I. INTRODUCTION

States assert jurisdiction to announce and enforce law against citizens and non-citizens within their territory. I will argue that the state’s public law governing its interactions with non-citizens – the state’s cosmopolitan law – must have a certain outward orientation and representative character if it is to be law, properly so-called. Drawing on previous work on international law with Evan Criddle, I deploy a criterion of legitimacy we develop for interpretative and normative purposes to make a conceptual claim in this chapter about the nature of law. This criterion stipulates that for a state’s action to be legitimate with respect to a given individual, it must be intelligible as action made on behalf of or in the name of the individual subject to it, even if the state’s action sets back the individual’s interests. I will refer to this norm as the “fiduciary criterion of legitimacy,” or where context warrants, simply the “fiduciary criterion.” The fiduciary criterion is both normative and conceptual, and here will argue that it can help explain

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* Professor of Law, McGill University, Faculty of Law. I thank for helpful comments the participants of the following events: “The Double-Facing Constitution” symposium at the Wissenschaftskolleg in Berlin, June 22-23, 2017; a Work-in-Progress workshop of the Research Group on Constitutional Studies at McGill University in Montreal, October 12, 2017; the Canadian Immigration Law Scholars Conference at the Université du Québec au Montréal (UQAM) in Montreal, March 1-2, 2018. I am also in debt to David Dyzenhaus and Tom Poole for truly helpful no-punches-pulled comments.

1 EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY (2016).

2 Id., at 3, 99-100, 131, 217, 240, 268, 288.
and inform the conceptual claim that, according to Joseph Raz, all legal systems necessarily make; i.e., the claim to possess legitimate authority. On this view, it is an existence condition of a legal system that it claims to possess legitimate authority. I will refer to this existence condition from Raz’s legal theory as “Raz’s conceptual claim.” It follows from his conceptual claim that legal systems either have (and claim) legitimate authority or they possess merely de facto authority while claiming but not having legitimate authority. A further corollary of his conceptual claim, Raz says, it that law “must be capable of possessing authority.”

Raz of course is not the first theorist to notice the intimate relationship between law and authority. Hobbes famously declared that “Authoritas non Veritas facit Legem.” But Raz’s theory is an important touchstone and foil for the argument I develop because, as I now explain, Raz’s conceptual claim grounds the best attempt in the Anglo-American positivist tradition to explain law’s relationship to authority. Although the attempt in my view fails, engaging with it seriously will help illuminate the point and content of the anti-positivist theory I later defend.

Within the Anglo-American positivist tradition, the four most important figures are Jeremy Bentham, John Austin, HLA Hart, and Joseph Raz. Bentham and Austin defended a command theory under which law was defined as the commands of a legally

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3 Joseph Raz, Authority, Law, and Morality, in JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 210, 215 (1994) (arguing that “every legal system claims that it possesses legitimate authority”). Raz use phrases such as “the law claims” or “legal systems claim” to indicate that legal officials or institutions implicitly or explicitly make certain claims qua legal authorities. For a defence and extension of Raz’s view, see John Gardner, How Law Claims, What Law Claims, in LAW AS A LEAP OF FAITH 125 (2012) (Gardner extends the view to assert that law claims authority vis-à-vis legal officials as well as subjects).

4 Raz, supra note 3 at 215. Following Raz, I will use “legitimate authority” and “authority” interchangeably, and distinguish both from non-legitimate authority with “merely de facto authority”.

unlimited sovereign backed by force.6 Hart criticized the command theory for its failure to explain power-conferring rules, such as the rules underlying contracts, wills, and marriage. Unlike sovereign commands, these rules invoke “the coercive framework of the law” only at the behest of individuals who wish to invoke it.7 For Hart, the command theory mischaracterized law as “the gunman situation writ large.”8 The individual subject to the gunman’s threat could be obliged to hand her money over, but, Hart said, “we should misdescribe the situation if we said…that [the individual] ‘had an obligation’ or a ‘duty’ to hand over the money.”9

Hart’s solution was a theory of law premised on the union of primary and secondary rules.10 Primary rules are object-level rules of private law and public law. Secondary rules are meta-level rules governing the identification, change, and adjudication of primary rules. Hart’s rule of recognition, for example, is the secondary rule that lets officials distinguish certain rules as legal rules and determine their validity. However, although Hart’s main complaint against the command theory was that it did not account for the way law purports to be authoritative, he did not think legal subjects generally had to accept or even have knowledge of “the legal structure or of its criteria of validity [i.e., its rule of recognition].”11 For officials “there should be a unified or shared acceptance of the rule of recognition,” whereas for subjects the “indispensable minimum” for a legal system to exist was merely that the system’s laws were “obeyed by the bulk of the population.”12 Hart thought that officials must share “the internal point of view

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6 See, e.g., JOHN AUSTRIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832).
8 Id., at 5.
9 Id., at 82.
10 Id., at 92-99.
11 Id., at 114.
12 Id.
accepting rules as standards for all to whom they apply,” whereas the “ordinary citizen” could obey the law “out of fear of consequences, or from inertia, without thinking of himself or others as having an obligation to do so and without being disposed to criticize either himself or others for deviations.”

In short, for Hart the “two minimum conditions necessary and sufficient for the existence of a legal system” were that (i) its primary rules must be “generally obeyed” by legal subjects, and (ii) “its [secondary rules] must be effectively accepted as common public standards of official behaviour by its officials.”

Importantly, the legal subject does not inhabit the domain of officialdom from which law’s authority is said to arise. And, it is law’s authority—its normative standing to announce and enforce public rules—that is supposed to distinguish legal directives that give rise to legal obligations from the gunman’s normatively inert commands. For the Hartian subject who obeys a directive purely ‘out of fear of consequences,’ the directive’s claim to be law would not be undermined simply because the directive came from a putative legal system that ruled its subjects through terror while making no claim to possess legitimate authority. For a rule-based terror regime to rank as a genuine legal system under Hart’s theory, its officials must accept the prevailing secondary rules as ‘common public standards of official behaviour.’ There is, however, no obvious conceptual bar to those standards enabling systemic wickedness in a manner that would reduce the regime to a merely coercive order of a kind incapable of possessing legitimate authority. Although Hart’s theory does not embody ‘the gunman situation writ large’ in

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13 Id., at 114-15.
14 Id., at 115.
15 I consider in Part III the reply that any system of putative but wicked legal rules is in principle capable of possessing legitimate authority because all that needs to change for authority to be present is the contingent content of the rules. For now my purpose is merely to suggest that Hart’s theory is hard-pressed to answer the kind of criticism he lays against the command theory.
anything like the way the command theory does, it nonetheless does not disqualify a regime from counting as a legal order merely on the grounds that the regime is in fact a gunman writ large. A terror regime such as this – one that in principle is incapable of possessing legitimate authority – would find its legal credentials under stress for the very reasons Hart invoked to discredit the command theory: unmediated coercion of the gunman variety is inconsistent with legal obligation.

Raz offers a way forward by linking authority to law at the conceptual level, but in a way that lets illegitimate regimes with merely de facto authority count as legal systems so long as in principle it is possible for them to possess legitimate authority. The lynchpin of Raz’s strategy is his separation of the law’s claim to legitimate authority, on the one hand, from the question of whether the law is a legitimate authority, on the other. Regarding the law’s claim to authority, Raz argues that the claim “is manifested by the fact that legal institutions are officially designated as ‘authorities,’ by the fact that they regard themselves as having the right to impose obligations on their subjects, by the claims that their subjects owe them allegiance, and that their subjects ought to obey the law as it requires to be obeyed.”16 Not only, however, does Raz’s conceptual claim stipulate an existence condition on which the designation “legal” depends. The content of the claim is such that it applies comprehensively to the relationship of ruler and ruled, official and subject.

