# The Constitutional Essentials of Immigration and Justice-Based Evaluations

*Fundamentos constitucionales de la inmigración y evaluaciones basadas en la justicia*

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**ABSTRACT:** The aim of this paper is to offer a broad characterization of the kind of account that I believe cannot plausibly face conclusively the problem of the ethics of immigration restrictions in a non-ideal world at the level of the constitutional essentials. I argue that justice-based accounts of immigration controls fail to normatively evaluate what immigration controls do to outsiders subjected to them in non-ideal conditions, so judgments of justice by themselves tend to be overall bad for the interest of immigrants. I explain this by insisting that a prior question about the legitimacy of immigration controls have been overlooked by familiar accounts. A full account of the ethics of immigration suitable for guiding constitutional essentials should be able to connect distinct kinds of justice-based evaluations in order to ask both, what legitimacy requires from territorial institutional control as well as what justice requires from immigration policy.
**Keywords:** justice, legitimacy, immigration, political self-determination, territorial rights, nationalism, statism.

**RESUMEN:** El objetivo de este trabajo es ofrecer una amplia caracterización del tipo de relato que, en mi opinión, no puede afrontar de forma plausible y concluyente el problema de la ética de las restricciones a la inmigración en un mundo no ideal a nivel de lo esencial constitucional. Argumento que las explicaciones de los controles de inmigración basadas en la justicia no evalúan normativamente lo que los controles de inmigración hacen a los extranjeros sometidos a ellos en condiciones no ideales, por lo que los juicios de justicia por sí mismos tienden a ser globalmente malos para los intereses de los inmigrantes. Explico esto insistiendo en que una cuestión previa sobre la legitimidad de los controles de inmigración ha sido pasada por alto por los relatos conocidos. Un análisis completo de la ética de la

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inmigración adecuado para orientar los fundamentos constitucionales debería ser capaz de conectar distintos tipos de evaluaciones basadas en la justicia para preguntar tanto qué exige la legitimidad del control institucional territorial como qué exige la justicia de la política de inmigración.

**Palabras clave:** justicia, legitimidad, inmigración, autodeterminación política, derechos territoriales, nacionalismo, estatismo.

Summary: I. *Introduction*. II. *Justice-based accounts of immigration controls*. III. *Political Legitimacy and the ethics of immigration*. IV. *First objection: is Political Legitimacy really different from Liberal Legitimacy?*. V. *Second objection: There are other conceptions of legitimacy that already perform the job*. VI. *Conclusion*. VII. *Bibliography*.

## I. Introduction

Liberal philosophers (Rawls, 1971; Barry, 1995; Dworkin, 2002) typically hold that —at least in the realm of ideal theory—[1] one of the most basic roles of a conception of justice regarding controversial issues such as immigration, is to establish some guidelines for laws and policies by asking what justice requires at least in the case of constitutional essentials (Rawls, 2001, p. 13).[2] Constitutional essentials are norms demanding respect to basic rights and liberties. They are also basic principles that structure the form of government and the main political structures and processes, for instance the norms determining whether a system is parliamentary or presidential or the norms determining the requirements to vote (Rawls, 1993, pp. 227-229).

Some believe that this liberal outlook is best explained by a particular view of liberalism constrained to this political domain of the constitutional essentials (Miklosi & Moles, 2014; Williams, 2012; Quong, 2010). This kind of "political liberalism" asserts that a conception of justice could be defended without invoking any particular comprehensive conception of the good (Rawls, 1993, pp. 10-13, 154-157). Some liberals appeal to a particular version of this idea to illuminate problems of applied ethics such as immigration:

[1] Roughly ideal theory discusses what justice requires within a theoretical model of society while non-ideal theory or theories of injustice ask what is required by morality as a whole or by justice in real-life scenarios. See Valentini (2012a) for an account of what different conceptions of justice require for the case of immigration see Barry, B., & Goodin (2015).

[2] I also discussed some difficulties of the applications of this kind of framework to controversial cases in my forthcoming *Tópicos* paper (2024).

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*Justice as Fairness:* Is a group of principles and ideas of political philosophy designed to serve as a guiding framework of deliberation and reflection which helps us reach political agreements on at least the constitutional essentials regarding a society as a fair system of social cooperation of free and equal citizens (Rawls, 2001, p. 18), over time from one generation to the next, in conditions of comprehensive pluralism (Rawls, 1993, p. 12, 144-45; 1971, p. 75).[3] This idea of a well-ordered society in turn should also provide some guidance in thinking about non-ideal theory (Rawls, 2001, p. 13).

Some liberals attracted by this guiding force of *Justice as Fairness* endorse a parallel conception of public reason as well, in order to explain the wrongness of coercively imposing one's views about how best to live. In the most general sense, public reason requires that the moral or political rules that regulate our common life are in some sense, justifiable or acceptable to all those persons to whom the rules purport to apply (Quong, 2010; Gaus, 1996; Williams, 2000). In a thumbnail,

*Liberal Legitimacy* Determines whether political power is justified. "Political power, as the power of free and equal citizens, is to be exercised in ways that all citizens as reasonable and rational might endorse in the light of their common human reason" (Rawls, 2001, p. 84; 1993, p. 217). In addition: "Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in light of principles and ideals acceptable to their common human reason" (Rawls, 1993, p. 137).

From these two views about two main political virtues, justice and legitimacy and their role in the deliberation of constitutional essentials, many liberals argued that what justice requires from border policies is members to exercise control over their society's composition, including the right to exclude whomever they see fit in accordance with their interest to preserve justice among them (Macedo, 2007; Walzer, 2008; Miller, 2014). In the *Law of Peoples,* Rawls himself stated that it is not permitted to migrate into other people´s territory without consent and the state is the agent qualify to enforce this: an important role of government, however arbitrary a society's boundaries may appear from a historical point of view, is to be the representative and effective agent of a people as they take re-

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[3] Along with constitutional essentials the principles of justice are devised to guide the deliberation of matters of basic justice. But I do not mention them above as in turn matters of basic justice are concerned about basic economic and social justice and other issues not covered by a constitution (Rawls, 1993, pp. 227-229). But the nature, localization and extension of borders are matters clearly determined by the constitution.

sponsibility for their territory and its environmental integrity, as well as for the size of their population (Rawls, 2002, p. 38).

