

KRITIČKI OSVRT III
REVIEW ESSAY

J. Angelo Corlett
San Diego State University
Department of Philosophy

Kimberly Unger
San Diego State University
Department of Philosophy

How Not to Argue about Immigration

Abstract *This paper describes and assesses the arguments offered both against closed borders and in favor of a more open borders approach to U.S. immigration reform as those arguments are set forth in R. Pevnick's book, *Immigration and the Constraints of Justice*. We find numerous problems with Pevnick's reasoning on both counts.*

Keywords *Environmentalism, Historical injustice, Human overpopulation, Immigration, Indigenous rights, Statism, Utilitarianism*

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R. Pevnick (2011) introduces his “associative ownership view” which seeks to provide a better framework for thinking about immigration issues than other theories. (Pevnick 2011: 6) Metaethically, Pevnick “doubt[s] whether the demands of ethics can be properly seen as prescribing a uniquely acceptable line of action for individual agents... [he doubts] whether most interesting policy questions admit of only one acceptably just solution.” (Pevnick 2011: 7) In line with this, he focuses “on describing the constraints imposed by justice and, thus, on the acceptable range of possibilities.” (Pevnick 2011: 7) In addition, he takes himself “to be offering theoretical support for intuitive convictions that many of us will have regarding immigration that are not well explained, or accounted for, by existing theories.” (Pevnick 2011: 17)

Pevnick goes on to describe three dominant views in recent immigration discourse: statism, open borders, and shared identity. His taxonomy describes these views as follows. Statism “holds that considerations of justice are inapplicable beyond state borders and, accordingly, that citizens should select that immigration policy which is best for current citizens. ...little or no weight ought to be given to the interests of foreigners.” (Pevnick 2011: 8) Pevnick uses J. Carens' position to serve as the paradigmatic open borders position: “Borders should generally be open and ... people should normally be free to leave their country of origin and settle in another, subject only to the sorts of constraints that bind

current citizens in their own country. (Carens 1987, 252).” (Pevnick 2011: 12) The shared identity position is described by Pevnick as significantly less homogenous than statism and open borders views. But the shared identity approach to immigration assumes both that “justice requires public redistributive institutions along the lines of the modern welfare state” and that the “efficacy of such redistributive institutions depends on citizens sharing a common public culture or national identity.” (Pevnick 2011: 14) It is a position based on social trust amongst citizens in the state. While he sees some similarity between the shared identity view and his own associative ownership position, Pevnick ultimately rejects all three of these views, but incorporates some of their strengths into his own. For example, his standpoint is like statism in that he wants to justify some sovereignty, but differs in what his view takes to be the source and range of that sovereignty. Pevnick states:

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In short, the associative ownership view insists that the citizenry constitutes an association extending through time that comes to have a claim over state institutions as a result of the efforts—from physical labor and tax payments to obeying the law—that make such institutions possible. In this sense, the citizenry has a special ownership relationship with state institutions that distinguishes their position from that of foreigners. It is, I argue, this relationship that underlies or legitimizes claims of sovereignty. (Pevnick 2011: 11)

Moreover, there are limits to sovereignty for “the needs and interests of foreigners are neither beyond the scope of justice nor trumped by considerations of sovereignty.” (Pevnick 2011: 21) This is because Pevnick assumes that all individuals are, to some degree, moral equals. (Pevnick 2011: 23, 27) Thus a state should not have as its only goal its survival, as statism purports. (Pevnick 2011: 26)

Pevnick parallels a state’s “*prima facie* claim to make future decisions regarding the shape of [its] programs” with the claims of ownership derived from labor. (Pevnick 2011: 33) But can the claims of ownership derived from labor be extended to states, particularly if membership in them is non-voluntary? In order to resurrect our intuitions on this matter, he gives us two hypothetical examples: the examples of the Kidnapped Lecturers and the Family Farm. In the former, political theorists are kidnapped and forced to create lectures of which are later sold. The example suggests ownership can be derived from non-voluntary association because, Pevnick writes, “Although the political theorists were forced into this joint work, one cannot reasonably doubt the claim that their labor gives them a right to the profits that result from the sale