Implicit to the law’s claim to authority is the idea that the law’s officials and institutions are in a relationship of authority with their legal subjects, since claims to authority presuppose relations of authority. As will become evident when we bring Raz’s service conception of authority into the picture, the law’s claim to be in an authority

16 Raz, supra note 3, at 215-16.
relation with its subjects entails that the law must also claim that its *raison d’être* is to help legal subjects act on the basis of reasons which apply to them independently. Whereas for Hart a legal system can exist without concerning itself with the legal subject beyond ensuring that its primary rules are obeyed on any grounds by ‘the bulk of the population,’ for Raz a constitutive element of a legal system is that it must claim that its coercive framework of rules helps its subjects comply with reason. In this sense, Raz’s conceptual claim is comprehensive in scope across officials and subjects because it implies that law claims to be in an authority relationship between ruler and ruled, a relationship whose justification lies in its service to the ruled. As we shall see, a central issue for present purposes is whether Raz’s conceptual claim implies that a certain form of wicked regime—a slave-owning regime—is disqualified from ranking as a legal system. More specifically, the question we will address is whether a slave-owning regime can satisfy the corollary Raz identifies as following from his conceptual claim; i.e., that law ‘must be capable of possessing authority.’

Let me now offer a roadmap of the argument I intend to make. To bring Raz’s conceptual claim into contact with the fiduciary criterion of legitimacy, I look first to the legal effects of peremptory or *jus cogens* norms of international law. Those norms bar inconsistent provisions of international treaties from having legal effect; in essence, invalidating the offending provisions. While such provisions may have impeccable legal sources or pedigree, their infringement of peremptory norms precludes them from having binding legal effect. Put another way, the legal validity of international treaty provisions depends on their consistency with international law’s peremptory norms.
I then consider a particular jus cogens norm of international law – the prohibition on slavery – and use it to show how the fiduciary criterion can serve conceptual as well as normative purposes. Roughly, the argument is that no regime that maintains slave laws can be understood to assert those laws on behalf of the individuals held in slavery, and therefore a slave regime cannot possibly claim to assert legitimate authority over slaves. Such laws manifestly violate the fiduciary criterion and show themselves to lack moral legitimacy. The more controversial claim I’ll make, with Kristen Rundle, is that slave laws violate Raz’s conceptual claim as well as the fiduciary criterion. Slave laws thereby show themselves to be instruments of mere coercive force rather than law. I suggest that Raz’s own views on the relation between law and slavery are ambivalent, and that there is good reason to amend Raz’s conceptual claim so that it incorporates the representational requirement from the fiduciary criterion of legitimacy.

The next step will be to show that if the state’s cosmopolitan law does not satisfy the fiduciary criterion in relation to outsiders, then the state treats them as possessing a status akin to slaves. Such a state would interact with outsiders as Hart’s gunman writ large. If this argument is sound, it will show that slavery is not a special case of a failure of law. Similarly, if the outsiders-as-slaves argument is persuasive, it will strengthen the case in favour of positing the fiduciary criterion of legitimacy as the content of the law’s claim to authority. With this content, the law would be understood to claim to possess the

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normative standing adequate to entitle it to speak in a fiduciary or representative capacity for everyone subject to its jurisdiction.\(^\text{18}\)

Let me introduce now how this argument relates to the idea of a double-facing constitution. In his chapter in this collection, David Dyzenhaus suggests that Janus should be appreciated as a god of doorways, and that a doorway denotes the idea of a threshold rather than a barrier. A threshold marks a physical or conceptual space through which passage is possible, but passage (or passage of a certain kind) is usually subject to conditions. If those conditions are satisfied, the person or thing or idea meeting them typically becomes transformed in some way for having crossed the threshold. For example, if someone comes to the unattended gate of a park, she may decide to enter without paying the token admission requested by a sign at the gate. But, other things being equal, she cannot decide to enter the park without paying and also be a friend of the park. Our free rider is no friend of the park precisely because she uses the park but refuses to contribute her fair share. Compare her position with the park user who pays admission. By doing her fair share, this second person is transformed from a mere park user into a park friend, since she has satisfied the threshold condition we stipulated for becoming a park friend. A threshold does not, therefore, necessarily pose a barrier to entry into a given physical or conceptual space, but it typically does affect the status of a person, thing or idea that has crossed it. Where attributions of status are definitive of the kind of person, thing or idea an entity is (e.g., a mere park user or a park friend), the threshold’s attribution of status is also constitutive of the kind of person, thing or idea the entity becomes.

\(^{18}\) *See* Paul Miller, *Fiduciary Representation, in* Evan Criddle, Evan Fox-Decent, Andrew Gold, Sung Hui Kim, Andrew Gold eds., *FIDUCIARY GOVERNMENT* (2018) (arguing that the fiduciary’s capacity for representation is the golden thread that unites private and public fiduciaries).
I will suggest that the fiduciary criterion of legitimacy sketched above can be understood as a threshold of a type familiar to public lawyers in the common law tradition. The threshold of the criterion is jurisdictional in nature, and therefore marked by considerations of what falls within and outside the scope of a given legal power. While authorities can make certain kinds of errors and still have their directives regarded as morally binding, they cannot make jurisdictional errors and have their directives regarded as binding, since in those cases they have no authority – they lack jurisdiction – to give directives of that kind. Now, the distinction between non-jurisdictional and jurisdictional error is one of the most riveting and intractable problems of both administrative law and philosophical discussions of authority. Riveting because the distinction provides a basis for distinguishing genuine assertions of authority from counterfeits. Intractable because once one concludes that an authority has made an error of any kind, there is no obvious way to resist the inference that the authority has exercised a power not delegated to it (or in the case of an inherent authority, a power not part of its inherent authority). And once this inference is made, it seems that every error an authority commits can be counted as a jurisdictional error – i.e., as an exercise of a power not confided to the authority – thus dissolving the distinction with which we started.

I cannot hope to resolve this puzzle here. Nor must I. My theoretical aim is to suggest that the representational fiduciary criterion must ultimately rely on the non-jurisdictional/jurisdictional distinction to distinguish de facto from legitimate authority when an authority’s decisions are called into question. Here too Raz’s views will serve as a helpful foil to illuminate how jurisdictional considerations can lend structure to a
cosmopolitan threshold that reflects a double-facing constitution involving national and supra-national law. When deploying the jurisdictional distinction to the case of outsiders, we shall see that the fiduciary criterion implies that national officials adopt a solicitous attitude toward international human rights law and other legal sources that recognize the outsider as a free and equal legal subject. The aim is to show that the fiduciary criterion requires a cosmopolitan threshold – not a barrier – that welcomes the entry of peaceful outsiders into sovereign states while empowering states to limit migration when conditions warrant.

In the final section I argue that when the fiduciary criterion in the context of cosmopolitan law is construed as a jurisdictional threshold, the assessment of validity it makes possible is necessarily substantive rather than formal, and porous to international norms. From this it follows that the fiduciary criterion is in tension with the exclusive positivist sources thesis that the existence and content of law can be identified by reference to institutional sources and without recourse to moral considerations. I begin, however, with a few words to clarify what is meant by cosmopolitan law and jus cogens.

II. **COSMOPOLITAN LAW AND JUS COGENS**

With respect to cosmopolitan law, I adopt with some qualification Kant’s idea of a *ius cosmopoliticum* that governs relations between states and foreign nationals or outsiders.\(^{19}\) Kant recognized that the law of nations provided norms appropriate to international legal order, and that municipal law was adequate to the task of providing domestic legal order by regulating interactions between citizens (domestic private law) and between citizens and the state (domestic public law). But even taken together, the law

\(^{19}\) See IMMANUEL KANT, PERPETUAL PEACE (2005) (1795).
of nations and ordinary municipal law leave a gap, since neither contemplate the legal regime appropriate to relations between the state and outsiders. Kant called this regime a “law of world citizenship,” and understood it to include various duties of hospitality, including the right to enter, visit, conduct commerce, and travel within and through foreign states.  

Today, international human rights law and international humanitarian law adopt Kant’s foundational premise that all human beings – including outsiders – have various rights against domestic and foreign states with which they interact.