So many liberals also endorse a version of *Membership*:

> The right of political self-determination of a society consist in the exercise by its members of rightful control over that society composition as they see fit, including the right to exclude whomever they decide in accordance with their interest to preserve justice among them.

In this view the main aim of the ethics of immigration is to exclude non-members because relationships of justice among members will be jeopardized if outsiders are let in. Famously, David Miller (2015) and Christopher Heath Wellman (2011) among others endorsed this view. But some other liberals extract almost the opposite conclusions from *Justice as Fairness* and *Liberal Legitimacy*. They reject that the scope of *Membership* should be limited to the scope of legal jurisdiction and societies. Instead, they propose that the scope of Membership should include all human beings.

They thus endorse a version of

> *Humanity*: The relevant set of individuals where relationships of justice must be established is in principle unbounded. Thus, it is unjust for people to face worse opportunities because of their nationality. As a result, members of political communities do not have a right to exclude whomever they see fit.

Joseph Carens (2013) and Arash Abizadeh (2008) are two central proponents of this view. Defenders of these two views claim to be both liberals in the sense they won't reject the ideological core of *Justice as Fairness* and *Liberal Legitimacy*. But then the confrontation between *Membership* and *Humanity* seems puzzling because it is difficult to determine what is then unjust about immigration. Note however that *Humanity* does not assume any role towards the constitutional essentials. It seems it is simply assumed that the constitutionals essentials are informed by questions of justice which are domestic in nature; regardless of considerations of global ethics such as *Humanity*. This seems an unjustified bias that makes non-national members vulnerable to the interest of members.

In this vein, much more recently Amy Reed Sandoval (2016) and José Jorge Mendoza (2014) argued that the injustice of immigration is much more located in its enforcement and the resulting disproportionated harassment to US citizens and residents. To survey, interrogate and apprehend seriously marginalize latino/a citizens, legal residents because they are perceived as members of a group that routinely "endure a common set of unjust constraints on the basis of being perceived to be undocu-

mented and thus deportable" (Reed-Sandoval, 2016, p. 375). This means that an unexpected and almost invisible effect of immigration policies presumably guided by Membership, is to disproportionally and impermissibly harm certain groups. Consequently, another task of judgments of justice is to highlight or denounce this kind of hidden effects.

> As a result, some social philosophers endorse a version of oppression: Migrants or people perceived as migrants or of migrant origin are categorized by society as members of a devaluated social group relative to a dominant highly valued group of full members within society. As a result, their social status and interests are attributed less value that the status and interests of the dominant group. This in turn results in less access to the protection of their rights and to valuable goods and opportunities (Young, 1990; Haslanger, 2016; DiAngelo, 2016).

Oppression is a power imbalance between dominant and minorized social groups (Cudd, 2006, p. 4). A group is minorized when its access to symbolic and material social goods is restricted by members of dominant groups. The restriction is so deep, pervasive and powerful that even what it means to be member of these groups is interpreted and thus misrepresented by members of the dominant group, so members of the minorized groups lack the very capacity to understand and interpret their own lives. Thus, membership to these groups is socially devaluated as members suffer injustices that they perceive as natural or deserved. On time, society as a whole learns how to ignore such injustices, so we need to device certain theoretical point of view to unlearn what we grown accustom. This point of view or perspective is constructed by critical theory.

Note that in contrast with *Membership* and *Humanity*, *Oppression* is not straightforwardly normative. Rather, its view is mainly descriptive in a way that allows to conceptualize the kind of injustices that dominant groups of society insist in naturalize or normalize. This kind of outlook is central for the methodology of social sciences, as it establishes the conditions of possibility of knowledge about social groups. But knowledge of this kind has to deal precisely with the conditions where social groups socializes us in ways that create several biases in our views as we are in fact cultured to see all these as natural.

In the face of it, it seems that what justice requires from immigration controls may be underdetermined as the injustice of immigration can either be a specific form of harm or wrong bestowed to members of society (*Membership*), to humans in movement (*Humanity*) or a failure to structure societies where dominant groups do not devalue vulnerable groups (*Oppression*). If claims of justice are under-determined, we cannot transfer

arguments and claims from *Humanity* to *Oppression* and back to *Membership*. This in turn seriously impair the possibility of using judgments about justice or claims of injustice to guide our discussion and assessment of the constitutional essentials related to immigration problems.

This is the subject of this paper. However, I will not try to decide what justice requires from immigration controls all-things-considered. My aim instead will be to find a way around this underdetermination by identifying a way to construct the conceptual space where claims of *Membership*, *Humanity* and *Oppression* can be productively related to each other as distinct levels of analysis regarding the nature of justice. In this paper I will lay the first stone: the political and moral virtue of legitimacy may be a common currency as much as we can understand the term independently from justice itself. We begin by deciding what sorts of immigration controls are legitimate for the case of liberal democracies.

The paper is ordered as follows. In the second section I characterize the kind of account that I think it cannot by itself guide the discussion of the constitutional essentials of immigration. The third section allows me to open the conceptual setting I hope will allow to transfer moral standards between these different ways to articulate claims of justice I invoked above. Sections four and five serve to discuss some objections against my account.

## II. Justice-based accounts of immigration controls

In this section I wish to distinguish and compare distinct justice-based consideration that are ordinarily invoked when we discuss the constitutional essentials implied in immigration controls. Consider again our first justice-based level of analysis where morality requires the protection of the rights of members of society:

*Membership*: The right of political self-determination of a society consists in the exercise by its members of rightful control over that society composition as they see fit, including the right to exclude whomever they see fit in accordance with their interest to preserve justice among them.

