



## ARTICLE

**Migration as Decolonization**

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**Abstract.** International migration is a defining problem of our time, and central to this problem are the ethical intuitions that dominate thinking on migration and its governance. This Article challenges existing approaches to one particularly contentious form of international migration, as an important first step toward a novel and more ethical way of approaching problems of the movement of people across national borders.

The prevailing doctrine of state sovereignty under international law today is that it entails the right to exclude nonnationals, with only limited exceptions. Whatever the scope of these exceptions, so-called economic migrants—those whose movement is motivated primarily by a desire for a better life—are typically beyond them. Whereas international refugee law and international human rights law impose restrictions on states' right to exclude nonnationals whose lives are endangered by the risk of certain forms of persecution in their countries of origin, no similar protections exist for economic migrants. International legal theorists have not fundamentally challenged this formulation of state sovereignty, which justifies the assertion of a largely unfettered right to exclude economic migrants.

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This Article looks to the history and legacy of the European colonial project to challenge this status quo. It argues for a different theory of sovereignty that makes clear why, in fact, economic migrants of a certain kind have compelling claims to national admission and inclusion in countries that today unethically insist on a right to exclude them. European colonialism entailed the emigration of tens of millions of Europeans and the flow of natural and human resources across the globe, for the benefit of Europe and Europeans. This Article details how global interconnection and political subordination, initiated over the course of this history, generate a theory of sovereignty that obligates former colonial powers to open their borders to former colonial subjects. Insofar as certain forms of international migration today are responsive to political subordination rooted in colonial and neocolonial structures, a different conceptualization of such migration is necessary: one that treats economic migrants as political agents exercising equality rights when they engage in “decolonial” migration.

**Table of Contents**

Introduction..... 1512

I. The Territorial Sovereign Nation-State and Its Right to Exclude Political Strangers..... 1523

    A. The Sovereign Nation-State and Its Right to Exclude..... 1523

    B. The Right to Exclude in Practice ..... 1529

    C. Political Stranger Exceptionalism..... 1531

II. What Political Strangers? ..... 1533

    A. Colonial Imperialism ..... 1533

    B. Neocolonial Imperialism ..... 1539

III. Revisiting the Right to Exclude..... 1547

    A. De Facto Co-Sovereigns and the Right to Exclude..... 1547

    B. The Right to Admission and Inclusion: Migration as Decolonization..... 1551

    C. Rethinking Sovereignty, Self-Determination, and Decolonization ..... 1566

Conclusion..... 1573

## Introduction

The term “economic migrant” has become a moniker for a category of international migrant that national populations across the world view generally with suspicion, occasionally with pity, and increasingly with hostility.<sup>1</sup> Europe’s response to African migrants offers an example. Between 2014 and 2018, over 1.8 million refugees and migrants risked their lives in journeys across the Mediterranean Sea attempting to reach Europe, and at least 17,000 of them paid with their lives.<sup>2</sup> The response of European states, especially to those international migrants falling outside of the “refugee” definition,<sup>3</sup> has been a righteous assertion of their sovereign right to exclude non-nationals. The June 2018 Aquarius search-and-rescue sea mission illustrates this phenomenon. The Aquarius—jointly operated by two international nongovernmental organizations—rescued 629 African refugees and migrants off the coast of Libya.<sup>4</sup> It was denied permission to dock by Italy and Malta, the two closest countries.<sup>5</sup> The Italian Interior Minister, whose party’s successful election platform was strongly anti-immigrant (and even xenophobic),<sup>6</sup> defended his country’s decision as a justified response to

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1. Anti-immigrant, and even xenophobic, rhetoric and policy are again commonplace in the United States. See, e.g., Alvaro Huerta, Policy Brief, *The “War on Immigrants”: Policies in the Trump Era*, MIGRATION & CITIZENSHIP (Organized Section on Migration & Citizenship, Am. Political Sci. Ass’n, Wash., D.C.), Summer 2017, at 57, 57-60, <https://perma.cc/UPY3-3M9W>; Khaled A. Beydoun, Opinion, *The Cost of Xenophobia in Trump’s America*, AL JAZEERA (Aug. 3, 2018), <https://perma.cc/BC5B-9F7E>. For a summary of the long history of xenophobic nativism in the United States, see Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1119-47 (1998); and Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83-95 (2005).
  2. See *Mediterranean Situation*, UNHCR OPERATIONAL PORTAL, <https://perma.cc/3BKD-J7BU> (archived Apr. 21, 2019); see also *Latest Global Figures*, MISSING MIGRANTS PROJECT, <https://perma.cc/C86M-TPGC> (last updated Apr. 18, 2019).
  3. Under international law, a “refugee” is a person who is outside her country of nationality owing to a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” and who, due to that fear, will not avail herself of her country’s protection. See Convention Relating to the Status of Refugees art. 1, ¶ A(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention].
  4. See Aryn Baker, *How One Migrant Ship Became a Symptom of a Sick Europe*, TIME (June 12, 2018), <https://perma.cc/JHX7-3NSF>.
  5. See *id.*
  6. See Loes Witschge, *What’s Next for Italy’s Immigrants Under the Populist Government?*, AL JAZEERA (June 3, 2018), <https://perma.cc/L3BH-GVCV>; see also Aaron Robertson, Argument, *Xenophobia Meets Reality in Italy*, FOREIGN POL’Y (June 13, 2018, 9:18 AM), <https://perma.cc/R8YP-A3UG>.

illegal immigration.<sup>7</sup> The French President publicly criticized Italy's rejection of the Aquarius refugees and migrants,<sup>8</sup> but this criticism belied the similarly aggressive anti-immigrant policies which even more centrist European nations have adopted,<sup>9</sup> including through the European Union.<sup>10</sup>

Unlike the refugee, whose international flight is by definition a last resort, the term "economic migrant" is typically reserved for groups or individuals whose movement is popularly and legally understood to be a matter of preference, defined by a fair degree of political agency, and motivated primarily by the desire for a better life.<sup>11</sup> Among economic migrants, this Article focuses on those who move from the Third World to the First ("Third World migrants"), including those who do so without legal authorization from the countries they seek to enter. The term "Third World" is a geopolitical and ideological category, and in this Article, the term refers to the territories and peoples that Europeans colonized primarily between the mid-eighteenth and twentieth centuries.<sup>12</sup> The corresponding category of "First World" refers to

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7. See Ramzy Baroud & Romana Rubeo, Opinion, *What Is Behind the Aquarius Refugee Ship Crisis?*, AL JAZEERA (June 17, 2018), <https://perma.cc/M69W-8S7H>.

8. See *Stranded Migrants: Macron Scolds Italy over Aquarius Ship*, BBC NEWS (June 12, 2018), <https://perma.cc/P49X-84V4>.

9. See, e.g., *France Approves Controversial Immigration Bill*, BBC NEWS (Apr. 23, 2018), <https://perma.cc/7GC5-JH7B>; James McAuley, *The Calais "Jungle" Is Gone, but France's Migrant Crisis Is Far from Over*, WASH. POST (June 10, 2017), <https://perma.cc/3QR7-5Y8G>; James McAuley & William Booth, *Pressed by France, Britain Agrees to Do More to Stop Migrants in Calais*, WASH. POST (Jan. 18, 2018), <https://perma.cc/Z5X9-HC7Z>.

10. For analyses of anti-migrant policies in the European Union, see, for example, ELIZABETH COLLETT & CAMILLE LE COZ, *MIGRATION POLICY INST. EUR., AFTER THE STORM: LEARNING FROM THE EU RESPONSE TO THE MIGRATION CRISIS 1-12, 22-50* (2018), <https://perma.cc/GDX3-S3PM>; Gianna-Carina Grün, *Follow the Money: What Are the EU's Migration Policy Priorities?*, DEUTSCHE WELLE (Feb. 15, 2018), <https://perma.cc/44M8-TA26>; and Kevin Sieff & Isaac Stanley-Becker, *Europe Is Trying to Cut the Flow of Migrants from Africa. It Won't Be Easy*, WASH. POST (Aug. 31, 2017), <https://perma.cc/DJ7Z-RNBS>.

11. To be clear, the motives that explain migrants' and refugees' cross-border movement are myriad, and the nature of the agency they exercise is complex. Economic migrants, as I have defined them, may have experienced treatment at some stage that pulls them closer to (or into) the refugee definition, such as persecution on account of membership in a political or social group. But I artificially suppress the refugee-related dimensions that may attend the movement of any given economic migrant in order to focus on the motivations and movements that are neither protected nor authorized under international law, and which happen to foreground the exercise of agency ("I want a better life") rather than the absence of it due to the fear of death or bodily harm ("I need to escape death or torture").

12. For some, the term "Third World" will seem anachronistic in light of its Cold War origins and connotations, or perhaps offensive for its derogatory connotations, but the choice to use this term here is rooted in its analytical significance and in the term's force in the larger intellectual tradition of Third World Approaches to International Law (TWAAIL). For an analysis of the category "Third World" as a "counter-hegemonic

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the metropolitan European colonial powers and to those settler colonies that preserved their European identities even after gaining independence.<sup>13</sup>

Fitting the archetype of the Third World migrant, for example, is an Ivorian national repatriated from a Libyan detention center whose primary reason for migrating to Europe is the desire to improve his living conditions (as distinct from the inability to find employment in Ivory Coast).<sup>14</sup> Another example would be a Nigerian, Pakistani, or Zimbabwean migrant whose unauthorized journey to or presence in the United Kingdom is the product of deliberate planning, sacrifice, subterfuge, and ingenuity, and who is uncoerced by any direct threat of persecution in her country of nationality. For Third World would-be migrants seeking admission to and inclusion in First World nation-states,<sup>15</sup> the project of their exclusion from the latter has reached a

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term that is designed to rupture received patterns of thinking,” see Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, 1998-1999 THIRD WORLD LEGAL STUD. 1, 3-4. Rajagopal addresses the anachronism critique and also lays bare how popular derogatory associations with the term Third World are instructive for international legal theory. *See id.* at 7-11.

13. Examples of such former settler colonies include the United States, Australia, and Canada. For further clarification on this Article’s treatment of settler colonialism (and the United States), see Part III.B below. The Second World is also an important category but is beyond the scope of this Article.
14. *See* Cécile Barbière, *The European Dream Remains Seductive to Côte d’Ivoire’s Youth*, EURACTIV (Dec. 22, 2017), <https://perma.cc/ZZA6-3N36>; *see also* ORGANISATION INTERNATIONALE POUR LES MIGRATIONS, RAPPORT DE PROFILAGE DES MIGRANTS IVOIRIENS, 2017, at 10 (2018), <https://perma.cc/9WR5-KCW8> (citing economic opportunity as the leading motivation for Ivorian migration across the Mediterranean, but noting that educational opportunities and personal considerations also motivate some migration). In other words, set aside images of war refugees that dominate humanitarian appeals and media coverage of involuntary migration. In her article “The Citizen and the Migrant,” Ratna Kapur focuses on “the migrant who is semi-skilled or unskilled, semi-literate, working class or lower middle class and unemployed,” and who “occupies a subaltern position.” Ratna Kapur, *The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion*, 8 THEORETICAL INQUIRIES L. 537, 538 (2007). My vision of the economic migrant incorporates hers. In keeping with Ratna Kapur’s articulation of the “subaltern” migrant, *see id.*, the category of Third World migrant is not merely descriptive but also has a normative dimension to it. The Third World migrant is “not merely a marginalized subject,” but instead “emerges from the specific ways in which the liberal project and imperialism operated during the colonial encounter.” *Id.* at 539.
15. By “admission” I mean authorized entry and presence in the territory of a nation-state, and by “inclusion” I mean formal extension of the various rights and privileges of membership that are incident to political community (such as the right to work). “Migration” encompasses both admission and inclusion, but individual migrants desire different durations of admission and different forms of inclusion. A migrant seeking to relocate permanently, for example, may desire the strong form of inclusion offered by citizenship status. On the other hand, a migrant seeking admission and inclusion for the purpose of obtaining a four-year college degree may be satisfied with only a visa. I distinguish migration from international mobility: the physical crossing of national

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fevered, bloody pitch. Those who seek legal authorization even just to visit the First World are faced with complex and often prohibitively expensive visa restrictions that, notably, do not apply to the international mobility of First World citizens.<sup>16</sup> And those Third World migrants who dare risk their lives to migrate to First World countries without legal authorization are confronted with increasingly militarized border regimes negotiated by First and Third World nation-states, and which amount to multilateral projects for the regional containment of Third World persons beyond the First World.<sup>17</sup>

Part I of this Article explains how, according to the governing law and the dominant ethics that underpin it, national exclusion of so-called economic migrants (minus any violence) is not only permissible but even righteous as a matter of sovereign self-determination. In international and domestic law, the territorial nation-state is the privileged vehicle for the collective self-determination of peoples: Political community at the nation-state level enjoys the strongest legal and political recognition, and sovereignty at this level is, at its core, about the capacity and right to self-determine collectively on grounds established by citizens or political insiders.<sup>18</sup> Today, the national right to exclude foreigners or nonnationals is considered a fundamental incident of this sovereignty and a requisite of collective self-determination. Both as a matter of law and on predominant ethical accounts, nonnationals are definitionally “political strangers” with no cognizable claims to shaping the trajectory of the respective nation-state, and certainly no say as to the terms of their admission and inclusion within that body.<sup>19</sup>

Even where international law and legal scholarship have contemplated expanding the rights of nonnationals to territorial admission and political inclusion, they have relied on a logic that holds fixed the nonnational’s status as a political stranger, instead making the case for why she is nonetheless worthy of discretionary exemption from the full force of the right to exclude. The refugee category exemplifies this political stranger exceptionalism. States that

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borders, which need not be accompanied by migration. *See, e.g.*, GLOB. POLICY INITIATIVE, COLUMBIA UNIV., MODEL INTERNATIONAL MOBILITY CONVENTION 4 (2017), <https://perma.cc/3QM3-SULF> (defining international mobility as “the movement of individuals across borders for any length of time as visitors, students, tourists, labor migrants, entrepreneurs, long-term residents, forced migrants, refugees, victims of trafficking, people caught in countries in crisis and family members”).

16. *See infra* Part I.B.

17. One prominent example is the ongoing project of African regional containment undertaken by the African Union and the European Union. *See supra* text accompanying note 39.

18. *See infra* Part I.A.

19. *See infra* Part I.

have ratified the 1951 Refugee Convention<sup>20</sup> and its Protocol<sup>21</sup> have dramatically limited the exercise of their right to exclude where refugees are concerned, recognizing legal claims to admission and inclusion for political strangers whose migration is driven by fear of certain forms of persecution.<sup>22</sup> There also exists a robust legal literature based in international human rights that has argued the general case for political stranger exceptionalism for nonnationals who fall outside the refugee definition, but whose human rights situation either in their country of origin or during flight is deemed to warrant admission to, and varying levels of inclusion in, the receiving state.<sup>23</sup> But even though international human rights principles sustain a more cosmopolitan approach to borders,<sup>24</sup> international law as a whole still most faithfully reflects the political theory of liberal nationalists, who defend the sovereign right to exclude as existential, making limited exceptions for the admission and gradual inclusion of political strangers who are otherwise at risk of persecution or extreme human rights violations.<sup>25</sup>

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20. 1951 Refugee Convention, *supra* note 3.

21. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

22. The United Nations Refugee Convention and its Protocol prohibit party states from returning nonnationals who qualify for refugee status to territories where they risk persecution, and also impose a range of obligations on these states to socially, economically, and politically integrate refugees within their jurisdictions. See 1951 Refugee Convention, *supra* note 3, arts. 25-34.

23. For an impressive example, see JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 1-6 (2007) (making the argument for why, “as a matter of law, persons protected by the extended [human rights] principle of *non-refoulement* ought to receive a legal status equivalent to that accorded by the Refugee Convention”). Notwithstanding the many benefits we might rightfully associate with the international human rights legal regime, as it stands it does little to weaken the nonnational’s status as a political stranger. While the human right to a nationality is an ascendant norm, see *Right to a Nationality and Statelessness*, UNITED NATIONS OFF. HIGH COMMISSIONER HUM. RTS., <https://perma.cc/EET9-R6Y5> (archived May 22, 2019), the same cannot be said of any general (or even qualified) human right held by nonnationals to the citizenship of a third state. For a useful and detailed analysis of citizenship in international law, see Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT’L L. 694 (2011). See also *supra* note 15 (discussing this Article’s use of the terms “admission” and “inclusion”).

24. The foundation of international human rights principles is the notion that all human beings, irrespective of political status, are entitled to full enjoyment of human rights on the basis of their inherent human dignity. See G.A. Res. 217 (III) A pmb., Universal Declaration of Human Rights (Dec. 10, 1948); *id.* arts 1-2. Cosmopolitan theorists arguing for open borders have done so on the basis of the inherent human dignity and equality of all human beings. See, e.g., Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 251-52 (1987).

25. See, e.g., David Miller, *Justice in Immigration*, 14 EUR. J. POL. THEORY 391, 395-98 (2015). Part I below explains how the political commitments of international law governing

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This Article challenges the logic of this dogmatic account of territorial nation-state sovereignty where encounters between Third World peoples and First World nation-states are concerned. It argues instead that First World nation-states have no right to exclude Third World migrants, for reasons tied to the distributive and corrective justice implications of the legacies of colonialism. To make this argument, this Article proceeds in three Parts.

As mentioned above, Part I explains the right to exclude as an incident of nation-state sovereignty and political stranger exceptionalism as the prevailing discretionary limit on this right.

Part II looks to the history and contemporary legacy of European colonialism to propose that encounters between Third World migrants and First World nation-states are subject to an entirely different ethics.<sup>26</sup> Between the nineteenth century and the first half of the twentieth century alone, at least 62 million Europeans emigrated to colonial territories across the world,<sup>27</sup> with enduring consequences for those territories.<sup>28</sup> As Part II explains, these Europeans were the quintessential economic migrants, yet in a striking contrast to the mortal costs international law imposes on many Third World economic migrants today, European colonial economic migrants benefitted from an international legal and imperial regime that facilitated, encouraged, and celebrated white economic

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migration mirror the liberal nationalist tradition, which aims to marry liberal values with a strong commitment to national identity.

26. For a very early sketch of the idea developed in this Article, see E. Tendayi Achiume, *Reimagining International Law for Global Migration: Migration as Decolonization?*, 111 AM. J. INT'L L. UNBOUND 142, 142-43 (2017). The present Article relies on the definition of colonialism as "a practice that involves both the subjugation of one people to another and the political and economic control of a dependent territory (or parts of it)." See Lea Ypi, *What's Wrong with Colonialism*, 41 PHIL. & PUB. AFF. 158, 162 (2013); see also ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 11 (2004) ("'Colonialism' refers . . . generally to the practice of settling territories, while 'imperialism' refers to the practices of an empire."). For a discussion of the difficulty of defining colonialism and a good overview of its essential features, see Daniel Butt, *Colonialism and Postcolonialism*, in 2 THE INTERNATIONAL ENCYCLOPEDIA OF ETHICS 892 (Hugh LaFollette ed., 2013).

27. See J.L. Miège, *Migration and Decolonization*, 1 EUR. REV. 81, 81 (1993).

28. See Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty?*, 14 MELB. J. INT'L L. 392, 439 (2013) ("Measured either as a percentage of the total population, or in terms of economic significance, the impact of the earlier wave of [colonial and New World] immigration was much greater than the [contemporary] one."). Historians note that even the "scale and consequences" of British Empire migration between 1815 and the 1960s "explain much about the modern world." See MARJORY HARPER & STEPHEN CONSTANTINE, *MIGRATION AND EMPIRE* 1 (reprt. 2012).

migration. This historical perspective reveals the irony of present-day First World righteous exclusion of Third World economic migrants.<sup>29</sup>

Even as economic migrants moved out of Europe, the colonial project pulled human and natural resources in the reverse direction, for the advancement and prosperity of Europe and Europeans.<sup>30</sup> Colonial-era imperial interconnection politically and economically subordinated Third World peoples for the purposes of shoring up the prosperous, collective self-determination of First World nations.<sup>31</sup> Thus, as other scholars have argued, a salient harm of colonialism was the unequal incorporation of Third World sovereign peoples into First World political communities and their exploitation as subordinates within the resulting imperial formations.<sup>32</sup> Colonial migration made all of this possible, and international law along with legal and political theory ensured that this migration—for Europeans—was firmly and righteously protected.

When formal decolonization of the Third World eventually gained momentum as a legal and political project, it was largely framed as the pursuit of political equality for colonized peoples—their capacity to self-determine—through the achievement of nation-state independence. Although international law facilitated formal independence for many political communities, for former colonies nation-statehood hardly did enough to disrupt relations of colonial exploitation. A large and rich international legal and interdisciplinary

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29. It also makes vivid the role that race has played in determining whose international mobility is worthy of protection, and whose international immobility is prioritized and ultimately achieved through containment to the regions of their birth. *See infra* Part I. The racialization of international mobility and its implications for international migration law and legal theory are issues I treat in more detail in a companion work in progress. *See* E. Tendayi Achiume, *Racial Borders* (2019) (unpublished manuscript) (on file with author).

