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Immigration Rights and the Justification of Immigration Restrictions

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I. Introduction

When, if ever, are restrictions on immigration morally justified? There is considerable disagreement about this foundational question in the political philosophy of immigration, with the debate often framed as a dispute between two camps that each seek to vindicate a putative right.[1] Populating the first camp are defenders of open borders, who defend a "right to immigrate," or a "human right" to immigrate and "move freely across borders."[2] Populating the other camp are those who support a receiving state's "right to exclude," "right to control [its] borders," or "right to choose an admissions policy."[3]

This article aims to answer the question at the heart of this debate by clarifying the conditions for immigration restrictions to be justified. I begin in Sections II and III by challenging the debate's current binary framing, which submerges three important distinctions: specifically, the distinction between individual rights to free immigration and rights to immigrate for specific reasons; the distinction between strong and weak individual rights to immigrate; and the distinction between a receiving state's legitimacy-right and justification-right to regulate and restrict immigration.

In Sections IV and V, I consider the view that individuals have a strong right to free immigration; since a right of this type stringently protects individuals' freedom to immigrate according to their choice, it would make immigration restrictions normally unjust. I offer a conditional argument that there is no such right. This argument is conditional because it takes for granted an internationalist conception of global justice that differentiates between egalitarian duties of justice that specially apply among those who share membership in a state, and distinct duties of justice that apply between states or among all human persons. I target in particular two arguments that each seek to mount a freestanding case for a strong individual right to free immigration—that is, a case that does not depend on accepting either internationalism or its rival, globalism.

While rejecting a strong right to free immigration, I affirm two distinct rights to immigrate: strong rights to immigrate for certain specifically protected reasons, and a weak right to free immigration that establishes a presumption against immigration restrictions that lack a sufficient justification. In Section VI, I then specify the conditions for immigration restrictions to successfully rebut

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this presumption; these are, equivalently, the conditions a state's immigration laws must satisfy for it to have a justification-right to restrict immigration. Since there is no strong right to free immigration, limits on the freedom to immigrate can be justified even when restrictions are not necessary to protect anyone's strong rights or to accomplish some other especially compelling goal. I argue that it is a sufficient justification for immigration restrictions that they are reasonably believed to advance, or have a high likelihood of advancing, a permissible goal of public policy while honoring whatever specific requirements of justice apply to immigration policy.

II. Disambiguating Individual Rights to Immigrate

Rights to immigrate are helpfully disambiguated along two dimensions: the object of the right and the stringency of the right relative to other goals and values. Along the first dimension, consider two possible objects of an individual right to immigrate. A right to *free immigration* protects an individual's freedom to enter and reside in states of which she is not a citizen, according to her choice. As a choice-protecting right, a right to free immigration is held against all potential receiving states. By contrast, a right to immigrate *for specific reasons* entitles individuals situated in certain objective circumstances to enter and reside in certain states of which they are not citizens, in order to achieve certain specifically protected purposes.

Along the dimension of stringency, we should distinguish between *strong* and *weak* rights. Strong rights have a special resistance to trade-offs that expresses their priority over other goals and values. Specifically, they cannot be traded off simply in order to promote the "public good" or the "general interest"; they are permissibly infringed only for the sake of protecting other strong rights or to secure some other especially compelling goal.[4] A paradigm example of strong rights are rights to the basic liberties such as freedom of conscience, expression, and association. Infringing these rights is objectionable except to protect other basic liberties or other strong rights.[5]

By contrast, weak rights are less resistant to trade-offs with other values: while it is objectionable to limit a weak right without sufficient justification, a state may permissibly infringe a weak right to promote a wide range of public policy goals. At least on a widely held egalitarian liberal view, most property rights are weak rights.[6] Taxation and other limitations on individuals' property rights can be justified as a means to provide public goods and to serve distributive justice; the standard for permissible limitations of property rights is not so stringent that they can only be infringed for the sake of protecting basic liberties or some other fundamental value.[7]

Drawing on these two distinctions, we can say that the philosophical defenders of open borders such as Joseph Carens, Kieran Oberman, and Chandran Kukathas hold that individuals have a *strong* right to *free immigration*: they claim that each receiving state is required not to interfere with any

migrant's choice to immigrate to its territory, except for the sake of protecting other strong rights.[8] On this view, almost all immigration restrictions are unjust—not only the *actual* immigration restrictions that existing states impose, which are undoubtedly open to a range of serious moral criticisms, but also *potential* immigration laws that would significantly liberalize immigration relative to the status quo without fully embracing open borders.

The claim that individuals have a strong right to free immigration must not be confused with two other distinct claims. The first is that individuals have a *weak* right to free immigration. The second is that some individuals have a strong right to immigrate *for specific reasons*. These latter views are uncontroversial, and indeed are embraced by noted philosophical opponents of open borders such as Michael Blake and David Miller. If individuals have a weak right to free immigration, then immigration restrictions stand in need of justification—although the standard for a sufficient justification is not the especially stringent one associated with strong rights. Blake and Miller explicitly accept this: the exclusion of any would-be migrant must, they insist, be justified by sufficient reasons.[9] The claim that individuals have a strong right to immigrate for particular protected reasons, rather than according to their choice, has likewise been explicitly endorsed by Blake and Miller in some form: both argue that at least those individuals who are unable to access adequate protection for their human rights in their own state are defeasibly entitled to migrate to a human rights–protecting state.[10]

III. Disambiguating States' Rights to Restrict Immigration

Turning now to a receiving state's putative right to regulate immigration, it is important to distinguish between what I call the *justification-right* claim and the *legitimacy-right* claim.[11] To say that a state *S* has a justification-right to restrict immigration by adopting a given immigration policy is to say that that policy is morally justified: there is sufficient moral reason in favor of the policy, and hence *S* is morally permitted to pursue that policy. To say that a state *S* has a legitimacy-right to restrict immigration is to make some or all of the following three claims: first, that there is sufficient moral reason for *S*'s current membership to have the unilateral power to determine the laws regulating immigration to *S*; second, that would-be migrants have a duty to comply with the immigration laws enacted by *S*'s membership, in virtue of those laws being enacted by *S*'s membership; and third, that it is morally permissible for the officials of *S* to use some degree of coercion to enforce compliance with its immigration laws, again in virtue of those laws' procedural source in the decisions of *S*'s membership.

