

CONSERVATIVE LIBERTARIANISM AND THE ETHICS OF BORDERS*

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Abstract

Many conservatives endorse a defence of closed borders grounded in basic liberal rights such as the basic right of association. Some conservatives also endorse libertarian principles of legitimacy. It is not clear though that this sort of defence of closed borders is somehow coherent with these libertarian ideals. I argue that conservative libertarians of this kind must reject this defence of closed borders because either it collapses into a form of statism incoherent with libertarian principles of legitimacy, or into an ideal precept without appeal regarding reality in the here and now that could only be applied to changing the very nature of the societies we know. As a result, at least conservative libertarians need to find a different source of justification for closed borders.

Keywords: Immigration, migration, borders, political self-determination, freedom of association, C.H. Wellman, legitimacy, libertarianism, justice, human rights.

Recibido: 01 - 09 - 2014. Aceptado: 27 - 01 - 2015.

Este texto se terminó durante una estancia posdoctoral que realicé en el Instituto de Investigaciones Filosóficas de la UNAM, la cual fue posible gracias al patrocinio de la Coordinación de Humanidades, la Secretaría General de la UNAM y la Dirección General de Asuntos del Personal Académico. Agradezco también a los miembros permanentes del Seminario de Filosofía Práctica del mismo instituto, especialmente a los comentarios de Claudio López-Guerra, Moisés Vaca, Itzel Mayans, Nalleli Delgado y Victor Bernal.

Resumen

Muchos conservadores defienden fronteras cerradas basadas en derechos básicos de asociación. Algunos conservadores son también defensores del principio libertario de legitimidad. No es claro sin embargo que este tipo de defensa de las fronteras cerradas sea coherente con los ideales libertarios. Aquí argumento que los conservadores libertarios de este tipo deben rechazar esa clase de defensa de las fronteras cerradas porque o bien colapsa en algún tipo de estatismo incoherente con el principio libertario de legitimidad o bien colapsa en un precepto ideal que no tiene ningún atractivo con respecto de la realidad aquí y ahora y que podría ser aplicado solo transformando la naturaleza de las sociedades que conocemos. Como resultado los libertarios deben buscar formas de justificación alternativas para las fronteras cerradas.

Palabras Clave: Inmigración, migración, fronteras, autodeterminación política, libertad de asociación, C.H. Wellman, legitimidad, libertarianismo, neoliberalismo, justicia, derechos humanos.

Ron Paul was the Libertarian Party nominee running for president in 1988. He was also a candidate in the Republican primaries of 2008 and 2012. Ron Paul and his son Rand Paul are both outstanding conservative libertarians. Both are libertarians who argue for strong migration controls. However, it is not obvious that the defence of closed borders is compatible with libertarian morality. In this paper I argue that the most popular philosophical defence for closed borders may be at odds with libertarian principles of legitimacy. I shall conclude that conservative libertarians who wish to close borders should look elsewhere for an argument and justification if they are interested in keeping the coherence between the policies they favour and their principles of legitimacy and justice.

Roughly *libertarianism* is a conception of legitimacy about the limits and constraints of the state's exercise of justified coercive power over its citizens. Libertarians typically argue that individuals have a basic right of liberty against certain kinds of forcible interference on the part of others, including the state. Thus, liberty, understood as non-interference, is the only thing that can be legitimately demanded of others as a matter of justice.

There are of course many interpretations of what it means to be a libertarian. But Rand Paul argues for a form of *constitutional conservatism*¹. Constitutional conservatives, like most other libertarian branches, endorse robust property rights too, as well as the economic freedom that follows from liberty as non-interference. They believe that a just social order should not be at odds with liberty, but it should develop it.² But most crucially they believe that the scope of libertarian legitimacy and justice should coincide with the borders of the nation-state.³ This is because for them the tradition of a political community is intrinsically valuable.

Thus, for constitutional conservatives the legitimate use of coercion—as defence or rectification—has to be contained within the state's borders. This means that governments are essentially bound by the same moral principles as individuals, and these moral principles cannot legitimately apply outside the borders of the political community that bound citizens and the state together. Libertarian principles of justice and legitimacy need to be properly qualified by other moral principles (like those contained within their tradition) requiring some form of partiality among members of the same people.⁴ Interpreted in this (constitutional conservative) way libertarian legitimacy will reduce the *scope* of libertarian justice to the boundaries of the state.

In the same vein, Rand Paul states: "To many of us libertarian means freedom and liberty but we also see that freedom needs

¹ In what follows, then, I will be concern only with the constitutional conservative interpretation of libertarian principles of justice and legitimacy in liberal democracies. I will use 'conservative libertarians' and 'constitutional libertarians' interchangeably.

² See Vallentyne (2007).

³ Note that I will not argue with *left libertarians* because they typically oppose migration controls and support free movement around the world. So for instance, for left libertarians if Utah wants to give citizenship to all undocumented immigrants it should be allowed to do so. In contrast conservative libertarians favour migration controls because they believe that belonging to a political community is something of extraordinary value.

⁴ By duties of partiality I mean to indicate the kind of obligations that arise toward particular individuals or groups when we grow into a special relation with them. See Goodin (1988).

tradition.”⁵ Furthermore, according to Ron Paul, endorsement of liberty and tradition seems to imply a policy of border restrictions: “A nation without secure borders is not a nation at all. It makes no sense to fight terrorists abroad when our own front door is left unlocked.”⁶ And also: “Immigration reform should start with improving our border protection, yet it was reported last week that the federal government has approved the recruitment of 120 of our best trained Border Patrol agents to go to Iraq to train Iraqis how to better defend their borders! [...] I will continue to oppose any immigration bill that grants amnesty to illegals or undermines our liberty and sovereignty.” (Paul, R. 2007: “Immigration ‘Compromise’ Sells Out Our Sovereignty”)⁷

In a nutshell, for conservative libertarians legitimacy requires partiality among members and partiality is qualified by tradition in a way that seems to entail closed borders. Note that this view is different from *left libertarianism*. Left libertarians have the view that governments are not permitted to restrict immigration if immigrants themselves are invited by citizens. So for instance, governments could only be permitted to enforce immigration law rejecting trespassers (regardless if they are aliens or nationals) and convicted immigrants (Steiner 1992).⁸

The problem is this: given the controversy about what kind of borders libertarian principles of legitimacy entail, the constitutional conservative interpretation of closed borders needs to be justified. One available option —one that somehow seems to come naturally to conservative libertarians—is to invoke the paramount importance of

⁵ Emphasis added. See as reference: <http://libertycrier.com/rand-paul-im-not-a-libertarian-im-not-advocating-everyone-run-around-with-no-clothes-on-and-smoke-pot/> and <http://www.politico.com/story/2014/02/rand-paul-case-libertarian-isnt-libertine-103190.html>

⁶ During the primaries: <http://www.rense.com/general80/amnest.htm>

⁷ <http://ronpaulmd.com/texas-straight-talk/05-28-2007/immigration-compromise-sells-out-our-sovereignty>

⁸ Take for instance this view expressed during the 2008 USA presidential campaign by McCain’s former personal blogger and member of the Republican Party, Matt K. Lewis, who argued that “There is nothing inherently conservative about being anti-immigrant. We are a nation of immigrants. As I have argued before, there are plenty of non-electoral reasons for conservatives to favour more legal Latino immigration. For example, immigrating is the most entrepreneurial thing a person can do.” *The Week* (2008).

basic collective rights like *free association* and *political self-determination*.⁹ Under this view, states are depicted as groups that may reject would-be migrants in the same way that private clubs may reject new members.¹⁰ In this paper I challenge this view and wonder if this manoeuvre is really coherent with libertarian constitutional conservatism.