30. This is the case notwithstanding the rhetoric and ideology of European colonialism, which included, as Otto von Bismarck remarked at the opening of the Berlin Conference, “the wish to bring the natives of Africa within the pale of civilization” as motivation for “opening up the interior” of the continent for European commerce. *See* ANGHIE, *supra* note 26, at 96-97 (quoting M.F. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW: BEING A TREATISE ON THE LAW AND PRACTICE RELATING TO COLONIAL EXPANSION* 332 (Negro Univ. Press 1969) (1926)).

31. This Article focuses generally on the indisputable dynamic of European domination and non-European subordination within the colonial empire. It devotes limited attention to the important non-European resistance to this subordination and the various ways in which European domination was by no means a totalizing, seamless operation. For a comprehensive account of the features and nature of colonial domination, which was truly complex in its operation, see generally, for example, LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400-1900* (2010).

32. *See infra* Part II.A.

literature has argued the persistence of neocolonial dynamics in the postcolonial era, with some of the literature focusing on international law's complicity in sustaining these dynamics.<sup>33</sup> Legal scholarship, however, has insufficiently grappled with the implications of colonial and neocolonial subordination for how we should think about the ethics of the international law of migration and the theory of territorial nation-state sovereignty that structures it.<sup>34</sup> Also missing from the legal scholarship is a discussion of the role that territorial national borders have played and continue to play in maintaining Third World subordination, and what this should mean for the present-day international law of migration.<sup>35</sup>

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33. *See infra* Part II.B.

34. Chantal Thomas is an important exception. *See* Thomas, *supra* note 28, at 435-36. Thomas has made a strong case for the limitations of dominant theoretical accounts of sovereignty for explaining or reforming contemporary international migration law, and historicizes contemporary international migration by connecting it to prior European colonial migration, noting that migration "tends to reflect [the] economic and political connections crafted by the governments and investors of the global North," including those forged in prior eras. *See id.* at 440. She draws on quantum physics and the picture of fundamental interconnectedness it offers to argue for a new approach to sovereignty that tracks the radical interconnectedness of the natural world, of which all humans are a part. *See id.* at 446-48. She calls this approach "new organicism," which takes interconnectedness as its starting point rather than the individualism at the heart of prevailing theoretical and legal approaches. *See id.* at 446. New organicism "does not exceptionalise humans as standing apart from, or over, nature," *id.* at 446, and rejects the "notion of ultimate autonomy—of atomism—that defines both the individual in the state of nature and the sovereign state in the modern political imaginary," *id.* at 446-47. She offers new organicism as a means of shifting to an ethics that "would not posit a formalistic or predetermined conceptual order but, at the same time, would establish a normative basis which requires that the distributive consequences and effects of law be measured." *Id.* at 447.

In this Article, I make claims regarding the political interconnection of vehicles of collective self-determination (specifically, nation-states) without disturbing fundamental liberal commitments to individual autonomy. This makes my arguments far less radical than the shifts I believe new organicism would require. Furthermore, the interconnection I focus on (colonial and neocolonial) is initiated and sustained through specific imperial projects. Thus, while both Thomas's argument and mine push for a move away from fictions of independence to more empirically rooted accounts of interconnection where sovereignty is concerned, we explore distinct (in kind and in degree) conceptions of interconnection. Nevertheless, deeper engagement with Thomas's new organicism is urgent for international legal theorists of migration (and for international law more generally) on account of the rich conceptual and theoretical possibilities it offers.

35. Whereas the work of such international law scholars as Antony Anghie and Sundhya Pahuja has elucidated how international institutions and international legal doctrine preserve the colonial advantage secured by European nations, this scholarship has neglected sustained analysis of national territorial borders in this regard. *See generally* ANGHIE, *supra* note 26 (analyzing the colonial history, foundations, and functioning of sovereignty doctrine); SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* (2011)

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In Part III, this Article argues that justice in immigration from the Third World to the First must, in important part, be a function of the distributive justice and remedial implications of the failures of formal decolonization. First and Third World peoples remain politically interconnected, and the former remain largely subordinated to the latter in an economic and political formation this Article refers to as “neocolonial empire.”<sup>36</sup> Third World peoples are entitled to operative equality within this association. As co-sovereign members of neocolonial empire, they are entitled to a say in the vehicles of effective collective self-determination within it. These claims are based on their status as political insiders bound with First World persons to First World nation-states, and not on their fitting into whatever exemptions apply to political strangers such as refugees. Under the view advanced here, First World nation-states have no more right to exclude Third World migrants than they have a right to exclude de jure First World citizens.

This Article thus presents a normative argument about certain forms of migration and a significant reconceptualization of sovereignty as interconnection.<sup>37</sup> It seeks to supplant the extant international legal fiction and logic of formally independent, autonomous nation-states (each with a right to exclude nonnationals as a matter of existential priority),<sup>38</sup> with the logic and

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(exploring the role international law and international economic institutions play in maintaining Third World, colonial-era subordination, including through the development frame). Although a few scholars in other disciplines, such as sociologist Radhika Mongia, have traced the entrenchment of racial subordination through national borders and even nationality, these insights have not penetrated international legal theory on migration, thus barring analysis of the implications of these insights. See, e.g., Radhika Viyas Mongia, *Race, Nationality, Mobility: A History of the Passport*, 11 PUB. CULTURE 527, 528-29 (1999).

36. In this Article, “empire” refers to substantive economic and political interconnection across national borders, to the systemic benefit of one or a conglomeration of territorial nations at the expense of others to which they are bound. Susan Marks has noted the popular usage of “empire” to refer to “the phenomenon by which, in all periods of history, nations have subjugated their neighbors and brought expanding areas under the control of a single supreme authority.” Susan Marks, *The Earl A. Snyder Lecture in International Law, Empire’s Law*, IND. J. GLOBAL LEGAL STUD., Winter 2003, at 449, 450. For a further elaboration of the concept of empire, see note 132 and accompanying text below.
37. Thomas begins the work of reconceptualizing sovereignty as interconnection in her review and rejection of dominant legal and political conceptions of sovereignty as premised on atomistic conceptions of individuals and their political communities. See Thomas, *supra* note 28, at 447-50; see also *supra* note 34.
38. For an argument regarding the dangers and costs associated with this fiction of nation-state sovereignty in the context of international responsibility for large-scale refugee displacement, see E. Tendayi Achiume, Essay, *The Fact of Xenophobia and the Fiction of State Sovereignty: A Reply to Blocher & Gulati*, COLUM. HUM. RTS. L. REV. ONLINE, Spring 2017, at 1 (responding to Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, COLUM. HUM. RTS. L. REV., Fall 2016, at 53).

ethics of imperial interconnection (specifically, colonial and neocolonial interconnection) that actually exists today. As an example of the implications of the new ethical baseline advanced in this Article, consider the difference it makes for assessing the validity of the project of African regional containment undertaken by the African Union and the European Union.<sup>39</sup> Today, this regional containment is undergirded by a sovereignty discourse that justifies African exclusion from Europe as an incident of collective self-determination of European nations, which may rightfully be wielded against political strangers. It thus offers an important context for exploring my critique of sovereignty doctrine and its implications for the right to exclude. Foregrounding persisting neocolonial interconnection, as I do, calls for a different assessment. Given the political ties that bind Africans to Europeans in a relationship that subordinates the former for the benefit of the latter, African regional containment is an unjust practice that violates African entitlements to European nation-state admission and inclusion.<sup>40</sup>

To be clear, the normative claims of this Article are not utopian. This Article takes as its starting point the current distribution of power within the international order, which is a result of European colonialism and its legacy. It is not primarily concerned with an ideal theory of collective self-determination and its relationship to territorial and political borders.<sup>41</sup> It is concerned instead with what justice demands of First World-Third World relations where sovereignty and the right to exclude are concerned, in light of the European colonial project and its enduring legacy. It identifies Third World migration to the First World as an entitlement of neocolonial imperial membership on grounds of political equality,<sup>42</sup> even while cognizant of the myriad ways in which migration can be consistent in fact with the continued subordination of Third World persons and peoples.<sup>43</sup>

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39. See Loren B. Landau, *A Chronotope of Containment Development: Europe's Migrant Crisis and Africa's Reterritorialisation*, 51 *ANTIPODE* 169, 170, 172-76 (2019).

40. See *infra* Parts II-III.

41. With respect to decolonization, it is *not* the argument of this Article that Third World migration is the silver bullet or even the most efficacious means for redressing neocolonial subordination. It is instead that migration, insofar as it is a means of formal political inclusion, is an entitlement borne by Third World persons by virtue of their *de facto* status as co-sovereigns with their First World counterparts. It is a requisite, if not a guarantor, of political equality.

42. As I elaborate in more detail below, this is a corrective distributive justice argument. In a different project, I make the distinction though a related argument for migration (territorial admission and political inclusion) as colonial reparations.

43. It is in this sense that the theory advanced here is “non-ideal”: “It does not seek to give an ideal-style account of how the world should be, and it need not necessarily be interpreted as giving an account of how the world should ideally proceed from its present non-ideal state.” See DANIEL BUTT, *RECTIFYING INTERNATIONAL INJUSTICE: PRINCIPLES OF COMPENSATION AND RESTITUTION BETWEEN NATIONS* 6-7 (2009).

In addition to its sovereignty as interconnection claim, this Article also makes a number of other significant conceptual contributions. If colonialism initiated inequitable global interconnection, decolonization could be conceived of not as *independence* but as more equitable *interconnection*. Insofar as the First and Third Worlds remain bound, for those who are subordinated in this relationship, equality or decolonization may entail shifting power *within* the relationship, not outside of or beyond it. Indeed, such a reconceptualization is urgent as long as global interdependence and interconnection remain a fact.<sup>44</sup>

I argue for a related and equally important reconceptualization of decolonization. In international law and legal theory, decolonization is a process for political collectives: Individuals are neither the subjects nor the objects of decolonization; nation-states are. My argument, however, is that the political equality claims that nation-state decolonization is designed to vindicate may have to be pursued through alternative means, including through individual rather than purely structural approaches. Given the failure of formal independence to undo colonial subordination, for some Third World persons, so-called economic migration may enact a process that enhances individual self-determination within neocolonial empire, irrespective of its implications for the collective self-determination of Third World nation-states.

This personal pursuit of enhanced self-determination (which asserts political equality with First World citizens) is thus *decolonial*; it is migration as decolonization. In this way, this Article centers acts of resistance or opposition by those who occupy subordinate positions within imperial formations, and explores the ethical (and legal) entailments of these acts once they are reframed as acts responsive to deep-seated political inequality. The aim is not to offer a tidy, ideal theory of how decolonization can be achieved for all peoples everywhere. Rather, it is to reframe migration—even unauthorized Third World migration—as one compelling means of asserting individual agency over political horizons, and to argue for the formal recognition in the law of this expression of agency.<sup>45</sup>

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44. Decolonization becomes not about severing connections, but about the renegotiation or the rearranging of the nature of the connections and the allocation of power in extant relationships. This conception of equality or antisubordination through more equitable interdependence was arguably at the center of the political theory of a number of prominent anticolonial figures, including Amílcar Cabral, Aimé Césaire, and Léopold Sédar Senghor. See, e.g., AMILCAR CABRAL, *Message to the People of Portugal*, in *REVOLUTION IN GUINEA: AN AFRICAN PEOPLE'S STRUGGLE* 123 (Richard Handyside ed. & trans., 1969) (calling for unity between the Bissau-Guinean and Portuguese peoples following decolonization); FREDERICK COOPER, *CITIZENSHIP BETWEEN EMPIRE AND NATION: REMAKING FRANCE AND FRENCH AFRICA, 1945-1960*, at 1-25 (2014); GARY WILDER, *FREEDOM TIME: NEGRITUDE, DECOLONIZATION, AND THE FUTURE OF THE WORLD* 2-16 (2015).

45. Note that my primary concern is substantive equality and the well-being of persons and peoples, rather than the equality of nation-states. This Article does not seek to  
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In addition to the normative and conceptual contributions of this Article, it also has potential sociological implications. Recovering colonial history and foregrounding colonial legacy point to a different explanation and understanding of Third World migration. This migration is not merely economically responsive but is politically responsive as well.<sup>46</sup>

## **I. The Territorial Sovereign Nation-State and Its Right to Exclude Political Strangers**

This Part introduces the territorial sovereign nation-state as the primary vehicle for the collective self-determination of peoples according to prevailing international legal doctrine and dominant political theory. It also introduces the right to exclude political strangers or nonnationals in international law, and outlines the prevailing political theory arguments used today to defend this right as an incident of nation-state sovereignty. It then reviews how this right operates in practice, especially in the context of encounters between Third World migrants and First World nation-states.

### **A. The Sovereign Nation-State and Its Right to Exclude**

James Crawford has explained that in its most common usage, sovereignty refers to the “totality of international rights and duties recognized by international law’ as residing in [the] independent territorial unit” known as the nation-state.<sup>47</sup> Among these rights is a broad right to exclude nonnationals,

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offer an ideal theory of decolonization in international law, but instead proposes a “non-ideal” means through which individual persons belonging to subordinated peoples can increase their capacity to self-determine, even if at some cost to a First World nation-state.

46. See, e.g., Marie-Laurence Flahaux & Hein de Haas, *African Migration: Trends, Patterns, Drivers*, COMP. MIGRATION STUD. 4-5 (Jan. 22, 2016), <https://perma.cc/M9S9-YRMM> (noting that “colonial occupation and concomitant practices of the slave trade and the systematic use of forced labour and recruitment have in many ways shaped contemporary migration patterns within and from [Africa],” and that “[w]e can see migration as a function of people’s aspirations and capabilities to migrate”).

47. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 32 (2d ed. 2006) (quoting *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 180 (Apr. 11)). As other scholars have noted, however, attempts to fix the legal definition of sovereignty promote “a certain amnesia about its historical and cultural[] specificity].” See Roxanne Lynn Doty, *Sovereignty and the Nation: Constructing the Boundaries of National Identity*, in *STATE SOVEREIGNTY AS SOCIAL CONSTRUCT* 121, 123 (Steve Smith et al. eds., 1996). Crawford’s definition serves as a starting point, and various sections of this Article highlight the colonial historical and cultural dimensions of sovereignty that are vital to making sense of its meaning and operation in international law today. The work on sovereignty in international law with the most influence on this Article is Antony Anghie’s seminal  
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although that right is constrained by international law in important ways.<sup>48</sup> Thus, under international law, the blanket exclusion of economic migrants—those who enter the territory of a foreign state in order to pursue better life outcomes—is within the full right of every nation-state and is subject only to procedural constraints.<sup>49</sup>

Central to political, theoretical, and philosophical justifications of the right to exclude as an incident of nation-state sovereignty is the notion of a collective sovereign whose capacity to self-determine rests on its ability to decide (on its own terms) who may become a member of this sovereign body. Sovereignty—as a political concept—is understood to be fundamentally about collective self-determination.<sup>50</sup> And sovereignty doctrine has evolved to

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book *Imperialism, Sovereignty and the Making of International Law*. See ANGHIE, *supra* note 26.

48. A dominant misconception is that international law enshrines an absolutist conception of sovereignty, according to which every nation-state bears an unqualified right to exclude foreign nationals that it can rightfully wield with untrammelled discretion. However, international law substantively and procedurally limits the sovereign right to exclude: (1) according to custom, treaty, and general principles dealing with migration; and (2) through constraints on the domain of domestic jurisdiction. See James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 818-22 (1983); see also Vincent Chetail, *Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel*, 27 EUR. J. INT'L L. 901, 902 (2016). The treaty regime that imposes the most substantive constraints on a state's right to exclude foreigners (politically and territorially) is the United Nations Refugee Convention and its Protocol, which requires states to admit individuals meeting the refugee definition and to facilitate their social and political integration. See 1951 Refugee Convention, *supra* note 3, arts. 17-24, 31-32. International human rights law imposes vital procedural constraints on the right to exclude nonnationals as well as some substantive constraints, such as the non-refoulement obligation. See, e.g., MCADAM, *supra* note 23, at 8-10.
49. These procedural safeguards, which do not substitute for substantive obligations to admit foreign nationals, play an important role in constraining the levels of violence that states can legally deploy to keep foreigners out of their territories. But in practice, nation-states are often inclined to disregard these procedural constraints, rejecting their applicability. See, e.g., Nafziger, *supra* note 48, at 822. States have also developed creative, unlawful practices through which they disclaim liability for violations of international law protections that do exist. Examples include what other scholars have described as the *non-entrée* regime of carrier sanctions and the regularly violent interdiction of migrants at sea using a combination of detention and pushback measures to prevent territorial arrivals. See UNITED NATIONS HIGH COMM'R FOR REFUGEES, *DESPERATE JOURNEYS: REFUGEES AND MIGRANTS ARRIVING IN EUROPE AND AT EUROPE'S BORDERS, JANUARY-AUGUST 2018*, at 21-25 (2008), <https://perma.cc/W4SN-PVV5>; B.S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 J. REFUGEE STUD. 350, 357 (1998); Thomas Gammeltoft-Hansen & James C. Hathaway, *Non-Refoulement in a World of Cooperative Deterrence*, 53 COLUM. J. TRANSNAT'L L. 235, 243-44 (2015).
50. Sovereignty as a political concept has been defined in myriad ways, and most scholars trace its intellectual origins to the work of sixteenth-century scholar Jean Bodin. See JENS BARTELSON, *A GENEALOGY OF SOVEREIGNTY* 141-43 (1995). For a useful

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characterize control of national borders on terms entirely set by predetermined national insiders as central to achieving this self-determination.<sup>51</sup> Within the liberal tradition, democratic theory and cultural nationalism combine to supply the dominant script in support of this relationship between political and territorial borders.

In liberal democratic theory, the “self” that determines through the nation-state is the “demos,” a political community specified in domestic law.<sup>52</sup> This tradition locates the foundation of the political community in the putative consent of its members, typically relying on the social contractarian tradition whose luminaries include John Locke and Jean-Jacques Rousseau.<sup>53</sup> What originally binds the demos in conventional accounts is their putative consent to be bound, through which each individual exercises her will to form the collective will of the demos.<sup>54</sup> This social contract establishes both the “civic . . . [and] territorial boundaries of the area over which the demos exercises jurisdiction.”<sup>55</sup> Membership in that community requires the consent of its citizens and is determined by the laws of citizenship they have stipulated.

In its liberal variant, cultural nationalism, broadly defined, is “a theory that attempts to merge the significance of national identity with liberal values.”<sup>56</sup> Within recent political theory, liberal nationalism supplies the most “strenuous” defenses of the nation-state’s right to exclude.<sup>57</sup> For liberal

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overview of sovereignty as conceptualized in political thought, see Nicholas Greenwood Onuf, *Sovereignty: Outline of a Conceptual History*, 16 ALTERNATIVES 425, 425-29 (1991). For a more succinct overview of the intellectual history and meaning of sovereignty in political theory, see Daniel Philpott, *Sovereignty*, STAN. ENCYCLOPEDIA PHIL. (updated Mar. 25, 2016), <https://perma.cc/L3PB-22Y2>. The working definition of sovereignty as a political concept in this Article is the political will of a community—its prerogative and capacity to self-determine in all spheres of life.

51. See Nafziger, *supra* note 48, at 804, 816-19.

52. Cf. Arash Abizadeh, *On the Demos and Its Kin: Nationalism, Democracy, and the Boundary Problem*, 106 AM. POL. SCI. REV. 867, 874 (2012) (“The point of departure for modern democratic theory is the claim that legitimate political authority derives ultimately from the people or demos. Thus political power is legitimized not by tradition, not by virtue, not by genealogy, but by the demos itself.”).

53. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, §§ 95-96, at 330-32 (Peter Laslett ed., Cambridge Univ. Press student ed. 1988) (1690); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 59-60 (Maurice Cranston trans., Penguin Books 1968) (1762).

54. See Abizadeh, *supra* note 52, at 875 (“[T]he ultimate prepolitical ground for legitimizing the procedures for articulating the popular will and the boundaries of the people itself is supposed to lie in the unanimous consent of all parties to the social contract.”).

55. *Id.*

56. See Sara Amighetti & Alasia Nuti, *A Nation’s Right to Exclude and the Colonies*, 44 POL. THEORY 541, 561 n.10 (2016) (emphasis omitted).