Within the philosophical debate on immigration, the distinction between a justification-right and a legitimacy-right to restrict immigration has not always been properly attended to. The views of Carens and others who hold that immigration restrictions are generally unjustified are treated as equivalent to the

views of those, such as Arash Abizadeh, who hold that immigration law determined by the unilateral choice of each receiving state's current membership is illegitimate.[12] This conflation obscures a crucial element of Abizadeh's views: as he explicitly stresses, because "justice . . . is not a sufficient condition for democratic legitimacy," even if there are reasons that make restrictions on immigration "hypothetically justifiable," it is an orthogonal question whether immigration laws enacted by the unilateral choice of a receiving state's citizens are "democratically legitimate."[13]

Conversely, views holding that some restrictions on immigration are morally justified are often taken to be equivalent to views holding that decision-making power over the regulation of immigration is legitimately wielded by the existing members of the relevant receiving state.[14] Defenses of the legitimacy-right claim—such as Miller's appeal to self-determination or Christopher Heath Wellman's contention that a human rights–protecting state's right to freedom of association imposes duties on "external parties" to "respect [that] state's dominion over its borders"[15]—are frequently conflated with defenses of the claim that immigration restrictions are substantively justified under certain conditions.

This tendency to conflate states' justification-rights and legitimacy-rights to restrict immigration is unfortunate not only because it represents a conceptual confusion; the distinction has an important *normative* significance. The moral considerations that bear on the substantive justification of various immigration policies differ from, and should not be collapsed into, the considerations that bear on the assignment of decision-making power over immigration policy. As an illustration, consider one kind of case where the justification-right and the legitimacy-right to restrict immigration come apart: cases where a receiving state legitimately wields the power to regulate immigration into its territory, but its prevailing immigration regime restricts immigration in a way that is not substantively justified.

Here the state lacks a justification-right to restrict immigration in the way that it does, but it nevertheless enjoys a legitimacy-right to determine its own immigration regime. The practical upshot is that there is a valid moral demand for the state in question to reform its immigration laws; at the same time, the addressees of its immigration laws are nevertheless morally bound to comply with these laws, and there is no valid moral demand for the state to reform the procedures by which it enacts its immigration laws so as to, for example, give decisional weight to judgments of noncitizens. Conflating the justification-right and the legitimacy-right to regulate immigration would prevent us from capturing this complex normative situation.

IV. Against the Argument from Negative Liberty

I have highlighted three important distinctions obscured by the binary framing of the existing debate on the justification of immigration restrictions. With this conceptual framework in hand, I turn to address the substantive normative

question at the center of the debate: When, if ever, are restrictions on immigration justified?[16] In Sections V and VI, I begin to answer that question by seeking to refute the view that individuals have a strong right to free immigration. Determining whether individuals have such a right is crucial to understand when immigration restrictions are justified, since if there is a strong right to free immigration, restrictions on immigration would be unjustified except when they are necessary to protect other strong rights or to honor some fundamental value.

One type of argument for a strong right to free immigration appeals to a *globalist* conception of global justice: this view requires at least civil and political equality, as well as equality of opportunity, across the global population.[17] To be sure, if justice condemns any policy that differentiates between the civil and political rights of citizens and noncitizens, or that conflicts with equalizing the socioeconomic opportunities of all persons globally, then there is a clear case for a strong individual right to free immigration.

Many philosophers have argued, however, that globalism should be rejected in favor of *internationalism*, the view that shared membership in a state is morally significant and properly grounds special duties of justice that apply among cocitizens but not among the entire global population. According to internationalists, while social justice requires the citizens of a given state to protect each other's strong rights to the basic liberties and to maintain equality of opportunity and socioeconomic fairness among themselves, what they owe to noncitizens is different. These latter requirements of global justice can be divided into two broad categories. First, there are duties to respect the human rights of all persons and to defend noncitizens' human rights when they lack adequate domestic sources of protection for their human rights. Second, there are duties to ensure that schemes of international and transnational cooperation are fair to all participants.[18]

To avoid turning the debate on the justification of immigration restrictions into a proxy war between globalism and internationalism, I will pursue a conditional argumentative strategy: I seek to show that given an internationalist conception of justice, there is no case for a strong individual right to free immigration. My target will therefore be a second type of argument that has been advanced in favor of a strong right to free immigration. These *freestanding* arguments claim to be independent of any background assumptions about the requirements of global justice. In particular, they claim to make the case for a strong right to free immigration without appeal to any globalist assumptions.

Broadly, two freestanding arguments have been advanced. The first takes free immigration to be a special case of a general strong right to negative liberty. This argument begins by claiming that there is a strong presumption against restricting negative liberty. For example, Kukathas claims that we need "very strong reasons" to forcibly prevent someone from acting as she chooses.[19] The argument then notes that immigration restrictions interfere with negative liberty, and hence that there is a stringent presumption against such restrictions. Absent especially weighty reasons such as the need to protect other strong rights, especially other liberty-based strong rights, immigration restrictions are unjust.

However, the special stringency of strong rights makes a strong right to negative liberty as such implausible. This right would render impermissible uncontroversial regulations that constrain conduct in order to protect individuals from harms that are not in themselves deprivations of negative liberty or some other violation of strong rights.[20] Indeed, since all laws restrict negative liberty in some way, a strong right to negative liberty would imply that the public interest almost never supplies a sufficient justification for law. If the interest in negative liberty as such had great objective urgency, it might be reasonable to prioritize it over the public interest. But given that negative liberty as such refers to the absence of external obstacles to action of all kinds, aimed at any purpose however trivial, it is hard to see why it should have this kind of priority.[21]

In common with a standard liberal view, then, I hold that individuals do not have a strong right to negative liberty generally. Rather, they have strong rights to a list of specific freedoms with special significance—that is, basic liberties.[22] While there is a right to negative liberty, it is only a *weak* right, that is, a right that lacks the special stringency that strong rights have. The weak right to negative liberty imposes duties of noninterference with individuals' conduct, but these duties are permissibly overridden simply when interference would serve the public interest. The weak right to negative liberty forbids interference in individuals' conduct that lacks a sufficient justification. However, permissibly infringing this weak right needs "no special justification . . . but only *a* justification," as Ronald Dworkin puts it.[23]

If there is no strong right to negative liberty generally, then we cannot derive a strong right to free immigration as a special case of that more general right. A more promising strategy is to show that free immigration is a specific, especially significant freedom—a basic liberty—protected by a strong right. This is precisely the strategy followed by the second freestanding argument, which has been developed most notably by Carens and Oberman. It is to this argument that I now turn.