I want to show that for constitutional conservatism it is not enough to invoke freedom of association and political self-determination in order to justify rejection of all immigrants. In particular I will argue that the most popular defence of closed borders grounded in basic liberties is not compatible with constitutional conservatism because it entails a form of collectivism that prescribes the radical transformation of the societies that are familiar to us into closed communities where collective rights are conceptually prior to individual rights.

I begin with the idea that commitment with democratic principles of legitimacy and justice restrict the kind of grounds that we may offer for immigration controls. When constitutional conservatives share a concern for the principles of legitimacy and justice that model the moral character of liberal democracies, it is not clear that they can simply invoke tradition and partiality in order to justify closed borders without betraying their own principles.

Note that this means the conservative constitutional interpretation of the moral character of liberal democracies is restricted in important ways. The libertarian I am envisioning must accept or reject the closed borders view for the right reasons; that is, they must appeal to the ideas of legitimacy and justice as interpreted by libertarians.¹¹ Thus, these restrictions I think rule out the temptation to invoke *ethnic or cultural nationalist claims* about the superiority or special condition of current

⁹ Another option is to invoke nationalist's arguments. I won't discuss those here.

¹⁰ See (Walzer) 1983.

¹¹ For instance, there is a broad libertarian consensus around the idea that individuals and not states are normatively primary Nozick (1974); Rand (1963); Hayek (1960); Stainer (1992). Thus, for instance a libertarian could invoke the belief that non-interference is the only thing that could be demanded of others as a political principle of justice. She could also argue that this claim must be qualified by the idea that the social order must not be at odds with liberty; so social order must be structured in contained units that allow and develop individual liberty.

members of the nation-state.¹² They could not say for instance that borders should remain closed because citizens of the USA are ethnically or culturally superior.¹³ As Ron Paul argues: “Libertarians are incapable of being racists, because racism is a collectivist idea. You see people in a group and a civil libertarian like myself sees everybody as an important individual.”

I will put aside the internal questions such as whether libertarians should endorse closed or open borders. I also refrain from defending or criticizing libertarian core beliefs. Instead I merely invoke the conception of the *libertarian moral character of liberal democracies*; a broad reasonable view about what political libertarian morality requires from contemporary liberal democracies. It is very important to realize that the libertarian moral character of liberal democracies rules out unreasonable forms of *patrimonialist libertarianism* that seeks liberation and emancipation only for members of the upper classes.

The agenda of this paper runs as follows. First, I outline key points from the most popular defence of closed borders presented by Christopher Heath Wellman. I also mention why many critics think it is inconclusive as it is. In §2 I present another objection. I argue that Wellman’s argument is flawed because it conflates political self-determination with how this right is exercised. Critics do not dispute that states have the right of self-determination in order to issue immigration policy. But this does not entail that the policy exercised is legitimate. In §3 I argue that in any case Wellman’s account may not be attractive for

¹² This is an important constrain as many conservative libertarians fall into the temptation of uttering a form of the old exceptionalist doctrine that sees the USA as the “shining city upon a hill”. Indeed, this doctrine has been invoked since the times of John Winthrop, but also by people like J.F. Kennedy and R. Reagan. I take that this doctrine is also at odds with the libertarian moral character, as Ron Pauls quote shows.

¹³ It is however not entirely clear that conservative libertarians could not invoke a form of cultural nationalism such as those defended by David Miller, Chiam Gams or Yael Tamir. I cannot discuss this here. It seems however very implausible for two reasons, apart from its evident collectivism: Cultural Nationalism implies the intervention of state in order to protect nationalist culture, and also involves certain central management of the official nationalist culture. Nationalism seems to imply a form of perfectionism that makes broader demands than those that typically libertarians are use to concede for grounding the state’s duties.

libertarians because it is better understood as a revisionist proposal for the future of states as opposed to a conception of immigration for liberal democracies here and now: that is an ideal that allows us to confront the coherence of our values, virtues, principles and conceptions. But just as with the cosmopolitan case, it doesn't tell us much about the kind of borders that liberal democracies ought to implement. Finally in §4 I question that even as a revisionist project, Wellman's case could be desirable and appropriate for the future of liberal democracies. It seems that Wellman's case is grounded in a form of collectivism that seems inappropriate for the libertarian interpretation of the moral character of liberal democracies.

1. State's Freedom of Association and Closed Borders

I identify the most salient and attractive defence of the closed borders position compatible with constitutional conservatism as the one presented by *Christopher Heath Wellman* (2008; 2009; 2010). He claims that states have a putative right to close borders and reject all potential would-be migrants. This right is grounded in the basic rights of association and self-determination (Wellman 2008: 110). He believes this right of association entails the right to be free from unwanted associations, such as those with unwanted would-be migrants.

[...] I appeal to freedom of association to defend a state's right to control immigration over its territorial borders. Without denying that those of us in wealthy societies may have extremely demanding duties of global distributive justice, I ultimately reach the stark conclusion that every legitimate state has the right to close its doors to all potential immigrants, even refugees desperately seeking asylum [...] (Wellman 2008: 109)

My main aim is to assess if constitutional conservative libertarians could possibly endorse Wellman's case for closed borders. Thus this is a very modest paper. If my argument is sound I will only conclude that libertarians of the constitutional conservative kind must look somewhere else to ground immigration restrictions if they want to keep coherence within their own principles of legitimacy and justice.

His view is potentially attractive for conservative libertarians for several reasons. First, and foremost it is compatible with a rejection of *luck egalitarianism* (which in turn personifies the conception of

equality that libertarians strongly reject). Second, it is also articulated using a minimalist functionalist account of legitimacy that seems to accommodate the libertarian conception of justice and legitimacy. Finally, it is grounded on basic rights that libertarians endorse such as freedom of association and political self-determination.

In order to explain how closed borders may be compatible with equality, Wellman first rejects *luck egalitarianism* (see Cohen, G. 1989; Arneson 1999; Dworkin 2000). Luck egalitarianism is roughly the view that we should care about equality in order to eliminate all the influence of luck with regards to opportunities. Instead, he believes the reason we should care about equality is that those who have less are predictably vulnerable to oppression and exploitation (see Altman & Wellman 2009, Ch6). It is not clear how the mere fact that someone may be worse-off than others just because they were unlucky enough to be born in a different country is necessarily unjust and how this difference necessarily entails open borders.¹⁴

But even if we think that as a matter of justice we should care about the dramatic difference in life prospects between, say Norwegians and Chadians, according to Wellman it is not obvious that the appropriate response to this kind of difference is to leave borders wide open, especially given the fact that there are some other options available to correct that inequality (Wellman 2008: 129). For instance, you could also transfer some of the Norwegians' wealth and redistribute it to the Chadians. Then it may not be necessarily unjust that some country closes its borders if at the same time it finds a way to take the legitimate interest and needs of foreigners into account.

