11-15-2015

Justice for Border Crossing Peoples

David Watkins

University of Dayton, dwatkins1@udayton.edu

Follow this and additional works at: http://ecommons.udayton.edu/pol_fac_pub

Part of the American Politics Commons, Comparative Politics Commons, International Relations Commons, Models and Methods Commons, Other Political Science Commons, Political Theory Commons, and the Public Affairs, Public Policy and Public Administration Commons

eCommons Citation


http://ecommons.udayton.edu/pol_fac_pub/51

This Book Chapter is brought to you for free and open access by the Department of Political Science at eCommons. It has been accepted for inclusion in Political Science Faculty Publications by an authorized administrator of eCommons. For more information, please contact frice1@udayton.edu, mschlangen1@udayton.edu.
Justice for Border-Crossing Peoples

David Watkins

This is the accepted manuscript for a chapter of the same title published in The Meaning of Citizenship, Richard Marback and Marc Kruman, eds. Detroit, MI: Wayne State University Press, 2015.

The entire volume is available for purchase from the publisher: http://www.wsupress.wayne.edu/books/detail/meaning-citizenship

Introduction

Citizenship, as a legal and normative concept, defines the condition of full membership in a sovereign, self-governing national community. Understood in these terms, citizenship produces remainders: individuals, groups, and ways of life that do not fit in the legal-normative model of equal citizenship in a single, unified national community. Many of these remainders are produced by the ancient and venerable practice of human migration, a social practice often found at or near the center of human societies and cultures for many thousands of years. States have claimed a right to exercise control of border-crossing activities as central to their understanding of their sovereign power, and the logic of the status of citizenship only bolsters that claim. If the state is to treat her citizens as full, equal rights-holding members of society, it must keep track of who those citizens are; migration must be tracked, and noncitizens permitted to be present in the polity’s territory must be marked with a status of their own, in part to distinguish them from citizens.

For tourists, business travelers, and many other border crossers, this arrangement, at least when functioning reasonably well, raises few concerns. Many countries provide a status for such visitors consistent with some of the rights of citizenship—protection from crime, due process, access to infrastructure, and so on—that are necessary for their purposes, but not those elements
of citizenship that seem irrelevant or inappropriate for them (such as the right to vote or access to social welfare programs). But for a large group of border crossers, the norms of citizenship present a greater challenge. The secondary statuses available to them and their access to borders do not obviously fulfill the requirements of justice. While they are not the only group of people for whom citizenship as membership produces legal and normative remainders, I will focus here on a group I call “border-crossing peoples.” I define border-crossing peoples as a distinct group whose historical cultural, religious, and socioeconomic way of life requires regular and routine access to the crossing of an international border. Border-crossing peoples generally have a long-standing history of participating in the cultural/social/economic pattern that necessitates that border crossing; sometimes predating the existence of the border itself, or predating any significant efforts to control or restrict the border. Just as the control of borders is presumably a tool a national community uses to maintain and shape its identity, the crossing of the border is crucial to the shaped identities of border-crossing peoples. In the now-vast literature on migrants and migration, in which migrants are divided into a variety of analytic categories, this general category has not (to my knowledge) been identified. The most similar analytic category I’m aware of is “border-straddling nations,” a category identified recently by Margaret Moore (2013). My conception of “border-crossing peoples” differs from Moore’s “border-straddling nations” in two significant ways. First, I do not restrict this category to groups that constitute a distinct nation, with all that that entails. Some border-crossing peoples may be a small slice of a nation; others may be identified as a distinct group by a set of markers—perhaps ethnic, regional, or religious—that fall short of approaching the status of “nationhood.” Second, a border-crossing people need not “straddle” the border territorially. One quintessential example of a border-crossing people, whose border-crossing rights are discussed in detail below, is the Kickapoo
tribe. Their primary territorial locations do not straddle the US/Mexico border—their reservations in Oklahoma and Kansas and their settlement in Nacimento, Mexico, are all several hours’ travel from the US/Mexico border, and yet they are properly characterized as a border-crossing people because of the historical nature of the social, cultural, familial, and economic ties between the Kickapoo settlements in Mexico and the United States. Whatever the reason border-crossing peoples has been ignored in the literature on immigration, it is unfortunate, as they have a distinct claim for accommodation. Indeed, much of the literature on citizenship and migration focuses on one-way, permanent migration, not on the kind of back-and-forth border crossing that characterize the lives of border-crossing peoples (Hampshire 2013). At the same time, the vast majority of the literature on migration focuses on the on question of the scope and limits of justifiable migration policies for abstract “liberal-democratic states” or “national communities” with little attention to the particular histories, practices, sins, or commitments of actually existing states.¹ This chapter attempts to overcome these two shortcomings in the existing literature by developing and exploring an analytical resource, in the form of a normative-legal concept, to articulate, justify, and defend claims of border-crossing rights for border-crossing peoples.

My aim here is to go beyond standard approaches to thinking about the boundaries of citizenship in order to solve the problem of one of citizenship’s remainders. In a sense, I see the argument presented here as a way of supplementing citizenship in theory and practice, by stepping outside of standard citizenship thinking and drawing from resources in property and international law to provide a theory of the rights of border-crossing peoples. One approach to the remainders of citizenship is the “semi-citizenship” approach advocated by Elizabeth Cohen (2009), or what Rogers Smith (2015) in this volume calls “appropriately differentiated

¹ Exceptions to this trend include Smith (2008), Exdell (2009), and Blake (2013).
citizenship.” This approach seeks to recognize the universality and apparent unavoidability of the practice of granting semicitizenship status to some citizens, and investigates the plausibility of different approaches to partial citizenship statuses (Cohen 2009). The argument fits within this approach, as I seek to establish why some members of particular groups might have a justified demand for a specific set of (partial) citizenship rights in a country other than their primary citizenship home. This may be a demand for full dual citizenship, or may be limited to a demand for a much less comprehensive partial citizenship narrowly construed as a right of passage to the second state.

The first section of this chapter considers what it might mean to deny a would-be border-crosser passage in the most general and abstract terms: is such a refusal best understood as an act of coercion or an act of prevention? Even if we assume it is (merely) an act of prevention, it still requires justification, and the way in which we define the right to exclude will shape the contours and boundaries of that right. The second section of this chapter considers the national territorial rights thesis as a foundation for the justified right to exclude. This approach relies, crucially, on an analogy with an individual’s right to exclude others from her private property. In the third section, I argue David Miller has ignored an important dimension of this analogy. If (individual) private property rights are appropriately analogized to the act of migrant exclusion by national communities, we must consider other dimensions of property law that might press in the other policy direction, identifying cases where migrant inclusion is demanded. The law of easements suggests one such way. In particular, I will consider the ways in which easements by prescription and easements by necessity can come to be created in individual property arrangements. In the fourth section I’ll discuss actually existing arrangements for border-crossing rules that suggest that something akin to border-crossing easements do exist, incompletely, in existing law and
custom. In the fifth section, I will use two cases of historically grounded patterns and cultures of labor migration—from Mexico to the United States and Lesotho to South Africa—to argue that the general conditions for easements in property might also apply to patterns of migration, thus expanding the conception of what constitutes a border-crossing people that we might plausibly derive from existing practice. Actually existing border-crossing easements, I will argue, should not categorically exclude border crossing for the purposes of labor. I conclude with a brief reconsideration of Miller’s arguments regarding immigration, and examine the exceptions to the right to exclude that appear in his account. Miller’s theory can potentially make room for border-crossing easements by necessity, but not border-crossing easements by prescription. I will close by reflecting on Miller’s failure to recognize the possibility of border-crossing easements by prescription, and what it might mean for his theory.