V. Against the Cantilever Argument

Carens contends that a strong right to free immigration is a "logical extension" of the familiar basic liberty of free movement within state borders.[24] Oberman likewise holds that free immigration is protected as one of the "human freedom rights," that is, strong rights whose objects are "basic freedoms."[25] Following the term now established in the literature, I call this the *cantilever* argument: it seeks to justify a strong individual right to free immigration as the international extension of, or counterpart to, internal free movement.[26] At its core, the cantilever argument claims that because the interests protected by internal free movement and the interests protected by free immigration are symmetrical, if individuals have a strong right to the former then they also have a strong right to the latter.

To evaluate this argument, we must first clarify the content of internal free movement and free immigration as basic liberties. Although Carens sometimes speaks of these liberties as protecting the freedom to "go where you want to go and do what you want to do," the content of these liberties cannot simply be unimpeded bodily locomotion, whether within or across territorial borders.[27] For one thing, both internal and international migration involve more than simply physically moving to and occupying space in a new location. Migration, whether internal or international, also involves *social* relocation: at a minimum, an authorized migrant—as opposed to a tourist or short-term visitor—is eligible to participate in the civil society of her new place of residence, and in particular to participate in the formal economy and labor market in some form.

For another, bodily locomotion is too general and expansive—it comes close to negative liberty as such—to count as a specific, basic freedom. Indeed, the objections to the idea of a strong right to negative liberty I canvassed above would apply as well to a strong right to unimpeded bodily locomotion. Such a right would imply that all private ownership of land is unjust except under special conditions, since property rights in a given piece of land legally prohibit nonowners from moving onto, and through, that piece of land without the owner's consent.[28]

I propose to conceive of internal free movement as a basic liberty comprising two specific incidents: (internal) *free travel* within a given state's territory and (internal) *free choice of residence*.[29] Free travel presupposes the establishment of a system of public roads and pathways that allows individuals passage "from every piece of privately held land to every other," and calls for the maintenance of the public character of that system: all must be able to use the roads and pathways in pursuit of their diverse ends.[30] Free choice of residence demands, at a minimum, noninterference in individuals' choices about where within the territory to reside. But to be substantive, this incident must also guarantee favorable conditions for individuals to choose and change their residence by requiring equality in fundamental civic entitlements, regardless of an individual's past or present place of residence within the territory. Thus, a state violates internal free choice of residence if it makes the level of protection of civil and political rights, eligibility to participate in the labor market and the formal economy, or eligibility to receive social services and welfare benefits dependent on individuals' place of residence within the territory.[31]

When the content of internal free movement is so understood, it aligns with other familiar basic liberties in the sense that its grounds are also the grounds for these other liberties. Specifically, the incidents of internal free movement are institutional preconditions for individuals to exercise personal and political autonomy. To see how free travel serves individuals' autonomy, consider what social conditions individuals would face absent a system of public roads and pathways. Individuals would have to seek the permission of all the landowners whose holdings their intended routes traverse in order to travel beyond their own holdings of land. This would make each person's ability to pursue her

personal projects and to participate in various relationships and associations dependent on these landowners' approval of (or at least acquiescence in) her projects, relationships, and associations. An individual's ability to engage in activism to advance her chosen political causes, and her ability to campaign for political office, would similarly be dependent on these landowners' approval of or acquiescence in her political views and causes.[32] If government officials abrogate the public character of the system of roads and pathways by preventing some persons from using that system, then similarly those individuals' personal and political autonomy will be undermined.

Free choice of residence is similarly an institutional precondition for individuals' personal and political autonomy. First, without free choice of residence, an individual will be unable to properly exercise other basic liberties, especially the freedom of occupational choice, that are themselves institutional preconditions for personal autonomy. Second, in order to pursue many personal projects, relationships, and associations, an individual may have to change her place of residence. Free choice of residence similarly serves political autonomy. To properly engage in democratic deliberation and political agency, a citizen must have a sound understanding of the social and political problems facing the whole body of her compatriots, including those who live in parts of her state's territory distant from her current place of residence. When citizens are free to travel to and take up residence in other parts of their state's territory, the general level of citizens' understanding of social and political conditions throughout the state is greatly improved.[33]

Because internal free movement is essential for individuals to exercise personal and political autonomy, liberals have recognized this basic liberty as the object of a strong right. The cantilever argument claims that the freedom to travel and to choose one's residence *throughout the world*—what we might call *international* free travel and *international* free choice of residence—are also preconditions for individuals' personal and political autonomy. For example, Oberman urges that because these incidents are necessary to access the "many life options that exist beyond the borders of the state in which we reside," they are preconditions for our personal autonomy.[34] Moreover, given present levels of global economic interdependence and the importance of political action at the global level to solve irreducibly global problems like climate change, individuals can only intelligently and effectively participate in the democratic processes of their own states if they enjoy international free travel and international free choice of residence. Hence, for Oberman, these incidents are also preconditions for individuals' political autonomy.[35]

The next premise of the cantilever argument claims that because the interests protected by internal free travel and free choice of residence—namely the exercise of individuals' personal and political autonomy—are the same as the interests protected by international free travel and free choice of residence, it would be inconsistent to recognize a strong right to internal free movement but not a strong right to free immigration. My objection to the cantilever argument

centers on this premise: I will grant that the interests individuals have in internal free movement are symmetrical to the interests they have in free immigration. I will also accept that the main function of rights is to protect the urgent interests of the right-holder.