It is important to highlight this: Wellman thinks that the best way to understand freedom and equality entails that closed borders are not necessarily unjust. This however does not mean he is defending the status quo. The point instead is that, under certain conditions,

¹⁴ In order to support this idea, Wellman offers a thought experiment (see 2008: 122). He compares inequalities of two different kinds. First, there are two societies isolated from each other. One of them is significantly better off than the other. Inequalities of the second kind occur within the same society. Members of this society are aware that some of them are doing considerably better than the rest. According to Wellman, inequalities of the second kind are much more important, because they arise as a result of oppression over vulnerable groups, while inequalities of the first kind are a matter of luck.

having an international arrangement of legitimate closed states might be compatible with understanding people as free and equal. Wellman hopes to reach the conclusion that states may have a right to *universal patterns of exclusion*; that is, to exclude everyone from their territory *if so they wish*.

Once we move towards this alternative account of equality, it is easier for Wellman to introduce his morality of borders. What equality and freedom really require from borders is for them to protect the value of certain forms of membership, which are necessary to protect our most basic rights. In turn, everyone needs to be free to pursue this kind of membership without interference from outsiders.

Wellman's account of the morality of borders is characterized by identifying a presumptive position of dominion over border policy, even if this means to close borders to all potential immigrants including refugees. When a country is *forced* to take in a would-be migrant, their members are wronged because each member is part of the collective endeavour of sustaining and shaping the institutions that protect their rights. This presumptive case focuses on the state's legitimacy rather than whether its constituents share a common culture or origin (Wellman & Cole 2011:52).

Wellman then endorses a formulation of a *functionalist account of legitimacy* (Altman & Wellman 2009, Ch. 2). Under this account, there are certain functions that can only be performed by states. One of those functions is providing justice. Justice has many currencies, but the most general of these is captured by the conception of *human rights*.¹⁵ Therefore, a state is legitimate when it is just; that is when it performs certain basic political functions such as the protection of human rights. When it does, it is entitled to close its borders if it sees it fit.

A functionalist account faces a major problem: In essence, the functionalist account says only *why* we may need just institutions that exercise effective jurisdiction over a bounded territory, but it does not justify the grounds of that authority. Conversely it is never the same

¹⁵ Human rights are a subset of moral rights that act as protections or trumps that place constraints on permissible exercise of power by states, guaranteeing the access to basic human interests and needs in order to live decent human lives.

to say that we may need to close borders than explaining why we may have the right to do so.¹⁶

Wellman acknowledges that a mere functionalist account finds it difficult to explain these problems on its own. That's why he introduces the basic right of *political self-determination*. Political self-determination delivers principled content to a mere functionalist account, because collective competence and achievements command respect (Wellman & Cole 2011: 24-25).

According to Wellman, it is very odd to explain certain facts of our political world without granting the existence of political self-determination and the freedom of association it should entail. Importantly, it seems somehow difficult to explain, for instance, why a country that does an excellent job performing its requisite functions, cannot forcibly annex another country that does a poor job protecting basic rights (provided that this annexation happened in a pacific way with full respect to human rights).

The upshot is that interfering with a legitimate state's dominion over its self-regarding affairs is impermissible and morally wrong because it *disrespects* members of the state (Wellman & Cole 2011:22). Putting it in another way: to have institutions enabled to protect our rights is a public and collective achievement that belongs to the members of political associations. Interfering with this group dominion over its own affairs fails to honour the importance of their collective mission (Wellman & Cole 2011:25).

Members are legitimately concerned to preserve their freedom of association because the size and composition of a group can dramatically change its character and the overall experience of membership in that group. Furthermore, new members will typically have a say in determining the future direction of a group that current members may

¹⁶ A functionalist account explains why it is overall beneficial to live under institutions that exercise jurisdiction and control borders. States need territorial continuity in order to enforce justice, define property rights and distribute public goods. But this kind of instrumental arguments fail to justify in a principled fashion one or all of the following problems: (i) why this particular state (and no other) is the one entitled to wield authority over us; (ii) who should be submitted these institutions (instead of some others) and (iii) why this state has dominion over this site of land (and not over this other) (see Quong 2010: 110,129).

not like. Wellman stresses: "One's fellow citizens all play roles in charting the course that one's country takes. And since a country's immigration policy determines who has the opportunity to join the current citizens in shaping the country's future, this policy will matter enormously to any citizen who cares what course her political community will take." (Wellman & Cole 2011:240) From these premises Wellman concludes that just as someone could chose not to marry anyone, a country may choose not to take in anyone.¹⁷

Note that Wellman is not really addressing the objection against the functionalist account of legitimacy. It is not enough to show that many people have interest in closed borders even if we all agree that political self-determination is a core value of liberal democracies; that members of a political community owe special duties to one another and also that fellow nationals have a right to associate with each other. Wellman needs to show not only that we may need and like strict border controls, but also that *we have the right* to close our borders and turn back all would-be migrants. Regarding this, Wellman's argument seems inconclusive because it cannot face the *standard objection* against border controls.

The standard objection notes this: with his account on freedom of association Wellman may very well be explaining why states should have control over membership, but this does not explain why they have the kind of right over territory and its borders that allow them to exclude everyone else. Wellman conflates arguments to control membership with arguments to control jurisdiction, territory and ultimately borders (see Carens 1983; Simmons 2001; Fine 2010).

Other scholars have questioned Wellman's reliance on analogies. Most of Wellman's persuasive power lies in his analogies. States have a right to exclude everyone just as an individual has a right not to marry anybody if they so wish. Or states may exclude everybody just as a family may close their doors to unwanted visitors.

Analogies aim to transfer knowledge from a familiar case to a less familiar or unknown case, provided that there are relevant similarities between both cases. But if the similarity is not relevant, then the analogy fails as trivial or superficial. As Bohr's analogy only tells that electrons

¹⁷ One may ask, what if the majority wishes to invite immigrants over? Then political self-determination would not favour Wellman's case. Wellman's issue of the relationship between democratic proceduralism and legitimacy is what I will discuss further in the last section.

rotate around the nucleus and not much more than that, many fear Wellman's analogies say what we already know: members are under special obligations that justify a certain kind of partiality among them. Just as Bohr's analogy does not tell anything about quantum physics, Wellman's analogies do not provide an account of what kind of borders liberal democracies ought to have (See Carens 1987; Carens 2002; Fine 2010; Lister 2010; Blake 2012).

Depending on the level of intimacy, the relationship grounds different exclusionary rights. Wellman's favourite example of marriage entails a great deal of intimacy, whereas it is safe to say that the non-voluntary, non-intimate nature of political states may at least cast doubt on a state's moral right to unqualified exclusion. For instance, in the case of marriage, my right of association indeed grounds rights that function as trump cards: I have the right not to be married with you, no matter how willing you'll be to marry me and no matter how harmful you find my rejection (Lister 2010: 724). But, the same cannot be said in the case of a state. States' legitimacy relies on its capacity to establish an appropriate institutional framework that allows associations of many kinds to flourish. If a state does not have the moral features of marriage or religion that enables these associations with trump-like rights, then a state's claim of exclusion must be weaker (Fine 2010: 350).