While foreign nationals living within a state’s territory are subject to most of the same laws as citizens – ordinarily, the primary rules of criminal law, private law, and public law – various legal regimes govern threshold issues that apply uniquely to noncitizens. These distinctive regimes govern entrance at the border, the naturalization process, and access to the state’s public institutions and social safety net (e.g., health care, social assistance, education, technical and professional certification, and so on). These interactions between the state and outsider have a threshold quality because in each there arises a boundary question concerning, in one way or another, whether the state will allow the outsider in. This is most evident at the border, but it applies to naturalization through the question of whether the outsider will be allowed into the political community as a citizen, and it applies to public institutions through eligibility conditions that determine access as a threshold requirement of receiving health care, education, a license to practice a profession, etc. These various regimes that govern territorial frontiers, naturalization and access to public institutions are the focus of this chapter. I will call them cosmopolitan regimes because structurally they involve threshold interactions between states and outsiders, notwithstanding that in many cases these regimes are

\[20\text{ Id.}, \text{ at } 20.\]
deliberately hostile to newcomers and in a good sense anti-cosmopolitan. Consider now the nature and effect of international law’s peremptory norms.

Peremptory or jus cogens norms of international law were described by Alfred Verdross as compulsory rules of international law that preclude states, independently of their consent, from agreeing to binding treaty provisions inconsistent with them.\textsuperscript{21} Treaties inconsistent with jus cogens, Verdross said, would include agreements “binding a state to reduce its police or its organization of courts in such a way that it is no longer able to protect at all or in an adequate manner, the life, the liberty, the honour, or the property of men on its territory.”\textsuperscript{22} Other agreements contrary to jus cogens would include treaties that purport to bind “a state to close its hospitals or schools, to extradite or sterilize its women, to kill its children, to close its factories, to leave its field unploughed, or in other ways to expose its population to distress.”\textsuperscript{23}

Peremptory norms are now recognized in the Vienna Convention on the Law of Treaties, article 53 of which provides that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”\textsuperscript{24} Article 53 goes on to define a peremptory norm as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”\textsuperscript{25} The VCLT, however, does not specify which norms of

\begin{flushleft}
\textsuperscript{22} Id., at 574.
\textsuperscript{23} Id., at 575.
\textsuperscript{25} Id.; see also id. art. 64 (“If a new peremptory norm of international law emerges, any existing treaty in conflict with the norm becomes void and terminates”).
\end{flushleft}
international law count as jus cogens, nor how such norms are to be identified. Nor does 
the VCLT specify the ultimate justification or theoretical basis of these norms.\textsuperscript{26} 

While the VCLT’s silence on these questions has led to heated debates, a common 
reference point regarding the specification of peremptory norms is the \textit{Restatement on 
Foreign Relations of the United States (Restatement)}.\textsuperscript{27} The \textit{Restatement} defines jus 
cogens to include, minimally, prohibitions against genocide, slavery, the slave trade, 
systemic racial discrimination, murder or disappearance of individuals, prolonged 
arbitrary detention, torture or other cruel, inhuman, or degrading treatment or punishment, 
and the use of military force not authorized under the United Nations Charter.\textsuperscript{28} 

Criddle and I argue that a helpful way of thinking about peremptory norms is that 
they arise as relational features of the fiduciary or trust-like relationship in which all 
public authorities stand vis-à-vis the persons amenable to their jurisdiction.\textsuperscript{29} On our view, 
the fiduciary principle that underlies fiduciary relations generally both authorizes and 
requires the state is to establish a regime of secure and equal freedom for everyone 
subject to the state’s authority. The state fulfils this duty, in part, by governing through 
norms that conform to two intermediate and regulative principles: the Kantian ideal of 
non-instrumentalization (persons cannot be treated as mere means) and the republican 
ideal of non-domination (persons cannot be made to live subject to arbitrary power). The 
principles are \textit{intermediate} because they fall between the state’s abstract duty to 
guarantee secure and equal freedom, on the one hand, and more determinate obligations
such as those flowing from international human rights law, on the other. The principles are *regulative* because the Kantian and republican injunctions are expressly normative and therefore proscribe some policies while encouraging others.

The fiduciary theory also suggests more substantive relational principles drawn from the trust-like nature of the state-subject fiduciary relationship: i.e., integrity (a prohibition on using public offices for private ends), formal moral equality (all must be treated with equal respect), and solicitude (legitimate interests must be taken seriously). And it incorporates the formal principles of Lon L. Fuller’s internal morality of law, such as publicity, clarity, and non-retroactivity of penal sanctions. Ultimately, the fiduciary theory brings together Fuller’s formal principles with the substantive relational principles mentioned above, and presents them as more hard-edged instances of the Kantian and republican ideals. Criddle and I claim that this model can explain the norms of international human rights law and jus cogens. We also suggest that the fiduciary theory can distinguish the relatively narrow set of international law’s peremptory and absolute norms from the much more expansive set of non-absolute norms that are subject to limitation and derogation under international law (e.g., international human rights to freedom of assembly or expression).

To distinguish peremptory norms from others, Criddle and I deploy a variant of the fiduciary criterion of legitimacy. On our telling, a norm that conforms to the fiduciary theory’s principles will count as non-derogable jus cogens if its infringement would always be inconsistent with the state’s basic duty to secure legal order (a regime of secure and equal freedom) on behalf of every person subject to it. The fiduciary principle

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30 Lon L. Fuller, *The Morality of Law*, 2nd ed. (1969) (defending as an internal morality of law the formal principles of generality, publicity, non-retroactivity, stability over time, consistency, susceptibility to compliance, clarity, and fidelity to the law’s spirit and letter).
entitles every individual to be treated as an equal co-beneficiary of legal order, and therefore prohibits policies that inherently and intractably instrumentalize or dominate individuals touched by them.\(^{31}\) Any state that adopts such policies is to that extent illegitimate. This is the corollary of the fiduciary criterion of legitimacy which, to reiterate, affirms that every legitimate state action must be intelligible as action taken on behalf of every person subject to it. Action that deliberately abuses or dominates individuals with impunity cannot be understood as action taken on their behalf, even if many others or the state would benefit greatly.

On the fiduciary theory, then, international law examines the on-the-ground relationship between state authorities and those who are subject to them, and extracts principles from the general features of that relationship to explain the norms of international human rights law and jus cogens, as well as provide a basis for their critique, interpretation, and extension.\(^{32}\) In this manner, concrete features of the national level explain and inform norms of international law that then descend to the national level with the aspiration of bringing state conduct into the deepest possible conformity with what Mattias Kumm calls the “the trinitarian formula of the constitutionalist faith” – human

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\(^{31}\) One need not adopt the fiduciary conception of public law to be persuaded by the central argument of this chapter. Various liberal and republican theories demand that individuals be treated with equal moral concern. Part of the point of the fiduciary theory is to show how the demand for equal concern can flow from a legal relationship and therefore have a distinctively legal as well as political quality. But, common law constitutionalists, for example, may be able to draw legal principles supportive of equality and human rights from the common law and international adjudication, and then use those to explain jus cogens. It may be awkward to deploy the fiduciary criterion of legitimacy without a theory to explain the centrality of representation to legitimacy (a core tenet of the fiduciary theory), but democratic theory and theories on corporate structure may be adequate to the task. Of course, these latter theories are in reality different kinds of fiduciary theory.

\(^{32}\) Criddle and I, for example, critique the alleged peremptory norm against piracy, arguing that it is merely a common crime, and we extend the typical canon of \textit{jus cogens} to include a prohibition on corruption. CRIDDLE & FOX-DECENT, \textit{supra} note 1 at 110-111.
rights, democracy, and the rule of law.\textsuperscript{33} The double-facing constitution of global constitutionalism can thus be seen to embody a mutual and fruitful sharing of norms between national and supra-national levels.

Let us consider now how the fiduciary criterion of legitimacy can explain the prohibition of slavery as a peremptory norm, and the possible connection between this criterion and Raz’s conceptual claim, including its corollary that law must in principle be capable of possessing authority.