But even on the interest account of rights, rights are not simply identical to the interests they protect. A claim that someone has a strong moral right is not merely a claim that it would be good for her to enjoy the object of the right; rather, it is a claim that, absent special grounds, relevant *others* are under a *duty* not to deny her the object of the right. Hence, in justifying a right, we cannot attend only to the "demand side," that is, the interests that the putative right protects. We must also consider "supply side" questions: why and in what ways specific others should be required to serve the protected interests.[36] To be successful, then, the cantilever argument for a strong right to free immigration must also demonstrate symmetry between the *duties* to secure free travel and free choice of residence that compatriots owe each other, on the one hand, and that all human persons owe each other, on the other.

But this symmetry of duties is exactly what internationalism denies. Internationalists hold that the members of a state owe each other—but not humanity more generally—duties to equally protect one another's basic liberties: they are duty-bound to serve each other's essential autonomy interests to the extent of prioritizing their satisfaction over other aspects of the public good. While there are conditional duties to act in defense of the human rights of noncitizens, these duties are only triggered when noncitizens' own states fail to protect their human rights. This asymmetry between the duties that the members of each state owe each other and the duties they owe to humanity at large affects the content of what strong rights individuals have.

In particular, an individual's strong rights to basic liberties protect only her exercise of those liberties within the territory of her state of citizenship or residence. Rights to political participation and to freedom of occupational choice provide the clearest examples. In line with their rejection of global democracy, internationalists hold that rights to political participation are not violated when someone is denied the franchise in states that she is not a citizen or resident of. In line with their rejection of global equality of opportunity, internationalists hold that the right to freedom of occupational choice is not violated when nonresidents face greater impediments in competition or even consideration for jobs because of their citizenship or residency status.

Even beyond these familiar examples, strong rights to the basic liberties are generally understood as territorially bounded on an internationalist account. Mathias Risse, a prominent internationalist, offers a trenchant statement of this view:

> For me to have freedom of speech . . . is for me to be able to speak my mind to those around me; it does not depend on governments elsewhere refusing to publish my views, even if such refusals mean I cannot reach the audience I am most eager to reach. For me

> to have freedom of conscience . . . is for me to be able to practice my religion where I live, not for my religion to be accepted elsewhere, nor does it mean for me to be able to travel anywhere my religion may require me to go. . . . For me to enjoy freedom of association . . . is for me to be able to associate with likeminded persons in an area where we are subject to the same jurisdiction; it does not depend on my ability to meet people far away, even if I have no other like-minded people in the same jurisdiction.[37]

The strong right-protecting free travel and free choice of residence is similarly territorially bounded. For internationalists, the members of a state have a duty to each other to establish and maintain a system of public roads and pathways joining all private landholdings within their state's territory, but they do not owe humanity at large a duty to establish and maintain a system of public rights of way throughout the inhabited parts of the earth's surface. The members of a state owe each other a duty of noninterference in each other's choice of residence, and a duty not to discriminate against each other in the provision of basic civic entitlements on the basis of past or present place of residence. However, they do not owe humanity at large a comparable duty. Therefore, while internal free movement is the object of a strong individual right, free immigration is not.[38]

Contrary to what the cantilever argument claims, then, there is no inconsistency in recognizing a strong right to internal free movement while rejecting a strong right to free immigration: even if the interests underlying both freedoms are symmetrical, the duties that citizens of a receiving state owe to each other and the duties that they owe to noncitizens are asymmetrical. Whether this thesis about the asymmetry of duties can be sustained depends of course on whether internationalism as a conception of global justice can be sustained. But insofar as the cantilever argument aspires to mount a freestanding case for a strong individual right to free immigration, it fails on its own terms: for the argument to go through, it must presuppose the rejection of internationalism.

Notice that my argument here differs significantly from Miller's influential objection to the cantilever argument. Miller argues that the right to internal free movement protects the right-holder's access to only an "*adequate* range of options," and therefore that individuals have a right only to a degree of free travel and free choice of residence "*sufficient*" to access this adequate range. For individuals whose states furnish them with an adequate range of options internally, what they have a right to is only internal free movement and not free immigration.[39]

As many have pointed out, Miller's account has difficulty justifying a right to free internal movement in a large high-income democracy, since free travel and free choice of residence within various substate regions of such a state would presumably be sufficient to access an adequate range of options.[40] This reflects a deeper problem: there is no reason to expect that the degree of free travel and free choice of residence that is sufficient to access an adequate range of options should track the distinction between internal movement and

international migration. Miller's account therefore seems an inapt response to the cantilever argument. In contrast, my supply-side–focused argument does not make any revisionist claims about the interests underlying internal free movement. Moreover, the asymmetry it appeals to between the duties that compatriots owe each other and the duties they owe to noncitizens tracks the differing scope of internal and international free travel and free choice of residence.

Notwithstanding its advantages over Miller's view, my argument against the cantilever argument will no doubt prompt objections. Here I anticipate and respond to four. The first observes that according to international human rights law, as reflected in the actual practice of democratic states, all persons lawfully present within a state's territory—including tourists and short-term visitors who have no plausible claim to be members of the state in question—are entitled to internal free movement. As Oberman puts it, the "right to internal freedom of movement, conventionally defined, applies to foreigners as well as citizens."[41] Appealing to *conventional rights* as a moral guide, this objection insists that the duties to honor internal free movement are owed without regard to a putative beneficiary's citizenship status: contrary to what I have argued, there is no asymmetry of duties to protect individuals' free travel and free residence.

Notice, however, that internal free movement *as a legal human right* guaranteed to all persons territorially present is far less extensive than the *basic liberty* of internal free movement as I have proposed to understand it. For example, human rights law does not require tourists to be given eligibility to participate in the economy of the territory they are visiting. The legal human right to internal free movement enjoyed by tourists covers at most internal free travel and a weak form of internal free choice of residence that forbids interference with the right-holder's choice of temporary residence but does not require access to the labor market and the formal economy. The international counterpart of this legal human right would be an international right to visit, not a right to free immigration.