Wellman accepts that freedom of association is much more important in cases like marriage, but he retorts that his argument does not really rely upon these two kinds of cases to be equally important (Altman & Wellman 2009: 162). According to Wellman, dismissing state's freedom of association only because of the lack of intimacy among citizens is to overlook the great importance that typically membership has for citizens. Wellman can still argue that a state-citizen relationship is still far more important than any other relationship among citizens with foreigners.

It is not clear however that this could always be the case. Wellman presumably hopes that those presumptive individual rights to associate with foreigners are easily overcome by countervailing conditions in favour of the case of state's rights. But we may ask: *what conditions are sufficient then to suspend Wellman's case?* One obvious source of conditions to limit Wellman's case is the disproportionate potential of harm that states have in contrast with the potential of harm that individuals and other corporations may have (Fine 2010: 339).

So it seems safe to say that the state's freedom of association is not a trump card or at least it is not in the same extension and sense as

it is in intimate associations, like marriage. Fine rightly points out that Wellman himself recognizes limits onto State's control of membership (Fine 2010: 353). For instance, Wellman presumably accepts, along with Walzer, that the state should not control membership by coercively regulating birthrates or selectively awarding the right to birth. So it is not clear that legitimate states have a *prima facie* right to close borders after all. Instead it seems that they may have under certain conditions a right to administrate certain forms of membership like citizenship. The putative right to exclude would-be migrants from the territory remains unsupported by Wellman's arguments. This is a problem because once migrants reside within the territory; even Wellman grants that residents have a strong claim for citizenship (Wellman 2008: 17-18).

Summarizing, we saw that critics have raised at least two main concerns. First, the disanalogies may entail that only individuals under certain circumstances, like those provided by extremely intimate relationships, may enjoy the kind of freedom of association that allows universal patterns of exclusion, such as those Wellman claims permissible for the state. Second, even if states may permissibly hold such exclusionary rights, presumably individual rights of association applied to certain important forms of association, like marriage, may trump the state's presumptive right to exclude, at least when this exclusion right is solely grounded on state's right of association. This would explain the broad rights to family reunions invoked by Lister (2010) and often endorsed by liberal democracies. But in any case, Wellman's analogies may be justifying only certain control over membership, but it is not clear how this form of membership control may ground the territorial right to exclude all would-be migrants that Wellman claims legitimate democracies must have.

2. Political Self-determination and the Legitimate Exercise of Political Self-determination

Scholars have shown that Wellman's view may be underdeveloped or inconclusive as it is because the kind of analogies that Wellman provide are not enough to support his case for closed borders grounded in the state's right of freedom of association. But scholars have not shown that the states' freedom of association is not the proper locus of the putative state's right to exclude all. I fear that Wellman would insist that there are certain decisions that individuals may need to do as a group,

in a corporate sense. Wellman's case could perhaps be supplemented or developed in a more complete or sophisticated fashion. So I want to dismiss that possibility at least for the libertarian moral character of constitutional conservatism in these two remaining sections. In this section I want to show that Wellman conflates states' entitlements to administrate borders with how these entitlements may be permissibly exercised. Only if we take them to be the same thing, we can stipulate a sovereignty right to close the borders. But this is false.

I shall begin my analysis of Wellman's case with three main assumptions in the hope that these are not too controversial. Then I will show these assumptions to be compatible with both Wellman's account and libertarian's core beliefs. However I will use these assumptions to show that Wellman's right to exclude all is unsupported. I start with the *pro hominem* principle (Condé 2004: 108). This principle states that all law (including international treaties and human rights, but also the rules that ground our institutions) is created for the benefit of human beings. So, all law must be interpreted and applied in a way that best serves and protects human beings, not in the manner that best serves the interests of the state. This principle is compatible with the libertarian priority of individual rights (see Nozick 1975).

Secondly, I believe that there is a fundamental distinction between the rights of individuals, rights of groups and rights of states. Private associations and states are created with different purposes and as a result they have also different properties. The difference is starker in the case of liberal democracies, due to its moral character: what makes the case of state's rights absolutely different from the case of groups and individuals is that states are not voluntary societies or associations (Hidalgo 2012: 17). As a result, there is a strong presumption against political states, because states exercise political power over people whom, most of the time, have not agreed voluntarily in being subjected to the dominion of the state. Libertarians of all sorts agree that there is a *prima facie* case against political power despite the fact they might disagree about what kind of state could be rendered just without universal consent (Vallentyne 2007).

Third, I believe the state and its institutions exercise political power (see Raz 1998; Christiano 2004). So borders as any other governmental institution exercise political power too. As a way of simplification, it can be said that borders exercise power at least in two forms. They allow things and people out and they allow things and people in. Borders

coerce constituents particularly when they limit constituent's freedom to associate with foreigners and aliens. Borders exercise some kind of political power over outsiders when they prevent them from carrying out their expectative plans and conceptions of the good within the territory they encompass. I suppose this could be accepted by libertarians since it could be taken as a consequence of accepting the other two assumptions.

These assumptions are, to a certain extent, compatible with Wellman's account. For instance, Wellman agrees that there is a presumptive case against group rights, because within liberalism individual's interest has a priority (1999: 13-40). Consequently, he also believes there is a strong presumption against the authority of the state (Wellman & Cole 2011: 16). He acknowledges the exercise of political power over would-be migrants when he says "[...] unless a state is able to exercise authority over the individuals who might migrate, it is in no position to control its future self-determination." (Wellman & Cole 2011: 44). The problem relies on the consequences that Wellman may extrapolate from these compatible claims.¹⁸

In my view too, my assumptions suggest that the morality of borders is deeply related to the problem of legitimacy. But for me this means the control of borders, as the rest of sovereignty rights, must be limited by typical sovereignty constraints. In the case of liberal democracies, according to their moral character, legitimacy entails restrictions such as democratic citizenship and individual rights, particularly individual rights of association, which include the right to associate with foreigners and aliens. To my understanding, this means that the political freedom of associations do not have always priority over individual freedom of association, including the exercise of associational rights with non-nationals.

¹⁸ I believe there is a broad consensus regarding the validity of these assumptions within liberal thinkers, so I won't pursue the issue further. Note, however that if this is true the same assumptions must play a role too in Wellman's argument. I don't wish to exaggerate the importance of these assumptions I make within Wellman's arguments. Also I do not mean to suggest that Wellman himself expressively begins with the same assumptions. For the purposes of this paper, it is enough to show that these assumptions are compatible with Wellman's account so the objection I wish to formulate could be considered somehow internal to Wellman's case. Thanks to an Anonymous Referee for this remark.

However, from the salience of the problem of legitimacy (as implied in my assumptions and in Wellman's claims) Wellman makes a move that I resist: he claims that borders are just when they have the power to exclude all potential immigrants. But I suspect that he reaches this conclusion because he conflates the right of political self-determination with the putative right to close borders and exclude all; so he thinks that exclusion is a condition of justice in borders.