57. See *id.* at 543. David Miller’s work is among the exemplars of liberal cultural nationalism (often referred to as communitarianism), and his recent book *Strangers in Our Midst* typifies the defenses cultural nationalism advances for immigration  
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nationalists, nations are “historical and ethical communities,”<sup>58</sup> and national self-determination is fundamental to preserving the collective autonomy of nations as well as their national identities.<sup>59</sup> It is this right of self-determination that “grounds the nation’s right to exclude,” through which the nation controls who may enter within its borders and be included in the national community.<sup>60</sup>

The commitments of these two strains of political theory—liberal democratic theory and cultural nationalism—are largely reflected in international law.<sup>61</sup> The territorial conceptions of the liberal demos and the cultural nation fit neatly within prevailing international legal doctrine.<sup>62</sup> In international law, the nation-state is the primary vehicle for the collective self-determination of political communities.<sup>63</sup> Self-determination has at least two international legal

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restrictions. See DAVID MILLER, *STRANGERS IN OUR MIDST: THE POLITICAL PHILOSOPHY OF IMMIGRATION* 153-65 (2016). For another exemplar work, see MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 31-51 (1983) (“The “distinctiveness of cultures and groups depends upon closure . . .”).

58. See Amighetti & Nuti, *supra* note 56, at 544 (“For liberal nationalists, the connection with the particular past of the nation is expressed by the fact that co-nationals identify with their ancestors and their actions throughout history, by ‘re-appropriating their deeds as [their] own.’ It is through this act of identification with the past that nations become ethical communities, that is, communities of obligations between different generations of co-nationals.” (alteration in original) (footnote omitted) (quoting DAVID MILLER, *ON NATIONALITY* 23 (1995))).
59. See, e.g., MILLER, *supra* note 58, at 85-90, 98-99; MARGARET MOORE, *THE ETHICS OF NATIONALISM* 165, 192-99 (2001).
60. See Amighetti & Nuti, *supra* note 56, at 545. Today, these cultural arguments for national exclusion of foreigners feature in political discourse all over the world, where excludable foreigners are those who pose a threat to the “culture” of the nation, and where culture is linguistically, religiously, and sometimes explicitly racially coded. See, e.g., E. Tendayi Achiume (Special Rapporteur), *Rep. of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, ¶¶ 42-43, U.N. Doc. A/HRC/38/52 (Apr. 25, 2018).
61. For a detailed exposition of how liberal nationalism fundamentally informs international law, see JAMES SUMMERS, *PEOPLES AND INTERNATIONAL LAW* 24-36, 131-32, 145-66 (2d rev. ed. 2014). Liberal nationalism “considers individual freedoms, national self-rule and a peaceful society of nations to be mutually compatible.” *Id.* at 2. As Summers argues, “[t]he law of self-determination is constructed from the interaction between nationalism, liberalism and international law.” *Id.* at 29. Nationalism here “is a doctrine of political legitimacy, which proposes that the basis for legitimate authority is a nation or a people,” and liberalism is “a political doctrine that centres on individuals (who may be organised as a nation) and the protection of their rights as the basis for political legitimacy.” *Id.* at 2.
62. See generally *id.* at 13-36 (exploring liberal nationalism as the basis for the right of self-determination in international law).
63. At least one widely held conception of sovereignty among international lawyers is that it “generally refers to the right of a state to exist as an independent political community.” See, e.g., Marks, *supra* note 36, at 465. Sovereign nation-states stand at the center of positivist international legal jurisprudence, and are in principle independent,

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meanings: the right of a people comprising a sovereign nation-state to “choose its own form of government without external intervention,” or the right of a specific, territorially defined people to choose its own government “irrespective of the wishes of the rest of the State of which that territory is a part.”<sup>64</sup> The legal status of the former in modern international law is largely undisputed.<sup>65</sup> The Friendly Relations Declaration states:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.<sup>66</sup>

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autonomous, and equal. See ANGHIE, *supra* note 26, at 33. For a discussion of the theory of statehood in international law, see generally Matthew Craven, *Statehood, Self-Determination, and Recognition*, in INTERNATIONAL LAW 203 (Malcolm D. Evans ed., 3d ed. 2010).

International law institutionalizes autonomous territorial nation-states as the vehicle through which territorially defined “peoples” collectively self-determine. Under international law, collective self-determination is reserved for “peoples,” who are often territorially specified. See Lea Brilmayer, Essay, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT’L L. 177, 195 (1991). Despite the term’s repeated usage in international law, there is no international legal definition of “peoples.” See SUMMERS, *supra* note 61, at 7.

64. See CRAWFORD, *supra* note 47, at 114. Self-determination both as a right and as a principle of international law is doctrinally complex. For careful treatment of this complexity, see, for example, *id.* at 107-31; and SUMMERS, *supra* note 61, at 70-88. In modern international law, self-determination appeared “as an operative principle . . . at the end of the First World War,” see CRAWFORD, *supra* note 47, at 108, but there was “little general development” of it prior to 1945, see *id.* at 111-12 (emphasis omitted). See also *id.* at 108-12.

65. With respect to the latter, in the context of colonial or alien subjugation, the right of a territorially defined people under colonial rule to choose its own government has been an undisputed matter of international law since 1971. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 52 (June 21); see also CRAWFORD, *supra* note 47, at 122. But the right of self-determination is not applicable “just to any group of people desiring political independence or self-government.” CRAWFORD, *supra* note 47, at 127. Rather, “[i]t applies as a matter of right only after the unit of self-determination has been determined,” such as through its recognition as a sovereign nation-state. See *id.*

66. G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations Declaration, at 123 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration]. The United Nations Charter states one of the purposes of the United Nations to be the development of “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” U.N. Charter art. 1, ¶ 2. The United Nations General Assembly has adopted a number of resolutions elaborating the meaning of self-determination, including the Colonial Declaration, which states: “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic,  
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And both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights provide the following:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.<sup>67</sup>

To be clear, international law does not require democratic rule at the national level, in that it does not make statehood contingent on democratic legitimacy.<sup>68</sup> However, the principle of popular sovereignty deeply inflects principles of national self-determination entrenched in this law.<sup>69</sup> And even in international law, territorially defined peoples are expected to have a say in the direction of the states that govern them.<sup>70</sup> The right of peoples to

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social and cultural development.” G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, at 67 (Dec. 14, 1960).

67. International Covenant on Civil and Political Rights art. 1, Dec. 19, 1966, S. TREATY DOC. NO. 95-20 (1978), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, S. TREATY DOC. NO. 95-19 (1978), 993 U.N.T.S. 3.

68. See CRAWFORD, *supra* note 47, at 150-55.

69. The International Court of Justice, for example, has stated that application of self-determination in decolonization situations “requires a free and genuine expression of the will of the peoples concerned.” See *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12, ¶ 55 (Oct. 16). For a discussion of “the will of the people” as a “central but equivocal” component of self-determination under international law, see SUMMERS, *supra* note 61, at 46-54. In the context of secessionist claims, the importance of self-determination is argued most strongly in terms of its foundations in commitments to “democratic principles of consent and popular sovereignty.” See Brilmayer, *supra* note 63, at 184.

70. See SUMMERS, *supra* note 61, at 42 (“Self-determination [in international law] proposes that a ‘self,’ equating to a people or a nation, is engaged in a process of deciding a matter. Like nationalism it assumes that nations and peoples are the natural and appropriate unit for a group identity and for taking action.”). Through General Assembly resolutions, United Nations member states have taken the position that the people of a given nation-state exercise the right of self-determination through their equal participation (race, creed, or color notwithstanding) in the government of that nation-state. See CRAWFORD, *supra* note 47, at 118-19 (citing Friendly Relations Declaration, *supra* note 66, at 124; and World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 2, U.N. Doc. A/CONF.157/23 (June 25, 1993)) (discussing the safeguard clauses of the Friendly Relations Declaration and the Vienna Declaration).

self-determine is a collectively held right.<sup>71</sup> Individual members of a nation-state—citizens—are politically equal, both as a matter of domestic law in liberal democratic states and under international human rights law.<sup>72</sup> By political equality I mean an equal entitlement among individuals to the same say in the collective self-determination of the political community within which they are bound together. Through various processes and institutions, these citizens or de jure political equals collectively self-determine, shaping the conditions of their own lives within their state. For these citizens as a collective, international law treats their right to exclude foreigners as a necessary means of protecting the territorial and political integrity of their self-determining nation-state.<sup>73</sup>

In sum, liberal political theory and international law come together to reinforce the normativity of national territorial borders, which double as political borders firmly closed to the economic migrant. Theory and law normalize, and arguably even sanctify, the national exclusion of economic migrants and other nonnationals, whom they designate as political strangers.

#### B. The Right to Exclude in Practice

Although every state in the international system formally retains full discretion to admit or exclude economic migrants, reality diverges from this principle in nonarbitrary ways. Not all states are equally capable of exercising this discretion. The control First World states have over their borders is by no means perfect, but it far surpasses that of their Third World counterparts.<sup>74</sup> First World states can and often do enforce their borders to exclude economic and other migrants, especially from the Third World, often through immigration restriction agreements with Third World states (and former Second World states).<sup>75</sup>

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71. See SUMMERS, *supra* note 61, at 7. Within the liberal tradition, “self-determination is a right of individuals and only by extension national.” *Id.* at 25.

72. International human rights law entrenches the rights of citizens to vote and to nondiscriminatory enjoyment of their human rights. See International Covenant on Civil and Political Rights, *supra* note 67, arts. 2-3, 25 (addressing nondiscrimination, equality between men and women, and the right to vote).

73. See ANGHIE, *supra* note 26, at 57 (“International Law regards states as political units possessed of proprietary rights over definite portions of the earth’s surface. So entirely is its conception of a state bound up with the notion of territorial possession that it would be impossible for a nomadic tribe, even if highly organised and civilized, to come under its provisions.” (quoting T.J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 136 (London, MacMillan & Co. 1895))).

74. See Landau, *supra* note 39, at 173-76 (comparing the European Union’s response to African migrants with African permeability of borders).

75. Consider the permeability of Lebanon’s borders to Syrian refugees and other involuntary migrants relative to the far more impermeable borders of Western  
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The other side of states' differential capacity to exclude is the differential freedom of movement that persons enjoy depending on whether they are citizens of the First or Third World. Freedom of movement exhibits structural dynamics related to the ones just discussed: First World citizens have far greater capacity for lawful international mobility relative to their Third World counterparts, even setting aside questions of personal financial means. One's nationality determines the range of one's freedom of movement in a way that completely belies claims that assert or imply that all persons are equally without the right of freedom of international movement in our global order.<sup>76</sup> This is because of the robust web of multilateral and bilateral visa agreements that privilege First World passport holders and preauthorize their movement across the globe.<sup>77</sup> In a global ranking of passports according to the extent of entitlements to visa-free travel, First World countries dominate the top and Third World countries dominate the bottom.<sup>78</sup> Freedom of movement is, in effect, politically determined and racially differentiated.<sup>79</sup> For many, place of birth alone determines whether or not the act of crossing national borders will be a matter of life and death. And because of the persisting racial demographics that distinguish the First World from the Third—demographics that are, in significant part, a product of passports, national borders, and other successful institutions that partially originated as technologies of racialized exclusion<sup>80</sup>—most whites enjoy dramatically greater rights to freedom of international

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European states to the same. See E. Tendayi Achiume, *Syria, Cost-Sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687, 688-89 (2015). This relative impermeability of First World borders is currently achieved using Eastern European states, Turkey, and North African states. See E. Tendayi Achiume, *Governing Xenophobia*, 51 VAND. J. TRANSNAT'L L. 333, 374-90 (2018).

76. The focus here is how nationality impacts international mobility, but the political economy of international mobility implicates other variables, including class, religion, race, and gender.

77. See Steffen Mau, *Mobility Citizenship, Inequality, and the Liberal State: The Case of Visa Policies*, 4 INT'L POL. SOC. 339, 348-49 (2010) (concluding, from an analysis of the visa regimes of 193 countries, that "the freedom of movement people enjoy depends greatly on their being citizens of rich democracies"); Eric Neumayer, *Unequal Access to Foreign Spaces: How States Use Visa Restrictions to Regulate Mobility in a Globalized World*, 31 TRANSACTIONS INST. BRIT. GEOGRAPHERS 72, 73, 81 (2006).

78. See *Global Passport Power Rank 2019*, PASSPORT INDEX, <https://perma.cc/WXA7-Q5YV> (archived Apr. 28, 2019).

79. See Mau, *supra* note 77, at 349 ("Looking at the data, it becomes apparent that . . . most countries with either black or Islamic majorities are exempted from visa-free travel on a large scale.").

80. See *infra* Parts II.B, III.B.

movement (by which I mean travel across borders) than most nonwhites.<sup>81</sup> The reality is that the mortal cost of international mobility is largely a nonwhite problem.

Further still, among Third World citizens, political and economic elites have differential access to *permission* to move, quite apart from the resources necessary to effect physical passage across borders. Due to prohibitively expensive and complex visa application processes, politically and economically marginal Third World citizens—including many who are likely to consider economic migration—are foreclosed from even seeking permission to move legally across borders.<sup>82</sup> They simply cannot afford to do so. They are not only the most *excludable* category of persons, but they inhabit the status of *excluded* even without or before any attempt to seek admission and inclusion in the First World. The heightened excludability of Third World citizens relative to their First World counterparts makes the argument for Third World migrant nonexcludability that follows in Part III below all the more important.

### C. Political Stranger Exceptionalism

Increasing international migration (including involuntary displacement) and vehement First World opposition to it have produced various critiques of the international law of migration. Progressive scholars have most concertedly argued for the expansion of various exceptional categories that would obligate the admission and inclusion of larger numbers of migrants. The most common approaches are to argue for the expansion of the criteria that qualify persons for refugee status or to argue for additional categories that would extend international protection to migrants whose circumstances are functionally equivalent to those of refugees. Arguments for the international protection of

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81. My claim here rests on a logical inference: If most First World citizens are white and most Third World citizens are nonwhite, and if First World citizenship confers greater international mobility than Third World citizenship, it follows that most whites enjoy greater freedom of movement than most nonwhites. There is more work to be done by scholars of international law to theorize the relationship between whiteness and international mobility privilege in light of ethnographic studies such as one by Max Andrucki, who documented the ease of white South African mobility and migration to the United Kingdom (relative to nonwhite South Africans), on account of descent privileges in British immigration law. See Max J. Andrucki, *The Visa Whiteness Machine: Transnational Motility in Post-Apartheid South Africa*, 10 ETHNICITIES 358, 363-64 (2010).

82. See *id.* at 363; see also, e.g., Simone Bertoli & Jesús Fernández-Huertas Moraga, *The Effect of Visa Policies on International Migration Flows*, IFO DICE REP., Spring 2018, at 38, <https://perma.cc/T257-NLYH> (reviewing a study finding that visa restrictions discouraged the migration of low-skilled, poorer migrants to countries in the Organisation for Economic Co-operation and Development more than it did the migrations of high-skilled, richer migrants); JR Thorpe, *Why Are the Only "Acceptable" Immigrants the Rich Ones?*, BUSTLE (Feb. 24, 2017), <https://perma.cc/B87U-K4UH>.

“climate refugees”—people fleeing the effects of climate change as opposed to persecution as traditionally understood—often take one or both of these forms.<sup>83</sup> Arguments for temporary protected status offer another example. Scholarship in this vein has been valuable and has successfully demonstrated the normative and logical inconsistencies that underpin justifications for the national exclusion of many involuntary migrants.<sup>84</sup> However, this body of work has done little to unsettle or undermine the notion of nation-state sovereignty that does much of the normative and legal work of sustaining extant international migration frameworks and state policies, whose predictable and escalating byproducts include dead bodies of migrants in the Mediterranean and the enslavement of others attempting perilous journeys.<sup>85</sup>

As mentioned above, the logic of even progressive international legal theory remains that sovereign states have a right to exclude, but that certain political strangers warrant discretionary admission and inclusion because some terrible event creates exceptional circumstances. I call this *political stranger exceptionalism*. A feature of scholarship advocating political stranger exceptionalism is that it typically premises migrant admission and inclusion on explicit or implicit suppression of the political agency of migrants. The most legally and politically salient arguments for protecting international movement of nonnationals and demanding their admission and inclusion originate, and remain located in, migrants’ victimhood at the hands of foreign political agents and nonstate actors.<sup>86</sup>

What remains absent in international law, legal scholarship, and adjacent literatures is serious consideration of the possibility that the Third World migrant does *not* need to resort to political stranger exceptionalism to ground her claims to First World admission and inclusion.<sup>87</sup> The next Part draws on an

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83. See, e.g., Heather Alexander & Jonathan Simon, “Unable to Return” in the 1951 Refugee Convention: Stateless Refugees and Climate Change, 26 FLA. J. INT’L L. 531, 533-34 (2014) (arguing that the language “unable to return” from the 1951 Refugee Convention could be used to define refugees to include those fleeing climate change and environmental disasters); Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 374 (2009) (proposing a new category for climate change refugees); Jessica B. Cooper, Student Article, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480, 486 (1998) (arguing that “environmental refugees already meet the requirements of the 1951 refugee definition and that they are entitled to the protections of official refugee status,” and that “all nations signatory to the Refugee Convention should be obliged to offer protections to this new refugee class”); see also 1951 Refugee Convention, *supra* note 3.

84. See, e.g., MCADAM, *supra* note 23, at 252-55.

85. See Achiume, *Governing Xenophobia*, *supra* note 75, at 391-93.

86. See, e.g., sources cited *supra* note 83.

87. As mentioned previously, Chantal Thomas’s work is a notable exception, insofar as it pushes for greater legal and ethical accounting for interconnection in sovereignty  
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interdisciplinary literature to propose that political stranger exceptionalism is ethically a poor fit for Third World migrants, whose movement is motivated by the desire for a better life.

## II. What Political Strangers?

The boundaries of the most salient political communities do not coincide with national territorial borders. Many nation-states are far from being the discrete autonomous political communities international law insists they are. Instead, they are politically interconnected in messy, complex ways determined significantly by historical imperial projects and their legacies, and this interconnection has implications for the law of international migration. This Part supports the claim that Third World peoples were brutally initiated into First World political communities under European colonialism and remain within these communities today.<sup>88</sup> To do so, this Part relies on the work of scholars across a number of disciplines who have deepened the understanding of the historical and continuing influence of colonialism, and the normative and legal implications of this influence.

### A. Colonial Imperialism

Much has been written about the brutality and horror that Europeans visited upon the peoples they colonized,<sup>89</sup> and there are a number of different

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doctrine. See Thomas, *supra* note 28, at 448 (“If sovereignty is premised upon an atomistic conception of the state of nature, then surely a more interconnected understanding of nature raises the question whether the basic presumption of autonomy that undergirds sovereignty should shift in favour of a politics of interdependence.”); see also *supra* note 34.

88. The historical analysis in this Part focuses on the history of British and French colonial empires in Africa and Asia during the nineteenth and twentieth centuries, with a much greater emphasis on the British. At one time, the British Empire spanned a quarter of the earth’s land surface, and in 1901, almost 3 million natives of the United Kingdom were globally dispersed outside of the metropole, living the project of colonial empire. See HARPER & CONSTANTINE, *supra* note 28, at 3. Also in that year, over 43 million people inhabited “Britain’s African possessions.” *Id.* at 111.

Many other European nations—such as Belgium, Portugal, Spain, Germany, and the Netherlands—headed colonial empires, but the specifics of these empires and their legacies are not addressed in any detail in this Article, nor are they necessary for assessment of its general theoretical and conceptual claims. Similarly, I do not exhaust all forms of European colonialism: I do not consider, for example, “Soviet colonialism” (communist domination in central and eastern Europe). See Luwam Dirar, *Rethinking the Concept of Colonialism in Bandung and Its African Union Aftermath*, in BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES 355, 355-58 (Luis Eslava et al. eds., 2017).

89. See Ypi, *supra* note 26, at 162 (“Burning native settlements, torturing innocents, slaughtering children, enslaving entire populations, exploiting the soil and natural  
*footnote continued on next page*”)

ways to conceptualize the various harms of colonialism.<sup>90</sup> This Article focuses on colonialism as a political process characterized by a specific harm, much along the same lines as Lea Ypi, who has argued that “the wrong of colonialism consists in the creation and upholding of a political association that denies its members equal and reciprocal terms of cooperation.”<sup>91</sup> Colonialism pursues political interconnection predicated on the subordination of certain members of the association it creates, and grants colonizers “certain prerogatives” and permission to deny the same to the colonized.<sup>92</sup> Colonialism creates and embodies “morally objectionable political relations,” and in this way is closely related to other configurations such as the oppression of minorities and apartheid.<sup>93</sup> The work of Immanuel Kant has ironically been instrumental to some of the leading political theory on this conceptualization of colonial harm.<sup>94</sup> Ypi’s analysis of Kant’s philosophy notes Kant’s argument that the pursuit of political associations is governed by “norms of equal treatment and reciprocity.”<sup>95</sup> As Ypi notes, Kant’s critique of colonialism included “its violation of standards of equality and reciprocity in setting up common political relations, and the consequent departure from a particular ideal of economic, social, and political association.”<sup>96</sup> Ypi observes that in treaties and negotiations that formalized colonial occupation, colonizers deployed coercion

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resources available to them, and discriminating on grounds of ethnicity and race are only some of the most familiar horrors associated with [colonialism].”).

