

In defense of the right to control immigration

PH338: Philosophy & Politics

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“We have voted to leave the European Union and become a fully-independent, sovereign country. We will do what independent, sovereign countries do. We will decide for ourselves how we control immigration.” Theresa May in her speech to the Conservative Party conference, October 2, 2016.

The presumed right to exclude

- Most political debate about national policies presupposes the state's right to its territory, which includes the right right to control borders: the right to determine who enters the country, and under which conditions.
- This is in effect a **right to exclude** people from the territory.
- Theresa May's claim simply says "others do it, so we do it".
- Can we say more about it, give a better reason for accepting the right to exclude?

Mapping philosophical and popular arguments for excluding non-citizens

“The foreigners. . .

- . . . take up our jobs and school places, congest public transport, overburden the health system, and unfairly draw on social security.“
- . . . are too different and make us feel like strangers in our own country.“
- . . . take over our country once we let them vote.“

- 1 Specifying the right to exclude
- 2 Collective self-determination (Wellman, Walzer, Miller)
- 3 Freedom of association (Wellman)
- 4 Freedom from duty imposition (Blake)
- 5 Associative ownership (Pevnick)
- 6 National identity (Miller)

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A right of citizens

- The state's right to its territory, and to exclude non-citizens from the territory, is most defensible for democratically legitimate states.
- The state's right is thus best understood as being derived from the corresponding rights of citizens as a body.
- Do citizens have the right to exclude people from the territory of their state?
- More precisely: Do citizens have a right to determine who they admit, and under which conditions?
 - admit to: territory, society, citizenry.

A moral liberty right

- The right to exclude is here understood as a *moral* as opposed to *legal* right.
- The right to exclude is a *liberty right*, i.e. citizens are morally at liberty to exclude outsiders.
- The moral right to exclude then means that citizens are not under a moral duty not to exclude outsiders.
- Note: Henceforth “moral” is often left implicit.

A general but presumptive right

- In international law, the right to exclude does not include a right to exclude refugees.
- Likewise, most theorists who argue for a *moral* right to exclude claim that *other things equal*, states are under no moral obligation not to exclude *any given non-citizen* from their territory.
- But sometimes other things are not equal: e.g. the moral claims of refugees to be given refuge.
- So the right to exclude is *general*, but also only *presumptive*.

What citizens are permitted to do *all things considered*

- Whether citizens are *all things considered* permitted to exclude a given non-citizen depends not only on their right to exclude, but also on other morally relevant reasons, e.g.
 - The situation of the non-citizen in question: e.g. need, family ties.
 - Duties to consistently apply immigration law alike to alike cases.
 - Duties of non-discrimination, e.g. to not have immigration restrictions based on ethnicity.

What defenders and opponents do *not* have to say

- A defender of the right to exclude is not committed to saying that for every person, citizens are permitted to exclude them.
 - So any example of a person who clearly must be admitted is not a counter-example to the right to exclude.
- An opponent of the right to exclude is not committed to saying that citizens must not exclude *anyone*.
 - They merely deny that there is a *general* right to exclude.
 - In other words, they affirm that *other things equal*, citizens are *not* permitted to exclude non-citizens.
 - But there may be situations in which they may exclude non-citizens: e.g. if a person would threaten public security, or if a country's infrastructure cannot accommodate more people.

The significance of a presumptive right

- If citizens have a presumptive right to exclude, they need not give any moral justification for excluding any given non-citizen. It is enough to say that they don't want the person there, or to cite prudential/self-interested reasons for exclusion: admittance is *discretionary*.
 - Note: They may have to answer accusations that the exclusion violates other duties, e.g. of equal treatment. But this justificatory burden arises from these duties, not from a duty to not exclude.
- If citizens do not have a presumptive right to exclude, then they have a *pro tanto* moral duty not to exclude anyone. Any specific act of exclusion then needs special *moral* justification.