In order to see this consider the following formulation of the problem of borders. The *general problem of borders* is to determine what kind of borders liberal democracies ought to have. This raises two particular problems; first, to justify the exclusive control over the administration of borders (problem of legitimacy of borders), and second, to specify how this control ought to be exercised (the problem of fairness of borders). It is paramount to note that we can distinguish between the entitlement to exercise any dominion over borders from the way this entitlement is exercised.

Observe for instance what happens when we confront Wellman's account with the distinction between entitlements and how entitlements are exercised: a tension between basic (individual) rights and sovereignty, or state's rights arises. Because of this tension the *pro hominem* principle and the distinction between individual and group rights become relevant. Let me explain this. Wellman believes that states have political rights of self-determination provided that they are legitimate. For him political association is an analytical condition of rights of self-determination (Wellman 2008). Then a right to be free from unwanted associations is a corollary from associational rights. As a result, on his account, one could have the liberty₋ to be free of any association at all, so universal patterns of exclusion are permissible if a state is legitimate and has a right to political self-determination. From this, Wellman claims that his case for universal patterns of exclusion is straightforward. But on closer examination this seems doubtful as legitimacy may pose stringent requirements on state's rights, and even outweighs them. Typically, basic individual rights are understood as limits to state's sovereignty. And state's right of association along with state's right to control borders are both part of the bundle of sovereignty rights (Simmons 2001: 302). This may mean that state's freedom of association and its liberty to exclude members is limited by individual rights, when we care about legitimacy.

To be sure, recall the third assumption about the nature of border control as a kind of exercise of political power. If we believe that border control is related with legitimacy in this way, we must accept the following: While an illegitimate state is not entitled at all to exercise any border control, a legitimate state may exercise impermissible border control. The problem is this: Wellman believes that exclusion is a corollary from political rights of self-determination. But this is plainly false for two reasons; firstly, self-determination does not make legitimate any particular exercise of political power regardless of its moral assessment; and second, if there is a *prima facie* case against political power, that means that there is a *prima facie* case against borders that needs to be cancelled by arguing for a legitimate border control.

First, as Javier Hidalgo notes (2012: 16), political self-determination does not entail permissibility of any policy, including border policy. A state may have a right to determine its political structure, constitution, laws and immigration policy, but this does not entail that the result would be permissible or justifiable. In other words, some exercise of political power by the state may be illegitimate. Similarly, the right of association entitles one to be free from unwanted associations, but this does not preclude the possibility that rights of association and rights for exclusion may be exercised in harmful illegitimate ways. I am afraid that at the end, Wellman's arguments are enough merely to explain why legitimate states are entitled to *some* membership control, but this does not account for his case of closed borders, as his case for patterns of exclusion may be suspended by conditions of legitimacy.

As noted before with the distinction between entitlements and the exercise of these entitlements, whether or not immigration controls are morally permissible is conceptually independent from the right that states may have to exercise them. Note, however, that the exercise of impermissible policies weakens state's legitimacy; so if the state enacts an impermissible border policy, it weakens its claim to legitimately enact that policy in the first place. For instance, a border policy denying clearance on entrance to would-be migrants based solely on the colour of their skin will diminish the legitimacy of both the country's border policy and the overall legitimacy of the country. Political rights of self-determination and association only point out *who* may permissibly exercise border control, but they do not explain *how* this entitlement ought to be exercised.

Of course Wellman can stipulate, as he does, that he is referring only to the ideal case of legitimate states. Presumably a legitimate state will engage in a legitimate exercise of political power through its law and policy, including border control. So, insofar as borders respect human rights, universal patterns of exclusion will be permitted provided that they are issued by a legitimate country. This however begs the question whether it is all things considered permissible to exclude everyone, provided that the permissibility of border policy needs to invoke other moral considerations apart from the fact that a country has the right to decide about its border control. As with any other policy, permissibility is assessed invoking *political values* such as equal concern and freedom, or by invoking political virtues such as fairness, justice, legitimacy or utility. Wellman avoids that problem by merely stipulating that policies of exclusion, and specifically universal patterns of exclusion, are a corollary of political self-determination. But again this is false.

Second, Wellman may insist that precisely these political virtues and values like fairness, justice and wellbeing are the ones that ground a *prima facie* case for exclusion. That's why in the first place he invoked freedom of association as something that can only be obtained between members of the same community. But this is misleading.

Recall the *pro hominem* assumption and the assumption about the distinction between individual and group rights. By the same token, Wellman acknowledges that in virtue of the potential of harm they have, in general there is a *prima facie* case against group rights (Wellman 1999: 13-40). Among libertarians there is a broad consensus around the idea that there is a *prima facie* case against political power. Wellman agrees with this assumption. He states: "Notice that there is a moral presumption against political states because they are by nature coercive institutions. This presumption can be defeated because this coercion is necessary to perform the requisite political functions of protecting basic moral rights." (Wellman & Cole 2011: 316)¹⁹

I believe that a *prima facie* case against political states counts as a *prima facie* case against border controls, because as indicated before, borders are basic institutions that exercise political power. So a legitimate country may have a right to self-determination, but from this we cannot

¹⁹ Again, libertarians and egalitarian-liberals disagree vastly about what kind of state may defeat this *prima facie* case. This disagreement amounts to differences in their conceptions of legitimacy.

conclude that border controls of a legitimate self-determining country will be legitimate in principle. Instead, it is not only that the exercise of border policy that needs to be legitimated, but also the entitlement itself.

So on closer examination, it seems odd that Wellman begins with a *prima facie* case of exclusion when there is a prior and more primitive *prima facie* case against border control, insofar as borders are part of the political power that states wield. At this point Wellman can say, as indicated above, that the prior case against political power may be defeated by legitimate states. Only then a *prima facie* case of exclusion takes precedence. The problem again is that according to him the prior presumption against political states and borders is almost never (if ever) defeated.

In the next section I will discuss the convenience of invoking a normative conception of legitimacy that does not take into account the kind of authority that is familiar to us. In the meantime the upshot is this: Whether or not any of the states that we know of are legitimate is a matter of philosophical controversy (Simmons 1999). On Wellman's view, there are just a few legitimate states, which may include Sweden, Denmark, Norway, Germany, Canada and New Zealand. The list of illegitimate or at least non-legitimate states includes the majority of *de facto* states in the globe (Altman & Wellman 2009: 3N8). Thus, just those few legitimate states above are permitted to exercise Wellman's universal patterns of exclusion. It follows that almost no country is permitted in fact to exercise border control. Since the presumption against political power and border control is almost never defeated, then the *prima facie* case of exclusion almost never (if ever) arises. This indicates that border control and the way this border control is exercised both need to be strongly justified.

In summary, the morality of borders is deeply related to the problem of legitimacy. Wellman agrees with this and he believes that a legitimate state needs to be self-determining. So a legitimate state is permitted to close its borders because state's right of political association (and the right to be free from unwanted associations) is an analytical condition of rights of political self-determination (Wellman 2008). From this, Wellman claims that his case for universal patterns of exclusion is straightforward. But on closer examination this seems doubtful as legitimacy may pose stringent requirements on state's rights, and even outweighs them. This becomes clear when we distinguish an entitlement from the way this entitlement is exercised. On the one hand a legitimate country is

entitled to self-determination of its political arrangement and policy, but a self-determined legitimate state is capable of issuing illegitimate and harmful exercises of political power. That is why, typically, basic individual rights are understood as limits to state's sovereignty. In this case, political freedom of association does not have always priority over individual freedom of association, including the exercise of associational rights with non-nationals.