90. One is to emphasize the territorial violations that attend colonialism, including the infringement of indigenous rights to jurisdiction, control and use of territorial resources, and the movement of peoples and goods within a given territory. See generally Lea Ypi, *Territorial Rights and Exclusion*, 8 PHIL. COMPASS 241 (2013).
91. Ypi, *supra* note 26, at 158. Daniel Butt has explained that although colonial domination has taken many forms, it generally involved (1) “the denial of self-determination, and the imposition of rule rooted in a separate political jurisdiction”; (2) “an attempt to impose the colonial power’s culture and customs onto the colonized, whether as a result of a belief in the racial and/or cultural superiority of the colonizing power . . . or as a mechanism for establishing and consolidating political control”; and (3) “the exploitation of colonized peoples.” Butt, *supra* note 26, at 893.
92. See Ypi, *supra* note 26, at 167.
93. See *id.* at 163.
94. The irony arises in light of the fact that Kant’s theoretical work defended the racial inferiority and political subordination of nonwhites, who, he argued, were “physically [and] mentally unfit” for global migration. See Pauline Kleingeld, *Kant’s Second Thoughts on Race*, 57 PHIL. Q. 573, 581 (2007). For a literature review and overview of Kant’s racial and racist theory, see generally *id.* (arguing that Kant rejected these views in his later work). Kleingeld argues that Kant ultimately adopted a racial egalitarianism which calls for a grant of “full juridical status to nonwhites” and which is “irreconcilable with his earlier defence of slavery.” *Id.* at 586. As an example, Kant’s “concept of cosmopolitan right . . . prohibits the colonial conquest of foreign lands.” *Id.*
95. Ypi, *supra* note 26, at 173.
96. *Id.* at 174.

and manipulation—and took advantage of conceptual ambiguity in, for example, the meaning of property and sovereignty—to consolidate their rule.<sup>97</sup> In their pursuit of political association with the colonized, colonizers violated the principle that the formation and maintenance of political associations can only occur “through the establishment of political institutions that allow people to relate to each other as equals, guaranteeing that their voice will be heard and that their claims will be equally taken into account when decisions affecting both are made.”<sup>98</sup> The resulting association—colonial empire—structurally and by design exploited colonized peoples for the benefit of colonizers.

The aim of European colonial expansion was the economic and political edification of metropolitan nation-states and their citizens. During the colonial era, metropolitan political and economic well-being nontrivially (though of course not exclusively) relied on colonial labor and extraction, in significant part condoned by the European international law in force at the time.<sup>99</sup> This reliance may have been existential for European colonial nations, but even if it was not, it certainly shaped these nations qua nations and contributed materially to their political and economic well-being. For example, even “[d]eep into the twentieth century, many of the territories incorporated into the [British] overseas empire were locked into providing primary products for the [United Kingdom] and by extension world markets.”<sup>100</sup> As I have noted elsewhere, “[i]nternational and bilateral law among European nations, and agreements involving European private corporations, played an important role in securing the *colonial advantage*: the economic and political dominance of

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97. *See id.* at 180-82.

98. *Id.* at 174-75; *see also id.* (describing the basis of “Kant’s cosmopolitan critique of colonialism”). Ypi’s interpretation of Kant’s theory posits: “[W]hen territorially distinct collective agents first make contact with each other, they have a duty (a) to not treat each other with hostility, (b) to communicate respecting criteria of equality and reciprocity, and (c) to set up a political association that reflects such criteria in the rules it generates.” *Id.* at 176. To be clear, no part of the argument here rests on the condition that preexisting non-European political communities were formed and governed on morally impeccable bases. Whether or not those preexisting political communities had unethical dimensions is irrelevant for the present analysis, because the harm of colonialism resides in the terms of the formation of those communities with the colonists. *Cf. id.* at 185 (“The unilaterality of these actions remains the same regardless of whether the agent one is trying to associate with is free from internal constraint or governed in a paternalistic way.”).

99. Consider, for example, that by 1880, South Africa’s Kimberley mines produced 95% of the world’s diamonds and by 1900, its Rand mines produced a quarter of the world’s gold. *See HARPER & CONSTANTINE, supra* note 28, at 136. *See generally* WALTER RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA 205-23 (1972) (providing a careful study of how colonial exploitation of Africa served European capitalist development).

100. HARPER & CONSTANTINE, *supra* note 28, at 149.

colonial powers at the expense of colonies.”<sup>101</sup> Colonial advantage was legitimized and achieved in no small part through sovereignty doctrine in international law at the time.

Antony Anghie has made the compelling case that as a nineteenth-century international legal doctrine, sovereignty “was constituted through colonialism.”<sup>102</sup> This doctrine developed in a nineteenth-century positivist jurisprudence that denigrated non-Europeans and legitimized their extreme and even violent subordination by Europeans, on the basis that the former lacked the requisite sovereignty possessed by European political communities—sovereignty that would have mandated equality in dealings with non-Europeans.<sup>103</sup> Legal sovereignty was only a feature of members of international society, which was comprised of civilized states.<sup>104</sup> International legal doctrine designated non-Europeans uncivilized and lacking in the cultural determinants of membership in international society, thereby largely ejecting them from the international legal framework within which European nations were then able to politically and territorially occupy non-Europeans.<sup>105</sup> Although civilization was presented as a cultural standard, it was decidedly racial: No amount of cultural similarity or assimilation would overcome the hurdle of nonwhiteness that was an implicit and explicit condition of legal sovereignty during the colonial era.<sup>106</sup> Anghie carefully shows, then, that state sovereignty—in many ways the organizing principle of international law—was, at this crucial stage in the evolution of modern international law, a racialized and culturally specified institution dispensed by Europeans on their own terms and largely denied to non-Europeans.<sup>107</sup> At the turn of the nineteenth century, sovereignty for Europeans represented “an assertion of

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101. Achiume, *supra* note 26, at 144.

102. See ANGHIE, *supra* note 26, at 38.

103. See *id.* at 32-114. Although Europeans conceded that some non-Europeans might possess “personal” sovereignties,” comparable with feudal societies of medieval Europe, this was not the same as the territorial sovereignty that could be claimed and projected by European nations and which gave them superior rights to non-Europeans. See ANDREW FITZMAURICE, *SOVEREIGNTY, PROPERTY AND EMPIRE, 1500-2000*, at 7, 16 (2014).

104. See ANGHIE, *supra* note 26, at 52-56.

105. Anghie notes that there were processes by which non-Europeans “could be brought within the realm of international law,” and these were encompassed by four “[d]octrines of assimilation,” which included treaty-making and even colonization itself. See *id.* at 67. Membership in international society required so-called uncivilized peoples to “adopt[] Western forms of political organization.” See *id.* at 86-87. Through the doctrine of recognition—according to which new states came into being only when their existence was recognized by established states—European states determined which non-European political communities could be sovereign and to what extent. See *id.* at 100.

106. See *id.* at 100-04.

107. See *id.* at 100-03.

power and authority, a means by which a people may preserve and assert their distinctive culture.”<sup>108</sup> At the same time, “[s]overeignty for the non-European world [wa]s alienation and subordination rather than empowerment.”<sup>109</sup>

Colonial migration was crucial to establishing and maintaining colonial advantage. The movement of people was required to project metropolitan political power and establish colonial empire. As mentioned earlier, the European colonial project involved the emigration of about 62 million Europeans to colonies across the world between the nineteenth century and the first half of the twentieth century alone.<sup>110</sup> Some colonial migrants were traders, others were settlers, and many moved in search of a better life; some were wholly or partially sponsored by metropolitan authorities who viewed colonial emigration as beneficial to the economic well-being of the metropolises.<sup>111</sup> These European migrants were the original economic migrants, and when they traveled out to the non-European world they traversed it and appropriated it by relying on the same justifications First World states now use to militarize their borders against today’s economic migrants.

Consider the example of the British Empire. In principle, British law provided for the right of entry to the United Kingdom and any part of its overseas empire equally to all subjects of the British Crown born anywhere within the empire.<sup>112</sup> British colonial migration “of all types was an important element in the transformation of huge spaces of the overseas empire into primary producing regions whose principal markets were in the [United Kingdom] (and other parts of Europe).”<sup>113</sup> Some of these migrants moved permanently, establishing indefinite residence in colonial territories, but many others were “temporary sojourners, whose careers in business, the military,

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108. *Id.* at 104.

109. *Id.* at 105.

110. See Miège, *supra* note 27, at 81 (noting that at least 42 million Europeans migrated during the nineteenth century, and about 20 million migrated during the first half of the twentieth century).

111. See HARPER & CONSTANTINE, *supra* note 28, at 5-6.

112. See *id.* This view was rooted in a feudal concept of subjecthood according to which:

[A]ll subjects enjoy precisely the same relationship with the monarch and no distinction [could] be made among them. One logical corollary of this was that free movement should have been guaranteed throughout the Empire and Commonwealth. . . . The maintenance of free movement did exist, and the chief beneficiaries of this system were, as one would expect, [white] Britons.

RANDALL HANSEN, CITIZENSHIP AND IMMIGRATION IN POST-WAR BRITAIN: THE INSTITUTIONAL ORIGINS OF A MULTICULTURAL NATION 39 (2000).

113. HARPER & CONSTANTINE, *supra* note 28, at 7; see also *id.* at 125 (noting that colonial migration achieved widespread dispossession, and in many places “native people were dispossessed of their land in a climate of ‘endemic and brutal violence’” (quoting JOHN M. MACKENZIE, THE SCOTS IN SOUTH AFRICA: ETHNICITY, IDENTITY, GENDER AND RACE, 1772-1914, at 48 (2007))).

and the public services (including Colonial Service) saw them spend long periods overseas, often much of their working lives.”<sup>114</sup> Crucially, colonial migration also involved the transfer of colonial subjects from one part of the colonial empire to another to work in mines or farm plantations.<sup>115</sup> Indian colonial subjects, for example, were shipped as far away as Africa or the Caribbean in large numbers.<sup>116</sup> All this reflects the fact that reaping the full benefits of colonial expansion required specific transnational arrangements, and distribution of labor and managerial personnel.

Emigration from the United Kingdom—except of convicted criminals and some children—“was a matter of free choice, and material advantage was among the primary aspirations” of most migrants from the United Kingdom.<sup>117</sup> Metropolitan Britons migrated of their own initiative, but were also supported or sponsored at various times by government and philanthropic actors committed to facilitating their pursuit of better lives.<sup>118</sup> Although such British-sponsored colonial emigration by no means defined colonial migration, it was an important part of it. Consider the largest official European-sponsored land settlement in Kenya, which “opened up 2.5 million acres and increased the area of white settlement by a third.”<sup>119</sup> This settlement program was devised by the Kenyan colonial government and British metropolitan authorities for ex-military servicemen, most of whom were former officers, including those from well-to-do Anglo-Irish and Anglo-Indian families as well as British metropolitan ones.<sup>120</sup> Unlike the mostly lower-ranking World War I veterans

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114. *See id.* at 4.

115. *See* HUGH TINKER, *A NEW SYSTEM OF SLAVERY: THE EXPORT OF INDIAN LABOUR OVERSEAS, 1830-1920*, at 15-19, 177-235 (1974) (summarizing the transfers of people from India to other British colonies and describing the plantations in British colonies that persisted, with laborers brought in from India, even after 1833); *see also* HARPER & CONSTANTINE, *supra* note 28, at 148-70 (discussing migration of indentured and free colonial laborers).

116. *See* HARPER & CONSTANTINE, *supra* note 28, at 4. Consider that in 1901, of Trinidad and Tobago’s population of 273,899, only 1,385 were born in the United Kingdom, compared with 47,677 from India. *Id.*

117. *Id.* at 5. An observer in 1907 asserted that “Johannesburg is but a suburb of Cornwall,” as Cornish migrants established a virtual monopoly over a significant proportion of the well-paying mining jobs in that city. *See id.* at 139 (quoting C. LEWIS HIND, *DAYS IN CORNWALL* 352 (1907)). A remarkable flow of remittances sent back to family members still resident in the metropolitan parts of the United Kingdom “provided a lifeline for miners’ dependants” and “sustain[ed] much of Cornwall’s business activity.” *See id.* at 141. Contrast this with the fact that “African mine workers in Southern Rhodesia commonly used the word *chibaro*, meaning forced labour or even slavery, to describe their terms of hire and conditions of employment.” *Id.* at 149.

118. *See id.* at 7.

119. *Id.* at 117. Another example is migration to the Cape of Good Hope in the early nineteenth century sponsored by the British government. *See id.* at 124-25.

120. *See id.* at 117-18.

who were settled in various parts of the colonial empire,<sup>121</sup> those who participated in this settlement program did so “to preserve their upper-class socio-economic status in a postwar world less economically kind and culturally sympathetic to their type.”<sup>122</sup> Colonial migration was thus pursued to enhance both individual and collective European self-determination, and was formative to colonial advantage.

In sum, this Subpart has articulated European colonialism as a project that brought metropolitan and colonial peoples together in transnational political community. This project politically and economically benefitted Europeans at the expense of their subjects, and colonial migration was a fundamental mechanism for the success of the enterprise.

### B. Neocolonial Imperialism

Decolonization—as a process and as an outcome—is the subject of a large, interdisciplinary literature, which unsurprisingly includes differing and even competing conceptions of what the word does or should mean.<sup>123</sup> As a legal and political project, decolonization was largely framed as the pursuit of political equality for colonized peoples—their capacity to self-determine—through the achievement of nation-state independence.<sup>124</sup> This was by no means the only salient conception of decolonization, and a number of notable anticolonialists proposed differing approaches that pursued more equitable interdependence within colonial empire, as opposed to equality through independence.<sup>125</sup> That said, the dominant conception of what decolonization would entail was ultimately the pursuit of political equality *specifically* through independent, autonomous Third World nation-states recognized as equal to those of the First World.

For the Third World, formal decolonization conferred a seat at the table of international lawmaking within the United Nations, and in principle, a chance to reform international law to eliminate colonial advantage and inequity. If sovereignty was to be good for anything, it was as a means of asserting

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121. For example, also following World War I, the metropolitan British government assisted and sponsored migration of veterans to Southern Rhodesia, including under the Empire Settlement Act. *See id.* at 119; *see also* Empire Settlement Act 1922, 12 & 13 Geo. 5 c. 13.

122. HARPER & CONSTANTINE, *supra* note 28, at 118.

123. For an illustrative volume considering different meanings of and perspectives on decolonization in history, see THE DECOLONIZATION READER (James D. Le Sueur ed., 2003).

124. For example, the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the United Nations General Assembly in 1960, frames sovereign independence in these terms. *See* G.A. Res. 1514 (XV), *supra* note 66.

125. *See supra* note 44 and accompanying text.

fairness in the international regime governing ostensibly equal nation-states. Third World Approaches to International Law (TWAAIL) scholars have analyzed efforts of Third World nations to achieve a New International Economic Order (NIEO) in the 1970s as arguably the high point of the nations' attempts to create more equitable international law.<sup>126</sup> Initiatives such as the NIEO were spurred in large part by the desire of Third World states to gain control of their economies and economic destinies after it became clear that without doing so, the formal sovereignty they were accorded at independence would not be enough for these states truly to self-determine in the deeper political sense.<sup>127</sup> Formal political equality was thus contested as farcical if unaccompanied by meaningful economic control by newly independent states.

The NIEO and similar initiatives were unsuccessful.<sup>128</sup> Concomitantly, an expansive interdisciplinary literature supports the assessment that the legacy of colonialism persists in a manner that continues to deny Third World peoples the exceedingly more robust sovereignty enjoyed by their First World counterparts.<sup>129</sup> Formal decolonization is viewed as having shifted colonial empire to neocolonial empire.<sup>130</sup>

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126. See, e.g., Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77, 81-82 (2003). For an overview of the NIEO and a recent assessment of the NIEO in light of contemporary global governance debates, see Nils Gilman, *The New International Economic Order: A Reintroduction*, 6 HUMANITY 1 (2015). Other touchstone initiatives aimed at using the nation-state system to rewrite colonial advantage out of international law have included the 1955 Bandung Conference. See Luis Eslava et al., *The Spirit of Bandung, in BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW*, *supra* note 88, at 3, 17-22.

127. See ANGHIE, *supra* note 26, at 211 (noting that the premise of Permanent Sovereignty over Natural Resources (a core demand of the NIEO) "was closely tied to the concept of self-determination, which in itself suggests the close links between political sovereignty and economic sovereignty"); Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 748 (2006) [hereinafter Anghie, *Evolution of International Law*] ("[The NIEO] initiative was especially important, as the new states realised that political sovereignty would be meaningless without corresponding economic independence."). The Spring 2015 issue of *Humanity* provides an illuminating exploration of the history of the NIEO. See, e.g., Gilman, *supra* note 126.

128. See ANGHIE, *supra* note 26, at 211-44 (describing how the emergence of a "transnational law of international contracts," among other developments, thwarted the aims of the NIEO).

129. See generally ANGHIE, *supra* note 26 (testing the colonial history, foundations, and functioning of sovereignty doctrine); PAHUJA, *supra* note 35 (analyzing the role international law and international economic institutions play in maintaining Third World, colonial-era subordination, including through the development frame). For a prior international law and international relations study of the failures of decolonization, see SIBA N'ZATIOULA GROVOGUI, *SOVEREIGNS, QUASI SOVEREIGNS AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW* (1996).

130. See GROVOGUI, *supra* note 129, at 2 ("[T]he process of decolonization transferred rudimentary political powers to the formerly colonized, but it did not transform the structures of domination—that is, the institutional and cultural contexts of

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A premise of this Article's argument, then, is that the present era is defined by neocolonial imperialism, even if formal colonial imperialism has been outlawed.<sup>131</sup> Imperialism may be defined as the practice of empire: the projection of political and economic power beyond the territorial borders of the power-wielding political community.<sup>132</sup> Imperialism of different kinds has arguably structured human relations for centuries.<sup>133</sup> The term "neocolonial imperialism" distinguishes the unique form of imperialism that results from the legacy, and continues the logic, of formal European colonialism from other forms of imperialism that contemporaneously exist alongside it.<sup>134</sup> Colonialism should be understood here as "a particular model of political organization, typified by settler and exploitation colonies, and is best seen as

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Western hegemony in the global international order on the one hand, and African marginalization within it on the other.").

131. In one of his articulations of neocolonial subordination, Frantz Fanon captures the essence of the relations with which this Article is concerned. See FRANTZ FANON, *First Truths on the Colonial Problem*, in TOWARD THE AFRICAN REVOLUTION: POLITICAL ESSAYS 120, 120-24 (Haakon Chevalier trans., Grove Press 1967) (1964). But see MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE*, at xii-xiii (4th prtg. 2001) (arguing that the era of neocolonialism and territorialized sovereignty has been superseded by a new global, entirely deterritorialized form of sovereignty: "Empire").
132. For a history of the concept of empire as entailing the projection of power beyond state boundaries, see FITZMAURICE, *supra* note 103, at 17-19. Different theoretical engagements have emphasized different dimensions of the projection of economic, political, and cultural power in the theorization of empire. Michael Doyle has defined empire as "a system of interaction between two political entities, one of which, the dominant metropole, exerts political control over the internal and external policy—the effective sovereignty—of the other, the subordinate periphery." MICHAEL W. DOYLE, *EMPIRES* 12 (1986). For Doyle, this must be distinguished from cases where a "hegemonic power . . . controls much . . . of the external, but little . . . of the internal, policy of other states." See *id.* (emphasis omitted). In the early twentieth century, Marxists foregrounded European imperialism as an economic project that "corresponded to a particular stage in the development of capitalism." See Marks, *supra* note 36, at 451. Notwithstanding its political dimensions, then, imperialism for Marxists referred to "a distinctive economic system, a key facet of which is the penetration and control of markets abroad." See *id.* Regarding the political and economic dimensions of imperialism, postcolonial theorists have argued that imperialism is a cultural system as well and that European imperialism imbued ideas of race, sex, civilization, property, law, and so on. See *id.* at 452.
133. See Marks, *supra* note 36, at 450.
134. An example of imperial relations that exist alongside neocolonial imperialism involves China's increasing economic and political dominance. These imperial relations benefit from neocolonial structures and processes but are nonetheless distinct, and as a result deserve independent analysis of what justice within that imperial relationship would entail. See, e.g., Ching Kwan Lee, *The Spectre of Global China*, *NEW LEFT REV.*, Sept.-Oct. 2014, at 29 (explaining how changes in global capital mean that foreign economic domination in Zambia today cannot fully be explained through the forces I attribute to First World neocolonial processes, including because of the distinct operation of Chinese capital).

one specific instance of imperialism, understood as the domination of a territory by a separate metropole.”<sup>135</sup> Neocolonialism, then, is a subsequent and distinguishable instance, which nonetheless retains the geopolitical terrain of colonial imperialism and colonial advantage. Neocolonial empire spans the territories of the First and Third Worlds, and is characterized by legal, political, and economic relations and institutions whose logic structurally perpetuates neocolonial advantage. Some of these relations and institutions are multilateral, others are bilateral, and others are purely domestic or intranational. What follows is an abbreviated review of the forces that keep the Third World connected to the First in a relationship dominated by First World nation-states and their interests.