As we saw, this view takes *Justice as Fairness* and *Liberal Legitimacy* as the core of the ethics of immigration controls because relationships of justice among members cannot be established, or at least are very difficult to establish, until non-members are not definitely excluded from the obligations and benefits that derive from membership (Blake, 2013). For instance, it seems that *Membership* accommodates well the nationalist concern about the value of communitarian culture (Gellner, 1983;

Miller, 1994; Tamir, 1993; Ignatieff, 1994; Gams, 1998). Under this inter-pretation, national or cultural identity has the kind of value that requires states to exclude outsiders in order to cherish and cultivate the distinctive culture necessary for the production of certain important social goods.[4] Correspondingly, *Membership* can also accommodate the claim that the protection of members' basic human rights (specially their collective right of self-determination and association) can only be secured inside the boundaries of the state, because only states are the agents that could perform the job of enforcing the protection of human rights (Wellman, 2011).[5]

Elsewhere I suggested that these two interpretations of *Member-ship* could be complementary in a way that strengths the support for ex-clusionary immigration controls: restrictive immigration controls would be required to protect the kind of cultural outlook that is not only aestheti-cally and symbolically distinctive, but also the culture that makes possible the kind of protection of rights that identifies unique ways to take care of each other throughout society (Camacho-Beltrán, 2022). However, I also suggested that the central problem of this composite form of *Membership* is that it tends to wrongly disregard the interests of would-be immigrants in the justification of immigration restrictions just by assuming that the in-terest of members is more important or relevant.[6]

This possibility allows me to take a step back and distinguish three dif-ferent kinds of questions. First, we could ask as we have done, how much can members of liberal democracies benefit from the institutions of *Mem-bership* without harming immigrants? (Camacho-Beltrán, 2022) When we ask question like this, still we find ourselves in the terrain of *Justice as Fairness*, where we are required to distribute benefits and burdens. Yet, to be sure about the result of our deliberations and how we may apply them to reality we must apply the test of critical theory. As Williams ex-

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[4] There are two main challenges against nationalist arguments for immigration con-trols. First, it seems they are empirically incorrect. The argument becomes conditional to the fact that limiting immigration is really necessary and/or sufficient to secure nationalist social goods. (Blake, 2015, p. 528; Wellman & Cole, 2011, p. 50; Caney, 2001, pp. 981-982). Sec-ond, even if the claim is empirically correct, we have to know if those who seek to restrict immigration have a moral right to do it. Nationalism does not have an answer for this: They seem to conflate a group´s cultural right of self-determination with political rights of self-de-termination (Lægaar, 2006; 2007; Camacho-Beltrán, 2017).

[5] I believe the main challenge to this view is that it collapses into a form of statism inco-herent with liberalism as it is the states rather than individuals who desides who is let into the society. See also Stainer, 1992.

[6] Camacho-Beltrán, 2020. See also Abizadeh, 2008.

plains "people can be drilled by coercive power itself into accepting its exercise" (Williams, 2005, p. 6).

In the oppressive political arrangements familiar to us, society impose to us certain views about how we all fit in it, and this views often establish biases in the way we interpret ourselves and the surrounding social reality. When we ask about our own biases and how the result of our deliberations from *Membership* may be devaluating groups in a way that may seem natural to us because precisely of these biases, then we are challenging *Membership* from *Oppression*. This is a justice-based evaluation because the test highlights injustices that we grow accustomed ignoring.

Consider *Oppression* again:

Migrants or people perceived as migrants or of migrant origin are categorized by society as members of a devaluated social group relative to a dominant highly valued group of full members within society. As a result, their social status and interests are attributed less value that the status and interests of the dominant group. This in turn results in less access to the protection of their rights and to valuable goods and opportunities (Young, 1990; Haslanger, 2016; DiAngelo, 2016).

As stated above, Reed-Sandoval and Mendoza use *Oppression* to highlight something that often gets overlooked: the effect policies oriented by Membership has in members themselves when they are collectively identified as immigrants regardless to their immigration or citizenship status. But *Oppression* also can go deeper. *Oppression* may be offering a way to put forward legitimate claims that *Membership* hides beneath, since *Membership* simply assumes a theoretical equality between all citizens and remains unaware that in the unjust societies we now know, groups of citizens are routinely humiliated, demeaned and discriminated because who they are perceived as members of socially devaluated groups.

The very fact of oppression seems to indicate that at least *Membership*, as expressed in the interpretations I considered above, may be empirically questionable. We need tangible evidence to show that in fact culture or basic rights can, in fact, only be protected when borders are exclusionist. The argument becomes conditional to the fact that limiting immigration is really necessary and/or sufficient to secure some special good such as culture or the exclusivity of certain associations (Blake, 2014, p. 528; Wellman & Cole, 2011, p. 50; Caney, 2001, p. 981-982). But even if the claim was empirically correct, *Oppression* may be pointing even deeper.

Given the interpretations of *Membership* we considered before may be enforcing forms of oppression by creating and sustaining the formation of unjustly and disproportionally disadvantaged groups without

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access to symbolic and material goods, we have to ask a more primitive question: those who seek to restrict immigration have a moral right to do it? Elsewhere I insisted that there is no conceptual connection between on one hand, the right to control the evolution of social constructs like *the people*, *the culture* or even *the territory* and on the other, the right to control who comes to this *land*. While the collective may have the right to control their imaginaries, why should this mean they have also the right to control something material like the land? The transit between the imaginary and the material is never justified (Camacho-Beltrán, 2020). As Hidalgo explains, the moral permissibility of establishing a legal jurisdiction of political institutions do not entail the moral permissibility of any policy or exercise of political power issue by those institutions (Hidalgo, 2012, p. 16). In other words, *Membership* is grounded in a putative analytical connection between rights of political self-determination (the imaginary) and unqualified rights of exclusion that does not exist (the material).