Internal free movement as a basic liberty is far more demanding: as we have seen, it includes substantive free choice of residence that guarantees equality of civic entitlements, including equal access to the labor market and formal economy, regardless of place of residence. This more demanding right is not owed, as a matter of international human rights law or state practice, to both citizens and foreigners. However, it is internal free movement as a basic liberty—not the weaker bundle of entitlements that tourists enjoy—that the cantilever argument must take as its starting point if it is to derive a counterpart right to free *immigration*. Migration goes beyond mere physical relocation and involves at a minimum eligibility to participate—and in the long term, fully and equally participate—in the formal economy of the destination state.[42]

A second objection claims that cocitizens cannot avoid violating each other's strong rights to *freedom of association* unless they authorize noncitizens to freely immigrate to their state; immigration restrictions are objectionable barriers to free association between citizens and noncitizens of a state.[43] Two

responses to this objection are available. One appeals to Risse's view that the right to freedom of association only protects the associational choices of parties located "in an area where [they] are subject to the same jurisdiction."[44] If the right to free association only forbids interference with associational choices within the same jurisdiction, but not across different state jurisdictions, then immigration restrictions do not violate citizens' rights to free association.

Alternatively, it is arguable that the right to free association, properly construed, does not require general noninterference in individuals' ability to select their preferred company. This explains why hiring practices and the terms of employment contracts are permissibly regulated for the sake of a wide range of policy goals. Rather, freedom of association is a basic liberty that comprises three specific incidents: the freedom to pursue shared expressive ends in concert with willing others, the freedom to engage in collective bargaining, and the freedom to form and maintain intimate personal relationships.[45] While immigration restrictions undoubtedly interfere with citizens' choices to associate with noncitizens, they do not violate citizens' rights to free association unless they burden the above three freedoms for citizens. Citizens' rights to free association require that immigration restrictions do not discriminate among would-be migrants based on their conceptions of the good or their (lack of) ties to local trade unions, and that restrictions do not unduly burden intimate personal relationships between citizens and noncitizens. These constraints, however, do not require states to allow free immigration.

A third objection urges that there is a stringent negative duty not to set back would-be migrants' important interests by imposing immigration restrictions, and that this duty is universal.[46] According to this objection, there is a negative duty to avoid interference with others' conduct whenever doing so will set back their important interests. Even if internationalists are right that some duties to take *positive* action to serve others' important interests apply specially among compatriots, *negative* duties of nonharm are always universal. Since individuals have important interests in having the freedom to immigrate, and immigration restrictions involve interference in would-be migrants' conduct, such restrictions violate the aforementioned negative duty. There are, then, stringent duties not to restrict the freedom to immigrate.

As we have seen, however, free immigration does not merely require noninterference with migrants' bodily locomotion across the border: the duties correlative to a right to free immigration are not purely negative but also mandate positive action. A state that does not police its borders but refuses to recognize and enforce the rental, employment, and business contracts of noncitizens fails to allow free immigration. At most, then, this objection establishes something less than a strong right to free immigration.

We may doubt, further, whether the distinction between positive and negative duties—understood as a distinction between duties mandating action and inaction, respectively—has the deep moral significance that this objection attributes to it. Immigration presents only one example of a more general fact: to

provide social protection for individuals' important interests, states must typically both take action and refrain from acting in certain ways.[47] This fact casts doubt on the idea that there is a categorical moral difference (especially in social and political contexts) between acting to promote another's well-being and refraining from action that will set back another's well-being.[48]

Another reason to reject the objection is that it relies on a crucial but implausible claim: that there is a duty to refrain from interfering with others' conduct whenever the contemplated interference will set back their important (autonomy) interests. This alleged duty would be inconsistent with property rights as they are commonly understood, since property rights precisely license interfering with nonowners' negative liberty—even at great cost to nonowners' interests, especially their autonomy interests—in order to preserve the owner's control over her property.

A fourth objection urges that my argument suffers from *status quo bias*.[49] This objection observes that each state's past immigration policies have shaped the specific composition of its present membership, and hence have partly determined which particular persons fall within the set to whom special compatriot duties are owed. Any attempt to justify immigration restrictions by appeal to an asymmetry between what is owed to current members and what is owed to nonmembers, then, incorporates an objectionable status quo bias.

The underlying principle this objection appeals to seems to be this: in case *A*, attempts to justify her disadvantageous treatment of *B* on the basis of some property of *B*, *A*'s purported justification suffers from an objectionable status quo bias if *B* has that property in virtue of previous deliberate decisions by *A*. However, this principle fails to consider that status quo bias is only sometimes objectionable. Consider a university that refuses to confer a degree on an individual because she has not completed the required courses. The justification offered by the university would not be undermined by the mere fact that that individual was prevented from enrolling in courses because the university had earlier declined to admit her. Only if the university's prior admission decision was itself wrongful—for example, if it was discriminatory—would its argument suffer from an *objectionable* status quo bias.

The objection is therefore more plausible if it is reconstructed as an appeal to the moral significance of past injustice. If a state's past immigration laws were unjust, then the existing boundary demarcating members and nonmembers is tainted by injustice. According to this objection from *past injustice*, it would be perverse to justify immigration restrictions by appeal to an asymmetry between what current members owe each other and what they owe to nonmembers, given that some would-be migrants are only nonmembers because they were previously unjustly excluded.

I grant that if an individual would-be migrant *M* was previously excluded from a state *S* unjustly, then *S* has a duty of reparative justice to *M*. An obvious remedy prescribed by this reparative duty would be to make *M* eligible for admission. I also grant that most, if not all, states have historically implemented

immigration policies that unjustly excluded many migrants who now have a claim of reparative justice to be admitted. However, unless *all* would-be migrants have this reparative claim to admission, reparative justice cannot generate a strong right to free immigration that individuals in *general* are entitled to. While the objection from past injustice shows that particular individuals have a strong right to immigrate for *specific reasons* of reparative justice, it does not establish a strong right to free immigration.