In 1965, Kwame Nkrumah, the anticolonialist who led Ghana to independence, defined neocolonialism as follows: “The essence of neo-colonialism is that the State which is subject to it is, in theory, independent and has all the outward trappings of international sovereignty. In reality its economic system and thus its political policy is directed from outside.”<sup>136</sup> At stake in neocolonial empire is *power*: “A State in the grip of neo-colonialism is not master of its own destiny.”<sup>137</sup> Instead, external control by neocolonial forces operates through a range of economic and financial regimes which Nkrumah argued effect neocolonial domination, including global commodity prices and exploitative aid through the International Monetary Fund (IMF), the World Bank, and related institutions.<sup>138</sup> These economic and financial regimes impose direct and indirect political constraints: They impose restrictions on fiscal and other domestic policies with consequences from health care to mining, and they restrict the field of political agency by controlling the economic means of the former colonial power.<sup>139</sup>

Nkrumah was quick to point out that former Western European colonial nation-states were not the only beneficiaries and purveyors of neocolonialism. The United States, for example, was “the very citadel” of neocolonial empire, through not only its economic force but also its political oppression of colonial peoples from South Vietnam to the Congo (Leopoldville).<sup>140</sup> Furthermore,

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135. Butt, *supra* note 26, at 892.

136. KWAME NKUMAH, NEO-COLONIALISM: THE LAST STAGE OF IMPERIALISM, at ix (1965).

137. *Id.* at x; *see also id.* at xv (“In the first place, the rulers of neo-colonial States derive their authority to govern, not from the will of the people, but from the support which they obtain from their neo-colonialist masters.”).

138. *See id.* at 239-43.

139. *See generally* GROVOGUI, *supra* note 129, at 196-200 (explaining some of the negative consequences that resulted from trying to universalize international law); PAHUJA, *supra* note 35, at 1-9 (describing changes in international law from the perspective of the Third World).

140. *See* NKUMAH, *supra* note 136, at 239-41.

Nkrumah noted that neocolonial control was also exercised by consortia of private and public financial actors, as was the case with the Congo.<sup>141</sup> Others also theorized the strategies and mechanisms pursued even in the era of decolonization, through which colonial logics of subordination would later be preserved in neocolonial empire. An important example is Walter Rodney's seminal *How Europe Underdeveloped Africa*, in which he considers the legacies of British, French, Portuguese, and other colonial empires.<sup>142</sup> Rodney's account explains how colonial powers—which, more significantly, were capitalist powers—formed relationships of exploitation that did not terminate with formal decolonization.<sup>143</sup> The work of scholars such as Anghie and Sundhya Pahuja has taken the next step of offering compelling international legal theories of neocolonial empire.<sup>144</sup>

Today, international law repudiates colonialism, but colonialism remains essential to sustaining the political and economic dominance of the First World.<sup>145</sup> Modern international law—including the United Nations Charter itself—preserves colonial advantage for colonizing powers even as it professes the formal political independence of former colonies and the equality of all sovereign states, including these former colonies.<sup>146</sup> This preservation is evident in international legal doctrines that prevented reparation or

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141. *See id.* at 239-51.

142. *See generally* RODNEY, *supra* note 99, at 173-80 (analyzing European colonial exploitation of Africa, including during the period of decolonization).

143. Rodney and (to a lesser extent) Nkrumah both advance economic theories of neocolonialism or its antecedents rooted in a critique of imperialism as the final stage of capitalism. Historian Thomas Benjamin has put Nkrumah's economic theory in the Marxian tradition, *see* Thomas Benjamin, *Neocolonialism*, in *ENCYCLOPEDIA OF WESTERN COLONIALISM SINCE 1450*, at 831, 834 (Thomas Benjamin ed., 2007), whereas Rodney would fall more in the dependency theory tradition under Benjamin's classification. My own theory of neocolonial empire is far more abstract, and rests on no single or detailed economic explanation for the functioning of the neocolonial interconnection it posits. In other words, while I concur with Nkrumah and Rodney in their basic claim of the existence of neocolonial relations, the level of abstraction at which I am conceptualizing neocolonial empire does not require me to commit to any of the specific economic theories they argue explain those relations.

144. *See* ANGHIE, *supra* note 26, at 3-4 (arguing that state sovereignty as theorized in international law is a racialized and culturally specified institution that perpetuates colonial subordination); PAHUJA, *supra* note 35, at 1-5 (describing the role international law and international economic institutions play in maintaining Third World, colonial-era subordination, including through the development frame).

145. *See* ANGHIE, *supra* note 26, at 245-72 (describing how globalization has been accompanied by contemporary international law—including international human rights law—and international institutions that maintain Third World subordination); Achiume, *supra* note 26, at 145; Anghie, *Evolution of International Law*, *supra* note 127, at 748-49.

146. *See* ANGHIE, *supra* note 26, at 196-98.

remediation of systematic colonial exploitation of Third World national resources.<sup>147</sup> Chief among these neocolonial international legal doctrines is sovereignty doctrine itself. Formal decolonization may have extended formal sovereignty and equality of status to former colonial territories, but closer scrutiny shows that this Third World sovereignty remains only *quasi-sovereignty*.<sup>148</sup>

The details of this quasi-sovereignty are important: Essentially, the sovereignty conferred on Third World nation-states is a form of sovereignty that pairs formal political independence with structural political and economic subordination to First World nation-states and the post-World War II international economic and financial institutions they dominate.<sup>149</sup> There are two separate but related claims at work here. First, within and through international institutions and bilateral arrangements, Third World nation-states are *politically* subordinate. The decisionmaking power they have—via the rules governing these international and bilateral fora—is unquestionably less than that of First World nation-states, which maintain superordinate positions.<sup>150</sup> Second, Third World nation-states are *economically* subordinate,

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147. *See id.* at 196-244.

148. *See id.* at 235-44; *see also* GROVOGUI, *supra* note 129, at 16.

149. Anghie has traced the transmission of this quasi-sovereignty characterized by economic subordination from the formal colonial period through the post-World War I mandate system and to the present day. *See* Anghie, *Evolution of International Law*, *supra* note 127, at 747 (“Crudely put, an examination of the Mandate System illuminates the ways in which political sovereignty could be created to be completely consistent with economic subordination.”). With the transition from the mandate system to formal independence, Anghie argues that “[i]n crucial respects, . . . Third World sovereignty was manufactured by the colonial world to serve its own interests.” ANGHIE, *supra* note 26, at 215.

Pahuja has studied the bifurcation of economic from political power, including through international law and international economic and financial institutions, arguing that this bifurcation undergirds informal empire. She argues that the development paradigm that superseded the mandate system following decolonization continues colonial logics of subordination. *See generally* PAHUJA, *supra* note 35. Others have looked not at international but regional neocolonial economic dynamics, such as those embodied in the Communauté Financière Africaine (CFA). The CFA is a monetary cooperation arrangement established among France and its former colonies. *See* Alexandra Esmel, *Currency Wars: The Need for International Solutions*, 43 DENV. J. INT’L L. & POL’Y 403, 410-11 (2015). Political scientist Guy Martin has argued that the CFA short-circuited any radical transformation of France’s economically exploitative relationship with its former colonies. *See* Guy Martin, *The Franc Zone, Underdevelopment and Dependency in Francophone Africa*, 8 THIRD WORLD Q. 205, 215-18 (1986) (“Even the most superficial analysis of the [CFA] system reveals that while France benefits from exorbitant rights and privileges and wields considerable power, the African member-states are practically powerless, and their rights are almost non-existent.”).

150. The distribution of power within the United Nations offers a clear example, with its concentration of power in the veto-holding nation-states drawn from the First World (as well as China and Russia—world powers with whom the First World states have  
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which not only is a harm in and of itself, but also further reinforces their *political* subordination.<sup>151</sup> Political self-determination requires economic agency;<sup>152</sup> structural economic subordination thus makes a mockery of the formal political independence that followed formal decolonization. This is not to say that the formal political independence achieved through formal decolonization was or remains meaningless; indeed, it has elevated the means of many Third World persons to pursue their respective visions of the good life, and for this reason, it should count as an important victory.<sup>153</sup> That said, this political independence is greatly overstated in conventional international law accounts and practice, including the ethics and governance of international migration. This belies the more salient dynamic, which is the stubborn persistence of colonial-era bonds tying together First and Third World peoples in an informal but very real empire, within which the latter remain subordinate to the former.<sup>154</sup>

Whereas Anghie and others have traced the international law and legal institutions of colonialism and neocolonialism, the work of scholars such as Siba N’Zatioula Grovogui has made a compelling identification of the colonial, political, and juridical mechanisms that continue to advance neocolonial logics in formally independent African nation-states.<sup>155</sup> Grovogui uses Namibia—a country colonized by Germany and then “administered” by South Africa—as a case study to show how colonial powers’ control over the processes of

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been forced to share Security Council governance). See U.N. Charter art. 23, ¶ 1, 3 (establishing the permanent members of the Security Council and their voting rights). The distributions of power within the IMF and the World Bank offer another example. See GROVOGUI, *supra* note 129, at 199-200.

151. See RODNEY, *supra* note 99, at 12 (noting that “equality of economic condition” is necessary for political equality).
152. As early as the seventeenth century, “European states sought political self-preservation not in military power, as had been the case for the Romans and Renaissance Italians, but in commercial power.” FITZMAURICE, *supra* note 103, at 2-3. Andrew Fitzmaurice has explored the centrality of sovereignty, property, and the law of occupation to this trajectory of self-preservation through empire, noting “a particular nineteenth-century preoccupation with the occupation of sovereignty in legal discourse—an attempt to develop a legal framework for commercial empires.” See *id.* at 6.
153. B.S. Chimni, for example, has argued that for Third World peoples, stronger nation-state sovereignty is in some respects an emancipatory objective. See B.S. Chimni, *Anti-Imperialism: Then and Now*, in BANDUNG, *GLOBAL HISTORY, AND INTERNATIONAL LAW*, *supra* note 88, at 35, 40-41.
154. See Anghie, *Evolution of International Law*, *supra* note 127, at 748-49 (“The end of formal colonialism, while extremely significant, did not result in the end of colonial relations. Rather, in the view of Third World societies, colonialism was replaced by neo-colonialism; Third world states continued to play a subordinate role in the international system because they were economically dependent on the West, and the rules of international economic law continued to ensure that this would be the case.”).
155. See GROVOGUI, *supra* note 129, at 143-207.

decolonization (even through the United Nations) allowed those powers to entrench legal and political arrangements in postcolonial states that would maintain their neocolonial dominance.<sup>156</sup> His examples include the imposition by former colonial powers of constitutional regimes protecting the property rights of colonial minorities who had secured those rights through the subordination and massacre of Africans.<sup>157</sup> For political parties aspiring to participate in the first democratic elections following decolonization, former colonial powers made constitutional protection of minority property (irrespective of its bloody colonial origin) a prerequisite.<sup>158</sup> In southern Africa in particular, colonial-era racial and related inequality in land and property ownership remains central to the socioeconomic marginality of many, and this persisting inequality and marginality are partially sustained by neocolonial logics embedded in the constitutions of postcolonial African nation-states.<sup>159</sup> The conclusion of Grovogui's exegesis is that the neocolonial DNA of postcolonial African nation-states plays an important role in maintaining their status as quasi-sovereign subordinates.<sup>160</sup>

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156. *See id.*; *see also id.* at 185 (“By determining the political and constitutional settings of national independence, Western powers virtually dictated the terms of postcolonial relations. These terms were intended to preserve structural links between Western economies and those of their former dependencies.”).

157. *See id.* at 175-77.

158. *See id.* at 171, 175-77.

159. *See, e.g.,* E. Tendayi Achiume, *The SADC Tribunal: Sociopolitical Dissonance and the Authority of International Courts*, in *INTERNATIONAL COURT AUTHORITY* 124, 127, 131-32 (Karen J. Alter et al. eds., 2018) (providing a summary of postcolonial racial inequality in land ownership in southern Africa, and offering the example of the Lancaster House Agreement, through which the British granted Zimbabwean independence and institutionalized postcolonial racial inequality in land ownership by imposing rigid restrictions on land reform). For more on the Lancaster House Agreement, *see generally* Edmund Yorke, “A Family Affair”: *The Lancaster House Agreement*, in *DIPLOMACY AT THE HIGHEST LEVEL: THE EVOLUTION OF INTERNATIONAL SUMMITRY* 200 (David H. Dunn ed., 1996).

160. *See* GROVOGUI, *supra* note 129, at 185-88. Mahmood Mamdani is another scholar whose work contributes to understanding the institutional continuity of neocolonial logic even in African domestic institutions. *See* MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* 3 (1996). Mamdani's *Citizen and Subject* traces the political institutions and technologies that apportioned political power in the colonial era and that persist in formally independent African nation-states. *See generally id.*

Mamdani has also argued that the legal and political institution of citizenship in postcolonial African states remains structured by colonial exclusionary logics that sustain political inequality within African states. *See* MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* 274-76 (2001). Notwithstanding the messiness and incompleteness of colonial domination, it was ultimately the prevailing logic that structured the political and legal character of colonized territories, having largely defeated or tamed precolonial

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In sum, then, there are different theories of how political bonds may be formed among individuals to produce a political community of equals, each entitled to partake of the benefits of political community for her own vision of the good life. As mentioned above, liberal theory rooted in the social contractarian tradition locates the formation of political community in the putative mutual consent of individuals to live under common subjection to a shared government.<sup>161</sup> Here, however, the posited political community (neocolonial empire) distinctly encompasses members whose induction into the community was decidedly coerced. This recalls the particular harm of colonialism emphasized above, which is that it forged former colonizing and colonized peoples into a political association or community in which the latter were subordinate to the former, notwithstanding the full and equal personhood of Third World individuals. The failure of formal decolonization maintains the political association between the First and Third Worlds in a political community of de facto co-sovereigns, mutually instrumental to the prosperity of neocolonial empire and mutually subjugated by the effective collective sovereigns of neocolonial empire: First World nation-states.

### III. Revisiting the Right to Exclude

This Part argues that the existence of neocolonial empire (if accepted) has serious implications for how the right of nation-states to exclude should be understood, where the First and Third Worlds are concerned. The argument proceeds as follows. First and Third World peoples are de facto co-sovereigns of neocolonial empire. In other words, within the political association that is neocolonial empire, First and Third World persons are co-sovereign, each with an equal right to a say in their collective self-determination. The First World nation-state, by virtue of its beneficiary status within neocolonial empire and the effectiveness of its sovereignty (secured in part through Third World subordination), has no more right to exclude Third World persons from its institutions of equal political membership than it has over its de jure citizens.

#### A. De Facto Co-Sovereigns and the Right to Exclude

Under domestic and international law, citizens and noncitizens are not considered political equals. As discussed above, the leading justifications for this inequality have to do with the collective self-determination interests of the

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governance logic. See ANGHIE, *supra* note 26, at 33, 36-38. This logic remains alive and well in the neocolonial order.

161. See, e.g., LOCKE, *supra* note 53, bk. II, §§ 95-96, at 330-32; see also *supra* text accompanying notes 52-55.

political community demarcated by the territorial nation-state.<sup>162</sup> A Zambian is not politically equal with a Briton because the law sorts the former into a different political community or “self” (Zambia) for the purposes of reaping the benefits of collective self-determination. The problem with this approach is that the borders that demarcate many communities of de facto political equals extend far beyond the national territorial borders that confer de jure political equality on citizens of the same state.

As outlined in Part II above, Third World exploitation remains a feature of neocolonial empire and continues to fuel First World prosperity.<sup>163</sup> Within neocolonial empire, First and Third World persons should be seen as co-sovereign, with equal entitlement to direct the effective collective vehicles of self-determination within the empire. If one concedes that all human beings are equally entitled to self-determine, and if one accepts the general structure of neocolonial empire articulated above, then Arash Abizadeh’s work supports the normative basis for this claim<sup>164</sup>:

The democratic ideal of collective self-rule is grounded in the notion that securing the conditions of individuals’ autonomy and standing as equals intrinsically requires that they be the joint authors of the terms governing the political power to which they are subject. That one’s interests in general are affected by others does not itself negate self-rule or autonomy and equal standing, but being unilaterally subject to a coercive and symbolic political power, without any say over the terms of its exercise, does. . . . [D]emocratic self-rule means that the exercise of political power conforms to the collective will of those *subjected to it*, and . . . the scope-condition of democratic legitimacy is that all those subject to the exercise of political power have a right of democratic say.<sup>165</sup>

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162. *See supra* Part I.A.

163. *See supra* Part II.B.

164. I use “democracy” here in the meaning emphasized by Abizadeh: “an attempt to legitimize the collective and political exercise of power, on terms respecting the equality and freedom of those over whom power is exercised, via participatory political practices of expression, contestation, discursive justification, and decision-making.” Abizadeh, *supra* note 52, at 880. One might focus attention, as some others have, on an ideal theory of political community boundary formation from the perspective of those committed either to democratic self-rule or to national self-determination. Abizadeh engages in such an analysis and compellingly argues that, in principle, only an unbounded conception of the demos “can yield a coherent theory of democratic legitimacy.” *See id.* at 868. To be clear, I do not pursue an ideal theory of democratically legitimate borders in this Article. Rather, I am more narrowly interested in the democratic legitimacy of boundaries between the Third World and the First World, in light of the history and legacy of European colonialism.

165. *Id.* at 878. Subjection occurs through coercion, either through “direct physical force, invigilation via agents authorized to use physical force, and threats of punitive harm,” or through “coercively undergirded symbolic processes of socialization and identity formation.” *Id.*

The claim is thus that historical and continuing Third World subjection to and exploitation by the First World meets the requisite threshold of coercion and coercively undergirded processes necessary to render Third World peoples part of a shared demos with their First World counterparts, holding an equal stake in its direction.<sup>166</sup> This move extraterritorializes the demos beyond nation-state borders such that its boundaries are contiguous with those of neocolonial empire.

First and Third World persons, then, should be seen as de facto political equals, sharing the mantle of the collective “self,” each with an equal say in the effective collective vehicles of self-determination presiding over the field of neocolonial empire. These vehicles are largely First World nation-states; international and domestic laws that exclude Third World voices from these vehicles are therefore unethical, as they undermine political equality. Rather than being political strangers to First World nation-states, Third World persons are, in effect, political insiders, and for this reason, First World nation-states have no right to exclude Third World persons.

Before elaborating on the possible legal implications of this co-sovereignty argument, it is important to highlight neocolonial imperialism’s implications for the liberal nationalist tradition that is central to sustaining the existing approach to national political and territorial borders. Recall that for liberal nationalists or communitarians, the collective sovereign “self” is the nation—a prior and culturally specified community, today again increasingly defined in ethno-nationalist terms.<sup>167</sup>

There is a strong argument to be made that Third World peoples are culturally co-nationals with First World peoples, also on account of colonialism. For example, political theorists Sara Amighetti and Alasia Nuti have argued that “the colonial experience created so strong a relation that the transformations and fusions it initiated in national identities” are “mutually constituted over time.”<sup>168</sup> They argue that given the “particularly strong and special” cultural relationship between colonial powers and their former colonies, “postcolonial migrants are already part of the ‘self’ that determines the ex-colonizing nation, because they are essential contributors to its identity.”<sup>169</sup> This gives them a right to migrate to the specific former colonial

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166. To be clear, Abizadeh’s argument focuses on the common subjection that is produced by border demarcation itself. See Arash Abizadeh, *Closed Borders, Human Rights, and Democratic Legitimation*, in *DRIVEN FROM HOME: PROTECTING THE RIGHTS OF FORCED MIGRANTS* 147, 159-61 (David Hollenbach ed., 2010). I focus instead on the implications of common subjection through neocolonialism to argue that Third World peoples have claims to First World nation-state membership.

