when it can be done at little or no cost). This confuses causing harm and refusing to benefit someone. After all, it is bizarre to say that where Henry Fonda able to save a dying woman by touching her fevered brow with his cool hand, Fonda causes her death when he refrains from doing so (Thomson, 1971).

Even if refusing to save someone harms her, the relevant right is the right not to be unjustly harmed. This can be seen in the above discussions of self-defense and punishment. If this is correct, then, once again, we face the issue of how



potential immigrants have a right to immigrate to the U.S. or, perhaps, a claim of justice to do so, if this is different.

A second objector might argue that if valid consent waives a right, then valid-consent-justified rules do not infringe on a consenters's right. If according to non-consequentialism, a right-infringement is the only wrong-maker, then valid-consent-justified rules are not wrong, no matter how exploitative, unequal, unfair, and so on. Here are the assumptions behind this account of non-consequentialism. Note, that here, we set aside consequentialist overrides.

1	An actor does a wrong act if and only if he wrongs someone.
2	An actor wrongs someone if and only if he fails to satisfy a moral duty owed to someone.
3	An actor fails to satisfy a moral duty owed to someone if and only if he infringes someone's right (that is, infringes someone's Hohfeldian claim).

This entails that, setting aside consequentialist overrides, rules to which the relevant parties have (validly) consented are never wrong. This is distasteful, but the distaste is a smaller price to pay than giving up the simple-and-explanatorily-powerful account of how wrongness, duties, and rights relate to one another. In addition, if there were general rights against exploitation, inequality, unfairness, or so on, these general rights would conflict with full-blooded property rights to particular things.

Third, an objector might object that consent does not legitimate a country, even if consent legitimates a country the authorized entry into it may not be arbitrary or discriminatory, and even if consent legitimates a government and authorized entry may be arbitrary or discriminatory, actual countries' owners have in fact consented to large-scale immigration.

The notion that consent does not legitimate a government can be seen in a number of arguments: citizens have not in fact consented to their government, and even if citizens have consented such consent is invalid because it is involuntary. A third objection is that the consent-based authorization of a state still depends on the prior consent to the consent-situation. This dependence creates a consent regress that cannot be satisfied. An in-depth widespread discussion of the consent theory of legitimate government (and, also, the related duty to obey the law) is outside the scope of this paper. The residence-as-consent claim needs more than a quick dismissal. The same is true for the notion that a high price of dissent invalidates consent. This is not true, for example, for consent to lifesaving medical treatment.

The regress-of-consent argument is a problem, but it is not as clearly a problem for collective property. Such property can be owned even if the owners' purported agent - the state - is illegitimate. Even if anarchism is true, people might still collectively own public funds (for example, money held for Medicaid, Medicare, and Social Security) or lands (for example, public parks and roads), at least until the current stock of such resources are distributed. Even if anarchism were true, it still would intuitively seem wrong for an undocumented immigrant to help himself to \$100 million of these funds or burn 10,000 acres of these lands to create desirable farmland. Intuitively, these monies and lands are owned. This is true whether they are owned by a collection (for example, the American people), the government, or individuals from whom the land was purchased or stolen.

In short, so long as there is collective or government property and unauthorized immigrants infringe on these property rights, the above argument succeeds. It is implausible that *no one owns* the B-52s, government buildings, roads, Analítica (2), oct. 2022- sept. 2023, ISSN-L 2805-1815

and social security money. It is the owners of these things whose rights immigration would infringe.

If there is collective ownership, then it intuitively seems that property ownership allows the owner to determine who may use it. As a matter of justice, he may do it on the basis of a good reason, bad reason, or no reason at all. For example, as a matter of justice, a woman may decide with whom she has sex. This is true even if she does so for a good reason (for example, love), bad reason (for example, bigoted sexual preference), or no reason at all. Similarly, if the owners of collective property want to exclude some immigrants, then – as a matter of justice – they may do so. This is true whether they exclude them for a good reason, bad reason, or no reason at all. An argument is needed as to why body rights allow discretion over whom to let into one's body, but property rights do not allow discretion over whom to let into one's house or land.

There is a notion that even if the owners of collective property may exclude immigrants from their property, they have not chosen to do so. This might be true for every nation, but the point is that the owners of the collective property have the right to do so. Certainly, some countries – for example, Japan and Poland – permit relatively little immigration.

### *Conclusion*

U.S. citizens own land, individually, collectively, and via their government. For immigrants to gain a right to enter it, Huemer must think that (1) the landowners have lost their rights to their land, (2) immigrants have competing rights, (3) the

landowners' rights are overridden, or (4) the landowners' rights are undermined.

None of these are true.

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