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- 2 Collective self-determination (Wellman, Walzer, Miller)
 - The argument from collective self-determination
 - Problems with the argument from collective self-determination

Step one: The right to self-determination or sovereignty

The right to self-determination

- It is wrong for other states to forcibly annex a given state or to force them into some sort of affiliation, e.g. an alliance. It is also wrong for other states to force particular policies on a given state.
- This wrongness can only be explained by the moral right to collective self-determination of states or the citizenries of states taken as collectives.
- Hence states or the citizenries of states have a moral right to collective self-determination.

Step two: From self-determination to membership control

Self-determination and exclusion

- States have the right of self-determination.
- Self-determination includes *determining who oneself is*, and not to have the self be forcibly changed by external forces.
- If new people become members of the state, they thereby change who the state's self is.
- Hence to exercise their right to self-determination, states must also have the right to determine membership.

Step three: From membership control to border control

- So far the argument has only established states' right to control membership.
- What about controlling access to territory?

Membership and border control

- Long-term residency on a country's territory entitles a person to citizenship, as a demand of justice.
- So by entering a country and remaining there, non-citizens can acquire a moral right to citizenship, and citizens are then no longer at liberty to deny them membership.
- So in order to effectively exercise their right to control membership, states must have a right to control access to their territory.

Note: Rights relations

- Step two and three of the argument from self-determination have the following form:
 - a has a right to do X .
 - Doing X conceptually includes doing Y . / In order to effectively do X , a needs to do Y .
 - Hence a also has the right to do Y .
- The right to determine membership is then *conceptually derivative* from the right to self-determination, and the right to control borders is instrumentally derivative from the right to control membership.

Note: Two kinds of rights

- **Basic right:** The person has a right to X (the right's "substance", e.g. to perform some action, not be subject to some action, or to obtain some good) just because of X: e.g. freedom of religion.
- **Derivative right:** The person has a right to X because X is conceptually necessary or otherwise instrumental to fulfilling another right of the person.

2 Collective self-determination (Wellman, Walzer, Miller)

- The argument from collective self-determination
- Problems with the argument from collective self-determination

Individual and collective self-determination

- The reasoning for the right to collective self-determination is flawed: We can explain the wrongness of forcible annexation, affiliation, or interference just as well as an implication of the right to self-determination of the citizens of the country, qua individuals.
- So the intuition that forcible affiliation, annexation, or interference is wrong does not speak in favour of a collective right to self-determination.

Moral rights of countries

- The argument from collective self-determination assigns moral rights to states or citizenries as collectives.
- Non-distributive, genuine collective rights are less plausible than individual rights:
 - Does it matter, irrespective of effects on individuals, how a state is doing, whether it is free, self-determined, etc.?
- Such supposed rights can come into conflict with the rights of individual citizens: e.g. if some citizens want to change their country, or simply want to abandon it.

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From collective self-determination to freedom of association

- Assigning self-determination to collectives *qua* collectives is problematic.
- But shaping the collectives of which we are members, and deciding which collectives to belong and not belong to, is a right we have *qua individuals*.
- So maybe this **freedom of association** can do the work of justifying the right to exclude.
- Note: “freedom” can be both descriptive (the person is in fact free to associate) and normative (the person has the right to freely associate). We are here concerned with the normative sense of freedom.

3 Freedom of association (Wellman)

- The argument from freedom of association
- Problems for the argument from freedom of association

Outline of the argument from freedom of association

Wellman's argument from freedom of association

- Persons have a right to freedom of association.
- This right includes the right to *not* associate with someone.
- Citizens of a country are associated with each other, and would be associated with a prospective new citizen were they to admit them.
- Citizens of the country have a right to not admit any given prospective new citizen.
- Derivative from this right, citizens also have the right to control access to their country's territory.

Identifying the core of the argument

- Key premises:
 - Individuals have a freedom of association & disassociation.
 - Co-citizenship is a form of association covered by the freedom of association.

Freedom of association and marriage

- First analogy: Marriage:
 - Individuals are free to marry whom they wish (if both parties agree),
 - and to not marry whom they do not wish to marry.
- What grounds this freedom? The right to determine one's intimate relationships.
- But this right is not impinged upon by involuntary co-citizenship association.