**Border Exclusion: Prevention or Coercion?**

Normative dimensions of immigration policy have garnered significant attention from political theorists and philosophers recently. A central focus of this literature regards the justification of restrictive immigration policies—can they be justified, and if so, how, and to what extent? A number of scholars have emphasized just how difficult it is to justify border exclusions. In his now-classic treatment of this issue, Joseph Carens emphasizes the challenge for justified migrant exclusion:

> Perhaps borders and guards can be justified as a way of keeping out criminals, subversives, or armed invaders. But most of those trying to get in are not like that. They are ordinary, peaceful people, seeking only the opportunity to build decent, secure lives for themselves and their families. On what moral grounds can these sorts of people be kept out? What gives anyone the right to point guns at them? (Carens 1987, 251)

Carens is not alone in characterizing such restrictions as difficult to justify (Abizadeh 2008; Child 2011; Cole 2000; Dummett 2001; Hidalgo 2014; Kukathas 2005; 2012; see also
Carens 2013). While stopping short of an all-things-considered defense of a fully open borders policy, theorists such as Carens demonstrate the power of the case against border restrictions and set the threshold for exclusion quite high. In response, David Miller makes two arguments in an effort to justify most immigration restrictions (Miller 2005; 2007, 201–30; 2010; 2011; 2012). First, he argues theorists such as Carens and Arash Abizadeh (2008) have mischaracterized the act of migrant exclusion in a way that exaggerates the threshold for justification. Second, he affirms a collectivist Lockean right of national communities to craft restrictive immigration policies as an act of democratic self-determination. In this chapter, I will not directly challenge either of these positions. I will instead examine the foundations of Miller’s “national territorial rights” position and its implications. On his own terms properly understood, he has exaggerated the scope of just exclusion in at least one important way.

In a recent essay Miller concluded that “even if the United States is the favored destination of the vast majority of Mexican immigrants, that fact alone does not give them a special right to be represented in the making of US Border policy. The United States is not coercing the Mexicans; nor is it single-handedly depriving them of the chance to lead autonomous lives” (Miller 2010, 118). This observation came in the context of a debate between Miller and Abizadeh regarding the appropriate way to characterize the act of refusing admittance to a prospective migrant (Abizadeh 2010; Miller 2010). Abizadeh insists that such an act is an act of coercion in the classic sense of the term: those denied entry by a restrictive border enforcement regime have been subjected to autonomy-invading coercive state action, which triggers a demand for democratic legitimation (Abizadeh 2008). Miller contends that under normal circumstances, the act of exclusion at the border is not an act of coercion but an act of prevention (Miller 2010). Prevention still requires justification, but at a considerably lower
threshold—the demand for democratic justification, according to Miller, isn’t applicable in this situation. Miller reaches this conclusion via an analogy between the private property rights of individuals in possession of land or other real property, on the one hand, and national communities in possession of a sovereign national territory, on the other. The right to prevent entry into a territory by a national community (acting through her representative government) is treated as analogous to a property owner refusing access to her property. As I will argue in the next section, this analogy is central to Miller’s theory of national rights.

Miller’s position on Mexican migration to the United States, as stated above, does not explicitly rule out the possibility of other reasons limiting the right to exclude in this case. However, his other recent writings on immigration suggest he is likely to be skeptical. Miller has elsewhere defended the right of national communities to restrict immigration, potentially quite severely, in service of their legitimate, reasonable, and democratic quest to control and shape “the way that their nation develops, including the values that are contained in the public culture” (Miller 2005, 200). Miller notes that the right to exclude is not absolute: “claims of material necessity—or more generally claims based on human rights—can sometimes place limits on their exercise” (Miller 2007, 221). Preferences and desires of prospective migrants aside, the “real question . . . is whether a decision to restrict immigration violates the human rights of those who are excluded” (Miller 2011, 2033). Miller’s primary recognized exception to the right to exclude follows the general international legal and moral consensus regarding legitimate asylum seekers (while keeping open the possibility of recognition of economic refugees, a shift that has the potential to expand the scope of legitimate asylees considerably). While this might seem to be a significant exception, Miller contends that its moral force cannot simply be wielded against the country of the would-be migrants’ choice, as “the claimant cannot choose who bears the
specific remedial responsibility in his case” (Miller 2007, 221). Except for special cases of emergency (such as someone adrift at sea, arriving in national waters, or fleeing immediate political violence across a land border), it is up to each national community how to discharge their fair share of remedial responsibilities with respect to refugees and asylum seekers. In other words, the moral demand on national communities here contains a significant amount of discretion in how “fair share” requirements are understood, and for whom asylum is granted. Should no national community choose to accept a migrant with a legitimate asylum claim, they may well have no recourse—they may simply have fallen through the “justice gap” between “what people in poor countries can legitimately claim as a matter of justice (protection of their human rights, especially) and what the citizens of rich countries are obliged, as a matter of justice, to sacrifice to fulfill these claims” (Miller 2007, 274). In the absence of an effective international regime governing refugee policy, states can violate their “fair share” obligations without fear of effective recourse from excluded asylum seekers (Miller 2011; Owen 2010).

Rather than challenge Miller’s claim that a “mere” act of prevention does not trigger democratic justification, I will argue that the reasoning that prompts Miller to classify exclusion as “mere” prevention may be less amenable to the justification of restrictive immigration policies than Miller currently suggests it is. Miller’s case ultimately rests on an analogy between private property rights for individuals and territorial rights for nation-states. A more thorough consideration of the implications of this analogy identifies potential limits on just exclusion that Miller does not consider. Examining Miller’s position on its own terms, I argue specifically that the national territorial rights thesis he defends may not justify his conclusion about the right to exclude Mexican labor migrants from the United States and other similar acts of exclusion.
**Territory as a Form of Property**

The case that the exclusion by force of a would-be border crosser is an act of prevention is easy to make. Insofar as this claim is controversial, it is not in the claim that prevention is taking place, but in the claim that the relevant act is “mere” prevention, and not a greater imposition. In order to make the case that this is the proper register to understand such exclusions, Miller relies heavily on the metaphor of the property owner, excluding others from access to her property. He analogizes border control to a hypothetical Scottish landowner who warns all who might attempt to access his private island that they would be met with violence, and to a homeowner who refuses to grant his obnoxious and persistent neighbor access to his house (Miller 2010, 114–16). But Miller does not solely rely on property analogies. He includes the following scenario: “Suppose that Peter, very much wants Jane to have dinner with him, and proposes that they should go to a nearby Thai restaurant. Jane, however, hates Thai food and makes it clear to Peter that if he goes to the Thai [restaurant], she will not be joining him—a threat sufficiently grave that Peter immediately drops his proposal” (Miller 2010, 113). It is clear, Miller argues, in this case, that Jane does not invade Peter’s autonomy or coerce him through her act of refusal in this scenario. For Miller’s purposes this analogy works if there are sufficient options beyond Thai food to meet Peter’s basic needs (thus anticipating a potential exception for refugees in the general right to exclude). But as Abizadeh notes, this analogy has a flaw: in the case of denying someone a particular option they prefer in the course of a friendship, one is not backing up that threat with the kind of coercive measures we associate with a state—“imprisonment, death, and so on” (Abizadeh 2010, 126). Insofar as the illustrative examples Miller uses to establish the noncoercive nature of territorial exclusion are apt, they rest, exclusively, on the private property analogy.
Of course, this does not require that the territorial rights of peoples are in every sense identical to private property rights. Tamar Meisels, a fellow national territorial rights theorist and territorial collectivist Lockean, gives an account of the important differences between individual property and collective territorial rights: “property and sovereignty are two forms, or two aspects, of ownership rights. Property in our connection refers to the ownership of land, while sovereignty includes inter alia the right to make the laws concerning real estate (as well as other) property” (Meisels 2009, 23; see also Meisels 2005, 5–8; Nine 2012, 11–13). The analogy between (individual) private property and (collective) territorial sovereignty can survive the obvious differences between the privileges that adhere to those rights, as they both generate the kind of ownership rights appropriate to that particular kind of agent as well as the principles that justify the type of ownership claim. For individual property owners, this means a collection of rights geared toward productive economic activity, “quiet enjoyment,” and significantly, the exclusion of other individuals in most cases (the latter may be limited in certain ways if the property is used for commercial purposes in some jurisdictions, but for property used for