of the lectures as well as future rights to, and control over, the material therein.” (Pevnick 2011: 37) Unlike the example, however, ownership claims over states cannot expire given the citizens are constantly “engaging in the project in ways that renew claims of ownership.” (Pevnick 2011: 37) To describe this type of engagement Pevnick writes, “The citizenry raises resources through taxation and invests those resources in valuable public goods: basic infrastructure, defense, the establishment and maintenance of an effective market, a system of education, and the like.” (Pevnick 2011: 38) He uses the example of a farm which is passed down to the owner’s children (albeit with a delayed status of full privileges, given the heir’s age) to further suggest that the non-voluntary character of membership passed down through generations can withstand objections to ownership claims. (Pevnick 2011: 37-38)

Pevnick considers the objection that “states’ rights to self-determination cannot rest on claims of ownership because the history of states is clouded by injustice in a way that casts doubt on any claims of ownership that they advance.” (Pevnick 2011: 41) Bracketing the “dispute” (Pevnick 2011: 41) concerning reparations of historic injustices that would challenge claims to state legitimacy and sovereignty, Pevnick provides this response:

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[W]hatever the correct view about how to specify the particular demands of rectification, it should be consistent with the associative ownership approach, for all I have wanted to say is that the associative ownership position suggests that it is possible for a group to have legitimate claims of collective ownership over the institutions they construct. (Pevnick 2011: 41)

And Pevnick even concurs that reparative justice is owed in certain cases of historic injustice. (Pevnick 2011: 41) Yet in agreeing with this point, he fails to understand that unrectified injustices of genocidal and slavery proportions (against American Indians, for example) cannot generate a state’s moral right to legitimacy or sovereignty. Pevnick ends his concise discussion of this matter abruptly and moves forward to consider a “more sweeping claim.” (Pevnick 2011: 41) In cases where the injustices of the past make it such that there can be *no* legitimate claims of ownership, Pevnick thinks that accepting this would force us to give up all claims of ownership (such as “congregations, family farms, or states”) for “[o]ur history is too unavoidably inundated with injustice for any claim to be purely innocent.” (Pevnick 2011: 42) Yet giving up “*all* claims of ownership is surely a medicine worse than the symptom.” (Pevnick 2011: 42) Pevnick seems to suggest that instead we should note the legitimacy

of ownership claims based on degrees. (Pevnick 2011: 42, 58-59) That is, it is more legitimate to claim ownership of a car that was bought from “the founder of the car company [who had] resources that were procured as a result of involvement with colonialism,” than it is to claim ownership of a car you stole. (Pevnick 2011: 42) Pevnick denies “that historical injustice somehow delegitimizes (a) all claims to ownership in our world; or (b) all such claims advanced by states.” (Pevnick 2011: 42)

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But denying a claim is hardly equivalent to arguing against it. Pevnick owes us an argument in favor of his claims instead of his dismissiveness of what he takes to be problematic. But matters take a turn for even the worse for Pevnick as he resorts to the disingenuousness of misattributing a straw man argument to those who would disagree with him on such vital matters: “Rather than insisting on the impossible demand that claims have immaculate histories, we can only reasonably judge claims on a continuum: to what extent, we ought to ask, do the particular injustices underlying this claim undermine its legitimacy?” (Pevnick 2011: 42) The logical problems with this claim are manifold. But we shall note two. First, Pevnick’s use of the locution “reasonably” in this context is a subtle way to suggest that those who are reasonable will adopt his position on the matter. In this way, Pevnick resorts to a kind of *ad hominem* abusive strategy to win the point, suggesting in effect that if one is reasonable one will adopt his attitude toward the matter. We write “attitude” here in that there is no supporting argument for Pevnick’s claim. Second, and more important, is his suggestion that there are those who would “insist on the impossible demand that claims have immaculate histories” as a prerequisite for the moral legitimacy or sovereignty of a state. But there is no one in the scholarly literature on such subjects who takes such a position (Pevnick curiously cites no one), as it is a straw man at best. Those philosophers discussing matters of the rectification of historic injustices make no such demands. (Boxill 1972; Corlett 2003, Chapters 8-9; 2010; McGary 1999) They too see injustice and justice and responsibility for it on a continuum. (Corlett 2006, Chapters 7, 9) Indeed, some have made that very point long before Pevnick did.