Freedom of association and religion

- Another analogy: Church and other religious groups.
 - Individuals are free to join or not join whatever religious group they wish.
 - And members of these groups can determine the conditions of membership and exclude e.g. atheists.
- What grounds these freedoms? The right to adhere to and exercise a religion or belief-set of one's choosing:
 - Essential that people can join or not join any given religious group.
 - Essential that members can exclude others who would change the group beyond recognition and make corporate exercise of the religious practice impossible.
- But this right is not impinged upon by involuntary co-citizenship association.

Freedom of association and clubs

- Yet another analogy: Hobbyist clubs.
 - Individuals are free to join or not join any hobby group they wish.
 - **And** these groups can control determine membership.
- What grounds these freedoms? The right to pursue one's interest and shape one's leisure time as desired.
- But this right is not impinged upon by involuntary co-citizenship association.

Overall challenge for Wellman

- There seems to be no single “freedom of association”, but different freedoms with different grounds.
- It is not enough to point to *some* freedoms of association to establish a general freedom of association that includes co-citizenship association.
- So the argument should not start by claiming general freedom of association, but needs to establish that citizens have a freedom of co-citizenship association.
- Wellman’s answer: Such a freedom is grounded in individual self-determination.

In defense of the freedom of co-citizenship association

The argument from freedom of co-citizenship association

- Individuals' have the right to determine how their lives are going.
- This right includes the right to participate in making the policies of the country in which they live, as these policies frame citizens' lives.
- Citizens must also have the right to determine the terms of such policy-making.
- The terms of such policy-making change when political membership changes.
- So citizens' right self-determination requires that citizens are free to admit or not admit would-be new citizens.

3 Freedom of association (Wellman)

- The argument from freedom of association
- Problems for the argument from freedom of association

Objection: Exclusion on discriminatory grounds

- If the right to exclude is based on freedom of association and ultimately self-determination, then it includes the right to selectively exclude on the basis of e.g. race, gender, or religion.
- Wellman bites the bullet and argues that such exclusion is impermissible only because it wrongs *citizens* who share the characteristic that is being discriminated against.
- That is not the core of the wrongness of discriminatory exclusion.

A better response to the discrimination objection

- Freedom of association e.g. in clubs or churches does not extend to arbitrary, association-unrelated association restrictions.
 - cf. not admitting people who want to play football vs. not admitting women to a golf club
 - cf. not admitting satanists vs. not admitting people of a particular ethnicity to church
- So the defender of freedom of co-citizenship association does not need to accept a right to exclude on grounds of ethnicity, gender, or religion.

A new problem: On what grounds may citizens exclude?

- But on what grounds may citizens then exclude non-citizens?
- These must be grounds relevant to the type of association: making political decisions together.
- Citizens' right here is to participate in policy-making on particular terms, and to determine these terms in turn.
- This right does not extend to living under the particular policy outcomes of the decision-making process that they would prefer.
- So citizens may exclude only non-citizens who will not abide by the terms of decision-making: In the club analogy, would-be citizens who won't play the same game.
- The right to exclude is then simply grounded in a right to protect one's (democratic) political system, and only extends as far as is necessary for this end.
- So Wellman's argument establishes much less than intended.

A possible response: New people in themselves change the terms of association

- Possible response of Wellman:
 - Merely having a new member of the citizenry changes the terms of association: dilutes individuals' votes, reduces the influence they have on collective decisions.
 - So citizens may exclude non-citizens from the citizenry, merely due to the voting power they would gain.

A counter-response: birthright citizenship

- By having children who automatically have their parents' nationality, parents impose on other citizens political association with these new citizens, and dilute their voting power.
- But this imposition does not seem problematic at all, and no concern whatsoever of other citizens.
- So it seems that merely adding more people to the citizenry is not a concern for self-determination.

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From mere association to duty imposition

- Maybe our criticism of Wellman underestimates the significance of political association, and hence underestimates the moral weight of freedom of political association.
- One thing that is particular about political association is that it involves special duties of justice of citizens towards each other.
- Maybe the freedom to determine towards whom we have these duties is weighty enough to grant the right to exclude?