VI. Justifying Immigration Restrictions

I have argued that there is no strong individual right to free immigration. There are, however, rights to immigrate of two other kinds. First, individuals who are faced with certain objective circumstances have *strong* rights to immigrate for certain *specifically protected reasons*. Two important examples are rights to immigrate for reasons of *nonideal* justice. One example concerns individuals who have no reasonable prospect of receiving adequate human rights protection except by migrating: the states they currently reside in unjustly fail to provide them with adequate protection for their human rights, and no external action to defend their human rights *in situ* is forthcoming. Individuals situated in these circumstances have a strong right to migrate to some human rights–protecting state.[50] Another example was discussed at the end of the previous section: individuals who previously were unjustly excluded by a given receiving state will normally have a reparative right to immigrate to that state.

Second, all individuals have a *weak* right to *free immigration* that establishes a presumption against restricting immigration absent a sufficient justification. Blake has argued for this weak right by appeal to the fact that immigration restrictions limit would-be migrants' negative liberty.[51] As we have seen, liberals commonly hold that individuals enjoy a weak right to negative liberty in general: interferences with individuals' conduct stand in need of justification. On Blake's view, the weak right to free immigration is simply a special case of the weak right to negative liberty generally.

However, as I have stressed, immigration goes beyond the migrant's physical relocation. Consequently, immigration restrictions are not simply constraints on individuals' bodily locomotion across territorial borders. To ground a weak right to free immigration, we must go beyond the presumption against restricting negative liberty. Individuals have a weak right to free immigration, I contend, because of their interests in having the freedom to immigrate. It is a universal requirement of respect for persons' basic moral equality that their interests are given due consideration in the setting of law and policy. While a receiving state has no duty to serve would-be migrants' interests to the extent of giving them priority over the public interest of its own citizens, it must not frustrate these interests absent a sufficient justification.[52]

But what counts as a sufficient justification for restricting immigration? In the rest of this section, I will answer this question by identifying the set of

conditions that a schedule of immigration restrictions must meet for there to be sufficient moral reasons in favor of it. When a receiving state's immigration regime satisfies these conditions, we can say that it has a justification-right to restrict immigration. If free immigration were the object of a strong right, then states could have a justification-right to restrict immigration only when this is necessary to serve some especially compelling goal, such as the protection of other strong rights. Since free immigration is the object of a less stringent weak right, however, the standard for a sufficient justification is less demanding. I propose three conditions that together specify when this weaker justificatory standard is met; unlike the demanding conditions required to permissibly infringe a strong right, these conditions could plausibly be met in a significant range of circumstances.

The first condition requires that the law in question aims at advancing at least one morally permissible goal of public policy: call this the *proper purpose* condition. Following a standard antiperfectionist liberal view, I take it that law and policy must not be guided by private or sectional aims, such as promoting the interests that individuals and associations may have in pursuing their particular conception of the good. Instead, the only objectives that are properly pursued through political means are those of serving justice—whether social or global—and promoting the public interest, that is, those interests that are genuinely shared by all citizens.[53]

The second condition requires that there is sufficient evidence to believe that the law advances—or with high probability will advance—its permissible goal or goals: call this the *effectiveness* condition. While individuals' freedom to immigrate can justifiably be restricted for the sake of justice or the public interest, a justification of this type fails if there is insufficient reason to believe that the contemplated restrictions actually advance, or are confidently predicted to advance, justice or the public interest. Note that this effectiveness condition imposes a significantly higher evidentiary burden than a mere criterion of *relevance* (or what might also be called rational connection, suitability, or fit). For a law to be relevant to promoting a policy goal, there need only be reason to believe that the law is capable of advancing the goal.[54] Where a relevance criterion only filters out laws that cannot plausibly be expected to promote their purported goals, the effectiveness condition requires sufficient evidence that the goal is actually advanced, or is reasonably expected to be advanced, by the application of the law.

Critics might object that the effectiveness condition is still too permissive. These critics would argue that justifiable immigration restrictions must be *necessary* or *narrowly tailored* to advancing the permissible goal they aim at: they must be the only practicable and morally acceptable means of advancing their proper purpose, or at least they must minimize limits on the freedom to immigrate, consistent with advancing their proper purpose. However, while a necessity condition would be appropriate if there were a strong right to free immigration, it is inappropriate given that individuals have only a weak right to free immigration.

The special stringency of strong rights—their priority over other values—makes the application of a necessity condition appropriate: while a strong right may permissibly be burdened for the sake of other (especially important) values, this burden should be minimized as far as is consistent with achieving the competing purpose.[55] By contrast, in the case of a weak right, given that the interest protected by the right lacks special stringency, a wide range of values can properly override the right. These values include not only specific goals of public policy, such as economic prosperity or the improvement of social services, but also considerations like administrative convenience and policy-making flexibility. But to say that considerations of this type can properly be invoked to curtail a weak right is simply to deny that limitations on weak rights must be narrowly tailored.

The third condition requires that the immigration law in question not violate any independent requirements of justice applicable to immigration policy: call this the *justice* condition. The proper purpose condition already requires that immigration laws not aim at unjust ends. However, even immigration laws that effectively advance a proper purpose might be unjust in three ways. First, they might unjustly exclude migrants who have an independent entitlement to be admitted; second, they might have objectionable effects on current citizens; third, they might have objectionable effects on the citizens of sending states who remain behind.

Without articulating a complete account of justice in immigration policy, I cannot fully specify the content of the justice condition here. For illustrative purposes, I point to examples of each type of potential injustice. An example of the first kind of injustice would be immigration laws that exclude individuals who have a strong right to immigrate for the specific reasons of nonideal justice discussed above. An example of the second kind of injustice would be immigration laws that violate duties of social justice by burdening current citizens' ability to maintain the intimate caring relationships they may form with noncitizens.[56] An example of the third kind of injustice would be immigration laws that cause developing countries to experience a "brain drain" that undermines their ability to adequately protect the human rights of their citizens.[57]

Integrating the above three conditions into a single principle, I propose the following justificatory standard for immigration restrictions:

Principle of Justified Restriction: There is a sufficient moral justification for a law, *L*, that restricts immigration if and only if

1. *Proper purpose*: *L* aims at advancing at least one goal that is permissibly pursued by political means;
2. *Effectiveness*: The available evidence provides sufficient reason to believe that *L*'s pattern of admission and exclusion contributes to advancing, on balance, *L*'s permissible goal or goals;
3. *Justice*: *L*'s pattern of admission and exclusion does not violate any independent requirements imposed by applicable principles of justice.