*Membership* entails the assumption that what justifies the state, justifies also their exclusionist border policy. *Oppression* helps us to see that rights of association, cultural rights and rights for exclusion may be exercised in harmful illegitimate ways that cannot be justified. Specific exercises of these rights must be justified in morally self-standing terms.[7] Absent this connection, the argument becomes incoherent or at least illiberal: Membership seems to be always impermissibly obstructing the freedom of someone: either members who wish to associate and bring in outsiders or outsiders who cannot exercise their freedoms unless they get in (Freiman & Hidalgo, 2016; López-Guerra, 2020).

Now, of course this does not deny the importance of state´s freedom of association, or the possibility of grounding rights to reject would-be immigrants in terms that satisfy at least *Justice as Fairness* and *Liberal Legitimacy* (or better in terms that satisfy Political Legitimacy as I will claim below), it only shows that *Membership* fails to perform the straight forward justificatory job that defenders of exclusion hope, for it can only establish by itself a limited right for members to constitute their group, but it does not provide full permission to discriminate non-members particularly if this happens in the harmful ways that *Oppression* highlighted (Blake, 2014; Van der Vossen, 2015; Fine, 2010; Lister, 2010).

But the point is straightforward: as I argued elsewhere, *Membership* does not establish any kind of exclusionist rights over the land from which defenders of *Membership* wish to exclude non-members (Camacho Beltrán, 2019, p. 6). The appropriate group and bounded land to which *Mem-*

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[7] See Blake (2014 p. 530) and Blake (2012).

*bership* applies is merely assumed, which begs the question. There is not principled way to support the claim that the relevant membership should only apply to the states we know.

From this, some writers wish to conclude that *Membership* should be expanded into the whole set of human beings as a single group (Carens, 1987; Cole, 2001; Caney, 2007; Abizadeh, 2008; Kukathas, 2010).

As we saw, these writers thus endorse

> *Humanity*: The relevant set of individuals where relationships of justice must be established is in principle unbounded. Thus, it is unjust for people to face worse opportunities because of their nationality. As a result, members of political communities do not have a right to exclude whomever they see fit.

It is very difficult to object to *Humanity* from *Oppression* because *Humanity* appeals to our highest moral hopes of what a just society would ideally look like. But perhaps this is weakness too. Notice that *Humanity* precludes the possibility of exclusion grounded in considerations of *Justice as Fairness* and *Liberal Legitimacy* even if it endorses these virtues. Accordingly, under *Humanity, Justice as Fairness* and *Liberal Legitimacy* indeed take into account the interest of would-be migrants. The problem is that the concerns of humanity may be distributive, but they seem territorially unbounded. In order to see this, first note that *Humanity* is coherent only if we assume that states have *certain* moral character now that will allow them to evolve into other morally superior arrangements whatever they will be. They need to possess the kind of moral character suitable to take responsibility for the transnational effects of their deeds (Dworkin, 2013).

Certainly, as stated in section one, part of the task of normative, interpretative and evaluative political theory is to determine the moral character of liberal democracies. John Rawls (1971) for instance famously characterized this moral character as a fair system of social cooperation between free and equal members. Joseph Raz (1986) believes that the moral character resides in the capacity of the society to accommodate value-pluralism. Ronald Dworkin (2011) believed that a state has a moral character when it is a community that endorses certain moral principles like dignity. Accordingly, defenders of *Membership* believe that what the moral character (either cooperative society, pluralistic people or a community of values) requires from immigration controls, is to protect relationships of justice among members by excluding outsiders (either cooperation, pluralism or the communitarian protection to dignity). But in contrast, *Humanity* has an idiosyncratic view of that moral character that is not addressed to liberal democracies. Instead, *Humanity* poses the very different problem of what kind of political units or arrangements morality requires for glob-

al distributive justice to obtain.[8] But it is not clear whether cooperative associations, pluralistic peoples or moral communities could be equally expanded globally somehow. Furthermore, *Humanity* does not indicate how the process of expansion needs to be undertaken in order to avoid the creation of oppressive effects.

To be sure we can assume that *Humanity* is true without having to face any normative consequence whatsoever unless we insist in the immediate dissolution of liberal states regardless of the immediate effects. Furthermore, according to Christiano, if the route to *Humanity* is through the successful operation of liberal democracies with the purported *transnational moral character*, then immigration states must not undermine the proper functioning of those states (Christiano, 2008b). Crucially, on closer inspection *Humanity* does not reject *Membership tout-court*, because, if open immigration were to undermine the proper functioning of democratic states, then that would undermine, in the long run, what *Humanity* prescribes as well. To put in in another way, in order to reach *Humanity,* we will need to transit through a transnational interpretation of *Membership* first. But at the end this analysis shows that the three levels of analysis (*Membership, Oppression and Humanity*) cannot properly inform the constitutional essentials each by itself. We need to create a common ground to allow them to link with each other in a complementary way. Let's explore this in the next section.