Interestingly, Pevnick states, “[G]oods [like the ones described above] only exist through the coordinated decisions, labor, and contributions of members. Given this, members may come, through their efforts, to have an entitlement to the accomplishments and *misdeeds* of the community.” (Pevnick 2011: 53, emphasis provided) However, some argue that, just like governments and businesses can pass on debt to

their heirs, oppressors can pass on responsibility for their injustices to their heirs as well (although the heirs do not inherit the guilt or fault involved in their ancestors' injustices). (Corlett 2003, Chapters 8-9; 2010) If we can inherit responsibility nonetheless, then this serves as a reasonable reply to the challenge to state legitimacy and sovereignty that poses moral problems for Pevnick's position on associative ownership of states and their alleged rights to make immigration decisions based on such rights. This is crucial in that Pevnick also states that "we need a theory of rectification to explain what it means to have a legitimate claim, and I make no effort to present such a theory here." (Pevnick 2011: 42-43) But then how is it supposed to follow that, as he continues, "concerns regarding such injustices do not cast doubt on the position as a whole"? (Pevnick 2011: 43) Is Pevnick implying that historic acts of state genocide and massive land theft serve in certain instances as possible grounds for new rights that emerge for the victors of such injustices? In fact, this is precisely what Pevnick states in his agreement with J. Waldron's since refuted (Corlett 2003: 178-184) line of reasoning for such a claim. (Pevnick 2011: 43) Although Pevnick does admit that rectification for past injustices is important, to agree with D. Schmidtz in stating "Our task, then, 'is to live constructively in a world that we acknowledge is profoundly marred'" is perhaps not taking sufficiently seriously responsibility for past injustices. (Pevnick 2011: 42)

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Pevnick refines his associative ownership approach to immigration in the following way. First, he takes on the objection of whether his approach can justify excluding non-members from a state's territory, in addition to a state's institutions. (Pevnick 2011: 54) For "Citizens have a right to the goods they have produced, but not to the territory that long predates such goods. So, in providing such goods, the state may either figure out a way to provide such goods in an excludable fashion or accept that others present in the territory may free-ride on their contributions." (Pevnick 2011: 56) Pevnick responds to this by stating that "territorial control is a necessary precondition on continuing to provide such benefits (because it is needed in order to make possible their continued efforts at providing security, public health, protection from fraud, discouraging free-riders, and the like)." (Pevnick 2011: 57) The objector might press further, however, by claiming that the state's territory contains natural resources of which "ought to be shared across humanity instead of being hoarded by the citizens lucky enough to find themselves on such territory." (Pevnick 2011: 59) Pevnick grants that states ought then to

make a good faith effort to admit those who seek territorial access just for the sake of territorial access, but this obligation ought not to be construed in a way that forces it to admit all those who seek access to the citizenry's package of public goods... Second, there are ways to share the value of differential access to natural resources without also giving territorial access to all who would claim it in order to capture a stake in the publicly provided goods of the political community. For example, Thomas Pogge advocates a tax on the consumption of natural resources... (Pevnick 2011: 60)

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A clearer idea of Pevnick's view emerges in his criticism of the open borders advocates' claims that there is a moral right to freedom of movement. He writes, "[W]e already recognize as legitimate all kinds of limits on movement: you are not free to move onto property owned by others, to climb onto the lap of the Lincoln Memorial, or even to move too quickly on an interstate. These restrictions seem quite *unlike* the one confining us to a single room." (Pevnick 2011: 84) Because there seems to be a difference in these kinds of restrictions, Pevnick argues that there is a difference "between the need for a set of options *sufficient* for the creation of an autonomous life and an *optimal* set of options." (Pevnick 2011: 84) In employing some immigration restrictions but nevertheless admitting immigrants like asylum-seekers, we are preserving the need for a set of options sufficient for the creation of an autonomous life for both citizens and those who need the *legal* right to freedom of movement in order to protect their *moral* subsistence rights from the countries they are trying to emigrate from. (Pevnick 2011: 87, 101) Some might argue that states, rather than accept certain immigrants, should pursue development projects within the countries threatening their citizens' moral subsistence rights and thus that there should be no legal right to free movement for such immigrants. (Pevnick 2011: 90) Pevnick thinks that until such development projects make an impact some immigrants should have a legal right to free movement but that such development projects might not even be able to transform conditions in such a positive way. (Pevnick 2011: 90) Therefore, the legal right to free movement should still obtain given that the immigrants in question are truly oppressed. Related to this is the often held belief in the moral right to exit a state. To be consistent with his other beliefs, Pevnick surprisingly (given the often held belief in the right to exit) states, "[T]here is a strong case to be made for thinking that by pouring their resources into the training of [its citizens], the political community obtains a kind of partial claim to the skills of that individual and thus may restrict their exit for limited periods of time." (Pevnick 2011: 99) Perhaps in part to mitigate any out-