III. \textsc{Slavery and Law’s Conceptual Claim as a Claim to Represent}

Under the fiduciary theory, international law delegates sovereignty to states by recognizing within them the operation of a power-conferring fiduciary principle that authorizes states to establish legal order on behalf of every individual amenable to their jurisdiction.\textsuperscript{34} As a principle of legality, the fiduciary principle must treat like cases alike, though of course there may be disagreement regarding which cases count as “like cases.” But even assuming that certain assessments of likeness will be controversial, it follows from the like-cases maxim that the fiduciary principle has no normative capacity to discriminate arbitrarily between individuals subject to the same fiduciary power, since such a capacity would be inconsistent with the maxim.

Individuals within a state are subject to the same fiduciary power. They therefore enjoy co-equal status as beneficiaries of the fiduciary principle’s authorization of state authority. One of the entitlements of co-equal status is that the state is not entitled to

\footnotesize{\begin{itemize}
\item[\textsuperscript{34}] This does not mean that states owe every person amenable to their jurisdiction identical duties. For example, states do not owe transient non-citizens political rights related to voting, though they do owe them duties related to due process if the state detains them.
\end{itemize}}
discriminate arbitrarily between individuals, because to do so would violate the like-cases maxim. As a consequence, if the state recognizes some individuals within its jurisdictions as legal persons, it must recognize all as such. And if the state must recognize all individuals as legal persons, it cannot regard any as slaves, since slavery is precisely the denial of legal personhood. The inexorable effect of a systematic denial of legal personhood is comprehensive, incurable domination with impunity. Even if the slave regime treats its slaves in wholly benevolent ways, under the republican conception of freedom as non-domination the slaves remain unfree merely by dint of their subjection to arbitrary power. 35 Thus, under the fiduciary model, the peremptory norm against slavery is explained, first, by the fiduciary principle’s incapacity to authorize the arbitrary discrimination presupposed by slavery, and second, by the theory’s rejection of domination.

This explanation is confirmed by the fiduciary criterion of legitimacy, which avers that slave regimes cannot be understood to maintain slavery on behalf of or in the name of the slaves. Slave regimes do not represent slaves. They instead enable masters to possess them as property, as things the master may destroy with impunity if he or she so wishes.

In his well-known article The Rule of Law and its Virtue, Raz endeavours to cut the rule of law down to exclusive positivist size, insisting at one point that the rule of law is consistent with slavery. 36 As Kristen Rundle points out, however, there is considerable tension between this claim from Rule of Law and his writing on authority. 37 In his writing

37 Rundle, supra note 17.
on authority, Raz clearly distinguishes de facto from legitimate authority. Contrary to what one might expect from reading *Rule of Law* and its view of slavery, Raz in his work on authority never claims that a legal system could consist of merely de facto authority (much less mere coercive authority). When discussing authority, Raz’s emphatic view is that a de facto authority *must* claim to possess legitimate authority in order to be a legal authority. And as also noted above, Raz takes it to be an implication of his conceptual claim that all legal systems in principle must be capable of possessing legitimate authority. Rundle astutely remarks that “it is difficult to see how the precondition of the capacity for legitimate authority over a subject that Raz suggests is part of the nature of law, and something which it cannot fundamentally fail to possess, could be satisfied if the law designated that subject as a slave.”

Raz might reply that when he said that putative legal systems must be capable of possessing legitimate authority, he only intended to exclude laws that don’t apply to human conduct, such as the laws of natural science applicable to volcanoes, and entities that cannot have authority, such as trees. Slave regimes, he might say, are just one type of wicked regime that with adequate abolitionist reform could possess legitimate authority, or at least some measure of it. The Antebellum South of the United States and ancient Rome are examples of this. They were wicked, but they were also perfectible normative systems that governed human conduct. Thus, it is possible, in the relevant sense, for slave regimes to possess legitimate authority, since slavery is a contingent institution that can be abandoned. Like many de facto regimes that lack legitimate authority, slave regimes could become legitimate if adequate reform policies were

38 Id., at __.
39 Raz, *supra* note 3 at 216-17 (excluding “a set of propositions about the behavior of volcanoes”); *id.*, at 217 (“Trees cannot have authority over people.”).
adopted. Thus, Raz might say, so long as slave regimes are de facto authorities that also claim to possess legitimate authority (e.g., the Antebellum South and ancient Rome), they qualify as legal regimes. They are wicked and do not actually possess legitimate authority, but on Raz’s theory this is not a bar to them counting as legal orders.

There is, however, a compelling rejoinder. The notion of a slave regime persisting over time and becoming legitimate is misleading because the only way a slave regime can become legitimate is by ceasing to be a slave regime. If we ask the question, “Can a slave regime as a slave regime possess legitimate authority over slaves?”, the answer is plainly “no,” including by the lights of Raz’s service conception of authority. The heart of Raz’s theory is the “normal justification thesis,” which asserts that a person will ordinarily count as an authority if following her directives will lead a subject to comply better with moral and prudential reasons applicable to him than he would if he decided matters for himself.40 If we plug the normal justification thesis into Raz’s conceptual claim, then, as noted in the introduction, the result is that law necessarily claims that (ordinarily) it issues directives that help its subjects comply better with reason than they would on their own. It is hard to see, however, how the typical directives of a slave regime directed toward a slave could help her comply better with moral and prudential reasons that apply to her. Another element of Raz’s theory of authority – the dependence thesis – makes this plainer still. According to the dependence thesis, “all authoritative directives should be based on reasons which already apply independently to the subjects of the directives.”41 I doubt there are any reasons underlying slavery-creating directives that “apply independently” to the slave targeted by those directives.

40 JOSEPH RAZ, MORALITY OF FREEDOM 53 (1986).
41 Id., at 47.
A Razian might counter that the fact that officials of slave regimes had de facto authority and claimed to possess legitimate authority is enough to say that there was a legal system in place, albeit a very wicked legal system. The Razian could agree that the officials of the regime are deluded in thinking their regime is legitimate. But that is what they believe and claim, and those beliefs and claims explain why their regime is a legal system, whereas a purely de facto slave regime in which officials do not claim legitimate authority is not a legal system.

In my view, there is something misguided about a conceptual approach to law that relies on moral delusion to distinguish legal from non-legal systems of rule. It is counter-intuitive to think that officials can in effect wish a legal system into existence by claiming a legitimacy the system does not and cannot possess, at least “cannot” while remaining a certain kind of wicked regime, such as a slave regime. I am, in other words, convinced by Raz himself when he writes that “[w]e cannot create reasons just by intending to do so and expressing that intention in action. Reasons precede the will.”42 If this is true of reasons, then it is true of authorities, at least on Raz’s account. The point of authorities for Raz is that they play a mediating role between the subject and her ultimate reasons for action, making it more likely that she will comply with those ultimate reasons while saving her the trouble of reasoning down to first principles every time she acts.

My hope is to improve on Raz’s conceptual claim that legal systems necessarily claim to possess legitimate authority, but to do so in a way that does not see the proposed improvement collapse into “old school” natural law under which any unjust law is disqualified as law. And that means conceptual space must be provided for a range of legal regimes with (relatively) wicked policies (of some kinds, but not others) to actually

42 Id., at 84 (chastising consent as a foundation of authority).
count as legal regimes. My suggestion is that we substitute the representational fiduciary criterion of legitimacy, suitably modified, for Raz’s conceptual criterion that legal systems necessarily claim to possess legitimate authority. The substitution yields the following: all legal systems necessarily represent – they necessarily act on behalf of or in the name of – every person subject to their authority. On this theory, it is part of the nature of law that all legal systems must be intelligible as normative systems that can credibly claim to represent the persons subject to their authority. The natural laws governing volcanoes and trees cannot count as these kinds of normative systems, but neither can slave regimes.

