

Does Freedom of Association Justify Restrictions on Immigration?

By Lars Vinx

Christopher Wellman has argued that legitimate states enjoy a right to freedom of association that necessarily includes a right to exclude immigrants. This paper shows that Wellman's argument for this conclusion is unsound since it is based on a construction of collective rights that is inapplicable to the rights of a state.

1. Introduction

This paper is a critical comment on Christopher Wellman's article 'Immigration and Freedom of Association' (Wellman, 2008). In that article, Wellman argues that a commitment to the existence of a moral right to freedom of association entails that legitimate states are presumptively justified in restricting immigration as they please. In Wellman's view, one cannot consistently acknowledge the existence of a right to freedom of association and deny a right to block immigration.

Wellman's argument proceeds in two stages. In a first stage, Wellman aims to establish that the right to freedom of association grounds a 'presumptive case' for the justifiability of restrictions on immigration (Wellman, 2008, pp. 109-19). In a second stage (Wellman, 2008, pp. 119-37), Wellman argues that this presumptive case is not defeated by arguments for open borders that are based on concerns of global distributive justice or on libertarian concerns relating to freedom of property (Carens, 1987). I will focus exclusively on the first of these two stages (for a criticism of the second stage see Wilcox, 2012): My aim is to show that freedom of association does not, *pace* Wellman, ground a presumptive case for the justifiability of restrictions on immigration (for previous, partially overlapping criticisms of the presumptive case see Fine, 2010; Cole in Wellman and Cole, 2011, pp. 233-60).

I will first provide a reconstruction of Wellman's presumptive case for the justifiability of restrictions on immigration. On that basis, I will then offer my critique of Wellman's argument from freedom of association. In a concluding

section, I will try to provide a tentative assessment of the significance of the failure of Wellman's presumptive case for the general debate on the justifiability of restrictions on immigration.

2. Wellman's presumptive case for the justifiability of restrictions on immigration

The presumptive case for the justifiability of restrictions on immigration presented by Wellman is, in outline, very simple. We intuitively agree, Wellman plausibly claims, that there is an individual right to freedom of association and that this right is highly important in a number of social contexts. We believe, for instance, that people should be perfectly free to choose who to marry or who to practice their religion with.

Individual rights to freedom of association, Wellman holds, *necessarily* include a right "to reject a potential association and (often) a right to disassociate" (Wellman, 2008, p. 110; see also Wellman in Wellman and Cole, 2011, pp. 31-2). That I am free to choose who to marry, for instance, entails that I am free to reject potential suitors I do not want to marry, and even that I am free to choose not to marry at all. Likewise, "if I elect to explore my religious nature in community with others", Wellman points out, "I have no duty to do so with anyone in particular, and I have no right to force others to allow me to join in their worship" (Wellman, 2008, pp. 110). Wellman concurs with Stuart White's observation that those who, by the use of their individual rights to freedom of association, "get together to form an association of some kind [...] will frequently wish to exclude some people from joining their association" (White, 1997, p. 373; cited in Wellman, 2008, p. 110). Like White, Wellman concludes that individual rights to freedom of association would be meaningless if the members of an association did not have the right to exclude: "What makes it *their* association, serving their purposes, is that they exercise this 'right to exclude'" (White, 1997, p. 373; cited in Wellman, 2008, p. 110).

Wellman admits that the law will sometimes legitimately restrict the individual right of freedom of association, so understood. For instance, the law may legitimately require an all-white golf club to admit people of color as members, or it may legitimately force the boy scouts to admit homosexuals. But this shows no more, according to Wellman, than that the right to freedom of association is merely presumptive, i.e. defeasible by sufficiently weighty extraneous

considerations. However, the presumption itself, Wellman holds, is that members of a group are free to exclude others from membership for whatever reason they see fit (see Wellman, 2008, pp. 111-2).

In a second step of the argument, Wellman claims that collectives, including legitimate states, enjoy a right to freedom of association that is perfectly analogous to the individual right of freedom of association:

just as an individual has a right to determine whom (if anyone) he or she would like to marry, a group of fellow-citizens has a right to determine whom (if anyone) it would like to invite into its political community. And just as an individual's freedom of association entitles one to remain single, a state's freedom of association entitles it to exclude all foreigners from its political community (Wellman, 2008, pp. 110-1.)