167. See *supra* Part I.A.

168. See Amighetti & Nuti, *supra* note 56, at 548.

169. *Id.* at 552.

nation-state whose national identity they have co-constituted. In this way, Amighetti and Nuti argue that former colonial nations bear an obligation to admit postcolonial migrants, and that postcolonial migrants have a corresponding right to enter their territories.<sup>170</sup>

However, even if one takes the view that the nation is a prepolitical cultural community that grounds the legitimacy of the sovereign state and also marks its boundaries,<sup>171</sup> certain practices of the resulting nation-state can expand the bounds of that political community in ways that give certain groups or individuals political entitlements, questions of cultural difference notwithstanding. In other words, even if the set of cultural distinctions between, for example, Zimbabwean and British citizens is said to place the two groups in separate *cultural* nations, I argue that there are supervening de facto political ties between the two groups that deserve formal legal recognition in order to do justice by both Zimbabwean and British citizens' rights to membership in a collective that politically self-determines.

To reiterate, if First World national sovereignty and its political and economic benefits remain significantly predicated on Third World subordination and exploitation, keeping First and Third World peoples bound in neocolonial empire, and if Third World peoples remain subjected by and to First World nation-states (often with Third World state complicity), this relationship gives Third World persons a valid claim to membership in First World nation-states. At the very least, First World nation-states have no more right to exclude Third World persons than they do their own citizens. The next Subpart explores the implications of this claim for contemporary so-called economic migration from the Third World to the First.

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170. See *id.* at 560. I find Amighetti and Nuti's arguments largely compelling, and I view my project as complementary, supplying political and economic arguments where theirs are predominantly cultural. There is a significant literature theorizing the economic and political injustice of colonialism as well as persisting relations of economic and political domination. However, I am not aware of any legal scholarship that takes the next step to articulate a theory of sovereignty that calls for Third World migrant inclusion on the basis of historical and continuing political and economic relations. I am also not aware of legal scholarship that characterizes Third World migration, conceptually or sociologically, as decolonial.

171. See, e.g., Abizadeh, *supra* note 52, at 869. Abizadeh attributes this position to Johann Gottlieb Fichte, whom he summarizes on the natural bounds of the state in the cultural nation bound by language: "The fact of shared nationality is supposed to legitimize political power because the linguistic-cultural nation makes possible, and is the locus for, freedom in its highest form; and the nation is the locus for freedom in part precisely because it is (supposedly) prepolitical." *Id.*

B. The Right to Admission and Inclusion: Migration as Decolonization

I argued in the previous Subpart that because of the political features of neocolonialism, First World states have no right to exclude Third World persons. I turn now to a related claim: that Third World persons are entitled to First World inclusion.

For many Third World peoples, their nation-states have failed to deliver on the promises that animated anticolonial movements. Neocolonialism has been a significant factor in their continued suffering, and Third World elites, including and especially government officials, have secured their own interests while pursuing social and economic policies that have benefitted foreign powers at the expense of most Third World citizens.<sup>172</sup> For Third World persons whose capacity to self-determine is diminished by neocolonialism, I propose that the closest they can get to what decolonization promises (self-determination) may entail something quite different than what is asserted by conventional international law accounts, if one takes as given the continuity and resilience of neocolonialism.<sup>173</sup> Once the enduring colonial legacy of global economic and political interdependence is brought to the fore, political equality for Third World persons may be more fruitfully pursued by seeking politically and economically equitable relations *within* what so far remains a relationship of enduring subordination.<sup>174</sup> In other words, for some in the Third World, decolonization as a strategy for self-determination is more realistically pursued as reformation, rather than severance, of the relationship of dependence.

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172. Notably, just as colonial subordination did before it, neocolonialism has brought with it ample facility and opportunity for Third World elites to benefit at the expense of the Third World peoples they preside over. *See, e.g.*, B.S. Chimni, *Capitalism, Imperialism, and International Law in the Twenty-First Century*, 14 OR. REV. INT'L L. 17, 19 (2012) (arguing that a “transnational capitalist class” that includes Third World elites profits from global capitalist imperialism—which includes some systems of neocolonial interconnection as I have defined it—“at the expense of the subaltern classes in both the First and Third Worlds”); Rajagopal, *supra* note 12, at 10-11 (describing how Third World elites, relying on similar concepts and values that originated under colonial rule, have oppressed and dispossessed the majorities under their rule).

173. An assumption underlying the arguments that follow is that the arrangement of the international order defined by the doctrine of nation-state sovereignty in its current form offers no plausible means for achieving true decolonization.

174. It is my view that, nothing short of an apocalyptic disaster is likely to disrupt the levels of global interconnection and interdependence enjoyed today. Notwithstanding the resurgence of nationalist, xenophobic discourses around the world, the global capitalist order remains unshaken and dependent on global interconnection. Consider a recent United Nations projection that 82% of the expected population growth through 2050 in high-income countries will be due to international migration. *See* POPULATION DIV., UNITED NATIONS DEP'T OF ECON. & SOC. AFFAIRS, ESA/P/WP.241, WORLD POPULATION PROSPECTS: THE 2015 REVISION; KEY FINDINGS AND ADVANCE TABLES 6 (2015), <https://perma.cc/3ZSX-2JPC>.

Whereas decolonization is typically considered a practice of political collectives (the nation-state in particular), this Article proposes that in light of how badly this arrangement continues to fail Third World peoples, Third World persons can take actions that we should understand as *decolonial*. These are actions that are responsive to the conditions of neocolonial subordination—actions that should be recast as attempted decolonization at a personal level. Colonialism and neocolonialism are best understood as structural harms, and I have highlighted above that achieving political equality or decolonization would require structural change. The point is that where the necessary structural change is not forthcoming, action can be taken by individuals disadvantaged by the status quo that can increase their individual capacities to self-determine, and this personal pursuit to enforce political equality should be viewed as a matter of corrective distributive justice.

For some Third World persons, at least one available means of pursuing political equality and asserting sovereignty (the capacity to self-determine)—together, *decolonization*—may very well be migration. By migration, I mean the act of leaving one's place of birth and moving across national borders in pursuit of greater capacity to self-determine through territorial admission and political inclusion. This migration may be temporary or indefinite, depending on the circumstances and desires of the persons involved, and entails territorial and political incorporation into the destination nation-state. Legal migration from the Third World to the First forms part of this picture. When, say, a Zambian or Indian student chooses to pursue study or employment in Europe in pursuit of a better life than she believes possible in her country of nationality, and where what makes Europe "better" and her country "worse" is a product of neocolonial advantage, her authorized admission and inclusion in Europe should count as decolonial in the individual terms advocated here.

However, the most urgent implication of this thesis concerns *unauthorized* Third World migration, especially by politically and economically marginal persons who today either perish on their journeys or do make it to First World states but are then perceived and treated as "illegal immigrants" and as excludable political strangers.<sup>175</sup> The thesis supplies an alternative lens for assessing the claims to admission and inclusion of Third World migrants who violate existing laws to settle in First World territories, and whose motivation—the desire for a better life—is itself the product of a calculus structured by persisting neocolonial advantage. For the Zimbabwean Third World migrant whose territorial presence is unauthorized by the British

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175. I view this as the most urgent implication, since unauthorized migrants today experience some of the worst forms of human rights violations under the existing, unethical migration governance regimes. Rethinking the foundations of the law that sustain these violations is a priority because of the severe and disparate toll of the status quo on unauthorized migrants.

government, the migration as decolonization thesis casts her as a de facto co-sovereign relative to de jure British citizens, and also attributes to her a right to de jure recognition, admission, and inclusion. My thesis casts First World immigration policies that prohibit admission and inclusion of Third World migrants as unethical.

I argue that Third World persons are entitled to a form of First World citizenship as a matter of corrective, distributive justice.<sup>176</sup> I emphasize citizenship here as primarily remedial rather than fully reparatory.<sup>177</sup> The

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176. See *infra* notes 200-04 and accompanying text.

177. Granting First World citizenship to Third World migrants would recognize their co-sovereign status and correct an unethical set of power relations by redistributing the power to achieve greater prospects of equality. There is a corrective justice dimension to this, in the sense that redistribution is made necessary by a historical wrong and its continuing, present-day legacy. See Linda Bosniak, *Wrongs, Rights and Regularization*, 3 MORAL PHIL. & POL. 187, 214 (2016) (discussing the need for more rectificatory theories of immigration justice). I view this enterprise as related to the enterprise of theorizing colonial reparations, but nonetheless distinct.

Claims for colonial reparations are grounded in the desire for comprehensive justice for colonialism and its legacy. See, e.g., *10-Point Reparation Plan*, CARICOM REPARATIONS COMMISSION, <https://perma.cc/T4UV-5MNS> (archived May 4, 2019) (outlining a comprehensive vision of reparations for slavery and colonialism). In international law, states are required to “make full reparation” for “internationally wrongful act[s]”; this reparation entails “restitution, compensation and satisfaction, either singly or in combination.” See Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 91, 95 (2001). The International Law Commission defines restitution as “re-establish[ing] the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; [and] (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.” *Id.* at 96. Where restitution is inappropriate or insufficient, compensation covers “any financially assessable damage including loss of profits.” *Id.* at 98. And finally, satisfaction “may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality.” *Id.* at 105.

I do not argue here that migration is a just entitlement of Third World peoples because it would achieve the restitution, compensation, and satisfaction purposes of reparations in international legal doctrine. My present interest is primarily in the ethical obligations we should associate with a particular set of power relations (neocolonialism), though I recognize that arguments for colonial reparations could include claims to First World admission and inclusion, and this reparations argument is one I am presently developing. Daniel Butt, for example, has articulated the foundation of the colonial reparations argument as the following:

Insofar as historic colonial empires subjected peoples to political control, it may be thought that colonial subjects became members of a larger political entity, and so were entitled to a fair share of this entity’s social production—a share which was denied to them at the point of institutional decoupling during decolonization.

Butt, *supra* note 26, at 896. He explains that this continuing injustice provides a basis for contemporary colonial reparations arguments. See *id.* at 894-96.

Viewed in the reparations frame, citizenship for those Third World persons who choose to migrate to the First World in search of a better life becomes one avenue for

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conception of citizenship at work is functional, and one such theory offered by Ayelet Shachar and Ran Hirschl is illuminating. They have argued that citizenship can be understood as conferring the right to exclude on the one hand and the right not to be excluded on the other. With respect to the right to exclude, citizenship plays a *gatekeeping* role, “determining who shall be granted full membership in the polity still remains an important prerogative of the state.”<sup>178</sup> As such, citizenship law demarcates insiders and outsiders.<sup>179</sup> Citizenship also performs a different function—it plays an *opportunity-enhancing* role.<sup>180</sup> In this mode it effects the right not to be excluded: “[T]he right not to be excluded means that as members of the political community, individuals are seen as equal partners in the common enterprise of *governing* the commonweal. They stand in a special interpersonal relation to each other; they are co-owners or partners in a shared political community.”<sup>181</sup> The right not to be excluded also imposes on joint owners or partners a duty “to consult with one another, providing each a secured and inalienable ‘voice.’”<sup>182</sup> The ability to have a say in the collective governance of one’s political community is an important part of what citizenship confers.<sup>183</sup>

In its gatekeeping and opportunity-enhancing modes, citizenship operates as a form of property, where “what each citizen holds is not a private entitlement to a tangible thing, but a relationship to other members and to a particular (usually a national) government that creates enforceable rights and duties.”<sup>184</sup> Viewing citizenship in this light emphasizes the role it plays in

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colonial reparations. For a reparations theory of asylum based in human rights, see James Souter, *Towards a Theory of Asylum as Reparation for Past Injustice*, 62 POL. STUD. 326 (2014). For examples of scholarship on colonial and slavery reparations, see Catherine Lu, *Colonialism as Structural Injustice: Historical Responsibility and Contemporary Redress*, 19 J. POL. PHIL. 261 (2011); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325-26, 362-97 (1987); and Ali A. Mazrui, *Global Africa: From Abolitionists to Reparationists*, AFR. STUD. REV., Dec. 1994, at 1.

178. See Ayelet Shachar & Ran Hirschl, *Citizenship as Inherited Property*, 35 POL. THEORY 253, 260 (2007).

179. See *id.* at 259-67.

180. See *id.* at 267.

181. *Id.* at 264 (footnote omitted).

182. See *id.* (referencing the concept of “voice” as articulated by Albert Hirschman (citing ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970))).

183. See *id.* at 267.

184. See AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 29 (2009). This conception of citizenship as property does similar work to Cheryl Harris’s earlier theorization of race—whiteness, specifically—as property. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1715-77 (1993). Harris articulates the operation of whiteness as property in the context of the United States, but it is  
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“distribut[ing] opportunity on a global scale.”<sup>185</sup> Shachar and Hirschl challenge territoriality (*jus soli*) and parentage (*jus sanguinis*) as bases for citizenship allocation on the ground that they result in “the transfer of membership entitlement as a form of inherited property.”<sup>186</sup> Existing citizenship laws “perpetuate and reify dramatically differentiated life prospects by reliance on morally arbitrary circumstances of birth.”<sup>187</sup> To promote equality and counter the injustice of what Shachar has termed “birthright lottery” as the basis for allocation of citizenship and corresponding opportunities and entitlements,<sup>188</sup> Shachar and Hirschl propose “taxing’ the intergenerational transmission of political membership” through a “birthright privilege levy.”<sup>189</sup> Whereas they propose a citizenship tax on affluent polities, I offer a different solution. I propose enhancing equality or opportunity through the migration of Third World persons (if they so choose<sup>190</sup>) to First World nation-states, as well as their formal political inclusion through First World citizenship.

Citizenship must be understood as a complex institution comprised of variable suites of rights and duties that can change depending on the circumstances. Recognizing this complexity is vital where transnational migration, such as that of Third World economic migrants, is concerned.<sup>191</sup>

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arguably applicable on a global scale and has value for making sense of First World resistance to Third World, nonwhite national incorporation. This is an idea I explore further in a separate work in progress on racialized or xenophobic exclusion achieved through the companion institutions of nationality and citizenship. *See* Achiume, *supra* note 29.

185. *See* Shachar & Hirschl, *supra* note 178, at 254.

186. *See id.* (emphasis omitted). They, too, consider the role that citizenship plays in modulating global inequality, highlighting the differences between the regions I have designated “First World” and “Third World”: “Virtually all of the world’s extreme and moderate poor live in Asia, Africa, and Latin America. The overwhelming share of the extremely poor live in Southeast Asia and sub-Saharan Africa . . . .” *Id.* at 256. In this context, Shachar and Hirschl have called attention to “the crucial ‘wealth-preserving’ aspect of hereditary citizenship—the dramatically differential opportunity structures to which individuals are entitled, based on the allocation of political membership according to predetermined circumstances of birth.” *Id.* at 274.

187. *Id.* at 258.

188. *See generally* SHACHAR, *supra* note 184.

189. *See* Shachar & Hirschl, *supra* note 178, at 277-79 (“The basic idea is that revenues generated by the ‘levy’ on inherited citizenship in an affluent polity would be devoted to specific projects designed to improve the life circumstances of children who are most adversely affected by the legal connection drawn between circumstances of birth and citizenship.”).

190. Not all who suffer due to neocolonial subordination have the privilege of choosing to migrate. Illness, poverty, lack of networks, and other factors will all mean that decolonial migration is unavailable to many, and, for such persons, alternative approaches are necessary.

191. *See* Rainer Bauböck, *Towards a Political Theory of Migrant Transnationalism*, 37 INT’L MIGRATION REV. 700, 705 (2003) (“Migration is basically an international phenomenon  
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Citizenship in most nominal liberal democracies displays this complexity: For example, citizens residing abroad might not be eligible to vote in their country of citizenship due to their foreign residency.<sup>192</sup>

This is important to highlight for two reasons. First, arguing that Third World migrants have First World citizenship claims that include national admission and inclusion is consistent with the possibility that Third World citizenship in First World nations may exclude rights and duties irrelevant to rectifying colonial or neocolonial subordination. For example, it is conceivable that permanent residence may not always be required to honor migration as decolonization claims if, say, circular migration can deliver the necessary political equality considerations motivating Third World economic migration. The point is that the ultimate form of First World citizenship that must be conferred to satisfy Third World migration as decolonization claims may, at least in theory, be more qualified than the form and content of the citizenship enjoyed by their First World counterparts. Second, this Article does not discuss the implications of the co-sovereignty claims of the migration as decolonization thesis for Third World persons who cannot or choose not to migrate but are nonetheless subject to neocolonial subordination.<sup>193</sup> But viewing citizenship as a diverse and variable institution allows for the possibility that Third World persons who do not migrate might nonetheless bear other rights of First World citizenship appropriate to their territorial residence in the Third World.

Citizenship as conceived of here is not unprecedented, and to a certain extent it echoes notions of imperial citizenship that, for a time, enjoyed serious attention in the anglophone empire. Thus, although the proposal advanced here will seem radical to many readers today, there are dimensions of it that may strike others as retrograde or even “colonial” insofar as it calls for the formal recognition of First and Third World political and economic bonds through the legal institution of citizenship.<sup>194</sup> Duncan Bell has proposed a new

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insofar as it involves a movement of persons between the territorial jurisdictions of independent states; it becomes transnational only when it creates overlapping memberships, rights and practices that reflect a simultaneous belonging of migrants to two different political communities.”).

192. For an analysis of differences in rights, including the right to vote, between resident and nonresident citizens, especially in Europe, see Rainer Bauböck, *Expansive Citizenship—Voting Beyond Territory and Membership*, 38 POL. SCI. & POL. 683, 683-85 (2005). For a discussion of territorial residence as a factor that can produce differential citizenship rights, see Rainer Bauböck & Virginie Guiraudon, *Introduction: Realignment of Citizenship; Reassessing Rights in the Age of Plural Memberships and Multi-Level Governance*, 13 CITIZENSHIP STUD. 439, 442-46 (2009).

193. This aspect of the sovereignty as interconnection argument warrants independent attention.

194. Even as the conception of First and Third World belonging advanced here will seem colonial to some, to others it will evoke the arguments of anticolonial francophone  
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analytical delineation of existing models to describe the different conceptions of imperial citizenship debated in anglophone political thought around the beginning of the twentieth century, a time when no unified citizenship status existed within the British Empire.<sup>195</sup> In his account, a central point of contention in these debates was how “egalitarianism and particularity” in the treatment of different empire subjects should be apportioned.<sup>196</sup> Notably, in these debates imperial citizenship was theorized in a manner that both explicitly and implicitly facilitated the racial and political subordination of Third World peoples.<sup>197</sup>

These historical perspectives offer a cautionary tale. Broadly construed, extraterritorial “imperial” citizenship is by no means a guarantee of substantive political equality for non-Europeans. It has been, and remains, compatible with Third World subordination.<sup>198</sup> But this Article’s argument is not that citizenship guarantees political equality, only that it offers a more promising means to pursue political equality between First and Third World peoples than the political strangerhood of nonnational status can ever offer, at least for marginal Third World citizens. And recalling the historical debates on imperial citizenship serves as a reminder that the most salient boundaries of political community, which today seem rigidly coextensive with nation-states, have not always been understood this way. As another scholar has put it: “The identity of the ‘we’ is a flexible political resource, adaptable to changing circumstances and new crises.”<sup>199</sup>

Although my political argument relies on a distributive justice claim, it is distinct from the cosmopolitan distributive justice claims for open borders<sup>200</sup>

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African leaders at the dawn of the decolonization of their nations. These leaders argued for a confederation comprising France and its former colonies on equal political terms, in part on the ground that these former colonies were too economically dependent on France to have a chance of surviving the formal political independence of separate nation-statehood. *See, e.g.,* COOPER, *supra* note 44, at 2, 9-11, 16-17.

195. *See* Duncan Bell, *Beyond the Sovereign State: Isopolitan Citizenship, Race and Anglo-American Union*, 62 POL. STUD. 418, 420-24 (2014).

196. *See id.* at 421.

197. *See id.* at 420-24, 426.

198. For an insightful and novel account of how race can interact with the institution of citizenship to subordinate formal citizens on the basis of race, see Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633 (2005). For an analysis of racial and ethnic subordination of minorities through the institution of citizenship in postcolonial nation-states, see Kamal Sadiq, *Postcolonial Citizenship*, in THE OXFORD HANDBOOK OF CITIZENSHIP 178, 180-83 (Ayelet Shachar et al. eds., 2017).