The representational or fiduciary criterion is both weaker and stronger than Raz’s conceptual claim. It is weaker in the sense that the power to represent someone, ordinarily, is weaker than the possession of legitimate authority over them. In Raz’s hands, legitimate authority is a moral power, the correlative jural concept of which is a liability that crystallizes ultimately (when the power to rule is exercised) in a duty to obey. The moral power to represent, without more, does not entail a duty to obey. The representational claim is stronger, however, because it includes a standard of adequacy that Raz’s conceptual claim does not. Whereas Raz simply looks to see whether legal officials have claimed legitimacy, with the ambiguous rider that the claim must be possible to realize, the representational criterion asserts that the words and conduct of legal officials must be intelligible as representing the people subject to their authority. It is not enough for officials to simply wish or say that they are acting for the people subject

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43 I am using a broad understanding of “represent” that includes cases where one person administers, manages, or simply acts on behalf of another in some way that treat’s that other person’s interests as primary. On this broad understanding, agents plainly represent their principals. But trustees also represent their beneficiaries, on this understanding, when they manage the trust’s assets.

44 Raz, supra note 40, at 24.
to their authority. There has to be some basis for believing that they are really doing so. If there is such a basis, then even if their policies fall short of establishing a fully legitimate regime, they will nonetheless have established a legal system.

The case of slavery, as discussed at the beginning of this section, is a relatively easy case, since it is not credible to think that a slave regime acts on behalf of the slaves. Reaching this conclusion does not require a searching moral assessment of slave regimes. All that is required is an inquiry to determine whether the facts disclose a relationship between ruler and ruled in which the ruler can be said to act in the name or on behalf of the slaves. Still, some may think slavery is a special case. It may appear that because slave regimes so comprehensively deny the slave’s legal personhood and the very possibility of legal entitlements, those regimes must enforce slavery through force alone. In the next section I argue that outsiders at the boundaries of the state’s territory, political community, and public services are at risk of being treated as slaves, since they are at risk of being subjected to a public power that cannot be said to represent them. The theoretical takeaway is that the fiduciary criterion of legitimacy can facilitate more fine-grained distinctions within analytical jurisprudence than those necessary to eliminate slave regimes from the set of regimes that rank as legal orders.

45 Some might think that the public rules of slave regimes are not law for the slaves, but that some of the regime’s rules are law for slave owners, notwithstanding the odiousness of slavery. Law might guide and structure the lives of slave owners vis-à-vis one another much as it guides and structures private interactions in non-slave-holding societies. These are complex matters I cannot pursue properly here. It is arguable that the apparently innocent private law of slave owners is akin to fruit of the poisonous tree. The slave owners’ private law is a standing and institutionalized reminder of his unjust privilege, and a social construction that facilitates his extraction, possession, and use of value from slaves. The legality of the slave owners’ law may also be challenged by analogy to fiduciary law that renders void decisions a fiduciary is not competent to make or which are made ultra vires the fiduciary’s mandate. The purported authorization of a slave-owning regime may be void ab initio on grounds that the fiduciary principle has no normative capacity to make or sanction such an authorization. Alternatively, one might think that some measure of legality may be in place for some in a society while absent for others. Even this more restrained view, however, marks a significant departure from the positivist thesis that the identification of a legal rule is always possible without recourse to moral considerations.
IV. OUTSIDERS AND LAW’S CLAIM TO REPRESENT

For the sake of simplifying, I limit discussion in this section to issues related to the state’s purported entitlement to establish a regime of unilateral border control. The regime is unilateral in the sense that states take themselves to be legally empowered to use irresistible force to deny entry to peaceful migrants for any reason or for no reason at all. With relatively minor adjustment, what I say about the boundary interaction at the border applies to other cosmopolitan contexts too (i.e., contexts where the relevant interaction is between states and foreign nationals, and the issue is access to citizenship or access to public services and institutions).

I have argued elsewhere that with respect to peaceful outsiders—not just asylum seekers, but ordinary migrants too—a border regime is legitimate from a normative point of view only if the state governing it is required to give a compelling justification for decisions to exclude outsiders.\textsuperscript{46} I suggested some possible, context-dependent justifications for exclusion, such as the threat of large-scale and rapid migration into a smaller state of lesser abundance. In principle, limits might also be set with a view to protecting a vulnerable culture or a comprehensive social welfare system sensitive to a sudden incursion of migrants. But, I claimed, such justifications would have to be reviewable by an independent public body, such as a national or international court. The default position, in the absence of an overriding and reviewable public justification, would be open borders to peaceful migrants.

Skating over many details, the argument begins with the observation that in practice the present regime of unilateral state border control produces a context of

\textsuperscript{46} Evan Fox-Decent, Constitutional Legitimacy Unbound, in David Dyzenhaus & Malcolm Thorburn, eds., PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 119 (2015).
pervasive domination between ascendant states and vulnerable outsiders. At the border, the foreign national is at the state’s mercy and subject to its coercive force. States may build physical walls or electrical fences across their frontiers. They may use tear gas or more extreme forms of violence to deny entry. They may separate undocumented families, separating small children from their parents and then holding those children incommunicado at undisclosed locations, possibly for the purpose of sending a message to migrants contemplating entry without the state’s permission. More powerful states may threaten to impose crippling economic measures against weaker states that decline to use example-setting force against individuals who appear prepared to cross without authorization the more powerful state’s border. States may engage in extra-territorial interdiction on the high seas for the purpose of denying migrants access to the state’s courts. States may inflict these and other dystopian consequences on outsiders for nationalist or populist reasons, or for no discernible reason at all, and with relative impunity. They may do so while formally subject to international human rights law and municipal legal regimes that demand better treatment of outsiders than in practice they generally receive. Overwhelmingly, migrants at the border are subject to arbitrary and often capricious power that states may use against them without fear of meaningful sanction. In other words, states ordinarily dominate peaceful outsiders who arrive at their borders. I will argue below that the position of the outsider resembles that of the slave: both suffer entrenched domination.

Against the view that citizens have a collective right to self-determination that justifies a general right to exclude outsiders, I argued previously that a right of self-determination does not imply that states have normatively legitimate claims to unilateral
jurisdiction over their borders. Although the state is a public entity authorized by international law to govern and represent its people, if the state in practice has a liberty right to do as it pleases with foreign nationals who come to its border, then it effectively confronts the outsider in a state of nature. The state appears to the outsider at the border not as a public authority, but as a lawless giant, a soulless Leviathan of which she is not a member.

To overcome the legitimacy deficit at the border, I suggested that we think of states as occupying two roles. At the local level, they are fiduciaries of the people within their territory, authorized by international law to govern and represent their people. At the global level, they are fiduciaries of humanity, and as such entrusted with collective stewardship of the earth’s surface. So conceived, states are entitled to favour the interests of their own people. Within reciprocal legal limits, states may legitimately bargain hard on behalf of their people in treaty negotiations. In less formal settings of foreign or transnational affairs, they may advocate for their people and institutions. And they may rightly limit migration for the good of their people, so long as they provide a compelling and reviewable justification that takes seriously the interests of outsiders. In sum, states can treat their people as their primary moral concern, but their people’s interests cannot be their exclusive moral concern. Because states are fiduciaries of humanity charged with stewardship of the earth’s surface, outsiders have a call on that stewardship and an entitlement to migrate where they wish in the absence of a compelling justification to exclude them. The right to a justification is supported by the view of Rainer Forst that

47 See Evan J. Criddle & Evan Fox-Decent, Guardians of Legal Order: The Dual Commissions of Public Fiduciaries, in Evan Criddle, Evan Fox-Decent, Andrew Gold, Sung Hui Kim, Andrew Gold eds., FIDUCIARY GOVERNMENT (2018) (arguing that fiduciaries commonly have multiple mandates to distinct beneficiaries, such as the lawyer’s duty of zealous advocacy to her client and her often competing duty of candour to the legal system as an officer of the court).
individuals are generally entitled to “justifying reasons for the actions, rules, or structures to which he or she is subject.” There is no reason to think this principle runs out at the border. Indeed, its salience at the border suggests that the proper focus of legality is not the citizen, but the legal subject.

The key point for present purposes, however, is that conceiving of states as fiduciaries of humanity allows them and foreign nationals to exit the state of nature and enter a cosmopolitan condition of legality with one another. As fiduciaries of both their people and humanity, states can credibly claim to represent both constituencies, and act on behalf of both, including when outsiders appear at their border. Put another way, the fiduciary premise gives the receiving state the opportunity to achieve standing to rule relative to outsiders. The receiving state can realize this opportunity if it treats the outsider’s request to enter with solicitude, rejecting that request only if there is a compelling justification to do so, and only if the state’s justification is capable of surviving independent review. Without the standing to rule this cosmopolitan legal framework provides, the receiving state interacts with the outsider as at best a de facto authority, with force aplenty, but not the force of law.