Wellman concedes that this step may seem controversial and anticipates that some might deny that collectives possess a right to freedom of association or, as Wellman now describes it, of 'self-determination', that is analogous to the right to freedom of association enjoyed by individuals (see Wellman, 2008, pp. 111-3). To deal with this objection, Wellman argues that there are certain moral features of states or political communities that would be inexplicable unless states are taken to have a right of freedom of association:

consider the moral dynamics of regional associations like the North American Free Trade Agreement (NAFTA) or the European Union (EU). If legitimate states did not enjoy a right to freedom of association – a right which entitles them to decline invitations to associate with others – then they would not be in a position to either accept or reject the terms of these regional associations. Think of Canada's choice to join NAFTA, or Slovenia's decision to enter the EU, for instance. No one believes that it would be permissible to force Canada into NAFTA or to coerce Slovenia to join the EU. [...] And the reason it is wrong to forcibly include these countries is because Canada's and Slovenia's right to self-determination entitle them to associate (or not) with other countries as they see fit. Put plainly, if one denies that legitimate states like Canada and Slovenia have a

right to freedom of association, one could not explain why they would be righteously aggrieved at being forced into these mergers (Wellman, 2008, pp. 112.)

In a similar vein, Wellman claims that we would not even be able to explain why forcible annexation is wrong if we denied that states have a right to freedom of association (see Wellman, 2008, p. 112). To account for the intuition that it would be wrong to coerce a state into a merger or federation with some other state or group of states, Wellman concludes, we must assume that states, as much as individuals, have a right to freedom of association; a right that includes a right to exclude immigrants.

Wellman holds that this right, like individual rights to freedom of association, is deontological. Self-determining states, like autonomous individuals, are said to be free to order their own self-regarding affairs as they see fit. The presumptive case for the justifiability of restrictions on immigration, Wellman claims, does not rest on the communitarian interest in defending ‘communities of character’, be they defined by ethnicity, culture, language, or religion (Walzer, 1983, p. 62). What we get, supposedly, is a perfectly liberal argument for restrictions on immigration (see Wellman, 2008, pp. 116-9).

3. Why Wellman’s presumptive case for the justifiability of restrictions on immigration is unsound
Wellman argues that if states didn’t have a right to freedom of association, there would be nothing wrong with forcing a state to associate with some other state. However, it is undoubtedly wrong to force a state to associate with some other state. Hence, states must have a right to freedom of association. And if states have a right to freedom of association, they must have a right to exclude immigrants as they please, since such a right to exclude is necessarily included in the right to freedom to association.

This argument is unsound for the reason that its last step trades on an ambiguity. There are two different ways to understand the notion of a collective right to freedom of association, and Wellman does not specify which of these two he adheres to. Under one of these two conceptions of a collective right to freedom of association – I will call it the ‘individualist construction’ – the right to freedom of association would indeed necessarily include a right, on the part of the

collective, to exclude any individual that might seek membership, and to do so for whatever reason the collective sees fit. The individualist construction, however, is not a defensible conception of a state's right to freedom of association, if there is such a right, since it conceives of the relevant collective in ways that conflict with the nature of a state.

The second conception of a collective right to freedom of association – I will call it the 'political construction' – is a more plausible construction of a state's right to freedom of association. But under this second conception of a collective right to freedom of association, the collective's right to freedom of association won't imply that the collective must also have a right to exclude individuals who seek membership, and to do so as it sees fit. It is perfectly conceivable for a state to enjoy the right to freedom of association, politically understood, and thus to have a right to refuse to associate or to merge with other states, without also having a right to block the immigration of individuals as it sees fit. Wellman's argument, in short, ends up in a dilemma: Either the state does not have a right to freedom of association, or the right does not imply that a state has the right to block immigration at its discretion.

According to an individualist construction of a collective right to freedom of association, a collective's right to freedom of association is a mere reflex of the individual rights to freedom of association enjoyed by its members. These individual rights, in turn, are understood perfect freedoms, on the part of every individual person, to decide which other individual persons to associate or not to associate with. That Wellman conceives of individual rights to freedom of association in these terms is suggested by the fact that he uses the example of marriage to illustrate the structure and importance of an individual right to freedom of association.