199. Doty, *supra* note 47, at 126.

200. *See, e.g.,* Carens, *supra* note 24, at 251-52.

or other institutions of global justice.<sup>201</sup> Linda Bosniak has noted that immigration theory has tended to be dominated by metaphysical distributive justice claims, with much less attention paid to rectificatory justice.<sup>202</sup> My arguments are less metaphysical, anchored instead in a historically contingent account of border justice.<sup>203</sup> History plays a scoping function: It helps identify the scope or bounds of the political community (neocolonial empire) and how power is constituted within it (unfairly). History also plays a related identification function: It supplies important information about the identity of the peoples bound up in the political community. The theory advanced here is thus both corrective and distributive.<sup>204</sup>

One question that arises is whether this decolonial migration right is reciprocal. In other words, does the co-sovereignty between First and Third World nations entail an equal entitlement on the part of First World citizens to Third World nation-state membership? Does a British citizen have reciprocal rights to Zimbabwean admission and inclusion? The answer to this question depends on one crucial factor: whether the migration at issue is responsive to, or seeks to counter, neocolonial subordination. This matters because, as argued above, migration as decolonization is at its core a corrective distributive justice argument. Thus, if: (1) a First World citizen occupies the political and economic margins of the First World as a result of colonial or neocolonial domination exerted by a Third World nation-state (this is a very big *if*); (2) the First World citizen chooses to resist this subordination through membership in a Third World nation-state; and (3) such membership at least in principle offers a potential corrective benefit, then that First World citizen

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201. See, e.g., Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 62-66 (1992). Pogge takes the moral cosmopolitan view that “every human being has a global stature as an ultimate unit of moral concern” and discusses the institutional distributive justice implications of this view. See *id.* at 49. My arguments, on the other hand, are decidedly communitarian, and the distributive justice obligations I focus on arise from the specific relationships instantiated by neocolonial empire. My arguments are distinct from cosmopolitan arguments and respond to different questions. Cosmopolitanists seek an ideal theory of borders (among other things) as they apply to all human beings, whereas I am concerned with what justice requires where a particular historical context and political identity obtains. For an overview of the fundamental tenets and main variants of cosmopolitanism, see Simon Caney, *International Distributive Justice*, in THE COSMOPOLITANISM READER 134, 134-35 (Garrett Wallace Brown & David Held eds., 2010).

202. Bosniak, *supra* note 177, at 215-19.

203. Like Bosniak, “I embrace . . . a politically contextual, rather than metaphysical, understanding of the source of political norms.” See *id.* at 218.

204. A colonial reparations theory of migration governance (as opposed to the decolonization theory motivated here) would also need to account for distributive and corrective justice considerations. Olúfẹ́mi Táíwò has termed such a hybrid approach a “constructive view of reparations.” See Olúfẹ́mi O. Táíwò, *Reconsidering Reparations* 1-3 (2018) (unpublished manuscript) (emphasis omitted) (on file with author).

would have a valid migration as decolonization claim. But the current reality of neocolonial empire makes it unlikely that the first condition would regularly, or ever, be met.<sup>205</sup>

Additionally, not *all* Third World persons are equally eligible to make valid affirmative claims of migration as decolonization. Not all movement by Third World persons to the First World is the sort of economic migration that must underlie or characterize decolonial migration: responsiveness to neocolonial subordination and diminished sovereignty. Consequently, Third World political and economic elites may not have claims to decolonial migration entitlements notwithstanding their membership within the neocolonial empire and their national designation to the Third World. One example might be someone similarly situated to Robert Mugabe, the former President of Zimbabwe. In postcolonial Zimbabwe, Mugabe derived significant personal benefit from the subordinating forces of neocolonial empire, amassing great wealth and power notwithstanding his frequent outspokenness about the perils of neocolonialism.<sup>206</sup> Under the corrective distributive justice

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205. However, the postcolonial relationship between Portugal and Angola allows us to imagine a scenario in which these types of circumstances might occur. Angola was colonized by the Portuguese (and briefly and partially by the Dutch), and it played a central role in the Portuguese colonial empire, supplying slave labor as well as natural resources. See Mariana P. Candido, *African Freedom Suits and Portuguese Vassal Status: Legal Mechanisms for Fighting Enslavement in Benguela, Angola, 1800-1830*, 32 SLAVERY & ABOLITION 447, 449-51 (2011).

Today, independent Angola is a rapidly growing economy and exerts its economic and political influence on Portugal—so much so that a Portuguese commentator has described the relationship between the two in the following way: “Portugal, which was the colonizing country, has become colonized by Angolan investment.” See Paul Ames, *Portugal Is Becoming an Angolan Financial Colony*, POLITICO (updated Apr. 28, 2015, 3:40 PM CET) (quoting Celso Filipe, Deputy Dir., *Jornal de Negócios*), <https://perma.cc/7T5U-ZRVW>. Angolan elites benefit from this inverted relationship: “Well-off Angolan families are now the only people who can afford to shop on the [Portuguese] capital’s upmarket Avenida da Liberdade. They are investing in luxury apartments at Cascais, a fashionable seaside resort [in Portugal], and buying up companies hastily privatised by the authorities.” Claire Gatinois, *Portugal Indebted to Angola After Economic Reversal of Fortune*, GUARDIAN (June 3, 2014, 5:04 AM EDT), <https://perma.cc/JK7F-2GLK>. It is not inconceivable that Angolan interconnection with Portugal, insofar as it marginalizes and subordinates Portuguese citizens, may lead to movement by these citizens to Angola in pursuit of a better life. In a world where Angola’s relationship with Portugal assumed neocolonial features with Angola as the neometropole, such a relationship would, in principle, confer migration as decolonization claims on marginal Portuguese citizens in search of a better life in Angola.

206. See Achiume, *supra* note 159, at 133 (noting Mugabe’s outspokenness on the perils of neocolonialism); Ian Cobain, *Robert Mugabe’s Vast Wealth Exposed by Lavish Homes and Decadent Ways*, GUARDIAN (Nov. 17, 2017, 12:00 AM EST), <https://perma.cc/6U5C-XSR5> (describing Mugabe’s extraordinary wealth); Rob Wile, *Robert Mugabe Accumulated Riches as Zimbabwe Crumbled. Here’s What We Know About His Money*, MONEY (updated Nov. 21, 2017, 11:51 AM ET), <https://perma.cc/2QUB-8VUH> (same).

argument made here, he would have diminished claims, if any, to First World citizenship, because there was nothing subordinate about his position within the neocolonial empire that would make First World citizenship an appropriate distributive justice mechanism.<sup>207</sup>

So far, I have made the general argument for why First World nation-states have no right to exclude Third World migrants. I now introduce additional specificity as to what this general argument means in terms of individual First World nation-states and the identity of Third World migrants to whom they owe obligations of admission and inclusion. One might ask, for example, whether the United Kingdom only has an obligation to admit and include citizens of former British colonies, or whether it also has similar obligations to citizens of former French and Dutch colonies. And what about the former British dominions that achieved independence and are today First World settler-colonial nation-states themselves—Canada, Australia, New Zealand, and even the United States? Does the United States, for example, have no right to exclude Zambian nationals? And, for that matter, what about non-First World imperial powers such as China and Japan? Do they also hold obligations of admission and inclusion to Third World migrants?

All of these questions share the same analytical core and must be resolved by returning to the normative basis of the argument for the lack of a right to exclude. The normative bases I have foregrounded are the corrective distributive justice considerations that attach to co-sovereigns bound in neocolonial empire. Questions like those above are essentially probative of what historical and contemporary facts of interconnection are sufficient to achieve the threshold of co-sovereign status.<sup>208</sup> I propose the following heuristic: For any given First World Country *X*, the nature of its decolonial admission and inclusion obligations to Third World migrants from Country *Y* depends on the extent of exploitative benefit or advantage Country *X* derives from neocolonial empire and the extent of subordination or disadvantage that a given migrant endures by virtue of being a national of Country *Y*.<sup>209</sup> Already it should be clear that even among those who accept my ethical arguments as a

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207. From a purely reparations-oriented perspective, however, the analysis might be different. As a leader of Zimbabwe's anticolonial struggle who directly experienced the myriad harms of colonial subordination, insofar as the migration as reparations argument was sustained on the bases of colonial wrongs experienced by Mugabe that have not been repaired, migration-related claims may still be available to him.

208. Recall that history is probative of political identity and helps excavate the contemporary bounds of neocolonial empire and the nature of contemporary distribution of benefit within it.

209. Importantly, and by definition, all First World and Third World countries are part of neocolonial empire, and the decolonial claims articulated here may only be levied by members of this empire.

matter of principle, there may be marked differences in what the implications will be for specific countries, depending on beliefs about the status and role of those countries in neocolonial empire.

The narrow (and in my opinion, incorrect) view likely to enjoy the easiest consensus is a one-to-one obligation, whereby former colonial powers owe obligations only to citizens of their respective former colonies. I call this the *bilateral account*. This would mean, for example, that a Zimbabwean or a Zambian only has a claim to admission and inclusion in the United Kingdom, and can make no such claims with respect to any other former colonial power (such as France), because only the United Kingdom formally colonized her country of nationality. Such a view would be premised on the belief that neocolonial interconnection and subordination is a bilateral affair, creating ethical obligations that are confined to the formal, original authors of colonialism and the specific Third World peoples those colonizers officially incorporated (for the purposes of exploitation) into their empires.

While First World nation-states have no right to exclude citizens of their own former colonies, the nature of neocolonial empire and interconnection points to a much more expansive conception of the identity of those who can make the political equality demands that obviate right-to-exclude claims. Instead, the United Kingdom should be seen as neocolonially connected to, and in a relationship of domination over, Third World citizens of nation-states formerly colonized by its European counterparts in ways that produce co-sovereign relations even among peoples the British did not themselves colonize.<sup>210</sup> The same is true for every other former colonial power.

The justification for this more expansive *multilateral account* is that the creation and maintenance of neocolonial empire is fundamentally achieved as a joint enterprise among First World nation-states, and benefit or advantage accrues structurally to First World nation-states as a collective in ways that belie the narrow, bilateral account of interconnection and ensuing obligations.<sup>211</sup> As discussed above, multilateral institutions are dominated by First World states and that advantage erodes the persuasiveness of the bilateral account.<sup>212</sup> Even if Zambians owe the details of their colonial domination and its legacy more to the United Kingdom than to France, Zambia's enduring

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210. My argument is that the United Kingdom is sufficiently interconnected to France's former colonial subjects so as not to have a right to exclude them. The United Kingdom may well be more interconnected to its own former colonial subjects than to those of France, but I posit that its connection to former French colonial citizens nonetheless meets the requisite threshold of interconnection for co-sovereign relations.

211. For an argument that theorizes colonialism as a structural injustice that triggers joint and international responsibility, in addition to national liability that may be assessed vis-à-vis any given colonial power, see Lu, *supra* note 177, at 269.

212. See *supra* Part II.

neocolonial quasi-sovereignty arguably has more to do with the colonial logics embedded in multilateral institutions—and in international law, especially sovereignty doctrine—that accrue benefits to First World states as a collective. Put crudely, the power and benefit France enjoys within the World Bank and the IMF<sup>213</sup> and any other institution that sustains neocolonial empire and Third World subordination, as well as France's status as an effective sovereign nation, warrant French decolonial obligations vis-à-vis Zambians even though France never itself colonized Zambia.

This multilateral account of decolonial obligations is consistent with a recognition that some colonial powers have maintained especially strong relations of interconnection and subordination with their former colonies, compared to their relations with the colonies of other countries. The French Communauté Financière Africaine (CFA) zone offers a prime example.<sup>214</sup> To be clear, I do not mean to deny the unique political and cultural connections that exist between former colonial powers and the specific countries they colonized.<sup>215</sup> I instead argue that although France may be more deeply

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213. France is one of eight countries that enjoy direct representation within these institutions. See Ngaire Woods, *Unelected Government: Making the IMF and the World Bank More Accountable*, BROOKINGS REV., Spring 2003, at 9, 10. France has used both financial institutions to serve its national interests. See BRUNO CHARBONNEAU, FRANCE AND THE NEW IMPERIALISM: SECURITY POLICY IN SUB-SAHARAN AFRICA 75 (2008).

214. See Martin, *supra* note 149, at 218; see also *supra* note 149 and accompanying text.

215. Consider the example of present-day Cameroon, which was colonized first by Germany, then by both the United Kingdom and France. See WM. ROGER LOUIS, GREAT BRITAIN AND GERMANY'S LOST COLONIES, 1914-1919, at 147-48 (1967); WOODRUFF D. SMITH, THE GERMAN COLONIAL EMPIRE 35-36, 222, 232 (1978); Richard A. Joseph, *The German Question in French Cameroun, 1919-1939*, 17 COMP. STUD. SOC'Y & HIST. 65, 66-67 (1975); Martin Z. Njeuma, *Reunification and Political Opportunism in the Making of Cameroon's Independence*, 41 PAIDEUMA 27, 27 (1995) (Ger.). French Cameroon achieved independence and became a sovereign state in 1960, with the unification of Cameroon happening the following year. See Susan Dicklitch, *Failed Democratic Transition in Cameroon: A Human Rights Explanation*, 24 HUM. RTS. Q. 152, 162-63 (2002).

Present-day Cameroonians remain culturally and politically interconnected to former colonial powers in vivid ways, as the ongoing violent conflict between anglophone and francophone Cameroonians illustrates. This conflict is characterized by demands by subordinated and marginalized anglophone Cameroonians for independence from their francophone national government. See Azad Essa, *Cameroon's English-Speakers Call for Independence*, AL JAZEERA (Oct. 1, 2017), <https://perma.cc/2G6T-ZMKF>; Verkijika G. Fanso, *History Explains Why Cameroon Is at War with Itself over Language and Culture*, CONVERSATION (Oct. 15, 2017, 6:23 AM EDT), <https://perma.cc/NHF4-E3MH>. Anglophone Cameroonians argue that their shared cultural (and, in effect, colonial) identity warrants their political autonomy from francophone Cameroonians, see Fanso, *supra*, illustrating yet a different point. Some Third World political communities arguably understand their present-day connection to former colonial powers to be even deeper or more salient than the presumed fundamental connection international and national law insist these communities must have with fellow members of their respective territorial nation-state.

interconnected with Mali (a member of the CFA<sup>216</sup>) than with Zambia, France's neocolonial interconnection with Zambia still rises to the threshold that triggers obligations among co-sovereign peoples.

What about the decolonial obligations of settler-colonial nations, such as the United States, which achieved independence from their colonizers but which were founded on the colonial extermination and subordination of sovereign indigenous peoples, some of whom resisted and remain present within these settler-colonial territories? For peoples of the Fourth World—indigenous peoples and nations<sup>217</sup>—the decolonial arguments made in this Article may be moot to the extent that they emphasize political inclusion and equality through First World citizenship. They are moot for members of indigenous nations that hold the formal citizenship status of the respective settler-colonial nation-state,<sup>218</sup> but they apply where members of indigenous nations are denied formal recognition as citizens. Of course, the subordinate status of many Fourth World peoples who are formal First World citizens speaks to the fundamental substantive inequality that is compatible with formal citizenship status.<sup>219</sup> My point here is simply that formal citizenship status is preferable to undocumented status.

With respect to Third World migration to settler-colonial nation-states such as the United States, the nature of neocolonial empire also suggests the absence of a right to exclude. This is because settler-colonial nations, including the United States, are central beneficiaries of neocolonial empire, wielding power and influence within and through neocolonial, transnational economic and political institutions to their benefit, and at the expense of the Third World.<sup>220</sup>

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216. See Martin, *supra* note 149, at 208.

217. For an initial treatment of what TWAIL stands to learn from Fourth World approaches to international law, see generally Amar Bhatia, *The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World*, 14 OR. REV. INT'L L. 131 (2012).

218. Examples include members of American Indian nations, who have been entitled to U.S. citizenship since the 1924 Indian Citizenship Act. See Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2017)).

219. See, e.g., Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 501-26 (2017) (illustrating how political and racial categories are deployed in U.S. constitutional jurisprudence in ways that reinforce the subordination of Indian tribes and their members, notwithstanding federal recognition of Indian tribal sovereignty and tribal members' possession of formal U.S. citizenship).

220. On the other hand, a country such as China—which can be seen as an ascendant global imperial power—does not have decolonial obligations within neocolonial empire. This is because the structural allocation of benefit within neocolonial empire, which is largely in keeping with colonial logics of benefit and exploitation, does not favor non-First World countries. See *supra* Part II.B. Recall the earlier stipulation that the political

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Consider the United States's deliberate actions to consolidate its status as beneficiary of neocolonial empire. Following World War II, the United States's hegemonic ascent included strategic action calculated to ensure that its political and economic interests would be advanced and preserved across the Third World, including through colonial structures.<sup>221</sup> Historians Roger Louis and Ronald Robinson, in arguing the United States's consolidation of its imperial enterprise during and through formal decolonization, have noted that beginning in 1957, "British and American officials . . . agreed that the African dependencies must evolve 'towards stable self-government or independence' as rapidly as possible 'in such a way that these [successor] governments are willing and able to preserve their economic and political ties with the West.'"<sup>222</sup> This goal was arguably achieved, and the extent of the advantage and benefit that the United States enjoys within neocolonial empire<sup>223</sup> warrants decolonial

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communities of interest for the present analysis are European colonial empires (with a focus on the period between the mid-eighteenth and the twentieth centuries and the territories colonized during this period) and neocolonial empire, which is the informal maintenance of colonial advantage through international, transnational, and national structures that shore up the effective sovereignty of First World nation-states and sustain the quasi-sovereignty of Third World nation-states. *See supra* note 88.

221. Aside from the formal colonies the United States governed in the Third World, including the Philippines and the Marshall Islands, it also played a fundamental economic and political role in sustaining French and British colonial power across the Middle East and Asia. *See, e.g.*, Wm. Roger Louis & Ronald Robinson, *The Imperialism of Decolonization*, 22 J. IMPERIAL & COMMONWEALTH HIST. 462, 483, 486, 493-94 (1994) ("Throughout the 1950s Anglo-American strategy rested on an oil cartel that allegedly fixed prices and divided 'producing and marketing territories' for 85 per cent of the world's supply outside the United States. The five American and two British multinationals involved represented the substance of empire in the Middle East." (quoting Memorandum from Eric H. Hager, Legal Adviser, U.S. Dep't of State, to G. Lewis Jones, Jr., Assistant Sec'y of State for Near E. & S. Asian Affairs, U.S. Dep't of State (Apr. 11, 1960), in 4 FOREIGN RELATIONS OF THE UNITED STATES, 1958-1960, at 630, 631 (Suzanne E. Coffman et al. eds., 1992))).
222. *Id.* at 487 (second alteration in original) (quoting Agreed U.S.-U.K. Paper: Means of Combatting Communist Influence in Tropical Africa (Mar. 13, 1957), reprinted in 27 FOREIGN RELATIONS OF THE UNITED STATES, 1955-1957, at 759, 759 (John P. Glennon ed., 1992)). The British and American collaboration to secure the assassination of nationalist Congolese leader Patrice Lumumba for his radical, emancipatory politics is but one illustration of how far these powers were willing to go to ensure neocolonial empire. *See id.* at 490-92; Boyd M. Johnson, III, Note, *Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader*, 25 CORNELL INT'L L.J. 401, 406-07 (1992); Stephen R. Weissman, Comment, *What Really Happened in the Congo*, FOREIGN AFF. (July-Aug. 2014), <https://perma.cc/86YZ-E8AZ>.
223. Consider the United States's power and influence within the Bretton Woods institutions. The United States "in effect chooses the president of the [World] Bank," it has "by far the largest share of votes," and it holds veto power "on some constitutional issues." Robert Hunter Wade, *US Hegemony and the World Bank: The Fight over People and Ideas*, 9 REV. INT'L POL. ECON. 201, 203 (2002); *see also* Robert K. Fleck & Christopher Kilby, *World Bank Independence: A Model and Statistical Analysis of US Influence*, 10 REV. *footnote continued on next page*

obligations. As a sovereign or super-sovereign within neocolonial empire, I posit that the United States has no right to exclude Third World migrants.

The case of the United States raises some distinct complications rooted in the difficulty of delineating different forms of contemporaneous imperial interconnection. By focusing on *neocolonial* empire, I privilege imperial formations that fundamentally retain the imperial logic and priorities of European colonialism. A different analysis might prioritize more squarely the imperial logic of global capitalism, for example.<sup>224</sup> The United States stands in a relationship of dominance over Zambia in ways that materially contribute to and benefit from Zambia's quasi-sovereignty, but the nature of that dominance and interconnection admittedly may be more fully explained and explored via a genealogy that does not privilege European colonialism and its legacy to the extent required by an account of neocolonial empire. It is conceivable that the imperial formation that generates the most salient ethical obligations where the United States is concerned—including obligations relating to migration—is distinct from neocolonial empire.<sup>225</sup>

The focus of this Article is decolonial migration, but decolonial migration is arguably an instantiation of a more general theory I refer to as *de-imperial migration*. De-imperial migration is any form of migration that is responsive to

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DEV. ECON. 224, 237-38 (2006) (finding that World Bank policy favors U.S. national interests). The U.S. influence over the IMF is similarly strong. *See, e.g.,* Axel Dreher & Nathan M. Jensen, *Independent Actor or Agent?: An Empirical Analysis of the Impact of U.S. Interests on International Monetary Fund Conditions*, 50 J.L. & ECON. 105, 121 (2007) (finding that U.S. allies receive IMF loans with fewer conditions than nonallies); Thomas Oatley & Jason Yackee, *American Interests and IMF Lending*, 41 INT'L POL. 415, 425-26 (2004) (finding that the United States influences loan conditionality in the global South).