- 4 Freedom from duty imposition (Blake)
 - The argument from freedom from duty imposition
 - Problems for the argument from freedom from duty imposition

Key premise: Territory, jurisdiction, and rights

- When a citizen of country X enters country Y, the responsibility of legally protecting her human rights falls to country Y.
 - e.g. the responsibility for protecting a French person on U.S. American soil from assault falls to the U.S., not to France.
- The institutions of the host country then acquire moral obligations to extend legal protection to the person.
- These duties extend not just to negative protection from harms, but also to some duties of provision.
- These duties of states effectively are duties of the citizenry of the country to extend such legal protection.

The argument from freedom from duty imposition

Blake's argument from freedom from duty imposition

- When a new person enters a country, she imposes duties on the country's citizens that they did not otherwise have: Duties to extend positive legal protection to that person's human rights.
- Obligations are reductions to our freedom.
- By entering a country, a person then reduces the freedom of the country's citizens.
- People have a right not to have their freedom be reduced in unwarranted ways.
- Hence citizens of a country have a *presumptive* right to exclude non-citizens from the territory.

Limits to the right to exclude

- When we can show that citizens *should* be obliged to extend protection to a given would-be immigrant, then it is not wrong to impose this obligation upon them. So there is no right to exclude these people.
 - In a sense, they already have the obligation before the person enters.
 - Prime example: Refugees.
- Often, we cannot escape duty impositions because doing so would conflict with other, more weighty, rights:
 - Rights to reproduce.
 - Rights to move freely in public space.

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Duty types and tokens (Pevnick)

- When a new person enters a country, citizens acquire duties to extend legal protection to that person.
- They thus acquire a new *token* or *instance* of the duty to extend legal protection.
- But they do not acquire a new *type* of duty: They already have a duty to support the legal system.
- So how much difference does the newcomer's presence really make to citizens' liberty?

Duty imposition vs. cost imposition

- Having more duty tokens in itself does not necessarily mean a liberty restriction.
 - Having more family members that I have to visit on weekends does reduce one's liberty.
 - Having more people who one may not harm does not.
 - Having more people who fall under the protection of institutions one ought to support does not, either.
- Supporting the legal system might become more costly because there are more people who have to be protected.

Cost imposition and exclusion

- So the main difference that the newcomer makes is that she makes it more costly for citizens to fulfil their duties of supporting the legal system.
- But this cost increase can easily be avoided without excluding the newcomer: Just charge an entry fee.
 - Often, this already happens implicitly through taxation, and many immigrants are net contributors.
- So the right to be free from unwarranted cost imposition does not require a right to exclude: it can be guaranteed in other ways.

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From freedom from duty imposition to associative ownership

- A key problem of the argument from freedom from duty imposition is that it boils down to (at most) increasing the cost of discharging pre-existing duties.
- But when a person immigrates into a new country, they are not merely increasing the population and thereby the cost of providing legal protection and public institutions. Instead, they are increasing the cost by using public institutions that the citizens *own*.
- So maybe citizens' *ownership* of public institutions can ground the right to exclude.

5 Associative ownership (Pevnick)

- The argument from associative ownership
- Criticism of the argument from associative ownership

Background and contrast: Ownership of the earth

- Pevnick vs. Risse: Risse holds that common ownership of the earth and natural resources entails that citizens have no right to exclude immigrants if they under-use their territory.
- Pevnick: But most would-be immigrants are not seeking access to natural resources.
- Instead, they seek access to human-made resources or *social goods*: a functioning economy (markets, regulation, enforcement, public infrastructure) and a more liveable society (rule of law, infrastructure, education, medicine, social security, external security).
- Even if would-be immigrants only seek access to the natural resources, citizens will have no feasible way of excluding them from using the social goods.

Outline of the argument from associative ownership

Pevnick's argument from associative ownership

- Citizens have ownership rights over the social goods that they create and maintain by their labour, or that have been passed on to them by their forebears.
- In virtue of this ownership, citizens have the right to control who uses the social goods.
- These social goods are largely non-exclusionary and can be used by anyone on the territory.
- So to control use of the social goods, citizens must have the derivative right to control immigration to the territory.