rage at such a conclusion Pevnick also writes, “Of course, that accepting public training will bring along with it temporary limitations on movement ought to be made clear prior to acceptance of that training.” (Pevnick 2011: 99) In conclusion, “neither rights of emigration nor rights of immigration are basic moral rights, but are instead of instrumental value because of their ability to (sometimes) protect interests that *do* rise to the level of moral rights.” (Pevnick 2011: 99) And, as suggested above, “it seems clear that [countries accepting immigrants based on their legal right to free movement] ought to be willing to accept *some* sacrifice” but not to such a degree that they “leave the world of moral requirements and embark upon the supererogatory,” like the heroes of Nazi Germany who secretly helped Jews. (Pevnick 2011: 102)

Furthermore, Pevnick believes that “as long as we live in a world marred by severe poverty and are without the capacity to quickly and effectively eradicate that poverty via development policies alone, limiting immigration for the sake of local environmental concerns elevates issues such as urban sprawl and the maintenance of sufficient wildlife above the basic interests of potential migrants,” and this is, Pevnick suggests, perhaps a “perverse” ordering. (Pevnick 2011: 153) First, “[w]hat matters is not the country’s total emission, but global emissions” so paying attention to how a country’s total emissions have been affected by immigration is a mistake. (Pevnick 2011: 152) This is especially so if immigrants are compelled to adopt more environmentally-friendly lifestyles in the country to which they emigrated. Secondly, though the preservation of wilderness areas and biodiversity is very important, we have to question whether prioritizing it “over the provision of basic necessities for potential immigrants” through restricted borders is justifiable. (Pevnick 2011: 152-153)

Pevnick notes that “birthrates among native citizens in the United States (and generally throughout receiving countries) are quite low, population growth in these countries is now mainly driven by immigration—both by their arriving in the country and their subsequently having more children.” (Pevnick 2011: 151) Because of this, we would have expected Pevnick to address whether admitting more immigrants (those who have the legal right to do so) puts more stress on the environment than had the immigrants not been permitted to emigrate and, presumably unlike before, produce children in the state to which they have migrated. Pevnick writes, “I am tempted to think that the environmental problems we face reflect more basic challenges to the way we

organize our lifestyles, challenges that ought not to be confused with, or pinned on, the largely separate issue of immigration.” (Pevnick 2011: 153) Yet insofar as immigration affects population size, and population size affects the environment, surely immigration and the environment are two issues more closely related than Pevnick believes.

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Pevnick denies “that concerns regarding population density provide reason to limit population” and that “the density of a community’s population affects the kind of life members can live and so seems to be a relevant consideration in thinking about justice and immigration.” (Pevnick 2011: 150) According to Pevnick, because the United States, in particular, “far from faces a land shortage” there is no good instrumentalist reason to close its borders. (Pevnick 2011: 150) In this way, “the interest of citizens of destination countries have in a reasonably stable social context does not necessarily override the interests or claims of potential immigrants.” (Pevnick 2011: 149) For Pevnick, the claim of current citizens in a country that there is no additional room for more immigrants is no justification for closing its borders. “Rather, the claim must be that current citizens prefer the lifestyle afforded by living in a country with a relatively low density of population.” (Pevnick 2011: 151) And this can be cashed out in terms of environmental concerns. (Pevnick 2011: 151)