On the other hand, there is a *prima facie* case against all kinds of political power, including the kind of power exercised by borders. This indicates that control of borders and its exercise needs to be strongly justified. In contrast Wellman believes that exclusion is a corollary from political rights of self-determination. But as we saw, this is plainly false, as indicated by the distinction between an entitlement from the way this entitlement is exercised. Closed borders, as any other exercise of political power, must be subjected to moral standards such as legitimacy, justice and fairness. Wellman's argument is good to point out that legitimate states may be entitled to *some* membership control, but not to justify universal patterns of exclusion.

3. Liberal Revisionism and Coherence

In the last section I discuss that Wellman's argument may only be showing that some political communities are permitted to exercise some control over membership, but it does not really supports-closed borders. So now the question is this: What does it mean for a constitutional conservative libertarian that the most attractive view for closed borders fails to articulate a sound argument for exclusion? In this section I want to show that Wellman's case may not be appealing for the constitutional conservative because it is not really about libertarian states with tradition, but quite the opposite: it is more coherent to understand it as a revisionist radical project for the future of liberal democracies. But that prescription may not entail what the libertarian expected.

Let's just assume for a moment that self-determination does imply a *prima facie* right to close borders, provided that the state is legitimate regarding the respect to human rights. Then recall that the list of states authorized, according to Wellman, to close their borders may include only states like Sweden, Denmark, Norway, Germany, Canada and New Zealand. So the standard to authorize closed borders is high. But

according to Wellman this is good, because it condemns the unjust current situation and sets a standard to aspire for.

I hope I can show that at least for the conservative libertarian Wellman's manoeuvre is inadequate in two main ways. First, in some sense it raises the standard too high. The concept of border's legitimacy loses normative appeal if only a few countries in the globe manage to get close to it. This may entail that at the end just a handful of countries have the right to issue immigration controls. Even if we think that a normative conception of legitimacy should not have a descriptive component that explains how liberal societies are justified, so legitimacy becomes an ideal standard that almost no political community achieves. Second, the problem, then, is that Wellman's standard of legitimate border control seems overall inadequate for the morality of libertarian democracies. In order to be considered legitimate, libertarian democracies have additional normative requirements that are not exhausted by Wellman's account of legitimacy as protection of human rights.

In order to see this, consider first the unpalatable consequences of understanding borders under Wellman's view. If most of the states in the world are *de facto* states and not entitled to border control, it's difficult to explain how they can be wronged when borders are trespassed without permission (Wellman & Cole 2011: 28). Most of Wellman's argumentative work goes to show that his case is not as easily overridden by egalitarian arguments. But Wellman overlooks the fact that his case never really takes off, precisely because the primitive presumption against political states can almost never be defeated.

There is however another available option. We could describe Wellman's case as an ideal case appropriate only for a different social world, or at least different from the social world of liberal democracies that are familiar to us. But recall that the general *normative* problem of borders is not oriented to discuss how borders are, but only how borders ought to be for the liberal democracies we now know. So at this point, it is worth asking what may be the philosophical appeal of a stringent account of borders that almost no state is permitted to exercise.

There are at least two options here. First, Wellman's case may be read as a normative principle. Typically, accounts of justice and legitimacy are of this kind. But note that feasibility and priority are important constraints here. To pursue ways of life that require material, social and political conditions, traits of character and psychology alien to human beings are not the subject of normative theory. Normative principles may

establish the conditions of a *realistic utopia*: strongly grounded by current institutions and practices, and informed by its historical development, yet also looking to extend the limits of practicable political possibilities (Rawls 2002: 11-23).

I believe, in this vein, Wellman may be read as arguing for a *partial compliance account* when he claims that even “a non-state group that aspires to become a state has a right to political self-determination if, and only if, it is willing to become a state that adequately protects and respects human rights” (Altman & Wellman 2009: 13). So, it seems that for Wellman some kinds of aspirations are enough to ground *partial* rights of self-determination and also conditional rights of exclusion. This particular move restores self-determination to many otherwise *de facto* states. If the liberty for exclusion were an analytical property of political self-determination, then this kind of states would be permitted to close their borders.

I must confess that I find this sort of aspiration-rights puzzling. I am not sure that a collective aspiration, even if genuine and well intentioned, has sufficient normative weight to grant at least provisional or conditional rights of universal rights for exclusion. Being that partial-compliance may grant conditional rights to exercise border controls, states may permissibly control the administration of their borders provided that they do a decent job protecting human rights. This again begs the question of how legitimate and fair are universal patterns for exclusion.²⁰

There is another way to read Wellman’s case. I believe Wellman’s case is best read as a normative full-compliance ideal for a different social reality, just as the cosmopolitan case of open borders. I understand the cosmopolitan case as a revisionist project. It attempts a methodological revision of liberalism in the quest of coherence and integrity between its various values, virtues, principles and conceptions. It is a normative ideal because it sets a desirable state of affairs that allows a systematic evaluation of what we want from our liberal democracies, according to an interpretation of the values and principles that ground them. But

²⁰ I want to make clear that I am not in any way denying that legitimate countries should protect human rights and under certain circumstances, for certain groups, a state would become illegitimate if it stops protecting human rights. I am not denying either that states have rights. I am merely pointing out some odd consequences of Wellman’s view.

cosmopolitanism is not about the problem of assessing with normative standards of legitimacy, justice and fairness the social world that is familiar to us. It is about the problem of what kind of social world will be the most coherent with our moral principles and standards. The first problem is interpretative insofar as it tells us how to make sense about our current institutions and practices in the light of our values and virtues. The second is doctrinal insofar as it tells us what kind of social world will be the best representation of our values and virtues.

If this is the case, there is a doctrinal discussion about what kind of social world is the one that depicts liberal values the best. Cosmopolitans think that a world of open borders realizes freedom and equality in a better way. Wellman seems to think that a world of closed states may have a better chance in doing the same. However, any chance to advance either of these projects necessitates the improvement of the conditions of legitimacy and justice in the global system of liberal democracies from how we know them now.

In this sense, I see Wellman's case as a doctrinal reaction to this cosmopolitan project. Wellman's case may also be a revisionist project, but instead of being motivated by the value of equality and individuality, as cosmopolitanism is, it is motivated by the value of collective rights as they take form in the modern state. He may be suggesting a methodological revision of liberalism and democratic theory from the point of view of a form of state-collectivism. Understood in this way, Wellman's case is of inestimable value because, along with the cosmopolitan case, it allows us to confront the integrity and consistency between moral ideals, moral values, political virtues, political principles and our current existing arrangements and practices.²¹ But just as in the cosmopolitan case, Wellman seems to point also to alternative global political arrangements, different from the system of states that we know; and he does this without a complementary theory that tells us how these alternative political arrangements might look like and why they will be plausible and appealing.²²

²¹ Compare Kukathas (2010: 219).