What of common ownership of the earth?

- What about would-be migrants who want to access natural resources and territory?
- Because social goods are non-exclusionary, we have a conflict of two types of ownership rights: ownership of the earth, in virtue of being human, and ownership of social resources, in virtue of one's labour.
- Pevnick's solution to the conflict: Common ownership rights can be fulfilled in ways other than allowing immigration: e.g. Pogge's global resource dividend.

Non-substitutable natural goods

- Access to some natural goods cannot be readily substituted e.g. by a global resource dividend.
 - Transit through the territory, especially, but not exclusively, for citizens of landlocked states.
 - Enjoyment of the natural beauty of the country.
- Due to their ownership, citizens have a right to make sure that those who would have access to the plain territory don't make unfair use of any of the socially created goods.
 - e.g. requiring visa guarantees, requiring minimum money spent in the country, restricting and charging for access to social goods.

Conflict with other rights

- The right to exclude can come into conflict with e.g. refugees' right to not be sent back ("non-refoulement").
- In this case, the right to be granted refuge wins out.
- Why? Because the ground of the right to be given refuge is stronger than the ground of the right to exclude: the right to physical security vs. the right to property (provided that no other rights are at stake, e.g. physical security of citizens).
- In sum: The argument from associative ownership, if successful, can justify present-day restrictive immigration policies even in some detail.

5 Associative ownership (Pevnick)

- The argument from associative ownership
- Criticism of the argument from associative ownership

Problem: Undeserved ownership and opportunity to contribute

- No every present citizen has contributed to the institutions of their society, and (in most countries) no present citizen has done anything for the *opportunity* to contribute.
- Luck egalitarians will not accept that Pevnick's argument establishes a genuine right to exclude: Undeserved unequal ownership of institutions.
- Even if undeserved ownership rights exist, they may be less weighty than ownership rights over which one has more control.

Problem: Undeserved ownership of worse institutions

- Inherited ownership rights are even more doubtful considering how many people *undeservedly* have inherited much worse institutions.
- Possible response: “Just because your forebears passed on less to you than mine to me doesn’t mean that my inheritance isn’t mine.”
- Counter-response: But it may mean that those who inherited better institutions have a duty to help those with worse institutions.
 - This holds all the more if the bad institutions in one country are historically linked to the good institutions in the other country.
- Counter-counter response: But such help need not come in the form of open borders but can instead take the form of state-building.
 - (Except in extreme cases like refugees, and here Pevnick grants the right to refuge already, anyway.)

Problem: Contribution of non-citizens

- In former colonial powers, the social goods available in the country are in part created through wealth extracted from the former colonies.
- The ownership argument may entitle citizens of former colonies of country X to citizenship of X, as their ancestors indirectly contributed their labour to the setting up of the social institutions of X.
- So the argument may have different implications than a general right to exclude of present states.
- This problem may extend to many other countries who generated their wealth in part through unfairly drawing on non-citizens' work.
- This is no decisive objection, but may come as an unwelcome surprise to defenders of the right to exclude.

A short back-up argument

- Pevnick's argument draws on link between ownership and labour, cf. Locke & associated criticism: You make it, hence you own it.
- Alternative argument from the fact that the goods at stake in immigration are mostly human-made and non-exclusionary social goods:
- Social goods are non-exclusionary, and are costly to produce and maintain.
- Uncontrolled immigration means that the benefits from producing social goods may well be shared by non-contributors.
- This reduces incentives to produce social good, thereby reducing overall welfare.

Evaluation of the back-up argument

- The argument from incentives is a **consequentialist** argument:
The right to exclude is grounded in the good consequences of this right / the bad consequences in not having this right.
- As a consequentialist argument, it is highly dependent on empirical assumptions:
 - How extensive would unfettered immigration be, and how much would it reduce the incentives to invest in social goods?
- Unless a supplementary argument for giving priority to citizens is provided, the consequentialist argument must consider the effects *on everyone*: So how much would unfettered immigration benefit non-citizens?