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[8]   Humanity implicitly invokes a cosmopolitan revisionist approach. There are many complex variations of this cosmopolitan account of liberal equality that I cannot revise in detail here. Instead, what Humanity is meant to highlight is the idea discussed before that Membership includes the ungrounded assumption that the main locus for justice and legitimacy of immigration is membership. As there are any reasons to narrow the scope of justification (of border exclusion) to Membership, Membership should be expanded to the whole set of human beings dissipating thus the rationale for exclusion (Carens, 1987; Cole, 2001; Caney, 2007; Abizadeh, 2008; Kukathas, 2010). Of course, there is no reason to restrict the influence of accounts such as *Humanity* to prescriptive political theory. Once we identify an attractive prescription, we can get back to evaluative political theory to see how far are from that ideal the institutions we know, and after that we can get back to normative theory in order to engineer how here and now, we can make institutions to take a step forward in that direction. But this is an entirely different problem from the one suggested by the contrast between *Membership* and *Humanity*. I assume that defenders of *Membership* have their own ideals which seem different from the cosmopolitan ideals. And I assume that *Membership* is somehow coherent with those ideals they have. What my contrast is meant to suggest is that defenders of *Humanity* have seldom used their ideas to evaluate our current migratory institutions and establish normative guidelines that could show how they can get closer to those ideals in a way that shows that Membership is inconclusive or incoherent. An exception of this is the latest book of Carens (2013).

I believe the first step to open a common ground for different assessments of justice is to realize that there is a certain morally minimalist perspective behind both *Membership* and *Humanity* that establish the fundamental requirement to avoid *Oppression* regarding the deliberation of constitutional essentials.[9] What matters is the protection of people's basic rights, autonomy and social stand insofar as this protection is instrumental for *resisting society* —to use Haslanger's voice— in the creation, reproduction and nourishment of oppressive relations. The distinction between *Membership* and *Humanity* arises only once we ask who the liable agent is (for violations to the requirements of *Oppression*).

If the state is currently the only liable agent, then *Membership* explains the scope of that responsibility, except that this cannot ground the unqualified kind of exclusionist rights that Miller or Wellman first hoped. It only may ground limited exclusion when needed to create and maintain such relations of mutual responsibility towards the requirements of justice or rather of the moral character of liberal democracies. But as we saw, we may interpret this character in an expansive way looking forward to *Humanity*. So, this may transcend the states we now know, as more stringent requirements of justice may arise once the institutional conditions and organizational technologies allow for them (and in a globalized world, we need normative frameworks capable of making sense of claims that transcend *Membership*). Let's unpack this.

Now, my suggestion is to take a step back and assess these varieties of moral character (cooperative society, plural people or ethical community) but *outside Membership, Humanity* and *Oppression* with a different currency: *Political Legitimacy*. In order to adjudicate what the moral character requires outside its core cases of discussion of constitutional essentials; we may need to pose the question outside *Justice as Fairness* and *Liberal Legitimacy* with a different currency. The obvious currency will be to judge the effects of *Membership* and *Humanity* from the point of view of what kind of society is good.

I believe in this field often we seek to determine what kinds of restrictions are appropriate for the moral character of liberal democracies re-

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[9] This means that *Membership* and *Humanity* are different conceptions of justice in immigration but I assume they have a good idea about a concept of justice they want to satisfy. *Membership* seems mainly concerned about how to satisfy the substantive claims of citizens while *Humanity* seems mainly concerned about which political arrangements may satisfy the substantive claims of everyone. About the difference between concept and conceptions of justice see Rawls (2001a, p. 5). For concepts of justice see Cohen (2008, p. 279)

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garding the administration of borders. From this, two particular concerns emerge. First, the most familiar makes us challenge how immigration controls are exercised. For example, we could ask if a specific immigration policy is just, efficient, adequate, etc. But as we saw *Oppression* forces us to ask the logically prior questions. In this case we could ask whether states have an entitlement to enforce immigration controls in the first place. This entails also to challenge the claim that, in general, states have the right to a monopoly of unilateral control or dominion over immigration controls.

Accordingly, if the role of the ethics of immigration is to determine what kinds of immigration restrictions are appropriate for liberal democracies, then, in order to define the terms of *the moral character of liberal democracies* in immigration we must first try to determine the requirements of *legitimacy* in immigration. This in turn will restrict the deliberation of the constitutional essentials related with immigration control.

In order to see this, consider the example of the constitutional essentials related to territory and land. I believe we should endorse: *Political Legitimacy*, determines who or what can guarantee a stable regimen able to secure order, protection, safety, trust, and cooperation (Williams, 2005, p. 3-5).

Note that *Political legitimacy and Liberal legitimacy* differ greatly from each other. Consider again

> *Liberal Legitimacy*: Determines whether political power is justified. "Political power, as the power of free and equal citizens, is to be exercised in ways that all citizens as reasonable and rational might endorse in the light of their common human reason" (Rawls, 2001, p. 84; 1993, p. 217).

"Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in light of principles and ideals acceptable to their common human reason" (Rawls, 1993, p. 137).

The main difference between *Liberal Legitimacy* and *Political Legitimacy* is that the former is parasitic or dependent from *Justice as Fairness* while the latter is in principle unbounded and more primitive. This means that *Liberal Legitimacy* and *Political Legitimacy* are parasitic from *Political Legitimacy*. *Liberal Legitimacy* works within the dominion of liberal societies while *Political Legitimacy* evaluates any exercise of political power. While *Liberal Legitimacy* and *Justice as Fairness* are intermingled and easily conflated (Valentini, 2012b), *Political Legitimacy* is not only a form of political justice as in *Justice as Fairness*, it constitutes an independent form of moral evaluation through practical reasoning. This is because *Liberal*

*Legitimacy* and *Political Legitimacy* already express a determined interpretation of the moral character which is bounded to cooperative societies.

Now consider the kind of relation that *Political Legitimacy* may stablish with *Oppression*. Recall *Oppression* seldom establishes a normative standard about how things should be, rather it seeks to highlight how bad they are, especially when ideologies and propaganda try to hide reality from us. In some ways *Oppression* constitutes a realist approach. We could ask if our ideas of the moral character have influenced immigration policy in any way that improves or worsens the life of migrants or other groups. But this approach is trivial for the conceptual evaluation of what kind of moral character should liberal democracies adopt. Instead, *Oppression* allows to test the consequences of adopting this or that models of moral character. As we saw, this crucially allow us to detect biases and unwarranted assumptions.