2 By “collectivist Lockean,” I refer to those who argue that territorial rights ought to be granted to the collective entities. Generally, national communities, although Miller (2012) suggests indigenous groups may sometimes qualify as well for reasons similar to those Locke argues grant individual rights. Miller (2007; 2010; 2011; 2012), Meisels (2005; 2009) and Nine (2008; 2012) defend different variants of collectivist Lockean positions. This stands in contrast to an individualist Lockean justification for territorial rights. This position, defended by A. John Simmons (2001) and Hillel Steiner (1996), holds that territorial rights are justified by individual property rights, insofar as they are necessary to create an entity that can sufficiently protect such property. This chapter will not address the individualist Lockean territorial argument.
dwelling or other private purposes, the right to exclude remains robust under normal
circumstances). Territorial rights, adhering in national communities via the state as an
institutional proxy,\(^3\) produce jurisdictional and metajurisdictional powers,\(^4\) and other powers and
duties associated with norms of sovereignty. The difference between the specific content and
contours of rights that attach to these different forms of ownership is explained by a logic of
appropriateness or fit. The concrete nature of the rights and privileges that attach to each form of
ownership differ due to the different purposes of each form of ownership, and what is needed to
achieve that purpose. Individual ownership rights are shaped by what individuals do with land—
primarily, to live and engage in economic activity (as noted earlier, the right to exclude may
differ somewhat for these two kinds of ownership in ways that reflect the difference between
their purposes). Limits are placed on those rights insofar as those limits are necessary to make
property rights consistent with other important values and goals; for example, antipollution laws
and “takings” legislation may prove necessary to protect the health of the environment (and, as

\(^3\) Miller insists that these rights belong first and foremost to the national communities, and are
only contingently granted to “the state” as a placeholder for the national community. This
position has been criticized by a number of theorists who see the state as a stronger candidate for
holding territorial rights (Levy 2008; Laegaard 2007; Pevnick 2011; Stilz 2011). Recently Miller
has explicitly considered the possibility that territorial rights might adhere to groups other than
national communities, singling out indigenous groups as another promising candidate (Miller
2012).

\(^4\) On the importance of metajurisdictional rights for collectivist Lockean accounts, see Nine
2008.
such, the value and usefulness of other people’s property) and to provide for adequate infrastructure, respectively.

Similarly, the scope and limits of national communities’ territorial rights should fit with the nature and purpose of those rights. One of the central purposes of national territories is self-governance, and as such the territorial rights of states include jurisdictional and metajurisdictional rights over subjects and rights over territory (Nine 2008; Simmons 2001). It is also argued that they contain what Simmons calls “rights against aliens” and what Miller classifies at the right to exclude would-be immigrants (Miller 2005; 2007, 201–30; 2012; Simmons 2001, 301). This, Miller argues, is necessary to fulfill at least one central purpose of national territory—the right of national communities to attempt to shape and control the development of their culture and economy (2005, 201). As with Lockean accounts of individual property rights, the justification for this mode of ownership is bolstered by transformation. A national community’s right to claim ownership of a particular territory (with the attendant right to exclude) grows as the occupation and settlement leads to a physical transformation of that territory (Kolers 2002, 34; Meisels 2005, 75–96; Miller 2007, 217–20). Just as a Lockean individual property owner’s claim strengthens as he transforms the land (and renders it economically efficient) through his labor, so does a national community gain a stronger claim via transformation. In the case of a national community this process is transformative in a dialectical fashion. National cultures shape the transformations of the land, but the physical and

---

5 Miller contends that jurisdictional rights are necessary for groups with a “repository of value” in a particular parcel of land, in order for their ownership and control of that land to remain secure (Miller 2012, 263). For a skeptical assessment of that account, and an argument for collective private property rights in some cases, see Angell (2013).
environmental features of the land, and the limitations and opportunities they provide, play a role in shaping the national culture as well, such that the character of the land and the character of the national community are deeply intertwined.

Occupation, settlement, and transformation justify a national communities’ territorial claim in both backward-looking and forward-looking ways. Looking backward, it bolsters the territorial claim against other potential claimants. Looking forward, it demonstrates an important practical reason to recognize territorial rights claims of national communities—they are particularly well positioned to benefit from this particular piece of territory, due to the connection that now exists between the people and the land. This mutual connection between national communities and the land they occupy equips Miller with a ready response to the argument that it is difficult to make a national territory claim persuasively because most national communities occupy territories obtained originally through conquest, occupation, or otherwise problematic means. The territorial rights of national communities are not tied to a just initial acquisition. While a national community that violently dispossesses other occupants for a piece of land does not automatically acquire a right to that territory, they may do so over time, as multiple generations live, settle, and transform the land. Past sins of acquisition are still potentially morally relevant to the present-day community, but they may take the form of (unspecified) national responsibilities for past wrongs, which are best discharged in ways that don’t directly interfere with that national community’s existing territorial rights. The “transformation” feature of territorial rights claims also provides a tool to evaluate the relative strengths of competing claims, which are necessary in a world in which “unblemished title” is an impossible standard (Miller 2007, 219–20).
Extending the Analogy: Border-Crossing Easements

Whatever the shortcomings of the national territorial rights thesis and the analogy on which it rests, it clearly captures something important about national communities and the territories they occupy and govern. However, in the hands of national territorial rights theorists, the analogy is applied in an overwhelmingly one-sided manner. It is deployed almost exclusively in ways that serve to bolster the territorial rights of national communities to exclude. Miller does recognize exceptions to exclusion, but as noted in part I they are significantly limited in scope and application. I will return to a discussion of his limited exceptions in the final section. In this section, I’ll identify a way in which the underlying logic of the property analogy might suggest significant limitations on the right to exclude migrants, including Mexican labor immigrants to the United States.

One way in which the property analogy has generated an argument against territorial privileges of national communities has been through a critique of inherited birthright citizenship. This inheritance, it is argued, is an illiberal form of privilege that troublingly resembles feudal birthright, and as such presents a substantial challenge to those national communities that have ostensibly liberal characters and commitments (Carens 1992; Shachar 2009; Stevens 2010). This is certainly a way in which a property analogy could work against a strong right to exclude. Whatever the merits of this argument, from a national territorial rights perspective it appears to be a category error. It focuses on the rights of individual citizens rather than the rights of the national community as such. By reducing this collective right to an individual right, this critique of birthright citizenship fails to engage the national territorial rights claim on its own terms. As

---

6 For an argument that the feudal privilege analogy is inapt, see Pevnick 2011, 130–32.
such is it not likely to be persuasive to those committed to a collective territorial right for national communities that cannot be reduced to the sum of its parts.

Can Miller’s robust account of just exclusion be challenged if we remain in the sphere of collective territorial rights analogous to, but not reducible to, individual property rights? I believe it can. In order to do so, I will explore one way in which individual property rights are limited by convention and law, and the purpose of that limitation, and argue that something similar should be applied to the territorial rights claims of national communities. I refer here to the law of easements. An easement is a specific legal limitation that restricts a property owner in a particular way. A common form of easement, for example, is the requirement to maintain a route of access to another piece of property for its owners. In property law, the “dominant tenement” holds an easement that restricts some aspect of the property use of the holder of a particular piece of property (the “servient tenement”).

One way easements are created is by agreement, in other words, by contract. In legal terms this is an express easement. In addition to basic contractual easements, however, there are easements by prescription, easements by prior use, and easements by necessity. These are of particular interest for the purposes of this analogy. This is but one example: “Besides right of way, the law of easements included the right to place clothes on lines over neighboring land, the right to nail fruit trees on a neighbor’s wall, and the rights to water cattle at a pond and take water for domestic purposes” (Dukenminier et al. 2006, 670–71). Also included in the law of easements are negative privileges—preventing a particular development or activity on a particular parcel of land.

---

7 My discussion of easements in the following paragraphs draws heavily from Dukenminier et al. 2006, 667–740.
Easements by necessity come into existence in a situation in which a parcel of property would be significantly diminished in value without the use or access the easement protects. For example, if I were to sell a piece of my property with no independent access to public roads except through another section of my property, an easement would be necessary to allow access to this new parcel. Insofar as it can be shown that a particular restriction on parcel A is necessary for the enjoyment or use of parcel B, parcel A may be subject to an easement restriction.

Easements by necessity are usually created through lawsuits, in which the claim of necessity is scrutinized and the costs of granting the easement are weighed against the costs that would be borne by the servient tenement, should the easement be granted. While the standard of necessity is generally quite high, easements by necessity are not strictly limited to questions of the economic use value of the land. For example, many states grant easements by necessity to descendants of those buried in private cemeteries to visit the grave of their ancestor.