224. Colonialism and capitalism are, of course, related in important ways, and each is understood better in light of the other. My analysis has nevertheless privileged colonialism and its political commitments, even though a different, fruitful analysis could privilege the political economy of capitalism to unearth the de-imperial rather than decolonial obligations and ethics that attach to this form of imperial interconnection. B.S. Chimni has argued, for example, that “neocolonialism has been succeeded by [the age] of global imperialism,” in which “universalizing capitalism penetrates and integrates national economies more deeply, imposing serious constraints on the possibility of a Third World state pursuing an independent path of development.” Chimni, *supra* note 153, at 36; *see also* Chimni, *supra* note 172, at 28-32 (elaborating on global capitalist imperialism). Global capitalist imperial interconnection likely generates de-imperial migration ethics not fully captured by my decolonial analysis.

225. Consider, for example, U.S. imperial domination in Central America, which arguably warrants centering of a different politics, anchored in what Jason Colby has described as U.S. “corporate colonialism” in the region. *See* JASON M. COLBY, *THE BUSINESS OF EMPIRE: UNITED FRUIT, RACE, AND U.S. EXPANSION IN CENTRAL AMERICA* 13 (2011). Along similar lines, consider that Cold War interventionism or Latin American settler colonialism might generate different, if related, analyses to those explored in this Article.

informal imperial subordination and that offers a means of countering that subordination through individual (rather than structural) means of enhancing political equality.

Within neocolonial empire, the constraints are so extreme as to produce quasi-sovereignty for subordinate member states, and the interconnection so thorough as to create conditions of co-sovereignty among all individuals subject to it. Not all informal empire will exhibit these dynamics, but informal empire may always ground corrective distributive justice claims with implications for migration governance. One such implication is that a country such as China, which I would argue does *not* have decolonial migration obligations to Third World migrants, may nonetheless have de-imperial migration obligations toward them that are beyond the scope of this Article.<sup>226</sup> Neocolonial empire with its particular genealogy and colonial-era logic does not capture the dynamics of imperial interconnection that attach to China. It is beyond the scope of this Article to elaborate fully a general theory of de-imperial migration, but this is an urgent direction for international migration legal theory, introduced here with neocolonial empire as the example.

### C. Rethinking Sovereignty, Self-Determination, and Decolonization

The point of this Article's migration as decolonization thesis is not to argue for global open borders *per se*, or even for any specific arrangement of political and territorial borders that can be stipulated on an *a priori* basis.<sup>227</sup> It seeks to do something rather different, though its arguments may nonetheless have prescriptive implications. The purpose of this Subpart is to summarize the key claims and contributions presented above.

To recapitulate, the first yield of the migration as decolonization thesis is a reconceptualization of the ethical and legal implications of persisting

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226. Recall that I reserve "Third World" for those places and peoples subjugated by the *European* colonial project. China engaged in its own colonial projects and arguably has decolonial obligations to those still subordinate on account of Chinese colonialism, but because neocolonial empire does not accrue advantage to China nearly to the extent it does First World states, China is not responsible for decolonial claims generally. It may, however, be responsible for de-imperial claims by subordinate persons within China's expanding, informal empire, including in the Third World. For a careful study of Sino-African relations, including Chinese investment in Africa, see generally CHING KWAN LEE, *THE SPECTER OF GLOBAL CHINA: POLITICS, LABOR, AND FOREIGN INVESTMENT IN AFRICA* (2017).

227. It is conceivable, however, that contemporaneous, imperial overlap across the earth's surface generates de-imperial migration obligations that push national borders closer to the "open" end of the spectrum, resulting in a composite of "open-ish" borders by virtue of accretion of de-imperial obligations.

neocolonial subordination as mandating the admission and inclusion of so-called economic migrants from the Third World, in opposition to the dominant justification for their at-will exclusion. This reconceptualization is powered by an even more fundamental move, which results from the new approach to sovereignty advocated above and which builds on the immense contributions of other Third World sovereignty scholars. It supplants the extant international legal logic of formally independent, autonomous nation-states, each with a right to exclude nonnationals as a matter of existential priority, with the logic and ethics of imperial interconnection (specifically neocolonial interconnection). The migration as decolonization thesis posits imperial interconnection and the extraterritorial co-sovereignty relations it entails as the baseline from which Third World migration to the First World must be assessed and negotiated. What is vital here is that First and Third World peoples, as co-sovereigns, bear an equal right and stake in First World national borders.

When the inclusion claims of Third World migrants are underwritten by their interests in political self-determination, these claims have hefty ethical force as levelled against the beneficiaries of neocolonial advantages. The unauthorized movement of Third World migrants across international borders, as they reject the partial sovereignty of Third World nation-states, should be understood to enact an important step in a process that offers the individual her best chance at self-determination absent real decolonization. What is widely condemned and reviled as unauthorized economic migration when undertaken by Third World migrants should instead be understood as radical political action of Third World persons seeking to formalize their status as co-sovereigns of the First World through citizenship.

This Article thus frames decolonial migration as a high form of political agency, which is in part about realizing (in the “making real” sense) and fulfilling individual autonomy—and doing so through decisions about how one relates to the political communities or collective self-determination vehicles on which individual self-determination rests.<sup>228</sup> In addition to the individual autonomy dimensions of migration, migration itself is a powerful technology for creating, consolidating and reforming political community. Colonial

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228. As Sherally Munshi has urged, “[w]e might begin by recognizing that migration itself is always a political act, an act of self-determination, and an expression of individual freedom.” Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 YALE J.L. & HUMAN. 51, 78 (2016). To be clear, the agency of Third World migrants who risk death to cross borders is severely constrained, and my characterization does not seek to trivialize the coercive forces that underlie this extreme risk-taking, even where imminent death or persecution are not at play.

migration was an exercise of such political agency, so it is no surprise that European international law and political theory defended it. But just as migration creates and consolidates political community, it also destroys, distorts, and threatens it. Colonial migration did so to the Third World,<sup>229</sup> and some might say that contemporary Third World migration threatens to have such effects on First World nation-states. The aim of this Article is to establish that to the extent Third World migrants are seen as a threat to First World nation-states, they are more properly understood as only truly threatening the continuing and illegitimate First World subordination of Third World peoples, with whom they share the neocolonial empire that remains in effect today. The centrality of human mobility to the shaping and reshaping of the borders of political community partially explains the striking efforts that nation-state governments exert in managing mobility and perceptions of mobility. But this special feature of human mobility arguably also means that its exercise, when pursued with the possibility of achieving greater equality among members of shared political communities, is fundamentally important and deserving of legal protection.

The policy payoff of this theoretical move would be its elaboration of changes to existing international migration regimes and national borders that would advance political equality for Third World persons, especially those whose marginality drives them to migrate in pursuit of enhanced self-determination. As mentioned in the Introduction, an example of a context where such reform is urgent is migration policy involving the African Union and the European Union. At present, the right to exclude purportedly means that European and African nation-state collaboration to contain Africans in Africa is ethically sound. From the perspective of neocolonial interconnection, this containment is revealed as an intervention that reinforces the subordinate political and economic status of marginal Third World citizens who have just as much claim to First World nation-state inclusion as do the citizens of those countries. The salience of neocolonial subordination demands that both Europeans and Africans have an *equal* say in the prospect and terms of European nation-state border closures with respect to Africans, as reflected in multilateral and bilateral treaties. Negotiations should be as among co-sovereigns, and the migration policies agreed to must legally protect decolonial migration. This means that rather than repatriating African economic migrants attempting to reach Europe (the current approach), African and

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229. See *supra* Part II.A.

European nation-states should be collaborating to find ways to facilitate migration that enhance the political equality of Africans.<sup>230</sup>

The second yield is to center migrants and the political equality ambitions of their movement as capable of suggesting more ethical, and perhaps more sustainable, contours of territorial and political borders. In other words, contrary to an a priori stipulation of an open-borders regime between the First and Third Worlds, the call is to look to the agents, impetus, and patterns of decolonial migration as vital sources of information about border regime institutional design. Third World migrants—including unauthorized economic migrants—emerge as a vital new “epistemological source.”<sup>231</sup> As Mari Matsuda has powerfully argued in a different context: “The method of looking to the bottom can lead to concepts of law radically different from those generated at the top.”<sup>232</sup>

There is reason to believe that what we might consider a “decolonizing consciousness” forms part of the ethical calculus unauthorized migrants use to make sense of their migration to the First World. An ethnographic study by geographer Dominic Pasura describes Zimbabwean migrants in the United Kingdom sheds light on this calculus. This study explores Zimbabweans’ explications of the motivation and justification for their legal and illegal presence in the United Kingdom in terms of the British colonization of Zimbabwe.<sup>233</sup> The narratives of two of the study participants (both

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230. Although my analysis above highlights the remedial potential of citizenship, for persons drawn to international migration as a decolonial strategy, *visas* may be an appropriate institutional form of political inclusion. Whereas citizenship is the first-prize institution for those seeking formal political and legal inclusion in a given nation-state, visas that grant “access to the goods of membership” in a nation-state with effective sovereignty can also be seen to perform a decolonial function. See Ayelet Shachar, *Children of a Lesser State: Sustaining Global Inequality Through Citizenship Laws*, in NOMOS XLIV: CHILD, FAMILY, AND STATE 345, 381 (Stephen Macedo & Iris Marion Young eds., 2003).

231. See Matsuda, *supra* note 177, at 325. Critical race theory scholar Mari Matsuda has argued that those who have direct experience with racial and other forms of oppression are essential to the production of knowledge intended to advance the emancipation of those groups. See *id.* at 324 (“Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.”). This penetrating insight precisely captures one of the important lessons generated by the migration as decolonization thesis: Migrants themselves, and especially those who move without authorization, represent an important source of knowledge regarding the benchmark for justice in immigration and what a legal arrangement faithful to that benchmark would look like.

232. *Id.* at 326.

233. See Dominic Pasura, *Competing Meanings of the Diaspora: The Case of Zimbabweans in Britain*, 36 J. ETHNIC & MIGRATION STUD. 1445, 1448-52 (2010).

Zimbabweans living in the United Kingdom) make the point poignantly. One participant, Mthokhozisi, recalled:

One day I went to central London. On my way back I saw a white person lying on the floor in an alley close to some shops. I . . . asked, “Why are you sleeping on the floor?” The white person shouted at me saying, “Why are you here in England? Why don’t you go back to your country?” I replied him, “To my country, where?” And the white person said, “Where you come from.” But I said to him, “I have come to England to take back the money you stole from my country. You know what, in my country where I come from we used to herd cattle in open trenches [mines] and when I asked my father who dug those trenches I was told it was a white man. The white man dug the trenches looking for money. And I have come here in search of that money. *Handiti makambodyavo kumba kwedu nhasi todyavo kwenyu* [As you once ate in our house now it is our turn to eat in your house].<sup>234</sup>

Another, Matthew, observed:

This country [the United Kingdom] takes responsibility why we are here. It’s because of colonialism. The British people oppressed us; they took our land and made us live on infertile land. We were made captives in our own land . . . . People grew up under oppression and it became even worse when we attained our independence as our economic situation deteriorated. It’s our turn to come to this country. God is making an equation that somebody who used to gain might also, even though not suffering, serve somebody.<sup>235</sup>

Pasura argues that the concept of “reverse colonization”—a term deployed by at least one of his study participants—enhances understanding of Zimbabwean migration patterns to the United Kingdom.<sup>236</sup> His study finds an explicit framing of economic migration as a moral assertion of agency that seeks to counteract colonialism and its legacy.<sup>237</sup> What Pasura and the

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234. *Id.* at 1449 (second and third alterations in original).

235. *Id.*

236. *See id.* at 1448-49. Pasura quotes a Zimbabwean study participant identified as Prosper:

When white people came to Zimbabwe they didn’t come to learn from us, they didn’t learn anything from us. We are here, and I can tell you 90 per cent of the people, in fact I would say 99 per cent whom you meet, most of them are economic migrants, they are here to get what they can get, it’s reverse colonization . . . . The only thing that I think is different is that when white people came to Zimbabwe they weren’t doing menial jobs but with a lot of Zimbabweans who are doing menial jobs.

*Id.*

237. *See id.* at 1450. Pasura explains:

As [one study participant] puts it, “I dislike the term economic refugee because the British were the first economic refugees in Zimbabwe”. Hence, there is an awareness among respondents that Britain, as a former colonial power, has a moral duty to [Zimbabwean migrants], at the very least to treat them fairly in their efforts to participate in the labour market without being stereotyped.

*Id.*

Zimbabwean migrants in his study conceptualize as “reverse colonization” is, as I have argued, better conceptualized as *decolonization*. It is migration responsive to the unfinished business of the European colonial project, and it seeks to counter the persisting subordinating effects of this project.<sup>238</sup> Insofar as the presence of these migrants in the United Kingdom is the product of colonial and neocolonial constraints on their ability to self-determine—to realize their vision of the good life—the “decolonizing consciousness” they express suggests that the thesis of this Article operates as a viable sociological claim or theory, in addition to being a normative proposition.<sup>239</sup>

Some might argue, motivated by a pragmatic concern, that any moves toward a less restrictive First World immigration policy for Third World persons must be weighed against the risk that this shift would result in endless droves of Third World persons migrating to the First World in numbers that would pose an existential threat to First World nation-states.<sup>240</sup> Of course, the impact that across-the-board loosening of First World border restrictions (as opposed to the more patchwork approach that results from one or a handful of such countries loosening border restrictions) would have on the volume and nature of Third World migration is difficult to predict. That said, there is good reason to believe that a systematic loosening of border restrictions would not result in the feared inundation. Not all, or even most, Third World persons view international migration as the path to their vision of a better life, and the vast majority have strong territorial connections to the parts of the Third

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238. “Reverse colonization” (where “reverse” is used as an adjective) risks implying the initiation of a new, separate colonial process. Instead, I would argue that the migration of Zimbabweans interviewed in the aforementioned study is better understood as an attempt to *undo* rather than initiate anew.

239. This Article makes no claims of proving this viability but instead takes the position that there is reason to take seriously an exploration of its viability. The work of socio-legal U.S. immigration scholar Emily Ryo offers an example of a successful and careful empirical exploration of a related phenomenon. See Emily Ryo, *Deciding to Cross: Norms and Economics of Unauthorized Migration*, 78 AM. SOC. REV. 574, 593 (2013) (“Understanding unauthorized migrants as moral agents capable of responding to and resisting perceived inequities underlying U.S. immigration policy may have significant implications for investigating not only their migration decisions, but also their behavior and incorporation patterns once they enter the United States.”).

240. To be clear, this floodgates concern has no per se bearing on the ethical implications of co-sovereignty, although it may be a concern that arguably will inform which attempts for complying with these ethical implications are viable. In other words, the floodgates cannot negate or diminish the Third World migrant’s claims to admission and inclusion, but might influence the specific institutional recognition of these claims.

World in which they reside.<sup>241</sup> The fact is, notwithstanding popular misconceptions in the West, most Third World citizens—even those who reside in politically and economically subordinate nation-states—have no interest in permanently relocating to the First World.<sup>242</sup> Furthermore, scholars of Third World migration to the First World have proffered empirical support for the claim that restrictive immigration policy actually *discourages* the return of Third World migrants to their countries of origin, suggesting that fewer restrictions might result in more circular migration patterns as opposed to an increase in permanent or long-term migration.<sup>243</sup>

More to the point, the work of transnationalist migration scholars illustrates concretely what lessons might be gained from “looking to the bottom” in the international migration context. Some ethnographers of migration have argued that a closer look at how migrants and immigrants actually live their lives recommends revising common conceptions of the relationships they form with receiving countries and the ones they sever with countries of origin.<sup>244</sup> These scholars have advocated the purchase of the theory of transnationalism—“processes by which immigrants forge and sustain multi-stranded social relations that link together their societies of origin and

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241. For example, a recent poll found that only 31% of sub-Saharan Africans expressed a desire to migrate, comparable to the rates for Europeans outside of the European Union (27%) and within the European Union (21%). See Neli Esipova et al., *Number of Potential Migrants Worldwide Tops 700 Million*, GALLUP (June 8, 2017), <https://perma.cc/RFD2-VEE3>.

242. See *id.* (noting that even in sub-Saharan Africa, which had the highest percentage of adults wishing to migrate, such individuals comprised only 31% of the population).

243. See Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPULATION & DEV. REV. 1, 21-24 (2012) (arguing that disruption in circular migration was an unintended consequence of restrictive immigration reform in the United States); Douglas S. Massey et al., *Why Border Enforcement Backfired*, 121 AM. J. SOC. 1557, 1588 (2016) (finding that enhanced U.S. border enforcement led to reduced, potentially to zero, circular migration across the Mexican border). For an early review of twentieth-century studies on return migration and the varied motivations of migrants returning to their countries of origin, see George Gmelch, *Return Migration*, 9 ANN. REV. ANTHROPOLOGY 135 (1980). For a more recent review of theories and studies of return migration, see Jean-Pierre Cassarino, *Theorising Return Migration: The Conceptual Approach to Return Migrants Revisited*, 6 INT’L J. MULTICULTURAL SOCIETIES 253 (2004).

244. See, e.g., LINDA BASCH ET AL., NATIONS UNBOUND: TRANSNATIONAL PROJECTS, POSTCOLONIAL PREDICAMENTS, AND DETERRITORIALIZED NATION-STATES 8-10 (1994); see also *id.* at 3-4 (“The word ‘immigrant’ evokes images of permanent rupture, of the abandonment of old patterns of life and the painful learning of a new culture and often a new language. . . . Today, immigrants develop networks, activities, patterns of living, and ideologies that span their home and the host society.” (citation omitted)).

settlement”—while “emphasiz[ing] that many immigrants today build social fields that cross geographic, cultural, and political borders.”<sup>245</sup> Transmigrants, as they are termed,

operate in the national arena of both their country of origin and country (or countries) of settlement, [and] they develop new spheres of experience and new fields of social relations. In their daily activities transmigrants connect nation-states and then live in a world shaped by the interconnections that they themselves have forged.<sup>246</sup>

Contemporary and historical migration patterns between the First and Third Worlds reflect the deep interconnection that results in Third World persons who live *transnational* lives across the neocolonial empire.<sup>247</sup> And to the extent that restrictive immigration policy has an impact on this transnational way of living, there is empirical evidence that it not only chills movement from the Third to the First World, but also chills movement in the reverse direction—the movement of Third World persons who are able to reach and enter the First World.<sup>248</sup> Studying decolonial migration patterns, then, might lead us to migration regimes and national border policies that are a better sociological (and normative) fit for transnational interconnection.

### Conclusion

This Article proposes a novel and radical break from prevailing theories and doctrine in the international law of migration. First and Third World peoples are *not* political strangers. They are quite the opposite: Due to neocolonial interconnection, First and Third World peoples are bound in a relationship of co-sovereignty that makes Third World peoples *political insiders* to First World nation-states. Corrective distributive justice considerations give Third World migrants entitlements to national admission and inclusion in the First World. Where Third World migration is responsive to neocolonial subordination, it should be understood as decolonial insofar as it enhances political equality, even if only as a formal matter. The migration as decolonization thesis foregrounds the political agency of migrants, and presents neocolonial interconnection and subordination as the baseline from which the ethics of immigration restrictions should be assessed, and from

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245. *Id.* at 7.

246. *Id.* at 8.

247. See Amparo González-Ferrer et al., *Distance, Transnational Arrangements, and Return Decisions of Senegalese, Ghanaian, and Congolese Migrants*, 48 INT’L MIGRATION REV. 939, 961 (2014).

248. See *id.* at 961-64.

which these restrictions should be negotiated. First World nation-states have no right to exclude Third World peoples, and creating a world that reflects this fact requires a complete reimagining of national borders and the institutions of political inclusion.

The area of international law that serves as the original motivation for and focus of this Article is migration. But the heart of this Article's claims rests on a reconceptualization of sovereignty more broadly. Given that sovereignty doctrine lies at the foundation of international law, asserting interconnection and interdependence as the new logic of this doctrine must have implications for the entire field of international law, not simply the subset relating to migration. It is beyond the scope of this Article to explore what "sovereignty as interconnection" means for international humanitarian law, international trade, or any other subfield of international law. What is possible, and has been attempted here, is an initial argument for what stands to be gained from a reconstruction of sovereignty as interconnection, as a first and important step in a much larger project.