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From associative ownership to national identity

- The social goods of a country are not just any odd property of citizens.
- Instead, these goods are an integral part of the culture and identity of citizens.
- Citizens then have a special claim on these goods and on determining the use and future shape of these goods, even if their property claims are not initially entirely justified.
- Maybe this special claim can ground the right to exclude?

6 National identity (Miller)

- The argument from national identity (David Miller)
- Problems with the argument from national identity

Why states must have a right to territory

Why states must have a right to territory

- States must have claims to monopoly of power on a well-defined territory in order to fulfil their essential functions.
- Exercising that power includes control over who falls within the scope of that power, hence who is on the territory.

Why states must have a right to their specific territory

Why states must have a right to their specific territory

- States and their peoples have bonded with their territory: the territory has transformed the culture, and the people have transformed the territory.
- The work of the people gives them a claim to the value they added to the territory, and this value can only be enjoyed on the territory.
- The territory has special meaning to the people, which grounds their right to continual access to the territory and the right to determine future changes of the territory.

Rights to specific territory and the right to exclude

Rights to specific territory and the right to exclude

- The specific identity-connected grounds of claims to a specific territory give citizens a special right to determine any future changes on the territory.
- To exercise this control, they must be able to exercise discretion over whom to admit.
- So citizens have the right to exclude non-citizens from the territory.

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Control over territory vs. control over immigration

- States can exercise effective control over territory without *deciding* who falls under their jurisdiction.
- It merely needs to be *clear* who falls under that jurisdiction.
- So states can legitimately take measures to know who is on the territory, and to prevent people fleeing legal consequences by leaving the country.
- But this kind of control over territory does not need to include control over who gets to enter and settle on the territory.
- So let's rewrite the argument as one about entanglement of territory and culture, and resulting claims on the territory.

Rights to specific territory and the right to exclude

Rights to specific territory and the right to exclude

- The specific identity-connected grounds of claims to a specific territory give citizens a special right to determine any future changes on the territory.
- To exercise this control, they must be able to exercise discretion over whom to admit.
- So citizens have the right to exclude non-citizens from the territory.

Occupation and forceful eviction

- How was the territory acquired in the first place? The argument sanctions occupation and forceful eviction.
- Response: The argument does not sanction such actions, but in the long run, the newly arrived people acquire rights over the territory nonetheless.
- The alternative is that almost no territory is rightfully occupied.

Totally non-disruptive immigration

- The argument from national identity cannot support immigration restrictions for would-be citizens who will not change the national identity.
 - Miller establishes a right to protect the goods that form part of one's identity.
 - It does not establish a right to exclude others from these goods other than for the protection of the goods.

Are all identities worth preserving?

- cf. Wellman:
 - A club with a racist agenda can, as a matter of freedom of association, exclude would-be members on grounds of ethnicity.
 - But arguably such a club should not exist in the first place.
 - And hence preservation of this association does not grant any rights to exclude.
- So what about a country that defines itself ethnically?
 - e.g. Australia's former "White Australia" policy
 - Arguably, these identities do not enjoy moral protection.
 - Hence they cannot ground a right to exclude.

So which identities are worth preserving?

- Cultural identities that require similarity in order to function.
 - e.g. language communities or religious communities.
- Together with the argument from non-disruptive immigration: Even more would-be immigrants may not be excluded: All those that are non-disruptive to those aspects of national identity whose preservation is a genuine moral interest of people.
 - Would-be immigrants who have learned the language, adopt or leave unaffected other aspects of the culture, landscape, way of life.

Exclusion and other means

- The identity-interest that the right to exclude is not necessarily threatened by immigration.
- This interest can be protected by other means, e.g. language requirements for long-term settlement.

Summary

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Seminar discussion

- Develop an objection to Pevnick's argument from associative ownership that is initially promising, but ultimately defeasible.
- Develop an objection to Pevnick's argument from associative ownership that is ultimately successful.