VII. Conclusion

I have argued that there is no strong individual right to free immigration, although there are strong rights to immigrate for specifically protected reasons. Individuals enjoy only a weak right to free immigration. This less stringent right can be infringed even when this is not necessary to achieve an especially compelling goal such as the protection of strong rights, but the right nevertheless establishes a presumption against immigration restrictions: only if there is a sufficient moral justification for a given set of immigration restrictions is it morally permissible to restrict immigration. For a law restricting immigration to have a sufficient justification, it must satisfy the three conditions of the Principle of Justified Restriction, namely the proper purpose condition, the effectiveness condition, and the justice condition.

It is likely that the Principle of Justified Restriction can be satisfied in a significant range of circumstances. In other words, states can have a justification-right to restrict immigration in a significant range of circumstances: albeit with important qualifications, immigration restrictions are a proper instrument of general public policy. Yet, my view does not endorse the status quo. Most notably, the border regimes of existing high-income democratic states arguably exhibit widespread failure to comply with the justice condition of the Principle of Justified Restriction: high-income democracies unjustly exclude millions if not billions whose socioeconomic human rights have no realistic prospect of receiving adequate protection except by migrating. The account I have developed here offers the theoretical resources to scrutinize and seriously criticize this and other aspects of existing border regimes. At the same time, it also offers a qualified defense of the idea that immigration restrictions are not a suspect part of the modern state's arsenal of regulatory powers, which are only permissibly used in exceptional circumstances, but a proper instrument of general public policy.

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Notes

[1] This framing is explicitly embraced in Christopher H. Wellman and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (New York: Oxford University Press, 2011). It is identified as the dominant framing in the "received literature" in Arash Abizadeh, "Democratic Theory and Border Coercion," *Political Theory* 36, no. 1 (2008): 37–65.

[2] Michael Huemer, "Is There a Right to Immigrate?" *Social Theory and Practice* 36, no. 3 (2010): 429–61; Joseph H. Carens, *The Ethics of Immigration* (Oxford: Oxford University Press, 2013),

237; and Kieran Oberman, "Immigration as a Human Rights," in *Migration in Political Theory*, ed. Sarah Fine and Lea Ypi (Oxford: Oxford University Press, 2016), 32–56.

[3] Michael Blake, "Immigration, Jurisdiction, and Exclusion," *Philosophy and Public Affairs* 41, no. 2 (2013): 103–30; Michael Blake, "The Right to Exclude," *Critical Review of International Social and Political Philosophy* 17, no. 5 (2014): 521–37; Wellman and Cole, *Ethics of Immigration*, chap. 1; David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), chap. 8; David Miller, *Strangers in Our Midst* (Cambridge, MA: Harvard University Press, 2016), chap. 4; and Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), chap. 2.

[4] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 294–95; and Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 188, 269.

[5] John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), 53–54.

[6] Specifically, property rights in the means of production are generally weak rights.

[7] Liam Murphy and Thomas Nagel, *The Myth of Ownership* (New York: Oxford University Press, 2002), chap. 3.

[8] Carens, *Ethics of Immigration*, chap. 11; Oberman, "Immigration"; and Chandran Kukathas, "Why Open Borders?" *Ethical Perspectives* 19, no. 4 (2012): 649–75.

[9] Michael Blake, "Immigration and Political Equality," *San Diego Law Review* 45 (2008): 963–79; Blake, "Immigration, Jurisdiction, and Exclusion," 103; and Miller, *Strangers*, 104–05.

[10] Blake, "Immigration, Jurisdiction, and Exclusion"; and Miller, *Strangers*, chap. 5.

[11] I draw the distinction between justification and legitimacy from A. John Simmons, "Justification and Legitimacy," *Ethics* 109, no. 4 (1999): 739-71.

[12] See Blake, "Immigration, Jurisdiction, and Exclusion," 103n3; Blake, "Right to Exclude," 522; and Wellman and Cole, *Ethics of Immigration*, 95.

[13] Abizadeh, "Border Coercion," 42, 54.

[14] See Kukathas, "Open Borders," 650; and Blake, "Right to Exclude," 527–31.

[15] Wellman and Cole, *Ethics of Immigration*, 48.

[16] Because my focus is on the question of justification, I will leave aside the important but distinct question of states' legitimacy-rights to regulate immigration.

[17] See Carens, *Ethics of Immigration*, 227–28.

[18] For prominent defenses of internationalism, see John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 2001); Miller, *National Responsibility*; Mathias Risse, *On Global Justice* (Princeton, NJ: Princeton University Press, 2012); and Michael Blake, *Justice and Foreign Policy* (Oxford: Oxford University Press, 2013).

[19] Kukathas, "Open Borders," 654.

[20] H. L. A. Hart, "Rawls and Liberty and Its Priority," *University of Chicago Law Review* 40, no. 3 (1973): 534–55. I am assuming a broadly "high liberal" view here; Kukathas himself would presumably welcome these implications that I take to be implausible.

[21] See Dworkin, *Taking Rights Seriously*, 267–69; and Charles Taylor, "What's Wrong with Negative Liberty," in *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985), 211–29.

[22] Dworkin, *Taking Rights Seriously*, 269–71; Rawls, *Political Liberalism*, 291–92.

[23] Dworkin, *Taking Rights Seriously*, 269. See also John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), 44; and Rawls, *Political Liberalism*, 292.

[24] Carens, *Ethics of Immigration*, 237.

[25] Oberman, "Immigration," 35.

[26] Miller, *Strangers*, 50; and Carens, *Ethics of Immigration*, 238.

[27] Carens, *Ethics of Immigration*, 249.

[28] Miller, *National Responsibility*, 205.