Of even greater interest for my purposes are easements by prior use and easements by prescription. These forms of easements do not rest on claims of necessity or prior agreement. The specific rules of such easements vary by jurisdiction, but the idea is that an easement can be created through the continued, specific use of a piece of property for a particular purpose over a significant period of time. For example, under Kentucky law, “an easement, such as a right of way, is created when the owner of a tenement to which the right is claimed to be appurtenant, or those under whom he claims title, have openly, peaceably, continuously, under a claim of right adverse to owners of the soil, and with his knowledge and acquiescence, used a way over the lands of another for as much as 13 years” (Duckenminier et al. 2006, 677). The strength of a claim to an easement is increased by a demonstrable improvement of an accessway (such as paving a road) by those who are claiming the easement. In other words, the extent to which the
prospective dominant tenant has invested in or improved a particular land use increases the strength of their legal claim to continued use via an easement.

Easements by prescription can be created in two ways. The first is described in the preceding paragraph. The second, a combination of the logic of necessity and the logic of prescription, is also of potential relevance to the idea of border-crossing easements: “the easement is implied when the court finds the claimed easement is necessary to the enjoyment of the claimant’s land and that the necessity arose when the claimed dominant parcel was severed from the claimed servient parcel” (Dukenminier et al. 2006, 688). In other words, when a particular property border is created through a division of a parcel in such a way that creates the necessity of a particular use of the servient tenement by the dominant tenement, this may produce a claim of easement by necessity.

The law of easements discussed here draws from US law, but easements as a legal category of property law is both older and broader than its current American application. Modern easement law is a product of the common law tradition, but the genealogy goes back quite a bit further: easements have been characterized as “the most Roman part of English law” (Dukenminier et al. 2006, 668n2). The specific history of easements in the common law tradition dates back to the breakup of the feudal order and the enclosure of the commons. As common fields were becoming patchwork-private plots, the need for owners of particular plots to have access to them became encoded in property law. While the specific content and purpose of easement law has changed over time, a consistent theme of easement law has been recognition that property rights are imbedded in a social, ecological, geographical, and historical context that cannot, in some cases, be entirely escaped by the current title holder. Medieval property law contained extraordinary complexities that have since been substantially simplified. These
simplifications have been useful—indeed, probably necessary—for the flourishing of commercial and industrial society. But as useful as they are, they remain useful fictions. The persistence of easement law demonstrates a limit of this useful fiction, as they directly confront the specific costs to others of unfettered freedom of property and resolve those claims in ways that acknowledge the legal/moral significance of existing historical practices over unlimited freedom to dispose of one’s own property. With property easements, this historical sequence has been completed; with border-crossing easements the third step has so far proceeded in an ad hoc manner, limited to a handful of cases discussed in section V below.

The next two sections examine empirical examples of laws, practices, and customs that take the form of border-crossing easements, and the normative case for granting easements in cases of long-standing, economically and culturally embedded labor migration, respectively. Before turning to these examples, I want to briefly consider some ways in which some existing logics of citizenship and immigration law and practice are similar to the logic of border-crossing easements offered here. The factors that should motivate the recognition of border-crossing easements are also present in migration and citizenship law in a variety of other ways. Obviously, time is significant to easements. An easement by prescription is based on the length of time of a particular use or practice. There is historical precedent to a temporal dimension to United States citizenship law as well. Prior to the 14th Amendment, “there is very strong evidence that a temporally based principle of citizenship . . . was treated as decisive when, following the founding, the U.S. Supreme Court and many state courts issued their decisions about the status of the first U.S. residence to whom irregular citizenship status was ascribed” (Cohen 2011, 575–76). Prior to the restrictive turn in immigration policy in the 1920s, there were a number of provisions limiting the government’s prerogative to deport settled, long-term
residents, and “discretionary mechanisms” for such individuals to adjust their status (Shachar 2013, 136; Ngai 2004, 59–90). In a host of nineteenth-century court decisions, the duration of residency was a crucial factor in determining citizenship status of residents. Indeed, the earliest federal deportation laws were limited to those who had been residing in the United States up to only one year (later changed to five years). In the 1940s and 1950s, Congress created legal mechanisms to avoid deportation for long-term residents (Ngai 2010, 58–60). Such arrangements exist in other countries as well. In France, until 2003, legal resident status was available to anyone who could demonstrate ten years of residence (Carens 2010, 21). In addition to the relevance of time to citizenship law, changing definitions of family have played an important role. Time is not the only familiar dimension of the logic of easements in existing citizenship law. During World War II, a number of American soldiers married while serving abroad. For the majority of the “war brides” from Europe, this presented no legal challenges based on current immigration law. But for the approximately 25 percent of the brides who were from Asia (primarily China), the situation was quite different. Their admission to the United States, even as spouses of current citizens, would be in direct conflict with the notoriously racist laws that had severely restricted Asian immigration over the previous several decades. This was initially dealt with in a fairly ad hoc fashion—via a hastily passed “War Brides Act” in 1945, designed to “cut the red tape” and otherwise circumvent long-standing immigration law and practice (Wolgin and Bloemraad 2010, 35).

8 For a forceful argument that the temporal dimension should play a role in adjudicating the fate of irregular migrants today, see Carens (2010). Mae Ngai (2003) has argued that allowing legal residence after a period of time in residence is simply to place a statute of limitations on the crime of illegal border crossing.
How do these stories from the history of immigration and citizenship laws relate to the concept of border-crossing easements? In the first case, I merely seek to demonstrate that the temporal principle that underlies the concepts of easements by prescription has long had a place—sometimes a prominent one—in our thinking and adjudication about citizenship. I raise the issue of the Asian war brides and their legal accommodation to make the following point: it is not unprecedented to grant exceptions to general rules and laws regarding immigration if doing so is necessary to meet some other broadly agreed-upon value or goal. The flourishing of intimate family life required such an exception.\(^9\) Border-crossing easements, as I’ll show in the following sections, are also necessary for the flourishing of long-standing economic and cultural arrangements. In both cases, respecting autonomy means granting exceptions, and easements is one form these exceptions can take.

Consider the logic of the centrality of family reunification in contemporary immigration law. As long as legal immigration routes to developed countries remain a scarce resource, a strong case could be made for placing refugees on a par with, or higher than, family reunification in immigration (Gibney 2004; Honohan 2009). Why does family reunification continue to occupy a central place in current immigration law?\(^10\) Why should this particularistic

\(^9\) This exception shouldn’t have been necessary, of course: the stated goal behind anti-Asian immigration laws at the time was explicitly and openly racist. But my point here regards merely the exception, rather than the general rule—an exception to a rule can be justified on its own terms, separately from any examination of the justifiability of the rule itself.

\(^10\) Family reunification is responsible for a majority of legal migration in the developed world. For a defense of family reunification–driven migration, see Lister (2010). For arguments that
consideration take precedence over more universal measures of desert, or fairness? One possible answer is that migration regimes should be constructed so as to make current migration practices consistent with the development of one’s intimate family life and culture. In this sense, the impetus behind family reunification as a top priority in immigration could, arguably, be leveraged to support border-crossing easements as well.

Obviously, there is currently no law, national or international, designed to provide specific guidance for granting or recognizing border-crossing easements in the sense that there does exist for property easements. But this is not a reason to abandon the idea. Recall the common law origins of easement law: easements emerged from changes in the practice of property ownership and allocation that took place during the breakdown of the feudal order. Changes in actual practices rendered a new legal category necessary, and it was developed in a bottom-up, ad hoc manner to respond to that challenge before it became a body of codified and general law. As James Scott recently noted, “The movement from practice to custom to rights inscribed in law is an accepted pattern in both common and positive law” (Scott 2012, 16). A case could certainly be made that past and current practices of migration, in light of an increasing trend to monitor, police, and restrict national borders by nation-states, represent analogous conditions to generate border-crossing easements, and existing legal arrangements of the sort discussed in this section could be seen as the early stages of ad hoc development of border-crossing easements, not yet identified as such.