²² Notice for instance that even if Sweden, Denmark, Norway, Germany and Canada could permissibly close their borders as Wellman claims, we must remember these nations are mostly uninterested in a putative right to reject all because they are involved in certain international practices of trade and

If Wellman's case is best read as a normative idealization of a different social reality comparable to a cosmopolitan revisionist project, we need not to worry about it now, as conservative libertarians are typically concerned with the normative problem of borders and the prior project of justice and legitimacy of the institutions we know. Libertarians may worry about choosing between cosmopolitanism and Wellman's project when they manage to realize their conception of justice in the institutions we now know. Whether or not Wellman's case or the cosmopolitan case will be the appropriate development for the future of states into different forms of collective organization is a problem I shall not address here.

4. Utopia and Dystopia in Legitimate Border Control

In the last section I discussed the potential that a revisionist project about the coherence of liberal democracies may have to attract the constitutional conservative. I tried to show that constitutional conservatives, concerned with how liberal democracies are here and now, won't feel very attracted to Wellman's revisionist project. But I realize that this objection relies on a contingent view about what it means for a conservative to care about tradition. Maybe constitutional conservatives will be more open to Wellman's revisionism than I think.

In this section however I want to assert that my claim against the compatibility between Wellman's closed borders view and constitutional conservative's views does not rely only in the resistance that the conservatives may show against revisionist proposals. I fear at the end it is more coherent to understand Wellman as conceiving a different social reality. But Wellman's ideal prescription for the future of states may not be compatible with the constitutional conservative libertarian account of the morality of liberal democracies centred in the priority of individual rights establishing limits to sovereignty. I will argue that Wellman's case does not really accommodate constitutional conservatism because it may be grounded in a communalist conception of group rights that will be at odds with libertarian morality.

Before I lay down my argument, I acknowledge again that someone could rightly point out that it is somehow arbitrary on my part to reject Wellman's case only because its revisionist nature may be too radical.

diplomacy that would make it impractical and even morally inconsistent to close their borders and reject everyone.

Wellman could claim that his revisionist case may be still prescriptive for the conservative libertarians here and now as an indication of how states need to advance in the protection of human rights in order to gain a claim to border control. For instance, if a conservative government wants to claim the right to close its borders, then it must work for it by advancing in the protection of human rights²³.

This is a very attractive interpretation of Wellman's case because it withholds border control in exchange for a more complete fulfilment of some conditions of justice. While it remains critical of the *status quo*, its utopian position somehow isolates the case from the objections I discussed in sections two and three, because within a utopian position the right to control borders may coincide with the way it should be exercised; and this could remain attractive for the constitutional conservatives as a prescriptive utopia.

I acknowledge that it is controversial to exclude the possibility that some normative concepts may remain appealing despite the fact that they depict a different social reality. For instance, we have distinct conceptions of justice. Some of them may not be applicable to the institutions we know. That is the case of some cosmopolitan accounts of justice which require the emergence of an international institutional order and different forms of sovereignty and governance that simply do not exist yet. However, cosmopolitan justice may still be influential since it helps to assess the institutions we know from higher standards inspiring philosophers, lawyers and internationalists to reform the international order.²⁴

However, while I accept some ambiguity in the conception of justice that allows non-procedural full-compliance accounts of justice,

²³ It is not clear whether Wellman's constraints of functionalist legitimacy require the protection of the human rights of citizens or the protection of human rights of every person over whom the power of the state is exercised. The second interpretation will require that borders protect the human rights of would-be migrants. The consequences of this are not obvious. I leave this problem aside for now. See Carens (2013).

²⁴ Note however that 'Justice' in the context of cosmopolitanism does not mean the same as when we speak about a conception of administrative distributive justice for the case of the basic structure of the society. Cosmopolitan Justice calls for radical reform; distributive justice requires better forms of institutional order. See Christiano (2008b).

I question that the same ambiguity could make sense regarding the conception of legitimacy.

This is a larger problem that I could not address properly in this last section. But I will say this: Legitimacy is surely not an abstract political virtue that could be predicated without taking into account the actual political institutions and how these institutions exercise political power. In that sense legitimacy is radically different from fairness and justice. In order to avoid contradictions we probably want an *interpretative conception of legitimacy* sensible to place and time (Dworkin 2011: 321-23). It will be odd to say that none of the regimens of the distant past were ever legitimate. And in the future when different social technologies become available and we develop more advanced forms of mutual concern it will be odd to say that we were mistaken when we thought that Sweden and Canada were legitimate at the beginning of the XXI century. Instead we want an interpretative judgment that describes the appropriate conditions which obtain when it make sense to say that citizens have in principle an obligation to comply and obey the law even though laws are not fully just or even largely unjust.

Still, someone could point out that my objection against Wellman is intolerant regarding his conception of legitimacy. It may be the case that pluralism admits several interpretations of legitimacy, including of course the possibility of understanding legitimacy as a minimalist form of justice as the protection of human rights. Indeed even if we accept that a normative conception of legitimacy needs to be interpretative and embedded, the conditions of legitimacy appropriated for liberal democracies are a matter of debate. But this is exactly my point: Wellman's account of legitimacy does not allow the controversy to arise because for a merely functionalist account of legitimacy that identifies legitimacy with minimalist conditions of justice all regimens are the same as long as they protect human rights. For instance, the differences between a libertarian conception of legitimacy and, say a Rawlsian conception of legitimacy get simply blurred. Supplementary accounts of legitimacy may be needed in order to take into account the difference. Indeed legitimacy has several dimensions.

In order to see this, consider the odd relationship between Wellman's account of legitimacy as justice and a supplementary conception of *democratic legitimacy*. Democratic procedures may be needed in order to explain how political power may be legitimately acquired even though the government is not fully just or even if its job of protecting human

rights is exemplary. But Wellman's simple view of legitimacy excludes democratic legitimacy (see Altman & Wellman 2009, 31-34).

Taking into account distinct dimensions of legitimacy is crucial because liberal democracies often exercise political power and authority in many ways. Regarding the case at hand, in a liberal democracy, we need standards to decide between competing claims of freedom of association. Excluding democratic legitimacy from the conditions appropriated for the exercise of power regarding political freedom of association within liberal democracies seems at odds with the principle of political self-determination that is central to Wellman's account.

Wellman claims that one of the main reasons members legitimately care about restricting membership is that new members will subsequently have a say in how the group will be organized (Wellman & Cole 2011: 39). Political self-determination requires people to act collectively, expressing their will about how to determine their community. It seems analytic that political self-determination requires members to preserve at all times some kind of joint control over main aspects of character of the group; otherwise the group would stop being determined by its members. Yet, Wellman excludes democracy from his account of legitimacy (see Altman & Wellman 2009, 25-34). If a state chooses a nondemocratic form of governance that respects human rights, then it remains legitimate.

Wellman argues rightfully that democracy is merely a form of legitimate government, but it is not the only form of legitimate government. He overlooks the fact that democracy is the only form of legitimate government at hand that can preserve self-determination for large and pluralistic groups, such as liberal democracies during extended periods of time. If members are excluded from the operation to determine the group, then the group is not self-determined by its members. For the case of liberal democracies, conditions of legitimacy seem to require some form of equal concern that gives democratic citizenship to members as a way to make them part of the collective exercise to the right of self-determination.