Let us now gather some of the implications of these ideas in relation to the fiduciary criterion of legitimacy, and then consider two important objections. On the view essayed immediately above, if a state arrogates to itself unilateral power to control its border, it cannot be said to represent or act on behalf of outsiders, and therefore, with respect to outsiders, the state’s legal system would fail to satisfy the representational fiduciary criterion of legitimacy that all putative legal systems must satisfy to be actual

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legal systems. Because the law, on this assumption, does not speak for the outsider, it is not the outsider’s law, but force channelled through a merely coercive de facto authority.

One objection to this analysis is that nationalist-populist states make no claim to represent outsiders, nor aspire to do so. The objection confuses contingent facts with the conceptual criteria of an analytical framework. It makes no difference whether a state explicitly claims or denies that it acts in the name of, or on behalf of, foreign nationals.

All that matters is the substance of the policy the state adopts and whether it offers reasonable grounds for inferring that the state in some sense acted in the name of or on behalf of outsiders. For instance, if a state raised the number of migrants it was willing to accept in a given year because the reasons justifying a lower number no longer applied, the policy shift would be a basis for inferring that the state had taken outsider interests seriously and acted on behalf of migrants as well as its own people. This inference remains valid even if the actual reason for the pro-migrant policy was that it served the government’s immediate political interest. The actual reason for the policy is irrelevant because the point of the inquiry is merely to determine whether the policy can be interpreted objectively, in the manner one might interpret a statute, as law made on behalf of outsiders as well as the state’s people.49

The second objection challenges the claim that if a state arrogates to itself unilateral power to govern the border in a manner indifferent or hostile to peaceful outsiders, then it fails to satisfy the fiduciary criterion of legitimacy and thereby fails to meet the demands of legality. If the unilateralist state abides by the relevant rules of

49 The point might be easier to see with Raz’s conceptual claim. Suppose an official explicitly denied that a just, reasonable, solicitous, and otherwise good legal institution implicitly claimed to possess legitimate authority. So what? We would evaluate the institution and its implicit claim on the merits, and possibly question the official’s understanding of his role.
international law – rules that include international human rights law but which permit the state to exclude non-necessitous outsiders – is that not enough to meet the demands of legality? No, it is not. Although international law has brought a measure of legality to state-outsider border relations through discrete but overlapping legal regimes that aim to protect asylum-seekers, children, and family life, as well as ensure humane treatment and due process, there remains an important sense in which international law governing borders has yet to catch up to its underlying presuppositions. On the view defended here, the crucial underlying presupposition is that part of what it means to be a public authority is to stand in a representational capacity vis-à-vis the individuals subject to the authority’s power, since it is this capacity that produces the normative standing that entitles the authority to rule. To appreciate the implications of international law’s failure to institutionalize this presupposition at the border, compare the position of the peaceful outsider vis-à-vis a hostile receiving state and the position of the slave vis-à-vis a slave regime.

In both cases, the vulnerable party is subject to an arbitrary power that can be exercised against her capriciously and with impunity. Although the contemporary outsider benefits from international human rights protections, human rights to association, assembly, and movement have yet to dent the state’s asserted prerogative to determine unilaterally whether non-asylum-seeking peaceful migrants may enter and remain within their territory. If a peaceful outsider has no family within the receiving state or prior

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50 In addition to international refugee law, in some cases international human rights law has dented the state’s claim to unilateralism. The right to family life and the best interests of children have led some courts to quash deportation orders and allow outsiders to remain. See e.g., Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 (referring to the Convention on the Rights of the Child and setting aside a Minister’s decision to refuse to grant discretionary relief from a deportation order to a mother of four Canadian-born children).
connection to it, and cannot make a case for refugee status or *non-refoulement*, then ordinarily she will find herself without legal recourse and at the mercy of the receiving state. The state may adopt a benevolent policy and allow her to enter and remain, but under the prevailing understanding of the prerogatives of state sovereignty, the state is not under any obligation to do so. From the conventional perspective, the state is entitled to use coercive force – even lethal force – against peaceful migrants, for no discernible reason or even capricious reasons. In this fundamental respect, the position of the peaceful outsider resembles that of the slave: both are subject to domination – arbitrary power exercisable with impunity – backed up by the threat and possible use of force.

One might object that there is nothing especially perverse or unusual about that state’s use of coercion to enforce its laws. The state is entitled to use coercive force on a subject who disobeys a lawful order from a police officer, but the subject’s status before the law is not akin to the status of a slave. There are significant differences, however, between the relationship of police officer and subject, on the one hand, and border guard and outsider, on the other. The police officer acts on behalf of the state of which the legal subject is a member, and thus in principle the officer can also be said to act on behalf of the subject, consistent with the fiduciary criterion of legitimacy. The same cannot be said of the border guard and the outsider, at least not under the conventional unilateralist assumption. Similarly, in issuing a lawful order the police officer implicitly relies on a legal warrant traceable to law made in the subject’s name. Not so in the case of the border guard and the migrant. Finally, in practice, police officers who use force are more likely than border guards to be subject to meaningful review and accountability procedures. In
the standard case, then, individuals subject to police coercion are also subject to authority, whereas migrants subject to border enforcement are subject to domination.

Nonetheless, some may think that the comparison of migrants to slaves is hyperbole, since slavery involves not merely a practical denial of the slave’s personhood, but the use of legal machinery to make the denial effective. As we shall see now, in *Jennings v. Rodriguez*, a 2018 decision of the United States Supreme Court, the United States Government argued that undocumented migrants are not entitled to constitutional protections because they are not persons within the United States.

Rodriguez is a Mexican citizen and permanent resident of the United States. Immigration authorities incarcerated him following a 2004 conviction while the seeking his removal. In 2007, while litigating his removal, he filed a habeas corpus petition as a class action representing three groups of non-citizens detained and awaiting determination of their residency status: asylum-seekers, immigrants with a criminal conviction who served their sentence, and immigrants claiming an entitlement to remain for reasons unrelated to persecution. Rodriguez claimed that the statutes under which he and the class he represented were detained did not authorize prolonged detention in the absence of periodic bond hearings. The United States Supreme Court had held in *Zadvydas v. Davis* in 2001 that the Fifth Amendment’s Due Process Clause protected deportable aliens held without a hearing, and construed the relevant statute to limit detention to six months.\(^\text{52}\)

In *Jennings*, Justice Alito, writing for a 5-3 majority, interpreted the statute to provide for the indefinite detention of all three groups without bail hearings, and sent the

\(^{51}\) 538 U.S. ___ (2018) [hereinafter *Jennings*].

\(^{52}\) 533 U.S. 678 (2001) [hereinafter *Zadvydas*].
case back to the lower court to re-determine the constitutional due process question. He panned Zadvydas, and without solicitation from the Government, suggested that the lower court dissolve the class, forcing every plaintiff to litigate his or her case individually.

Justice Breyer wrote for the dissent. He took the extraordinary step of reading his opinion from the bench. Relying on Zadvydas, he interpreted the relevant statute to require a bail hearing after six months. Breyer J held that the Due Process Clause foresees eligibility for bail as part of due process, and that it applies to “all persons within the territory of the United States.” Breyer J was especially anxious to denounce the Government’s argument that “the law treats arriving aliens as if they had never entered the United States,” and thus they are not “persons” within its territory and cannot avail themselves of constitutional protections. Breyer J warned that the Government’s position would strip away personhood and legal protections in a manner that recalled slavery and the vulnerability to arbitrary cruelty slaves suffered:

No one can claim, nor since the time of slavery has anyone to my knowledge successfully claimed, that persons held within the United States are totally without constitutional protection. Whatever the fiction, would the Constitution leave the Government free to starve, beat, or lash those held within our boundaries? If not, then, whatever the fiction, how can the Constitution authorize the Government to imprison arbitrarily those who, whatever we might pretend, are in reality right here in the United States? The answer is that the Constitution does not authorize arbitrary detention.