To illustrate the individualist construction of the collective right of freedom of association, it is helpful to focus on Wellman's other example for the importance of individual rights to freedom of association, the example of the individual right to freedom of religious association. This right is typically used by those who possess it, in a liberal society that respects the individual right to freedom of religious association, to form religious groups whose normative structure reflects the individual rights to freedom of religious association of their members.

A religious group in a liberal society must clearly enjoy a collective right to freedom of association, i.e. a right to decide for itself whether to associate or to refuse to associate with some other religious community. That the group must have such a right is implied by the individual rights to freedom of religious association that its members will enjoy in a liberal society. If the state, or some other institution, claimed the authority to force two religious groups to merge, against the will of their members, it would violate the individual rights to freedom of association of the members of the religious groups in question, since it would claim the power to force individuals to be associated, in a religious community, with those – in case they oppose the merger – they do not want to be religiously associated with.

Moreover, a religious group in a liberal society must have a right to exclude or to refuse to admit any individual that may decide to seek membership, and the group must be permitted to do that on whatever ground it sees fit. The group must have such a right to exclude for the simple reason that to force the group to admit someone whom the current members do not want to be religiously associated with would evidently violate the individual rights to freedom of religious association enjoyed by the group's current members in the same way as a forced merger.

Finally, note that a religious group in a liberal society must have the right to expel any of those who are already members, and to do so for whatever reason it sees fit. It would violate individual rights to freedom of religious association if those who are currently members of one and the same religious community did not have a perfect freedom to dissociate, in case they no longer want to belong to same community. Whether a process of dissociation is more accurately portrayed as an instance of secession or of expulsion will depend on the size of the subgroup that decides to dissociate. If that subgroup forms the large majority of current members, the result amounts to an expulsion of those from whom the majority have decided to separate. The group has a right to expel, then, for the same reason that it has a right to exclude or not to admit: All the group's members enjoy an individual right to refuse, for whatever reason they see fit, any future religious association with any individual that currently belongs to their religious group.

Some might argue that the collective right to freedom of religious association, thus understood, is not a genuine collective right at all. After all, its effects are completely reducible to the effects of the individual exercise of

individual rights to freedom of religious association. We do not have to settle that question here. What should be clear, at any rate, is that *a state's* right to freedom of association, if there is such a thing, cannot possibly be explicated by reference to the individualist construction.

The reason for this is straightforward: While there can be little doubt that a state has the right to refuse association with other states, and while it is arguably the case that a state has the right to refuse to admit immigrants, it is quite clearly false to hold that a state has a perfectly discretionary right to expel those who are already citizens. It would appear to be a universally recognized principle that states do not have the right to force those who enjoy rights of citizenship to leave the territory of the state against their will. What is more, some constitutions make it altogether impermissible for citizens to be stripped of their citizenship, and even states whose constitutions do, in principle, permit individuals to be stripped of citizenship will typically allow for such action only in highly exceptional circumstances and for very narrowly circumscribed cause. Certainly, a state's power to strip an individual of citizenship, and then to remove them from its territory, could not legitimately take the form of a completely discretionary power, of a right comparable to (and resulting from) the individual right of its members to refuse to associate with other individual persons as they please.

However, as long as we adopt the individualist construction of a collective right to freedom of association, the right to refuse to associate with another group, the right to exclude individuals seeking membership, and the right to expel current individual members are logically inseparable, as they are all equally implied by the individual rights to freedom of association held by the members of the relevant group that ground the collective's right. If the state does not have a right to expel, it therefore follows that the state's right to freedom of association, assuming that there is such a thing, cannot be explicated by reference to the individualist construction of the collective right of freedom of association. It must be a right that differs in kind from the collective right to freedom of religious association that we attributed to a religious group in a liberal state.

We must therefore consider the possibility that Wellman's argument might be based on a different construction of the collective right to freedom of association. The obvious alternative to understanding the state's right to freedom of association is to adopt a political construction of that right. By the use of the

term ‘political construction’, I simply mean to refer to the view that a state’s rights are rights that inhere in the state as an artificial person, but not in individual citizens or in a mere collection or ‘multitude’ of individual citizens.