Recall that for Wellman's argument, two things are crucial: that states have a moral standing, and that the moral standing of states implies political freedom of association. That I accept. But Wellman makes a move that the libertarian may resist. He believes that the moral standing of states implies that the political right of association has priority over individual rights of association in a way that strong rights to limit

immigration obtain. Those anti-immigration political rights will trump the individual rights of association that willing members would like to exercise by establishing all sorts of relationships with willing aliens.

To be sure, consider that in the case of most immigrants the invitation to join the political community is not expressed as a form of outspoken or formal consent. Yet, suppose that at least in North America (Canada, USA and México) most of the time job markets may be rather precise due to migrant networking. Indeed some empirical work on job markets shows that when there is a scarcity in jobs availability, immigration declines (Weissbrodt 2008). This perhaps could show that there is an important group of nationals willing to associate with immigrants at least for employment purposes despite the fact they never explicitly consent to invite one alien or group of them in particular. At the same time, despite the fact that the entire political community never explicitly consented to an open labour market, consumers keenly enjoy low prices and the sustainability of a systemic tax balance that results from an immigrant labour force. Instead Wellman claims that the state's right to be free from associations trumps the associational rights that the entire political community seems to be expressing.

I believe then that Wellman characterizes the moral standing of states as a form of *collectivism* pursuing the protection of human rights. But this conception of the moral standing of states fails to protect political self-determination insofar as democratic participation is not required by Wellman's conception of legitimacy. But political self-determination is crucial to understand the role of freedom of association.

In order to make sense of this kind of priority, Wellman may perhaps need to invoke a kind of historical consent. We may find ourselves in the obligation of complying with the state's wishes to avoid associations with aliens if our ancestors consented to grant the state with the power to qualify the kind of associations that we will be allowed to establish.

This avenue is of course very problematic. Unless Wellman claims that people had plenty powers of participation in a "magic date" like the original moment of the state's constitution and that suffices to account for political self-determination in a morally binding way in perpetuity; the argument of absolute governmental legal power to restrict immigration seems implausible because of its own terms. Crucially the conditions requiring participation in the moment of the original constitution are different from those requiring participation and inclusion later (See Steiner 1992).

In liberal democracies, according to their moral character, the structure of rights is complex in such a way that we need standards to decide between competing claims, leaving a veto-like trump-rights structure only for basic human rights. In particular we need to address the interests and claims of those who do want to associate with foreigners and the importance of equal concern and anti-discrimination rules. The state's freedom of association does not preclude unwanted association; it rather serves as a common ground for the beginning of the process of interpretation, judgment and argumentation about the different associative rights and obligations (Blake 2008).

On the face of it, Wellman's view could be characterized as a form of *rights-statism* incompatible with libertarian legitimacy. As indicated above, he advocates the right that a legitimate country has to issue universal patterns of exclusion based upon a state's right of political self-determination and political association. *Statism* is a term used when the rights of the state have prior status over the rights of individuals (Walzer 1980: 209). I suspect that Wellman gives an arbitrary priority to the rights of the state over the associational rights of individuals. When I say that Wellman's statism is rights-based, what I mean is that rights-statism is not a form of patrimonialism. *Patrimonialist statism* is a form of governance where all political power flows from government agencies in a way that institutions and policies are explained by the interest of officials who control government agencies. I take this as non-compatible with legitimacy constraints that Wellman establishes, yet Wellman assumes a sort of fitness between members, state and government that justifies the priority of state's rights over the rights of individuals. This, I believe, could be read as a form of statism grounded on an interpretation of group-rights; an interpretation that seems difficult to accommodate with the libertarian moral character of liberal democracies.

So if it is not a form of illegitimate patrimonialism, how can we make sense of Wellman's case? As indicated in the last section, I believe Wellman's case for the right to exercise universal patterns of exclusion is better understood as a *revisionist utopian project* that articulates a prescription to borders. This prescription establishes a form of *collectivism* that instantiates the priority of state's rights of political association over individual rights of association. But note that this priority is never supported by Wellman's case. The priority of state's rights is only assumed to be true or at least desirable.

I agree with Wellman that states have moral standing. I also accept that this moral standing implies that states have rights of self-determination and rights of political association. I accept the importance of border policy remaining in control of members of society. I resist, however, Wellman's statist prescription arbitrarily postulating the dominion of state's rights over individual rights of association.

A collectivist view of legitimacy could perhaps make permissible that minorities renounce their right to associate with outsiders and defer to the states the control over their own right to be free from any association with outsiders. But this view of legitimacy seems inappropriate for liberal democracies. Crucially it seems incompatible with a libertarian view of legitimacy focused in individual rights. Once a *richer* account of legitimacy is introduced, it becomes clear that political freedom of association does not have absolute dominion over individual freedom of association or at least not the kind of dominion that permits universal patterns of exclusion. That is why I think Wellman's view is a form of statism grounded in a collectivist interpretation of basic rights: the putative priority of state's right of association over individual rights of association is never grounded. Instead the moral character of liberal democracies seems to make universal patterns of exclusion illegitimate, thus refuting Wellman's case.

On the face of it, we may ask, do those who seek to restrict immigration have a moral right to do so? In a liberal democracy, the moral standing of states is interpreted by their moral character. Libertarian legitimacy understands moral character as the normative preeminence of individuals over states. This rules out state's freedom of association as the only adequate locus for the justification of exclusionary rights. Political rights of self-determination and association certainly participate in the justification of claims over the administration of civic borders. For those who seek to restrict immigration from a conservative constitutional view much more is needed in order to explain territorial boundaries and the permissibility of specific border policies.

5. Conclusion

Christopher Heath Wellman defends the view that closed borders are just when they are grounded in the political right of association of a legitimate country. In the same way we all are free not to marry a willing fellow, states are free not to associate with would-be migrants. Constitutional conservative libertarians who wish to limit immigration

may feel very attracted to this view because it's grounded only in our most basic rights and does not require a substantive account of equality and distributive justice. Some scholars however have shown that Wellman's view is inconclusive as it is because it only shows how states may have a right to control membership, but it is not obvious how the control of membership may imply control over the administration of borders.

This conventional objection however does not preclude the possibility that Wellman's view could be supplemented or restated in a more complete sophisticated way that connects membership with territorial borders. Scholars have not shown whether or not freedom of association is the appropriate locus for border control.

I hope I have shown that Wellman's view may not be attractive for libertarians because it entails a form of radical revisionism that seeks to establish new forms of political order and governance that allow closed borders. If this is not convincing, I insisted that Wellman's view is incompatible with conservative libertarianism because it is grounded in a form of collectivism incompatible with libertarian morality that celebrates the priority of individual basic rights as individual freedom of association.

As for the problem about the appropriate locus of the right to control borders, I believe that freedom of association may be the appropriate locus, but we must acknowledge that our practices in the international realm may ground associational rights in others over whom we exercise power and influence. If we wish to enact closed borders we may need first to retract our power and influence back home. I do not argue for this position here, however. More discussion about this will need to wait for my next paper.

Wellman's argument for closed borders is objectionable not because it defends the value of sovereignty, the value of political self-determination or the value of state's freedom of association. Most libertarians and liberals share these same values. It is objectionable because it is based in a concept of political community that remains, at least for now, incompatible with liberal democracies, particularly with the libertarian interpretation of them.

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