Admittedly, Breyer J overstates. Someone – a U.S. appellate judge – has claimed as recently as 2017 that undocumented migrants ‘are totally without constitutional protection.’

53 Jennings, supra note 47, at 7 (per Breyer J, dissenting).
54 Id.
55 Id.
In *Rochelle Garza v. Eric Hargan*, Judge Henderson of the U.S. Court of Appeals for the District of Columbia Circuit found that a pregnant, undocumented 17-year-old held in custody was not entitled to the protection of the Due Process Clause. In her dissenting judgment, Judge Henderson held that the woman was not entitled to access an abortion, a right protected under the Due Process Clause. She explained: “Despite her physical presence in the United States, J.D. has never entered the United States as a matter of law and cannot avail herself of the constitutional rights afforded those legally within our borders.” That is, having failed to enter the United States ‘as a matter of law,’ she is not deemed to be a person within its territory, and therefore, like Dred Scott, she is denied standing to assert constitutional rights. Under this doctrine, undocumented migrants would be in a worse constitutional position than detainees at Guantánamo Bay who enjoy constitutional protections such as habeas corpus. While Justice Alito in *Jennings* remanded the case to the Ninth Circuit for redetermination, his evident sympathy for the Government’s position rivals Judge Henderson’s. The United States is just that close to formally entrenching its practical domination of outsiders by stripping them of their personhood.

From a normative point of view, the denial of migrants’ personhood is egregious. But once we appreciate the implications for legality of the state’s assertion of unilateralism at the border, we can see that the proposed policy is just the chickens coming home to roost. Nativist institutional norms are chasing nativist practices that are made possible, in part, by the state’s assertion of unilateral authority at the border that international law sanctifies. Although the connection between nativist practices and

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56 No. 17-5236 (D.C. Cir. 2017).
57 *Id.*, at 8 (*per* Henderson, dissenting).
personhood-stripping norms is not one of logical entailment, nativist practices arguably lend plausibility and acceptability to nativist norms. Of course, defenders of unilateral border authority can resist the descent into nativism, and do have a more positive argument on offer.

A familiar defence of borders is that if the migrant is not an asylum-seeker fleeing persecution, then by definition there is somewhere else she can go without threat to her human rights. This being so, international law may be thought to allocate properly territory to states that can have sovereignty in the sense of robust self-determination and self-government only if their citizens are entitled, as a general matter, to determine the terms under which peaceful migrants may enter and gain membership. I have suggested elsewhere that this defence of unilateral border control conflates public territory with private property, and that the argument cannot bear the weight it attempts to shoulder.\textsuperscript{58} But its deeper weakness is that it presupposes that the state alone is the arbiter of the purported scope and legal consequences of its alleged right to exclude. This unilateralist presumption puts the state and the outsider in a state of nature with one another because the state’s assertion of unilateralism just is an assertion that it alone sits in final judgment of the migrant’s claim to enter, as Austin’s uncommanded commander. In this context, the state cannot plausibly be said to be acting in the name of or on behalf of the migrant, and as explained above, the fact that the state may strenuously deny that it in any way represents or acts on behalf of migrants subject to its coercive power is irrelevant. It follows that under the fiduciary theory’s representational criterion of legitimacy, the unilateralist state that uses force against migrants – e.g., physical restraint, forcible confinement and detention, or forcible transportation – does so extra-legally, since the

\textsuperscript{58} Fox-Decent, \textit{supra} note 46, at 129-131.
statutes and regulations relied on by the unilateralist state to mobilize force against migrants are in no way implemented in their names.

As noted already, the state can avoid this descent into lawlessness by taking seriously its global role as a fiduciary of humanity as well as its local role as a fiduciary of its people. Taking these dual roles seriously means being prepared to justify publicly and submit to independent review decisions to exclude. The state’s participation in this exercise of public justification and review would allow the state to defend, as a fiduciary of its people, its understanding of the significance of its community’s identity, as well as its conception and preferred means of self-determination. By engaging in public reason in this way, the state would enter a cosmopolitan state of right with the outsider, and treat her as a legal subject rather than as a stranger or enemy. Although the state’s advocacy of its conception of its citizens’ interests may pit it against the outsider, the state’s participation on an equal legal footing with the outsider in an institutional regime of public justification and impartial adjudication is itself a way for the state to act on behalf of the outsider. Public administrative authorities do not, as a rule, owe favourable outcomes to all who come before them. But ordinarily they owe individuals a reviewable justification if they propose policies that will be backed with the threat or use of force. This is part of what it means to be a public fiduciary. Put another way, the representational criterion of legitimacy requires at the border a cosmopolitan threshold – not a barrier – that permits entry to peaceful outsiders unless states can offer a persuasive and reviewable justification for exclusion.

Let us consider now the sense in which the fiduciary criterion of legitimacy can play a heuristic role as a jurisdictional grundnorm of cosmopolitan legal order. The
criterion can play this role because, like the norms of jus cogens, it polices the validity of state action, implicitly limiting what the state can do and authorize through law in its interactions with outsiders (e.g., no torture or deportation to a place of danger), and the manner in which the state can do those things (e.g., no deportation without a public and reviewable justification). These limits are jurisdictional by nature, since they delimit, even if imprecisely, the scope of the state’s lawful authority vis-à-vis outsiders. But for any such account of authority to be practicable, we need to be able to distinguish jurisdictional errors that render purportedly authoritative decisions or directives invalid from non-jurisdictional errors that do not. Raz’s discussion of jurisdiction and its relationship to authority will help us grasp the stakes involved. With those stakes in view, I will tentatively suggest that the norms of representation may help to draw the jurisdictional/non-jurisdictional distinction. With the contours of some of these norms in place, we will return, in the following section, to the sense in which the representational fiduciary criterion of legitimacy works as a threshold in a service of peaceful outsiders who are also the subjects of cosmopolitan law.

V. THE JURISDICTION OF COSMOPOLITAN LEGALITY

Along with the normal justification and dependence theses mentioned above, Raz’s conception of authority involves a third thesis, the pre-emption thesis. According to this thesis, authoritative rules or directives replace the dependent reasons the subject had to act in a certain way before the rule or directive came into existence. To illustrate, Raz gives the case of an arbitrator whose decision is “meant to replace the reasons on which it

59 Raz, supra note 40, at 57-59.
depends.”\textsuperscript{60} Thus, “reasons that could have been relied upon to justify action before his decision cannot be relied upon once the decision is given.”\textsuperscript{61} Having appointed an arbitrator, the parties must accept his decision and decline to act on the reasons they believe applied to them before the decision. Otherwise, there would be no point to the arbitration. Moreover, authorities are entitled to make mistakes, Raz says, and have their directives treated as binding, since second-guessing would defeat the mediating role authorities are supposed to play (via the pre-emption thesis) between action and the ultimate reasons for action.\textsuperscript{62} Thus, Raz claims that “the legitimate power of authorities” is not “generally limited by the condition that it is defeated by significant mistakes which are not clear.”\textsuperscript{63}

Nonetheless, he admits that the pre-emption thesis “depends on a distinction between jurisdictional and other mistakes.”\textsuperscript{64} Raz recognizes, for example, that an arbitrator’s decision can be challenged or disregarded under certain jurisdiction-forfeiting circumstances: if the arbitrator “was bribed, or drunk while considering the case, or if new evidence turns up, each party may ignore the decision.”\textsuperscript{65} And mistakes that authorities make “about factors which determine the limits of their jurisdiction render their decisions void.”\textsuperscript{66} In other words, when authorities make these kinds of mistakes, they do so as de facto rather than legitimate authorities, since their decisions are ‘void’ and therefore have no capacity to bind their subjects. The decisions of authorities who lack jurisdiction are not really decisions of authorities on those matters, and are invalid

\textsuperscript{60} Id., at 42.
\textsuperscript{61} Id.
\textsuperscript{62} Id., at 61.
\textsuperscript{63} Id., at 62.
\textsuperscript{64} Id.
\textsuperscript{65} Id., at 42.
\textsuperscript{66} Id., at 62.
ab initio. The legal validity of public, authoritative decision-making depends on the decision-making body having jurisdiction to make the relevant decision. Rather than offer an account of how to distinguish jurisdictional from other mistakes, however, Raz simply notes that if the distinction were difficult to make, “most other accounts of authority would come to grief.”