By way of example, think of the legislative authority that we attribute to a state. Even while a legislator acts on behalf of the citizens who are the addressees of the law, no individual member of society, *qua* individual, and no voluntary association of individual members of society can hold a right to legislate. This is true even of a voluntary association that so happens to include all members of society. Even if all members of a society happened to agree, at some point, on how some issue that might need legislative resolution ought to be handled, their mere agreement could not bind future dissenters to defect from the consensus. Laws made by public authority, by contrast, bind even those who disagree, at least as long as they are not formally repealed. The right to legislate, then, cannot be a mere reflex of individual rights, like the individualistically construed collective right to freedom of association. It must be a right that inheres in the collective but not in (any collection of) its individual members.

A state’s right to freedom of association, if there is such a thing, might plausibly be understood in the same way, i.e. it could be conceived of as one instance of the right to legislate. In a modern constitutional polity, exercises of the state’s right to freedom of association, decisions as to whether the state should associate or dissociate with some other state (or a certain class of individuals), will typically have to take legislative form. The state’s right to freedom of association, then, must be a right that inheres in the public person of the state and not in its individual members.

That the state’s right to freedom of association is to be so understood is, at any rate, easy enough to see. Take the case, to go back to Wellman’s own example, that Slovenia, exercising its collective right to freedom of association, decides whether or not to join the EU. Presumably, that decision is going to be taken through a procedure of democratic legislation. But there will almost certainly be those who disagree with whatever decision is eventually supported by the majority. These dissenters, consequently, will be associated (or not be associated) with the EU (and its current citizens) against their own will, given that a valid legislative decision binds even those who disagree. If the state’s right to freedom of association was a mere reflex of individual rights to freedom of association, the

dissenters would have to have a freedom to opt out of the decision, to avoid a violation of their individual rights to freedom of association. Dissenting individuals, however, evidently have no such freedom with regard to the state's otherwise legitimate decision to associate (or not to associate) with the EU. Hence, the state's right to freedom of association, if there is such a thing, must be political in the sense just outlined.

To put the point slightly differently: Shared citizenship constitutes a limitation on individual rights to freedom of association. We do not hold that citizens have the right to refuse to associate with or to dissociate from other citizens as they see fit; there is no individual right to freedom of civic association. It would therefore be a fundamental misunderstanding of the state's collective right to freedom of association, if there is such a thing, to assume that this right is grounded in an individual right on the part of each citizen to refuse to share membership in the state with this or that other individual (or with this or that group of individuals), as an individualist construction would have to have it.

If the construction of the state's right to freedom of association must be political, Wellman's presumptive case will run into trouble. To be sure, a political understanding of the state's right to freedom of association does not by itself entail that states do not have the right to block immigration for whatever reason they see fit. However, once we adopt the political construction there is no longer any reason to think that the state's purported collective right to freedom of association necessarily includes a discretionary right to exclude or to refuse membership to individuals who seek it.

To begin with, the fact that some of those who are already members of the state might prefer not to share citizenship with would-be immigrants will no longer imply, on a political construction, that the collective must have a right to exclude. After all, dissenting citizens will, in any event, have to accept a legitimate decision of their own state to associate with some other state that they may not approve of, and thus be ready to share citizenship with individuals that they may not want to be associated with. They are also, as we have seen, barred from expelling fellow citizens that they may prefer no longer to be associated with. Recourse to individual rights to freedom of association held by current members of the state, as a result, is not available to explain why the collective right to freedom of association must include a right to exclude.

It might be replied that such an explanation on the basis of individual rights is unnecessary, for the reason that *all* collective rights to freedom of association should be presumed to be perfectly similar in content, and thus to include a right to exclude, unless there is specific reason to think otherwise. After having observed, correctly, that there are *some* collectives that hold a right to exclude individuals, Wellman, in this vein, asserts that those who want to deny that a state's right to freedom of association includes a right to exclude "would owe us an explanation as to why the logic of freedom of association does not apply to political states as it plainly does in other contexts" (Wellman in Wellman and Cole, 2011, p. 43). I submit that this challenge has been answered here: If the state's right to freedom of association followed the same individualist 'logic' as is exemplified in the structure of voluntary associations, like the religious group in a liberal society, then the state would have to have a discretionary right not just to exclude immigrants, but to expel individuals who are already citizens. But this claim, I trust it will be agreed, is patently false.