Pevnick’s handling of these matters is to measure environmental concerns globally, instead of locally (Pevnick 2011: 152), and then to suggest that the humanitarianism of honoring the interests of potential immigrants outweighs concerns for the environment. (Pevnick 2011: 152-153) But he admits that his own opinion, undefended as it is, “hinges on claims regarding anthropocentrism.” (Pevnick 2011: 153) Further admitting that “These are enormously difficult and contested philosophical issues,” he nonetheless avers that environmental concerns are “largely separate” from the issue of immigration. (Pevnick 2011: 153)

Yet Pevnick’s dismissiveness regarding such matters effectively denigrates the religions and ways of being of indigenous populations, each of which construes humans as being part of the environment, part of nature, implying that all of nature has importance and that one aspect of it (such as humans) enjoys no privileged position. Pevnick’s apparently Christianized notion of a human-centered world is quite indicative of the very oppressive ideologies that colonized the Americas in the first place! For Pevnick, immigration has nothing to do with genuinely native populations, as such issues are brushed aside as being

intractable philosophical issues. But since they are so foundational to immigration discourse, conceptually speaking, no amount of utilitarian disregard for indigenous rights will suffice for sound reasoning. Nor will Pevnick's mere propounding of a speciesist and essentially Christian ideology which holds that humans count more than the environment and is meant to serve as a sound argument for his associative ownership way of thinking about immigration. For the right to control borders, normatively speaking, is contingent on the moral right of a legitimate state to assert its sovereignty in that way. But if a state is not morally legitimate, then it lacks the very legitimacy that ground its sovereignty to control its borders. One way, perhaps the only practical avenue, to attempt to gain a meaningful degree of such moral legitimacy is for a country founded on genocide and slavery and massive land theft to rectify its wrongs in various and meaningful ways and for some time. (Corlett 2010) For as justice and injustice are matters of degree, so are matters of state legitimacy. And as a state decides to take it upon itself to rectify its most horrendous evils, so too it can then begin to acquire a modicum of moral legitimacy. In turn, it can gain a moral right to sovereignty over its own affairs, one that can in some regard serve as a basis of its right to determine its own borders. But one would think, unlike Pevnick, that one such road to state legitimacy would entail the taking seriously of indigenous rights and interests at the very heart of one's theory of immigration.

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So other factors, such as the injustices committed against American Indians of who seem to be the original moral claim right-holders of the territory on which the U.S. resides, and whose land and natural resources were stolen from the Indians by the U.S. and some other colonial powers, have nothing to do with what grounds the moral legitimacy of a state? It is especially surprising that Pevnick does not address this given that, according to him, an instance of one country stealing natural resources from a group of persons who were entitled to them is an instance of an unjust inequality his view is supposed to take into consideration. (Pevnick 2011: 118) It is doubly surprising because his associative ownership theory of immigration is supposed to be dedicated to the articulation of justifiable immigration policy within the United States. (Pevnick 2011: 18, 163) Why, then, does Pevnick not address the rights of and injustices to American Indians in addressing justifiable immigration policy? It is at least in part because he fails to take indigenous rights and interests seriously, as he has completely written them out of the

complex equation of justice. For Pevnick's view is a simple-minded concern for what counts for those in power and those seeking to join that elite group. It is hardly a concern for the least well-off, and ironically for those on whose land the generations of us nonindigenous folk remain.