“family” should be rethought to consider a variety of nontraditional forms, see Lister (2007) and Holland (2008).
**Actually Existing Border-Crossing Easements**

Easements are a form of servitude in property law, so the first place to look for such arrangements is the law of international servitudes, in particular those servitudes that relate to a right of free passage across sovereign territory.\(^\text{11}\) One area in which such an arrangement has frequently come up is for enclaves—pockets of sovereign territory entirely surrounded by another country. In such cases, it is common for a right of passage from the enclave to the main body of territory of the state to which it belongs. A good example here is Llivia—a small Spanish town in the Pyrenees, removed from the main border by several miles and entirely surrounded by French sovereign territory. While the Schengen agreement has rendered the right of free passage to this enclave redundant, it existed for many centuries—from the creation of the modern border in 1659, which intended to cede Llivia to France but failed to do so through “defective wording in the Treaty of the Pyrenees” (Catudal 1974, 123; see also Krenz 1961, 65–70; Sahlins 1989) until the late twentieth century. The road from the border to Llivia, known as the *chemin neutre* (“Neutral Road”) was open to Llivia residents on a permanent basis (Catudal 1974, 120). Even as both French and Spanish authorities chafed at the cost of this arrangement—“This enclave provides a livelihood for a Corps of French and Spanish customs officials almost as numerous as the rest of its inhabitants” (Farran 1955, 298)—the right of free passage persisted as an obligation for both states for hundreds of years. Llivia is not unique among enclaves in this respect. According to a number of scholars of enclaves in international law, there is a right of access for enclave residents, as well as a variety of state officials, that while not absolute, should

\(^{\text{11}}\) On international servitudes in general, see Reid (1932) and Vali ([1958] 1986). On the right of transit in general, see Lauterpacht (1958). On the right of transit as it relates to enclaves, see Catudal (1974), Farran (1955), and Krenz (1961).
be understood as a requirement of customary international law (Catudal 1974, 130–31; Farran 1955, 304; Krenz 1961, 138–46). When India denied Portugal access from the coastal colony of Daman to the interior enclaves of Dadra and Nagar Evili in 1954, the International Court of Justice responded with the finding that “Portugal possessed a right of transit for goods, private persons, and officials” between the coastal territory and interior enclaves, and India was required to permit access under international law (Krenz 1961, 64–65). The customary international law surrounding access to enclaves appears to be the most obvious international analogy for easement law. But there are other examples: international law has long recognized a number of transit rights and usage rights that fall under the category of international servitudes.

Furthermore, it is not uncommon for specific subnational groups for whom international border restrictions impose a significant hardship to have some form of special border-crossing rights. De facto and de jure border-crossing privileges have been granted for reasons conceptually similar to the logic of easements suggested here. The remainder of this section identifies and explores examples of such “border-crossing easements.”

Legal border-crossing privileges on the US/Canada border for indigenous peoples date back to the Jay Treaty of 1794, in which the United States and Great Britain agreed that “Indians dwelling on either side of said boundary line, freely to pass and re-pass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America” (Osburn 1999, 472). These border-crossing rights were reaffirmed explicitly after the War of 1812 in the Treaty of Ghent and went largely unchallenged until the anti-immigration

---

12 By the time the ruling was issued in 1960, Portugal had effectively lost control of these colonies.

13 While dated, thorough accounts of such rights can be found in Reid (1932) and Vali (1986).
movement of the 1920s. They were severely curtailed in the 1924 Immigration and Naturalization Act. However, the Supreme Court effectively reinstated native treaty rights just four years later in *U.S. ex rel. Diablo v. McCandless*. In 1952 a 50 percent blood quantum requirement was added, but this was again replaced by simple possession of tribal identity cards by the 1980s, returning determination of tribal membership to the tribes (Luna-Firebaugh 2002, 162–63; Osburn 1999, 474–79). In the case of the United States’ northern border, the analogous type of easement is an express easement; these border-crossing rights, while reflecting long-standing cultural and historic practices, are based on treaty law.14 A similar express easement was negotiated on behalf of indigenous residents of western Alaska and northeastern Russia in the early 1990s, shortly after relations between the United States and Russia improved following the collapse of the Soviet Union (Osburn 1999, 481–82).

On the southern US border, the situation is more complex and tenuous, and existing border-crossing rights for indigenous peoples have deteriorated in recent years (Singleton 2008). Some indigenous groups have received express easements through law, others have been granted border-crossing rights via ad hoc administrative rules, and others have no border-crossing rights at all. The clearest case of a recognized border-crossing easement can be found with the Kickapoo. Originally from the Great Lakes region, the Kickapoo tribe moved around considerably beginning early in the nineteenth century “as a result of broken land treaties and a desire to resist the forces of colonization” (Luna-Firebaugh 2002, 168). Some subgroups of the

14 There is some question about whether the contemporary free passage rights are best understood as treaty rights or whether the relevant treaties have been entirely superseded by statute. The latter case is made by Yablon-Zug (2008), while the treaty rights case is made by Lewerenz (2010).
Kickapoo briefly settled in Texas, but due to local hostilities moved south to Mexico, where they were granted land and citizenship by the Mexican government, in exchange for military service (Osburn 1999, 480). Meanwhile, the US government established a Kickapoo reservation in Indian Territory (present-day Oklahoma) in 1883. The two branches of the Kickapoo tribe subsequently “maintained close relations through intermarriage and frequent visitation” (Osburn 1999). The Mexican Kickapoo lived year-round in Mexico until the 1950s, when a series of droughts forced an annual labor migration to Eagle Pass, Texas. The centrality of free passage across the US-Mexico border for the economy and culture of the Kickapoo tribe was acknowledged by the INS, which issued tribal identity cards that enabled free passage for all tribal members (of Mexican and US citizenship) in the 1950s. This administrative easement was formalized into law in 1983, when the Texas Band of Kickapoo Act was passed, which granted free and unlimited passage of the US-Mexico border for all tribal members. The cultural necessity of continued free passage was explicitly noted in this legislation (Osburn 1999, 480–81).

This is the most clear-cut present border crossing easement on the US-Mexico border, and while it became an express easement in 1983, it was clearly recognized as an easement right prior to that, as that legislation codified existing informal INS privileges. Other groups have had similar arrangements. The Cocopah peoples’ traditional lands were separated by the Gadsden Purchase, but they continued to cross freely until the 1930s. After an initial crackdown, the Cocopah “developed an unofficial agreement with the INS that allowed for freedom of passage of Mexican Cocopah into the U.S.” (Luna-Firebaugh 2002, 167). The Yaqui’s homeland was not directly split by the border, but Yaqui subgroups resided on both sides. Furthermore, the Yaqui practice religious ceremonies that require the presence of religious leaders from other regions,
often across the border. The Yaqui came to an agreement with the INS Arizona regional office in 1997, which allowed Yaqui leaders to identify and sponsor religious leaders from Mexican Yaqui communities to cross the border for these ceremonies (Luna-Firebaugh 2002, 174). The Tohono O’odham, whose territory in Southern Arizona extends into the state of Sonora, have long sought recognition for a border-crossing easement, which is particularly urgent in their case since about 10 percent of registered tribal members are Mexican nationals (making them the only US tribe to grant full tribal membership to non-US citizens). A traditional unofficial border-crossing location for O’odham members was quietly ignored by the INS for decades. Recent border enforcement strategies have complicated this arrangement, as nonindigenous illicit border crossings have been pushed farther away from population centers and brought disruption, crime, and border guards to O’odham territory (Cadava 2011; Luna-Firebaugh 2002, 166). As a result, the nonofficial border crossing has been closed, imposing a significant hardship on the Mexican tribal members, who are now forced to make a several hour trip to visit friends or relatives, receive medical care, or otherwise participate in tribal activities just a few miles away from their home (Ellingham 2004, 122–36). O’odham leaders continue to negotiate special “laser visas” for tribal members, which would presumably ensure their members are permitted by immigration officials to cross the border, but not address the geographical problem (Luna-Firebaugh 2002, 170–73).