The state's right to freedom of association, moreover, would by no means become empty or meaningless if we adopted the view that states have a duty to keep their borders open to individuals who want to become citizens (and who are willing to assume the relevant duties). After all, even a state that practiced an open borders policy would still be free to refuse association or federation with other states, and it might still have very good moral reason (as well as perfectly rational incentives) to do so. Other states that seek affiliation or federation might have a political or economic system that differs from that of one's own state, for instance, one might have concerns about the democratic functioning of political entities that are too large, or states might differ in their respective wealth and economic development. It is perfectly possible, then, to conceive of the state's right to freedom of association as a right to refuse association or federation not with individuals but exclusively with other political collectives. In order to be meaningful, such a right needn't include a right, on the state's part, to exclude individuals who seek membership.

The public powers of the artificial person of the state, finally, are in any event circumscribed by normative considerations. They cannot be deduced from assumptions about the essential content of individual rights and rickety analogies between individual and collective powers. If the attribution of some power to a

state would violate constraints of legitimacy or justice, we should refrain from attributing the power. Whether we should attribute a power to exclude immigrants to a state, or, put differently, regard that power as included in the state's right to freedom of association, hence, depends on whether such an understanding of the state's right to freedom of association is required by (or can be brought into line with) considerations of political legitimacy or justice. To claim that these considerations are at best capable to defeat an antecedent right to freedom of association that already includes a right to exclude, as Wellman argues, clearly begs the question, in light of our analysis.

In a more recent statement of his argument, Wellman appears to concede – though he is not consistent on the point – that a right to exclude is not necessarily included in a collective right to freedom of association. He admits that one can conceive of a state's right to freedom of association as including only the power to refuse associations with other political collectives, but not a power to exclude individuals (see Wellman in Wellman and Cole, 2011, p. 37 and pp. 41-5, but compare *ibid.* pp. 31-2). Nevertheless, Wellman continues to argue that we should still take a state's right to freedom of association to contain a right to exclude; for the reason that a right to exclude is required by the principle of political self-determination:

even if a solitary immigrant would be unlikely to have much of an impact on any given state, a sufficient number of immigrants certainly could make an enormous difference. And unless a state is able to exercise authority over the individuals who might immigrate, it is in no position to control its future self-determination (Wellman in Wellman and Cole, 2011, p. 44.)

To illustrate the claim, Wellman offers the following example: Imagine that Russia sent a large number of immigrants into Lithuania, who claim entry under a principle of open borders, and then has those Russian immigrants, once they have reached a majority in Lithuania, vote for Lithuania's accession to Russia. If one agrees, Wellman argues, that Lithuania has a right to defend itself against that fate, one must admit that it has a right to restrict Russian immigration, and one is consequently committed to the view that the national right to freedom of

association includes a right to exclude (see Wellman in Wellman and Cole, 2011, pp. 44-5).

This appeal to the principle of self-determination, on closer inspection, does not help very much. The claim that open borders would leave a state in ‘no position’ to exercise self-determination is a clear overstatement. More to the point, Wellman himself emphasizes that collective rights to freedom of association can only inhere in legitimate (i.e. in liberal-democratic) states (see Wellman in Wellman and Cole, 2011, pp. 13-9). Collective self-determination, as the power of citizens to determine the character of their own state, is thus in any case restricted, since appeal to the principle of self-determination, on Wellman’s own view, must fail to justify a majority’s choice of a community-character that is not liberal and democratic. The argument offered here (and in the next section of this paper), moreover, does not rule out the claim that the right to immigrate should be conditional on a willingness, on the part of would-be immigrants, to accept the constitutional framework of the liberal state into which they immigrate. Given such conditionality, an open borders policy would not threaten the liberal-democratic character of an open polity. And since Wellman himself adamantly rejects communitarian arguments against open borders, he must admit, it would appear, that a liberal-democratic character is the only kind of collective character in whose preservation a state could take a legitimate interest. It is a little difficult to see, as a result, what the restriction of (legitimate) self-determination is supposed to consist in that Wellman thinks would result from requiring a liberal state to keep its borders open.

Of course, the Lithuania-example is striking at first sight, but it clearly trades on the intuition that it would be bad for a small linguistic or cultural community to lose its own state that expresses and protects the community’s own cultural identity. That, however, is a communitarian and not a liberal argument against open borders. The process described in the example could, after all, conceivably take place in a way that does not destroy the liberal-democratic character of the polities involved.