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In the end, Pevnick's reasoning fails to recognize in his own view what he criticizes various other scholars in doing. First, he notes that other scholars on immigration policy fail to "explicitly recognize that their policy proposals grow from normative commitments." (Pevnick 2011: 5) But Pevnick certainly fails to take indigenous rights seriously, as he propounds a theory of immigration that implicitly trumps indigenous rights to territory -- including indigenous moral rights to the territory of what is now called the "United States!" -- by a host of social utility considerations. Yet John Rawls, some of whose words are cited often by Pevnick, is famous for his philosophical destruction of utilitarianism because it disrespects rights which in turn undergird the separateness of persons which utilitarianisms fail to regard. (Rawls 1999: 3-5) Hence Pevnick falls right into the trap of being "stuck talking past one another because" he too is "committed to disparate normative criteria." (Pevnick 2011: 5) Pevnick also gives the impression that he is serious about "examining to what extent and in what type of circumstances frameworks for thinking about immigration are consistent with considered moral convictions." (Pevnick 2011: 6) Yet he is hardly serious about indigenous rights. This point embarrasses Pevnick's putative commitment to theoretical fairness when he writes: "It is important to deny the putative naturalness of positions and instead assess the assumptions on which they rely. Justifying an immigration policy depends on making explicit and defending the normative assumptions underlying the position." (Pevnick 2011: 6) His denial of indigenous rights precisely *is* natural to most theorists in the U.S., and yet Pevnick does nothing to question it. As we saw, he instead resorts to "remarks" that merely parrot the status quo in U. S. political theory, without even the slightest recognition that he ought to in a fair-minded manner take indigenous rights seriously.

An example of Pevnick's simplistic theoretical vision is found in his statement that "opinions on how to treat illegal immigrants or whether to militarize the border depend on underlying views about the nature of state sovereignty and the legitimacy of state control over territory. Thus skipping over these deeper philosophical conflicts in order to get directly to policy issues promises to leave us begging the question against those with whom we disagree." (Pevnick 2011: 7) It is unfortunate that Pevnick

fails to heed his own advice here. His wisdom that “it is imperative to assess the various paradigms people use to conceptualize controversies surrounding immigration” proves hypocritical as he ignores the rights of the most long-standing group of non-immigrants, the only ones on the continent who are not immigrants, in his discussion. Indeed, Pevnick’s discussion is indicative of every other US scholarly discussion of which we are aware in the sense that it represents one or another of the leading opinions of those in power who simply ignore the rights of those who possess the greatest moral claims to the territory in question. Pevnick’s reasoning is consonant with the New Utilitarians whose teleological commitment to equality (Pevnick 2011: 13) is so great that it actually commits another error against which Pevnick himself cautions, namely, “to misunderstand the grounds and responsibilities of that sovereignty” that a state is said to have (Pevnick 2011: 12) as it ignores the historical contributions to institutions made by political communities. (Pevnick 2011: 13) Recall that it is Pevnick who states that “positions that hinge on ignoring the historical process by which state institutions came about and the connection between such institutions and political community that constructed them (such as open borders views) are necessarily *incomplete*.” (Pevnick 2011: 39) But while Pevnick makes a “remark” or two about such issues, his remarks fall far short of constituting solid argumentation and resemble rather one who refuses to plumb the philosophical and moral depths of some of the foundational issues of immigration insofar as they rely on answers to questions of state legitimacy and sovereignty.

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Pevnick, like so many other New Utilitarians, cannot be committed to rights in his discussion of immigration. For as Rawls and many others have argued decades ago, “rights” are not rights to the extent that they can be trumped by social utility considerations. Perhaps Pevnick means to discuss immigration rights in terms of claims or interests. If so, they must not be valid ones as rights just are valid claims or interests. So our suggestion to Pevnick and the growing hoard of New Utilitarians who discuss immigration in terms of rights is to either stop using “rights” and its cognates, or to disavow their underlying utilitarianism that in effect robs rights of their genuine significance. For it is precisely utilitarianism’s consequentialist commitment to its principle of utility that stands as an ethical barrier to utilitarianism’s respect for rights. (Feinberg 1980; Mackie 1984; Rawls 1999: 3-5; Rachels 1999: 110f.)

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J. Anđelo Korlet

Kimberli Anger

Kako ne treba raspravljati o imigraciji

Apstrakt

U radu će biti predstavljeni i razmotreni argumenti koje R. Pevnik, u svojoj novoj knjizi *Imigracija i ograničenja pravde*, nudi protiv pristupa koji podrazumeva zatvorene granice, a u prilog pristupu otvorenijih granica u reformi imigracione politike SAD-a. Ukazaćemo na brojne probleme u Pevnikovoj argumentaciji povodom obe tvrdnje.

Ključne reči zaštita životne sredine, istorijska nepravda, prenaseljenost ljudi, imigracija, prava urođenika, etatizam, utilitarizam.