For the reason given in the introduction, however, distinguishing jurisdictional from non-jurisdictional mistakes is notoriously controversial. An authority’s interpretation of virtually any provisions or terms of its mandate can be recast as an interpretation that ‘determines the limits’ of the authority’s jurisdiction. Consider, for example, the famous Canadian case *CUPE v NB Liquor Corporation*. At issue was the meaning of the term “employee” within the *Public Services Labour Relations Act*, and more specifically, whether management personnel were to count as “employees” for the purpose of determining whether they could lawfully replace striking workers. Interpretative arguments pulled in both directions. Management argued that “employee” was a defined term under the Act. The union argued that the Act prohibited management personnel from replacing striking workers as the *quid pro quo* for the Act’s prohibition of union picketing. The lower courts held that determining the meaning of “employee” was a matter of legal interpretation and jurisdictional, and therefore the Board had to get the interpretation right to have jurisdiction to determine whether management personnel were unlawfully replacing strikers. In other words, the lower courts treated the interpretive question as one involving Raz’s ‘factors determining the limits’ of the

67 Id.
68 [1979] 2 S.C.R. 227 [hereinafter "CUPE"].
69 R.S.N.B. 1973, c. P-25 [hereinafter “the Act”].
70 *CUPE, supra* note 68, at 240.
Board’s jurisdiction. Having determined the crucial issue to be jurisdictional, the lower courts reviewed the Board’s decision on a standard of correctness, ultimately quashing it.

Dickson J (as he then was), for a unanimous Supreme Court of Canada, sought to rein in judicial interventionism in labour law by admonishing reviewing courts not to “brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.”\(^{71}\) According to Dickson J, the interpretive issue did not go to jurisdiction, and so review of the Board’s decision was to proceed on the deferential standard of patent unreasonableness. In the result, he upheld the Board’s decision. Dickson J did not, however, declare a ban on jurisdictional review. Nor did he explain how courts were to determine if a question of legal interpretation was or was not jurisdictional.

The representational fiduciary criterion of legitimacy offers pointers toward a framework to guide inquiry on the question of whether an issue is jurisdictional. Roughly, the idea would be to use institutional norms that attend representation as signposts for whether an issue goes to a public decision-maker’s jurisdiction. Some of the constraints are familiar. For example, we would expect the decision-maker to be disinterested in the outcome and impartial in her deliberations. The thornier issues are like those in *CUPE* and involve contentious legal interpretations of the public body’s enabling statute. The norms of representation suggest the following sorts of inquiries. Has the Board in *CUPE* interpreted its statute in a manner that takes seriously the interests of the parties before it? Has the Board interpreted the statute in a way that is consistent with the statute’s general purpose and the Board’s role within the statutory scheme? The first question pays close attention to the legitimate interests of the parties for whom the Board is acting. The

\(^{71}\) Id., at 233.
second question seeks to determine whether the Board is making decisions related to the purpose for which it was established, for the benefit of the public at large as well as for the benefit of the parties. The idea is to adopt a restrictive approach to jurisdictional review by limiting the relevant questions to those that concern fairness between the parties and the Board’s *raison d’être* as a public actor. Far more would have to be said, however, to show that this framework does not suffer from the same weaknesses as others; specifically, that it does not invite the collapse of all questions of law into jurisdictional questions.

With that caveat in place, a weaker claim that will serve for present purposes is that norms related to representation plausibly have a place in whatever framework is ultimately best for distinguishing jurisdictional errors from other mistakes. We can also concur with Raz that theories of authority generally, including the fiduciary theory and its representational criterion of legitimacy, must be able to distinguish jurisdictional from other mistakes if the theory is to be capable of specifying the conditions under which directives are binding (i.e., the twin conditions of when the decision-maker has not made a mistake and when the decision-maker has made a mistake but it does not go to jurisdiction). At this risk of some repetition, this feature of the theory is crucial because the jurisdiction of a given authority is constitutive of its legal powers and their limits, and so without a grasp of an authority’s jurisdiction we lack understanding of the nature and limits of its public power.

It is time now to consider the relationship between the representational fiduciary criterion as a jurisdictional threshold that is porous to peaceful outsiders, and the sources
thesis according to which the existence and content of law can always be identified by reference to social sources alone.

VI. LAW’S MORAL CLAIM TO REPRESENT AND THE SOURCES THESIS

In the border context, the representational fiduciary criterion is a jurisdictional threshold in the sense that it supplies a standard of adequacy the receiving state must meet for its interactions with peaceful migrants to conform to the demands of legality. The threshold is jurisdictional because its standard of adequacy provides the power-conferring conditions the state must satisfy to have de jure authority over outsiders. These power-conferring conditions – the procedural and structural threshold requirements of cosmopolitan legality – are public justification and independent review. But it is important to recognize that the justification of these formal requirements presupposes that the outsider’s interests will be taken seriously, both at first instance and on review.

A state that chooses to exclude peaceful outsiders might be expected to offer a proportionality analysis to show that exclusion is a necessary or at least proportionate policy in light of legitimate state concerns. Moreover, the state’s justification would be expected to take seriously international norms such as international human rights law. These norms expressly recognize outsiders as both legal subjects and persons, and thereby resist the nativist call to strip migrants of their personhood. And, because international norms transcend states and their encounters with migrants, they can contribute to a cosmopolitan and double-facing constitution from which the just state can garner legitimacy through public justifications that strive to accommodate fairly the state’s local and global responsibilities. While these justifications would be context-
dependent, they would also be substantive and jurisdictional, since they would explicitly refer to and establish the limits of a state’s authority to exclude outsiders. Public justifications that pass independent review demonstrate a valid exercise of the state’s limited power to exclude, while justifications that fail to survive scrutiny under review are legal nullities.

Let me briefly retrace our steps and then assess the sources thesis in light of this framework for cosmopolitan legal order. We began by noting that norms of jus cogens, such as the prohibition on slavery, supervise the validity of international treaties (offending treaties or treaty provisions are of no legal effect). The representational fiduciary criterion of legitimacy allows us to identify jus cogens norms; these are norms the violation of which could never be lawful because slavery, genocide, racial discrimination, etc. could never be intelligible as policies implemented in the name of or on behalf of the people subject to them. I then argued that under the prevailing understanding and practice of state sovereignty, outsiders at the border occupy a position akin to slaves: both are subject to comprehensive domination, and mere coercive force rather than law. For states to have legal authority over outsiders, I suggested they have to take seriously their position as fiduciaries of humanity, and institute a legal framework premised on a double-facing constitution that includes substantial public justification and meaningful review. The framework makes the receiving state’s implementation of exclusionary policies intelligible as action that take seriously the interests of the outsider, precisely because the state must offer a justification and subject it to review. It is this submission to legality that makes it plausible to say that the state’s action, filtered through legal channels in which the outsider enjoys legal equality, is action taken on
behalf of the outsider as well as the state’s citizens. When the state occupies its dual roles as a fiduciary of its people and a fiduciary of humanity, there is arguably a sense in which it unifies institutionally the internal and external aspects of the double-facing constitution.

This conception of legality is in significant tension with the sources thesis. The tension arises from the fact that the fiduciary criterion of legitimacy makes demands on the receiving state that flow from norms of representation. These norms are not source-based in any ordinary sense, but rather arise from a morality of role intrinsic to the representative nature of public institutions. On the theory defended here, the norms of representation are constitutive of legality and have ineliminable moral content, such as the duty to justify adverse decisions. In the cosmopolitan context, these norms are drawn from the global and local roles of fiduciary states charged with stewardship of the double-facing constitution.