An argument could be made that the Tohono O’odham have a uniquely strong case for border crossing rights (Ozer 2002). Their presence on the border substantially predates the Kickapoo (and, of course, the border itself). While the Kickapoo’s border crossing dates back to the early 1800s, the Tohono O’odham have been crossing the present-day border for, at a minimum, several hundred years before contact with European settlers. The Kickapoo must cross
the border to get from one territory to another, whereas the border split the Tohono O’odham’s homeland. So why was the Kickapoo border-crossing easement legislatively successful, whereas the Tohono O’odham not? The details of the failed legislation are important here. In both cases in which a legislative border passage right was pursued, there was broad agreement between the tribe and the US government regarding the need for and justice of a border-crossing right for tribal members. In both cases, the sticking point became how the border would be crossed. In both cases the US and Mexican governments insisted that border crossing could only take place at officially recognized border crossings, whereas the Tohono O’odham insisted on being permitted to cross the border on their own land, via customary migration paths (Luna-Firebaugh 2002, 170–71). This was a cultural necessity, but also a practical matter, as crossing at an official border checkpoint would force a 120-mile trip to visit a village a few miles away (Osburn 1999, 149). Indeed, the traditional migratory routes had been used: “The O’odham maintain an unofficial border crossing on tribal lands that, while known to U.S. customs, is not regulated by the U.S. government” (Luna-Firebaugh 2002, 166). However, this arrangement became untenable as new restrictive border enforcement efforts pushed other border crossers and smugglers into more remote territory, bringing law enforcement with them and severely disrupting life in the Tohono O’odham’s territory (Madsen 2007; 2014). In other words, the idea that a border-crossing easement for the O’odham is both needed and deserved was never in doubt—the easement failed for reasons related to the challenge of implementation, especially

15 The O’odham operated an illegal shuttle across the border to bring their Mexican members to their medical clinic in 2001–2, but by 2004 they had abandoned this service, as both the increased presence of border guards, and the increased danger from criminal activity associated with border crossing had rendered the shuttle impractical (Ellingwood 2004, 122–36).
insofar as it might conflict with the US government’s renewed and reinvigorated effort to aggressively police the border. Prior to the significant increase in border enforcement, the O’odham’s informal crossing was tolerated by various agents of the US government because there was no reason to believe anyone else might seek to take advantage of it, given its remote location. With the militarization of less remote sections of the border, this was increasingly not the case. This easement fell apart because it conflicted with a higher priority for the state, not because the force of the claim was rejected.

It might be argued that indigenous peoples are a special case, because their status as (a) sociopolitical forms that predate the state that were also (b) subjected to all manner of indignities by those states that now separate them, they might have a different and much more substantial case to make for border-crossing easements. In particular, one could argue their status as sociopolitical entities that predate the settlement of modern states imbues them with a claim for accommodations and rights that is qualitatively different, and more demanding, than any other sort of plausible subnational group claim. Indigenous peoples can point to the United Nations Declaration on the Rights of Indigenous Peoples, which includes a statement of support for indigenous border-crossing rights in Article 36.\footnote{Article 36 of the Declaration of the Rights of Indigenous Peoples reads:}

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.
Crossing easements may be among the most morally and politically compelling. Such claims are not, however, irreducibly unique. The justification for indigenous border-crossing easements and those of nonindigenous labor migrants are based on broadly similar principles. First, the length of time the border has been crossed (and the length of time the geography of the community has necessitated border crossing); second, the cultural and economic importance of the border crossing; third, the hardship or harm done through the act of border creation and the ongoing policies of restricted access. For each of these criteria, the indigenous claims to border-crossing easements, while often quite strong, are not qualitatively unique.

I have focused here on border-crossing easement-like arrangements at US borders. There are many non-US border examples of such arrangements, however, including the legal recognition of border-crossing rights of the Sami people in northern Scandinavia, which date back to at least 1751, when the Lapp Codicil was added to the Stromstrad border treaty between Sweden and Norway. This granted the “Lapp people” the formal right to cross the border between these two countries to continue their long-standing practice of nomadic reindeer herding (Henrikson 2008, 28; Hannum 1990, 247–62; Lantto 2010). Under provisions of the Torres Strait Treaty of 1985, residents of certain villages in the Torres Strait islands have legal permission to cross the maritime border between Australia and Papua New Guinea “to visit and trade with one another without having to go through formal customs inspection, passport control or other formalities” (Arthur 2001, 219). Since 1967, the Druze people of the Golan Heights have found

themselves separated by a new international border from the rest of their people. Even as tense relations have led to a closed border for most Israelis and Syrians, the Qunietra Crossing has been open to residents of four Druze villages in the northern Golan Heights only, for the purposes of attending school, family events, visiting significant religious sites, and commerce (in the form of apple sales) in Syria (Ashkenazi and Khoury 2013; Einav 2010). Examples of easement-like arrangements for border-crossing peoples are, if not routine, not entirely unusual.

**Searching for Border-Crossing Easements: Mexico–United States and Lesotho–South Africa**

The previous section establishes that “border-crossing easements” do, in fact, exist. But which groups should be granted border-crossing easements? Most of the examples of successful border-crossing easements identified in the previous section fall under two categories—indigenous peoples and residents of enclaves. These are perhaps two of the easiest cases for border-crossing easements, but the case for expanding the concept beyond them is strong. In this section, I want to explore two cases I believe are eligible for a border-crossing easement, due to the central role a pattern of labor migration plays in the society, culture, and identities of the would-be dominant tenement. The two cases are Mexican labor migration to the United States (particularly from parts of Mexico with a robust and long-standing culture of labor migration, such as many rural Oaxacan villages) and Lesothan labor migration to South Africa.\(^{17}\) I will give an account of some of the salient features of these two cases for our purposes before making the case that they may qualify as border-crossing easements.

First, the specific location of both of these borders has historical origins in the prerogative of the wealthier and more powerful country. In this case “both borders were

---

\(^{17}\) For an account of the important similarities between these borders see Coplan (2010).
established through a process of war, resistance, and domination” and “the conquered local people were not consulted as to where the border would inevitably run” (Coplan 2010, 55). The US-Mexico border was the product of a protracted nineteenth-century struggle in which the United States effectively seized a considerable portion of Mexican territory, in which itinerant labor had (and continued to) moved freely. At the time of the Treaty of Guadalupe Hidalgo approximately 100,000 Mexican citizens (as well as twice as many Native Americans) resided in the territory ceded to the United States (Nevins 2002, 19). The present-day American Southwest was severed from Mexico politically, but the social, cultural, and economic ties between these territories were not. The border remained unstable and virtually unpoliced for many decades, as the initial boundary between America and Mexico in this newly acquired territory was racial rather than geographic.

Similarly, Lesotho’s current border with the South African Free State to the west was shaped through conflict with the Orange Free State Republic in the mid-nineteenth century, in which virtually all of the Lesothan western lowlands were ultimately lost to the Boer Republic (which later merged with South Africa after the second Boer war). The borders of modern Lesotho were settled when the British agreed to make what was left of Lesotho a protectorate in 1868, after nearly two decades of fighting a losing war of attrition, thus preventing any territorial concessions to the Orange Free State. At its founding, Lesotho became, effectively, a labor reserve for the rest of South Africa—the agriculturally productive lowland region of the country was now almost entirely gone, leaving scarce options for domestic employment (Coplan 2001; Mensah and Naidoo 2011). The country that was once known as the “granary of the Orange Free State” (Ferguson 1994, 65) saw its status as a major agricultural exporter decline rapidly, to the point that it was no longer close to agricultural self-sufficiency. This decline has multiple
causes—the disruptions of the Orange Free State wars in the 1850s and ’60s and the
aforementioned loss of fertile agricultural land in 1868 to the Orange Free State, but also the
development of a system of labor migration in which investment in agricultural activity and
capacity declined precipitously (Coplan 2001). While the inequality in drawing the border is
historical, the inequality in defining the border is contemporary. In both cases discussed here it is
the more powerful, wealthier state, the United States and South Africa, that has attempted to
create a highly restrictive border regime where a largely open border had once existed. In both
cases, the present-day character of the border is not defined by the policies and enforcement
regimes of the Mexican and Lesothan governments to any significant degree.

Also, in both of these cases labor migration has a deep and long history, dating back
approximately one and a half centuries. This practice has long contained a great deal of
exploitation and unfair treatment of workers, but it could also be characterized as beneficial to
both sides.¹⁸ Economic development on both sides of each of these borders has been shaped and
driven by these migratory practices for some time. But these long-standing patterns and practices
of migration have not merely shaped the economic path of both nations, they have shaped (and
been shaped by) a culture of migration that has taken hold in virtually all of Lesotho and a
number of regions in Mexico. As Miller (2007, 218–21) argues, just as a national community
transforms and is transformed by the land such that they become a fit for each other, so too do
long-standing migratory patterns and practices.