As a result, guided by *Oppression* we could use *Political Legitimacy* to challenge the questioned interpretations of *Membership*. This will constitute an application of Political Legitimacy to a specific case. For instance, we could ask who can permissibly decide about the putative rights members claim to have over the territory they claim is theirs, and what is the permissible scope and limits of these kinds of decisions? What are the extension and limits of the position of dominion citizens claim over the territory? When we ask questions like these, we find ourselves in the terrain of *Political legitimacy*. From that conceptual environment, we are questioning *Membership* by adopting a point of view from *Humanity* after we considered objections from *Oppression*.

For instance, as suggested Camacho elsewhere (2020) we should endorse:

> *Bordered Land*: the use of political power to enforce immigration restrictions should be justified. It is justified when a legitimate liberal democracy possesses rights over the land it wishes to enclose when the exercise of this power is necessary to protect the rights of everyone including the basic rights of non-members.

Note that *Bordered Land* has clear advantages over *Membership*. Recall, *Membership* had overlooked the interest of non-members without any right to do so, since the right to exclude from the group is not analytically connected with the right to exclude from the territory. In contrast *Territory* preserves *Membership*´s original concern with the wellbeing of members without disregarding the rights of outsiders; for their interest and wellbeing is to be taken into account before any rights over the territory could be established insofar as considerations of legitimacy are more primitive.

*Bordered Land* is a conception of legitimacy for the case of liberal democracies but is different from *Political Legitimacy* because *Bordered Land* is specifically applied in the case of borders and appropriation of land. I proceeded in a similar fashion with *Justice as Fairness* as I began with a general concept which in turn was interpreted and specified by conceptions appropriated for the case such as *Membership* and *Humanity*. Similarly, the concept of *Political legitimacy* determines who or what can guarantee a stable regimen able to secure order, protection, safety, trust, and cooperation (Williams, 2005, pp. 3-5) while *Bordered Land* explains what it means to guarantee order in a liberal democracy but specifically by enforcing borders (which is an exercise of political power).

As discussed in section one, the defence of migratory exclusion makes no sense if the state in question has not good claims of rights over the land. According to *Membership*, political self-determination may ground the right to exclude outsiders from membership; but members have no right to exclude outsiders from a territory over which they have no right. So, we must turn to the moral dimension of land appropriation to seek for an explanation of that putative right.

Before we move on and consider some objections an important clarification is in order. Legitimacy has several dimensions: it is not only about what people in fact endorse even if they are wrong. That is a merely empirical dimension of legitimacy. But when we assess how well our endorsed political institutions and their authorized exercise of political power live up to our moral conceptions, we have to deal with legitimacy in normative and interpretative ways. Legitimacy is a normative virtue when it determines what exercises of political power people should accept as morally justified. This dimension obtains from practical abstract reasoning. And as divergent to both these ideal and empirical dimensions, legitimacy is an interpretative judgment when it determines what people could accept as justified *pro-tanto* in their actual circumstances. This dimension obtains from confronting what people actually endorse with what should be endorsing.

For instance, as a prescriptive matter we can say states that forbid women to vote *should* be illegitimate even if some people actually endorse it. And that is indeed true for liberal democracies here and now, even if there are still some communities that outlaw it. But all-things-considered, states which forbid vote to women were legitimate one century ago. And for those people at that time that was legitimate even in interpretative terms considering the facts and moral outlook they had. After all, limited voting rights were only gained by women in Finland, Iceland, Sweden and some western U.S. states in the late 19th century. But our moral

outlook produces a different judgment. Thus, in applied ethics we need to gather the relevant context in order to make a case-for-case pro-tanto moral judgment.[10]

Of course, these considerations greatly exceed the objectives of this paper. But for the purposes of this paper, it should be enough to assume that *Political Legitimacy* is an interpretative judgment that takes a normative view of the virtue of legitimacy in a way that takes into account what most of the people actually endorse. So *Political legitimacy* offers a critical view informed by *Oppression*, so it highlights the moral bias introduced by *Membership* and even *Humanity*. In that way the three levels of analysis of justice can play in the same ground.

## IV. First Objection: is Political Legitimacy Really Different from Liberal Legitimacy?

Now before concluding let's consider some objections to my account. In this section I will ask if Political Legitimacy can really scape the orbit of Justice as Fairness and Liberal Legitimacy. I believe it can, as it would be regrettably reductionist to subsume all public morality to distributive problems of justice. In the next section I will consider the possibility that other conceptions of legitimacy already perform the job I assigned to *Political legitimacy*. I hope I can show that other conceptions of legitimacy are already affected by ideological biases, so we need precisely the kind of critical view Political legitimacy allows to introduce from *Oppression*.

Let's begin with the first objection. Some liberals will forcefully resist *Political legitimacy* as a virtue independent from the liberal values as I invoked them with *Justice as Fairness* and *Liberal Legitimacy*, but it is a great —but not uncommon mistake— to think that, because we see distributive justice as especially important in public morality, we must make everything especially important in public morality into distributive justice as understood by *Justice as Fairness*. Indeed, most people in must societies never have problems with the police, courts, armies or special government bureaus. Most people will never wish to emigrate to other country, challenge the nature of the political arrangement or overturn a government. Hence, their interests are far more affected by matters of distributive justice and the protection of human rights than say the assessments of public morality in matters such as immigration. Still, matters of public morality can be highly important without being matters of distributive

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[10]  I discuss this problema of moral progress in my forthcomming paper in Tópicos.

justice because they define the moral character of our democracies as a whole. Some of these issues are problems of political legitimacy that transcend the scope of *Liberal Legitimacy* constrained by *Membership*, such as consideration about the goodness of society in terms of a stable regimen able to secure order, protection, safety, trust, and cooperation.