Wellman’s presumptive case, thus, remains stuck in the dilemma outlined above: The individualist construction of the collective right of freedom of association will imply that the collective has a right to exclude, but this construal of the collective right to freedom of association is evidently inapplicable to the state.

The political construction of the state's right to freedom of association, on the other hand, does not entail that states have a right to exclude. However, that construction is perfectly capable to account for the fact that a state must not be forced to federate with some other state, as Wellman correctly observes. I conclude that Wellman's presumptive case for a right to exclude is unsound. We can hold on to the view that it would be wrong for a state to be forcibly merged with some other state, and explain the value of political self-determination, without being committed to the claim that legitimate states have a presumptive right to exclude immigrants.

4. Implications for the open-borders debate: A duty to provide for citizenship?

That Wellman's presumptive case for a state's right to block immigration is unsound does not show, needless to say, that states do not have such a right. Other arguments for closed borders may, after all, turn out to work. However, the failure of Wellman's presumptive case draws attention, I believe, to an argument against restrictions on immigration that deserves more attention than it has been given so far. Let me close by trying to offer a rough sketch of that argument.

Recall that Wellman's presumptive case fails in part because a state does not have the right to expel those who are already citizens, or at least no right to do so without very good cause. The suggestion I would like to make is that the reasons that make it impermissible for states to expel those who are already citizens, or to do so without very good cause, may also make it morally impermissible to refuse to admit immigrants, at least as long as we are arguing on liberal ground.

It is helpful, to get the argument started, to consider why we do not think that it is morally problematic for voluntary associations in civil society – such as the religious group in a liberal state that we discussed earlier – to wield a discretionary right to exclude. We said that the group's right is required by the individual rights to freedom of religious association held by its members. Our willingness to attribute such rights to the members of the group, however, would appear to be premised on the assumption that, in attributing the resulting right to exclude to the group, we do no very serious harm to the interests of those who might suffer exclusion. Those who are excluded from some religious group are free to form their own religious association, together with those who share their personal views as to how religion ought properly to be practiced. In a free and

vibrant civil society, it is likely that all individuals are going to find, or else to be able to found, a religious group that suits their taste, and thus to satisfy their spiritual needs.

Clearly, expulsion from one's state – to be stripped of citizenship and potentially removed from its territory – would likely have much more serious and potentially detrimental consequences for the expelled (see also Fine, 2010, pp. 345-52). If someone was stripped of their citizenship and removed from the territory of their state, they would not likely be able to found a new state of their own, together with others who might share their idea about how to organize a political community; if only for the trivial reason that there is no unoccupied territory available for founding a new state. What is more, a person expelled from a state, in particular in a world of closed borders, may well find herself unable to accede to any state other than the one that expelled her. An expulsion from a state, in other words, is likely to permanently deprive the person expelled of the benefits of membership in a state.

The benefits of membership in an adequately functioning state, however, are nothing short of crucial for the success of a human life. Those who are deprived of citizenship in an adequately functioning state are deprived, for instance, of the benefit of living under a rule of law and, to a very considerable extent, of the benefit of possessing enforceable individual rights. They will not enjoy sufficient protection against crime and external aggression, or be able to rely on a public infrastructure of the sort that only a state can provide. Finally, those who are deprived of citizenship will not be able to exercise the political powers that will tend to go along with the possession of citizenship in an adequately functioning state. One does not have to be a Hobbesian to agree that to be deprived of all these benefits is a very serious harm indeed.

These considerations suggest that the benefit of membership in an adequately functioning state cannot legitimately be withheld from anyone who is willing to assume the legal duties of a citizen. If the reason why expulsion is unjustified is that expulsion is likely to result in a person's being deprived of the benefit of membership in a state, then it must be equally unjustified to refuse to admit to membership those who do not yet enjoy it, and who have no other means to obtain it than to accede to one or another adequately functioning state. Adequately functioning states have a moral duty, therefore, to admit those who do

not currently enjoy the benefits of membership in an adequately functioning state, at least to the extent that they can do so without impeding their own adequate functioning.