Lesotho “has served as a labor reserve supplying migrant wage labor to South African
mines, farms and industry for more than a century” (Ferguson 1994, 26; Murray 1981). The

¹⁸ Mutually beneficial but still highly exploitative cross-border cooperation is a common feature
of highly unequal borders (More 2011).
centrality of labor migration in Lesotho dates back to the period of the Orange Free State wars, during which time Basothan men sought work in Natal and the Cape to escape the war. After the settlement of the boundary, two facts drove the practice of labor migration to become widespread and permanent: the aforementioned loss of the fertile agricultural portion of the Basothan homeland in the west, and the opening of labor-intensive diamond mines in nearby Kimberley. Basothan labor migrants were pushed, but also pulled, across the border. By the end of the nineteenth century, the vast majority of men of working age sought passes for work outside the territory (Murray 1981). The agricultural productivity of Lesotho continued to decline as much of the labor force spent their working years in South Africa—for many years, in the mines, and more recently on Free State and Transvaal farms (Coplan 2010; Ulicki and Crush 2007). The particular pattern of migration in which men of working age spent between six and ten months a year or more working abroad, but women were not allowed to take work in South Africa, had a profound impact on gender roles, the nature of marriage, and the structure of family relations in Lesotho (Coplan and Thoahlane 1995; Modo 2001; Murray 1981, 110–19). The relationship between family, work, and conceptions of masculinity in Lesotho are now such that “men in rural areas of Lesotho generally do not consider work on one’s family farm as legitimate work” (Mensah and Naidoo 2011, 1030). South Africa’s development was also shaped by these migratory patterns and their malleability. When NUM, the primary mineworkers union, became too militant in the view of the South African state, the presence of foreign workers (primarily Basothan, who were often among the most skilled miners and the most militant union leaders) became a valuable tool in undermining union power, as they could be deported and sent to other

19 Lesothan refers to the name of the country, while the people are known as Basothan (plural) and Mosothan (singular).
locations when they reapplied for work. Migratory patterns became a useful tool for the manipulation of labor relations for the South African regime (Coplan 2001, 96–98). The migratory pattern has even been politically useful—in 1994 a significant number of Basothans in South Africa were promised permanent resident documents in exchange for their vote for the ANC. The following year, South African president Nelson Mandela made a public pledge that Basothan migrant workers would not be denied access to work in mines (Mensah and Naidoo 2011, 1018–19). In sum—the migratory practices of Basothans have, over time, played a significant role in shaping and reshaping the economy, society, politics, and culture of South Africa. Furthermore, a culture of labor migration for virtually all competent working-age men has been central to Lesothan society for much of the same time.

As with Lesotho, Mexican labor migration to the United States has been a feature of life since the boundary was established in the nineteenth century. As the new American territories seized at the conclusion of the Mexican-American War were settled and developed, Mexican labor migration played an important role. In particular, the agricultural economy of the American West came to rely on a shifting, itinerant population of workers at certain times of the year; the manpower to complete the harvest would have otherwise been impossible given the scarcity of local available labor. Temporary Mexican labor migration, from regions near the border but also from southern Mexican regions such as Oaxaca (Cohen 2003), became central to the development of the economy of the US Southwest, providing labor flexibility that intra-American migratory practices did not. The economy of the American West could not have developed as it did without Mexican labor migration. This long-standing pattern of migration has, predictably, deeply shaped Mexican communities as well. The practice of labor migration has been a central feature of cultural and family life in many parts of Mexico for over one
hundred years (Cohen 2003; Coplan 2010; Kandel and Massey 2002; Wilson 2010). The social
dynamic of (mostly male) long-term migration and (mostly female) migratory communities in
parts of rural Mexico has had a profound role in shaping gender norms, relations, and
expectations as well as family patterns. On the economic front, recent evidence suggests that
remittances from US-employed labor migrants are a major engine of economic development in
parts of Mexico where labor migration is common (Orrenius et al. 2012). The culture of
temporary, cyclical out-migration can be seen as “a set of interrelated perceptions, attitudinal
orientations, transnational social networks, growing out of the international migratory
experience, which constantly encourage, validate, and facilitate participation in this movement”
(Cornelius 1990, 24).

The legal status of these migratory practices has changed considerably over time. That
said, their status as licit (if not necessarily legal) practices remained largely unchanged—in both
societies; the practice of labor migration (including, at times, labor migration outside the law)
was both expected and normal on both sides of the border. Changes in the legal status of
migration (and the relevance of that legal status to the actual experiences of migrants) have
remained largely in the hands of the more powerful country in each pair, the United States and
South Africa. For both countries, the manipulable nature of the legal status of migrants from the
other country has served as an economic and political resource, to be altered to meet the different
and changing needs (as previously noted with respect to labor organizing in South African
mines). In the case of the United States, policies and enforcement have shifted over time as well,
with a similar dynamic. Initially, there was virtually no border enforcement. Between 1890 and
1930, the Mexican border became an object of concern, first as a circuitous route for unwanted
and illegal Asian immigration, and later as part of a general turn against immigration in the
1920s, which would only intensify in the 1930s. During this time the US government also saw the Mexican border as a potential financial resource, offering “work permits” to would-be migrants at rates few could afford (Nevins 2002). Still, during this time enforcement was sufficient only to moderately disrupt or complicate labor migration for a few, rather than preventing or significantly altering the flow of migrants. By the early 1990s, however, the flow of migration from Mexico became another kind of political resource; namely, a stage for politicians to engage in a performance of sovereignty in the form of a “crackdown” on “illegal” immigration (Andreas 2009; Brown 2010; Nevins 2002). This may have been useful for the politicians engaged in it, but its consequences for the culture of migration was not to end it but to alter the flow; under the new regime of fences and expanded border enforcement, labor migrants shifted from temporary to permanent (as multiple border crossings became too risky). Coyotes—smugglers of labor immigrants—became more profitable and powerful, changing the demographics of who can afford to migrate, and border crossings became more deadly as they were pushed out into the harsher desert (Nevins 2002).

This historical account of these migratory patterns suggests several reasons why they might trigger a justified demand for an easement. One way to make the case for border-crossing easements would be to observe that the very idea of states “controlling borders” is a relatively recent imposition on the ancient and venerable practice of human migration, which has been a central feature of human civilization for far longer than national communities or states have existed, let alone the much more recent practice of attempted control of border crossings, and explains how our species came to occupy most of the habitable territory on the planet in the first place. On this perspective it is not migration that disrupts the nation-state but the nation-state that disrupts migration (Brubaker 2010). While this view has a certain appeal, the spirit of easement
law is not so radical. It is, instead, a minor supplement to the system of private property rather than a radical challenge to it. I presume a similar scope for border-crossing easements.

The central purpose of easements is the continued use and enjoyment of property. Insofar as a particular pattern of property use/access has become central to the relevant parties’ continued enjoyment of their property, restriction on one parcel can be created to facilitate that continued practice. Something similar could be said to exist with respect to these patterns of labor migration. First, the migratory patterns here are long-standing. Easements by prescription are developed over time, as patterns of use become embedded and habitual. While minor details have changed, both of these migratory patterns have persisted for well over a century. Second, the cultures and economies of the equivalent of the dominant tenement (Lesotho and Mexico) have been shaped and altered considerably by this practice. These migration patterns have been tolerated or even encouraged by the servient tenement (United States and South Africa), but have also played a role in “improving” the economy of servient tenement, through the provision of flexible, temporary labor whenever and wherever it is needed. Just as the claim for an easement is bolstered if the would-be dominant tenement has made improvements to the land, the border-crossing easement claim should also be similarly bolstered. For better or for worse, the local cultures and economies of the dominant tenement have been significantly shaped by the long-standing pattern of return migration. This has been done with the quiescence of the would-be servient tenements, who have, in fact, used these migratory patterns (and their own ability to manipulate them) in pursuit of their own political and economic projects. Third, the legal claim for an easement by prescription is bolstered when the initial severance of the two parcels of land placed the would-be dominant tenement in a difficult position without the easement. The moment of severance (the creation of the modern border—the Treaty of Guadalupe Hidalgo and
the Gadsden Purchase in 1848 and 1853, respectively, and the creation of modern-day Lesotho as a British Protectorate in 1868) placed potentially significant limits on the continued enjoyment of the would-be dominant parcel without the easement. The basic ingredients for a justified easement claim are clearly present in both cases. If easements are good property law, and the law of individual property ownership serves as the metaphorical foundation of the territorial rights of national communities, should not those territorial rights be subject to claims of easements?