[29] See Laurence H. Tribe, *American Constitutional Law* (Mineola, NY: Foundation Press, 1988), 1382–23. For another account of internal free movement that distinguishes between the incidents

of free travel and free choice of residence, see Brian Barry, "The Quest for Consistency: A Sceptical View," in *Free Movement*, ed. Brian Barry and Robert E. Goodin (University Park: Pennsylvania State University Press, 1992), 284. This conception of the content of internal free movement is found in U.S. constitutional law.

[30] Arthur Ripstein, *Force and Freedom* (Cambridge, MA: Harvard University Press, 2009), 248.

[31] For American cases emphasizing this point, see *Shapiro v. Thompson* 394 US 618 (1969), *Memorial Hospital v. Maricopa County* 415 US 250 (1974), and *Saenz v. Roe*, 526 US 489 (1999). For parallel arguments in Canadian jurisprudence, see *Canadian Egg Marketing Agency v. Richardson* 3 S.C.R. 157 (1998).

[32] See Ripstein, *Force and Freedom*, 243–52.

[33] See Adam Hosein, "Immigration and Freedom of Movement," *Ethics and Global Politics* 6 (2013): 25–37.

[34] Oberman, "Immigration," 35.

[35] Oberman, "Immigration," 36.

[36] Charles R. Beitz, *The Idea of Human Rights* (New York: Oxford University Press, 2009), 59, 68.

[37] Risse, *Global Justice*, 27. I offer this passage from Risse to illustrate the territorial boundedness of strong rights to the basic liberties, without thereby endorsing all the details of his trenchant statement.

[38] For similar arguments appealing to the special duties owed among those who share liability to a common legal system, see Michael Blake, "Immigration," in *A Companion to Applied Ethics*, ed. R. G. Frey and Christopher H. Wellman (Oxford: Blackwell, 2005), 224–37; Blake, "Right to Exclude," 523–24; and Hosein, "Freedom of Movement." My argument points to a more general reason that internationalists of all stripes, including those who do not ground internationalism in the necessity of justifying shared coercive structures, can resist the cantilever argument.

[39] Miller, *National Responsibility*, 207–08.

[40] Christopher Freiman and Javier Hidalgo, "Liberalism or Immigration Restrictions but Not Both," *Journal of Ethics and Social Philosophy* 10, no. 2 (2016): 1–22; Oberman, "Immigration," 38–39.

[41] Carens, *Ethics of Immigration*, 241–42; Oberman, "Immigration," 37–38.

[42] Barry similarly stresses that tourism mainly involves travel and not residence, whereas migration involves both travel and residence. See Barry, "Quest for Consistency," 284.

[43] Hillel Steiner, "Libertarianism and the Transnational Migration of People," in *Free Movement,* ed. Brian Barry and Robert E. Goodin (University Park: Pennsylvania State University Press, 1992), 87–94; and Freiman and Hidalgo, "Liberalism," 17.

[44] Risse, *Global Justice*, 27.

[45] See *Roberts v. United States Jaycees* 468 US 609 (1984); *Boy Scouts of America et al. v. Dale* 530 US 640 (2000); and Stuart White, "Freedom of Association and the Right to Exclude," *Journal of Political Philosophy* 5, no. 4 (1997): 373–91.

[46] I adapt this objection from Javier Hidalgo, "Associative Duties and Immigration," *Journal of Moral Philosophy* 10, no. 6 (2013): 697–722.

[47] See Henry Shue, *Basic Rights* (Princeton, NJ: Princeton University Press, 1980), chap. 2.

[48] Note that the objection's claim that there is a universal duty to refrain from actions that set back others' interests but only subglobal duties to actively promote others' interests can draw no support from the following widely accepted principle: that our reparative duties to remedy injustices for which we are responsible are more stringent than our duties to aid victims of injustices committed by third parties. This principle makes no essential reference to the distinction between action and inaction; the injustices in question can be violations of requirements to act or to refrain from acting.

[49] I adapt this objection from Arash Abizadeh, "The Special-Obligations Challenge to More Open Borders," in *Migration and Political Theory*, ed. Sarah Fine and Lea Ypi (Oxford: Oxford University Press, 2016), 113–14.

[50] See Matthew Lister, "Who are Refugees?" *Law and Philosophy* 32, no. 5 (2013): 645–71; Miller, *Strangers*, chap. 5; and Andrew Shacknove, "Who Is a Refugee?" *Ethics* 95, no. 2 (1985): 274–84. This strong right has often been framed in terms of a refugee's right to asylum and/or resettlement.

[51] Blake, "Political Equality," 967–68; and Blake, "Immigration, Jurisdiction, and Exclusion," 103.

[52] For a similar view, see Miller, *Strangers*, 104–05.

[53] See Rawls, *Political Liberalism*, 42n44; and Samuel Freeman, "Illiberal Libertarians: Why Libertarianism Is Not a Liberal View," *Philosophy and Public Affairs* 30, no. 2 (2001): 105–51. Perfectionist liberals might adopt a broader view of the proper purposes of state action; they may simply require that immigration restrictions aim at some policy goal that does not in itself violate strong rights or other basic requirements of citizens' equal freedom. Unfortunately, I lack the space to defend antiperfectionism over perfectionism here.

[54] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012), 305.

[55] See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (New York: Aspen, 2006), 794–98; and Barak, *Proportionality*, chap. 11. My view parallels the view taken by the courts of many constitutional democracies in scrutinizing legislation that is challenged for infringing a constitutional right: a necessity or narrow tailoring requirement is applied when a constitutional right is infringed, but not when less constitutionally significant interests are at stake.

[56] Matthew Lister, "Immigration, Association, and the Family," *Law and Philosophy* 29, no. 6 (2010): 717–45; and Caleb Yong, "Caring Relationships and Family Migration Schemes," in *The Ethics and Politics of Immigration*, ed. Alex Sager (Lanham, MD: Rowman & Littlefield, 2016), 61–83.

[57] Gillian Brock, *Global Justice: A Cosmopolitan Account* (Oxford: Oxford University Press, 2009), chap. 8; and Caleb Yong, "Justice in Labor Immigration Policy," *Social Theory and Practice* 42, no. 4 (2016): 817–44.