But *Liberal Legitimacy* eschews this approach with good reasons as famously Rawls insisted that liberalism and political theory do not have any means to identify the right account of a good society. According to Rawls a conception of justice has to be independent from comprehensive moral theories because otherwise pluralism would prevent any way of consensus and stability in society.

The distinction is clear but not sharp. Justice and legitimacy are both political virtues because they both assess how well institutions protect the dignity of those over whom they extract obedience and allegiance and those over whom they exercise political power. But as we saw they evaluate different things. The idea that institutions ought to protect dignity includes the requirement that political power should be consistent with the equal objective value of the life everyone (Dworkin, 2011, p. 13-19). So, the use of political power, coercion and the distribution of burdens and benefits should not be arbitrary, but it should be solely addressed to maintain the conditions that make possible, in turn participation, social cooperation and compliance without requiring that any member or group give up their autonomy, authenticity and self-respect.

This means coercive power needs to be exercised with equal concern. While the concept of justice determines what we owe to each other; the concept of legitimacy is more primitive, because it serves as a moral background for justice. The concept of legitimacy determines who or what can guarantee a stable regimen able to secure order, protection, safety, trust, and cooperation (Williams, 2005, pp. 3-5). This allows legitimacy to connect our intuitions regarding what we owe to other members (*Membership*), what we owe to any person (*Humanity*), and what we owe to those harmed by society as a whole regardless of their membership (*Oppression*).

The problem is that, even if the distinction I made turns to be meaningful, it can be still argued that perhaps *Political Legitimacy* is indeed different from *Liberal Legitimacy*, but precisely when we apply *Political Legitimacy* to the specific case of liberal democracies, then, Political and Liberal Legitimacy become at least co-extensional because of the constrains of the case itself. If this is true, the distinction is merely analytical. But this objection is misleading.

In order to see this, notice that general concepts need to be particularized and qualified into conceptions appropriated for each case.[11] Of course the case in hand are liberal democracies. In a liberal democracy to treat everyone with equal concern means that everyone could develop the minimum degree of capacities to take full part in the cooperative life of society.

Here we find again the requirements of Oppression: citizens need to be able to think about themselves as a valid source of legitimately reasonable claims, instead of thinking themselves as being submitted to fortune or crucially to the arbitrary will of others (as highlighted by *Oppression*) (Rawls, 2001, p. 20). That means a legitimate liberal democracy must provide the conditions for everyone to be a member without losing one's dignity. Participation, social cooperation and compliance with the rule of law should not be seen as something that implies losing one's dignity (Dworkin, 2001, p. 205).

Notice that as powerful and compelling *Justice as fairness* is, it remains —as constrained by Rawls himself— a conception of justice appropriate *only* for the case of the basic structure and the constitutional essentials. The concept of justice requires many other conceptions of justice such as restorative justice, transgenerational justice, allocative justice; retributive justice etc. (Rawls, 2001, pp. 10-11). I assume that the same happens with legitimacy and many conceptions of legitimacy may be invoked for other cases where democratic legitimacy is not required.

I cannot discuss this in full here. But I suspect that much of the confusion between these two virtues derives from the fact that for some cases legitimacy and justice may be co-extensional. Rawls was mainly interested in the problem of justification and endorsement of a conception of legitimacy in conditions of pluralism. In that specific case, a conception of justice is grounded in *Liberal legitimacy. Liberal legitimacy* is a form of political justice. Rawls is right in stressing that public institutions of a liberal democracy are just when they distribute the burdens and benefits from social cooperation as they are owed (Rawls, 2001, pp. 5-6). He is also right to claim that in a liberal democracy legitimacy requires the authority of the state to be publicly justifiable (Rawls, 2000, p. 12). But in turn authority is justified only when it is just. As a result, in this specific case the distance between justice and legitimacy is merely conceptual *and not substantive*.

But legitimacy and justice are not co-extensional in every possible case, so they should be conceptually distinguished. This analysis of the

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[11]  About the difference between concept and conceptions of justice see Rawls (1971, p. 5). For concepts of justice see Cohen (2008, p. 279).

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conceptual relationship between legitimacy and justice, importantly explains why (i) in the conceptual literature about distributive justice for the basic structure of liberal democracies, the two concepts merge (Slate, 2015; Song, 2012; Rossi, 2014) and also (ii) why in many factual cases what is just may not be legitimate and what is legitimate may not be just. But for the purposes of this work it suffice to say that justice assess distributions and their effects; and legitimacy asses the kind of social order and the moral rights it upholds.

For instance, it is a matter of justice if we consider the effect that nationality tests have in minority groups, or the effects of high levels of immigration has in trust and cooperation among citizens. But when we ask what kind of political arrangement, we need in order to accommodate those conflicting claims of justice, we are in fact asking how we legitimately interpret the relative value between cultural homogeneity and diversity, between freedom and equality, between order and liberty, between security and plurality and so on. This latest kind of questions about legitimacy are the kind I think we can and should take on before we adjudicate problems of justice. Again, questions about legitimacy seem somehow more primitive than questions about justice since what is morally required seems prior to what is owed, because justice always assumes certain cooperative institutional order with a moral character which allows the questions of justice to arise (Rawls, 2001, pp. 5-10).

## V. Second Objection: There are Other Conceptions of Legitimacy that Already Perform the Job

Let's consider the second objection. So far, I argued we need to apply and particularize *Political legitimacy* in a case-by-case approach, so we can see how it performs for the case of immigration constitutional essentials. I suggested to apply *Political legitimacy* first to the case of exclusion of would-be immigrants from the occupied and appropriated land, so I suggested to apply to that case *Bordered land*, as an instance of Political legitimacy to that specific case. But there are of course many other conceptions of legitimacy related with *Bordered Land*. For instance, democratic legitimacy, the legitimacy of the law, public reason, constitutional legitimacy, international legitimacy; etc. Accordingly, we may challenge it by saying that its job is already covered by other conceptions of legitimacy. This would make *Bordered land* plainly trivial.