**Are National Territorial Rights and Border-Crossing Easements Compatible?**

In the final section of this chapter, I return to David Miller’s theory of immigration and consider his account of exceptions to the right to exclude in light of the preceding discussion of border-crossing easements. Miller’s writing on immigration suggests he might accept border-crossing easements by necessity but reject border-crossing easements by prescription. I will attempt to explain why Miller might be inclined to make this distinction, given his larger commitments, and why it is nevertheless a mistake to do so.

No particular form of ownership automatically generates a general or absolute right to exclude. Identifying a person or collective as an “owner” is the beginning, rather than the end, of a discussion of the particular rights that resource ownership entails (Pevnick 2011, 43). Each form of ownership generates a specific set of legal exclusions that are tied to the purpose of that particular form of ownership. While ownership usually entails some exclusion rights, the contents of those exclusion rights vary considerably, based on the point of the kind of property right being claimed. For example, a racist who does not wish to associate with African

---

20 The method used in this chapter—drawing lessons from common law tradition with respect to individuals and applying those lessons to national communities—is one that Miller employs with respect to the inheritability of responsibility for harm. See Miller (2007, 148–50).
Americans in any capacity has a right to categorically exclude them from her private residence, but not her restaurant. This reflects a legal distinction between the purpose of private residences and businesses shaped by civil rights legislation; the latter is public in a way that the former is not, and as such it is a form of property that is more subject to limitations based on the public value of racial equality. Or, to consider this from another angle, consider the exclusions generated by intellectual property. If you published a book, you would have no right whatsoever to exclude African Americans—or any other paying customer—from reading it. You do, however, retain a host of exclusion rights as an intellectual property holder in this case. Specifically, you (and/or your publisher) would have the right to exclude any reproductions or use of the copyrighted material beyond what relevant statutes determine is “fair use.” Finally, consider the recent revolution in Australian constitutionalism. Since *Queensland v. Mabo* (1992), the founding doctrine of *terra nullius* (empty land) has been replaced by a system in which “native title” claims can be made, in which Australian Aboriginals’ long-standing cultural and spiritual ties to the land can provide a kind of legal title. It isn’t straightforward ownership, however, that they have been granted in most cases, but rather a combination of ceremonial rights, dwelling rights, and some light commercial rights. Pastoral rights and mineral extraction rights have generally remained in the hands of the pre-*Mabo* economic interests that own them. “Native title” is a particular form of ownership that entails some privileges but not others—presumably, the privileges that are historically and culturally relevant for traditional native land use (Glaskin 2003; Hinchman and Hinchman 1998).21

---

21 I am not making an argument here that native title under *Mabo* (and the subsequent Native Title Act of 1993) is sufficient in providing justice for Australian aboriginals. My point is merely that this arrangement is consistent with—indeed, based on—the notion that different forms of
With this set of lessons in mind, it’s important to note that, much like property easements, border-crossing easements are likely to take many different forms, and generate different sorts of “differentiated citizenship” statuses, relevant to the circumstances that lead to the justified claim for an easement. I initially formulated this concept as “migration easements,” but this suggests a right to actual migration, which might attach in certain cases, but by no means all of them. In some cases, a border-crossing easement may entail little more than an exception to administrative checkpoints (for the Tohono O’odham, for example, or Torres Strait Islanders traveling between Australia and Papua New Guinea). In other cases, border-crossing easements may entail permission to cross borders for the purposes of seasonal work or temporary migration. In some cases, border-crossing easements may entail political incorporation, with full citizenship for citizens of the dominant tenement in the servient tenement. During the years of South Africa’s apartheid regime, Lesothan incorporation into South Africa was unthinkable. Since South Africa’s democratization, however, ethnic Basothans from the South African side of the Free State border have played a significant role in Free State governance, and many nonelite Lesothans, who regard their own domestic political elites and institutions as an oppressive, extractive anachronism compared to South African democracy, regard political incorporation as an attractive option (Coplan 2001, 110–13). A case could plausibly be made that political property rights entail different bundles of privileges based on the alleged purpose of that form of property rights. For compelling arguments that native title in Australia should be transformed into something more akin to alienable freeholder title, see Levy (1994) and Altman (2012). For an argument against such a plan, see Hepburn (2006).

22 I thank Robert Goodin for pointing this out.
incorporation, with Lesotho as a tenth South African state, would be the best way to fulfill the
easement demands of Lesothan workers. The point I wish to make here is that there is not a
preferred or ideal administrative or legal form of border-crossing easement rights; like easements
in property law, they arise to address particular situations, and their form is determined by the
nature of the border-crossing practices and the obstacles they now face. Furthermore, this
argument is not meant to suggest that all border-crossing easements are absolute or permanent.
Just as property easements can be brought to an end by negotiated arrangements or changes in
use patterns, so too might border-crossing easements. And an easement might be trumped by
another, more urgent consideration; for example, a particular individual who has a border-
crossing easement right might be justly denied entry if he has demonstrated a pattern of violent
criminal behavior. The precise conditions that might justifiably override a migration easement
are beyond the scope of this chapter; I merely note here, drawing another parallel to conventional
property easements, that such an override is conceivable and consistent with a fairly strong
easement right.

If we are to accept the national community claim to territory as a form of property, we
need an understanding of justified exclusion to fit the purpose of this particular property right. I
have argued that border-crossing easements are analogous to easements in property law in
several important respects such that they provide sufficient justification for an exception to the
right to exclude outsiders. Miller’s account of the right to exclude as a territorial-ownership right
is not absolute; refugees and the truly desperate may have a justified right to demand an
exception to a policy of exclusion. This would suggest he might be amenable to border-crossing
easements by necessity, but not particularly welcoming to easements by prescription, since
necessity for self-sufficiency is not a condition for the latter. But just as easements by
prescription are consistent with our general enjoyment of private property rights, border-crossing easements by prescription, such as the cases considered here, can and should be understood as consistent with the general purpose and function of territorial rights of national communities. That purpose for Miller is to give a people the chance to build a way of life together, intentionally and democratically. That is certainly one way to describe the set of practices over the last century or more that created the claim to a border-crossing easement—if a national community is the kind of agent that Miller wants it to be, it should be considered the kind of agent capable of entering into practices and arrangements that create responsibilities and obligations going forward, such as the creation of easements.

One curious feature of Miller’s argument is that when he describes the nature and value of national communities, his account is deeply sensitive to their status as specific and concrete historical entities, and to the claim that shared history has on those operating in the present. His account of national communities is very much grounded in their actual historical character, culture, and long-standing practices. But when he turns to considering the range of possible approaches to the question of migration and exclusion, the weight and power of historical practice has suddenly vanished. He does not mention how previous approaches to inclusion and exclusion might play a role in determining the boundaries of just inclusion. Miller argues that Mexican labor migrants have no special claim to gain admittance to the United States even if it is their “favored destination” (2010, 118). But it is their favored destination not as a simple matter of taste or even just as a matter of convenience. It is their “favored destination” due to a series of decisions made by a variety of actors on both sides of the border during the last 165 years that have shaped the cultures and economies that confront the individual and condition that “preference.” Miller grants national communities a legitimate right to attempt to control and
shape the development of a common culture through immigration policy. If we accept this we
surely must also accept that some previous efforts to do just this may create limits on what we
can do today, particularly in cases where our previous efforts have shaped not only our own
national community but also that of a neighboring country (and a substantially weaker and less
powerful one at that). The recognition of border-crossing easements by prescription would make
the general right to exclude less robust, but it would make it more consistent with the purpose of
exclusionary territorial rights for national communities. Indeed, it would better recognize
national communities as moral agents, by recognizing their historical capacity to incur specific
responsibilities via long-standing patterns of behavior and use. It would also entail recognition of
an important fact about such communities—that, like plots of private property within a nation,
they are not islands, and through ordinary historical practice may become entangled with each
other in ways that create moral/legal obligations and restrictions.

Works Cited
Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and
the State, edited by Suzana Sawyer and Edmund Terrence Gomez, 46–74. Houndsmills:
Palgrave Macmillan.
Cornell University Press.


Krenz, Frank. 1961. “International Enclaves and Rights of Passage, with Special Reference to the Case concerning Right of Passage over Indian Territory.” PhD diss., Graduate School of International Studies, Geneva, Switzerland.


Moore, Margaret. 2013. “Divided Nations and the Challenges to Statist and Global Theories of Justice.” In *Divided Nations and European Integration*, edited by Tristan Mabry, John