Or to put the matter slightly differently: If I am forced to live in state of nature, the laws of the states that aim to exclude me cannot bind me. Those who are deprived, through coercive policies of exclusion, from the benefit of official membership in an adequately functioning state consequently cannot have a moral duty to respect the laws that make it illegal for them to immigrate to one or another adequately functioning state. But if the would-be immigrants have no duty to respect the laws that presume to exclude them, then these laws must be illegitimate, and the states that have made those laws cannot have had the right to enact them in the first place (see Abizadeh, 2008).

It might seem as though this argument will show no more than that formally stateless persons or refugees have a right to be admitted to some adequately functioning state, i.e. to a state that secures the benefits of membership described above to all its members on an equal basis (Cavallero, 2014 argues that the claims of such persons defeat Wellman's presumptive case). This overlooks that many political entities that are recognized as states in positive international law are not adequately functioning, in that they do not manage, or often do not even try to, procure the benefits of membership to all their citizens on an equal basis. Those who were born into a political condition of this sort are, in effect, suffering from a condition of statelessness which they may not be able to remedy in any other way than by acceding to an already existing adequately functioning state. At least as long as a large part of humanity is forced to live under circumstances that deprive them of the benefit of membership in an adequately functioning state, adequately functioning states have a duty to admit immigrants who suffer from that condition of quasi-statelessness. A closed borders policy would be justified only if all members of humanity already enjoyed the benefit of membership in an adequately functioning state; a condition from which the real world of international politics is very far removed at this point.

It might be argued in reply that states could legitimately close their borders on the condition that they engage in state-building efforts, so as to discharge their duty to help those who are excluded from the benefit of membership in an adequately functioning state without having to admit them (see Wellman, 2008, pp.

126-8). Clearly, such efforts are laudable, and arguably morally required. If they were to be fully successful, they would create the conditions that permit for closed borders. However, the fact that some adequately functioning state makes an effort to help with state-building would not necessarily imply that those who do not (yet) enjoy the benefits of membership in an adequately functioning state may now legitimately be excluded by that state. The duty to admit will continue to exist for as long as there are some who are not yet in enjoyment of the benefit of membership and who could be admitted without impediment to the receiving state's adequate functioning. This condition would very likely continue to persist for a considerable time even in a world in which adequately functioning states made much greater efforts than they currently expend to support state-building. What is more, efforts to support state-building may well turn out to be futile due to factors not under the control of the supporting state(s). In that case, keeping borders open will be the only way to help at least some of those who are unjustly deprived of the benefit membership in an adequately functioning state.

I concede that the conditional argument for open borders offered here is open to contestation on the part of communitarian critics. A communitarian approach would provide reasons for thinking that it is wrong to expel fellow citizens which do not transfer to those who are now excluded and who seek to be admitted. The claim would be that we have associative obligations towards the former but not towards the latter. Our fellow citizens, it could be said, 'are family' – they speak our language, practice our religion, have our color of skin, share our political-cultural traditions, etc. – while the latter are alien and do not belong to 'us', to the people as defined in pre-legal cultural or ethnic terms. One might go on to argue that the preservation of communities that exhibit the fellow-feeling characteristic of family is ethically valuable or conducive to the well-functioning of a democratic state (see Walzer, 1982, pp. 31-63; Miller, 2005).

I will not attempt to refute this communitarian challenge here, since I do not have to in order to make my point against Wellman. As we have seen, the promise of Wellman's argument for the right to exclude was that it would offer a liberal defense of closed borders that need not appeal to the purported good of the preservation of 'communities of character'. Wellman himself forcefully argues that it would be wrong for a state to discriminate in its immigration policies on the basis of ethnicity or religion, so as to create or maintain social homogeneity among

citizens (Wellman, 2008, pp. 137-41). If that liberal approach is taken seriously, we seem to be committed to a fairly strong case for open borders. Appeal to the right of freedom of association, *pace* Wellman, cannot ground a *liberal* argument for closed borders in today's world.

At the end of the day, Wellman's presumptive case turns out to be a conservative attempt to shift the burden of proof in matters of global justice onto the shoulders of those who criticize the status-quo. The failure of his argument confirms Juha Räikkä's warning that, as things currently stand, conservative attempts at burden-shifting will tend to prevent justice being done (see Räikkä, 2005).

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