So, I should briefly explain in which sense *Bordered Land* is the relevant case for the constitutional essentials related with immigration in con-

trast with these other forms of legitimacy. This will show the unique job that *Political legitimacy* delivers when we instantiate it into conceptions like *Bordered land* appliable to specific problems of constitutional essentials. Given the lack of space I will focus on democratic legitimacy and constitutional legitimacy.

One obvious candidate to perform the task in hand is *democratic legitimacy*. Democratic legitimacy is one normative conception of legitimacy that justifies some exercises of political power by means of a decision-making process constrained by moral values. Democratic legitimacy is attractive mainly, first, because it is typically understood as a form of political justice in the sense that settles procedures to take decisions, thus giving what we owe to each other politically as free and equals in conditions of reasonable pluralism and dissent (Rawls, 2001, p. 146; Buchanan, 2002, p. 711). Note that this may take us back to *Justice as Fairness* and *Liberal Legitimacy* where the distance between justice and legitimacy, if any, is merely procedural (Valentini, 2012b). If democratic legitimacy performs the task of evaluating immigration restrictions, then my view becomes trivial.

The question then, is whether democratic legitimacy can transcend *Membership*. According to some writers, democratic legitimacy can indeed perform the task of evaluating immigration restrictions because it establishes that those who are coerced by immigration controls are entitled to be taken into account (Abizadeh, 2008 and Abizadeh, 2012; Fine, 2010). The act of constituting civic borders is always an exercise of political power over outsiders because the very act of constituting borders disenfranchises the outsiders (Abizadeh, 2008, p. 46). According to liberal and democratic principles, this kind of coercion must either be removed or justified. Under this view, immigration controls may be legitimate insofar as they succeed to give voice to the people they coerce, including would-be migrants. Consequently, when we coherently endorse democratic legitimacy, we should also endorse multilateral justification of immigration controls.

This view is attractive but goes too quickly. This expansive view may accommodate the kind of transnational moral character required for discussing the constitutional essentials of immigration; but it misplaces the scope of democratic legitimacy by conflating the issue of what it is for a liberal democracy to enforce immigration controls with the reasons why nations have emerged in the first place. Furthermore, as theories of secession suggest, we can distinguish between the general legitimacy of the state from the legitimacy of state´s various exercises of political power like those implied by territorial control.

What borders do to outsiders cannot be described as coercive in the same sense as taxes and tort law may be (Miller, 2010b, pp. 112-117).

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But even if we admit that borders may be somehow coercive, this still leaves open the possibility that the kind of coercion borders impose is not the one that requires democratic justification. Not all requirements of justification demand democratic justification and presumably there are certain kinds of coercion that do not necessarily require democratic justification. Abizadeh simply goes too quickly to assume that a single act of coercion such as the erection of borders by itself will raise demands of governmental democratic legitimacy. The upshot is this: if only coercion from the basic structure and matters of constitutional essentials trigger demands of democratic justification, that means that the scope of democratic legitimacy coincides too with the scope of *Justice as Fairness* and *Liberal Legitimacy*. But crucially, problems of immigration remain so to say, *outside* the scope of democratic legitimacy and distributive justice. So we need to check in with other forms of legitimacy.

*Constitutional legitimacy* offers a more promising panorama. In a constitutional regime democracy is much more than majority rule because laws and statutes must be consistent and coherent with certain fundamental principles or essentials (Rawls, 2001, p. 145; Dworkin, 1985, p. 215). Typically, the will of the majority is limited by minority's rights. Minorities have certain rights that must be protected such as freedom of speech and freedom of worship. In the case that concerns us, qualified government officials must bring immigration restrictions under a single coherent scheme of principles (Dworkin, 1985, p. 216). Freiman and Hidalgo (2016) elucidate how difficult this may prove to be challenging. According to them coherence may require from us to choose between abide to liberal principles or endorse immigration restrictions but not both. The upshot is that on closer examination, if the reasons offered by defenders of *Membership* are sound and insiders have the right to limit freedom of movement, freedom of association and freedom of labour of would-be immigrants, then coherence requires that we accept further limits to other core liberties for insiders, because freedom of speech, freedom of conscience, and freedom of reproduction also change the demographic and cultural composition of society; and makes no difference if the influence comes from outside, because citizens can too convert to faiths or values originated in other countries (Freiman & Hidalgo, 2016, p. 10). The problem is that constitutional legitimacy remains evaluative and leaves the normative job for other conceptions of legitimacy. Indeed, constitutional legitimacy helps us to determine whether immigration controls are constitutional or nor; they won't play the role of determining whether those who wish to instil immigration controls have the moral right to do so.

## VI. Conclusion

I hope I made a convincing case for the idea that justice in immigration may require a pluralistic analysis assembling different kind of justice-based evaluations. Although perhaps there are many more evaluations than the ones I considered here, I believe *Membership*, *Oppression* and *Humanity* provide a good sample of blending short-sighed moral claims, ideal long-sighed hopes and urgent claims for systematic evils. The upshot is we cannot successfully discuss the constitutional essentials of immigration just by invoking justice-based considerations that cannot capture the whole picture. Hopefully *Political legitimacy* can open a conceptual space that allows many more applications than the one I suggested with *Bordered land*. I think we can offer similar analysis regarding natural resources such as the air, costs and the basins of rivers. But for now, what matters is to taste the kind of philosophical methodology that could be more appropriate for facing the kind of deliberation that constitutional essentials demand. On this vein recall I claimed that for establishing an stable ground for deliberation regarding constitutional essentials *Political Legitimacy* needs to be (i) freestanding from comprehensive morality and (ii) freestanding from *Justice as Fairness* and *Liberal Legitimacy* themselves. it is worth noticing that I have not said anything to show this is possible or even plausible. But I certainly take up this challenge in my upcoming paper at *Tópicos*.

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