

DOES BEING A LIBERTARIAN ENTAIL A NECESSARY COMMITMENT TO OPEN BORDERS?

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ABSTRACT: In this paper I investigate whether Wellman’s freedom of association argument provides libertarians with a compelling argument against open borders. In the first section I set out Wellman’s argument, highlighting its appeal to libertarians. In the second section I address some objections to his argument, and in the third section I discuss some specifically libertarian objections. I conclude that the freedom of association argument is a strong argument against open borders and that thus libertarians are not necessarily committed to unrestricted immigration.

INTRODUCTION

Immigration is a confusing subject for libertarians. Libertarians would seem to be natural advocates of open borders: not only are they suspicious of the power of the state, but to promote closed borders would be to restrict the liberty of both immigrants and those in the country who wish to interact with them. But libertarianism is a doctrine which aims always to defend individual rights, so to conclude that open borders are the only tenable position is to oversimplify and miss a lot of nuance. But can one be a libertarian and also be against open borders?

To test this, I will take an argument against open borders (namely Christopher Wellman’s freedom of association argument) and assess whether it is compatible with libertarianism, and, further, whether it is potentially compelling to libertarians. For the sake

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of simplicity, I shall restrict my focus to immigrants without any special claim to membership who are moving to a country indefinitely—thus excluding refugees, holiday makers, students, those on business trips, temporary residents, and the like. I will also exclude the more morally dubious area of immigration to bring families together, as this is a subject worthy of debate beyond the scope of this paper. This will focus discussion upon the majority of immigrants, rather than outliers and special cases.

My argument can be summarized as follows:

- (1) If Wellman's freedom of association argument is compatible with libertarianism, then libertarians are not necessarily committed to open borders.
- (2) Wellman's freedom of association argument *is* compatible with libertarianism.
- (3) Therefore, libertarians are not necessarily committed to open borders.

In part one, I will show that Christopher Wellman's freedom of association argument is a sound argument against open borders. I will start by explaining why libertarianism seems to have a *prima facie* commitment to open borders, and why it appears that core libertarian principles lead to a belief in open borders. I will then set out Wellman's argument, showing that his assumptions and foundations are very appealing to libertarians and that in fact his commitment to self-determination is a central aspect of libertarianism. Along the way, it becomes necessary to have a definition of "rights," and I shall use Nozick's, not only to use a "libertarian" definition, but also because doing so further emphasizes how Wellman's argument has an appealingly libertarian flavor. By the end of the first part I hope to have demonstrated the compatibility of the freedom of association argument with libertarianism even if Wellman's conclusion is not very libertarian.

It seems that libertarians accept Wellman's premises, but not his conclusion. There are only three ways to solve this dilemma. The first way is to show that there is some mistake or flaw in Wellman's reasoning which leads him to draw the wrong conclusion. To this end, in part two I shall address two key internal criticisms of his argument, the first concerning immigrants' association with the state and the second concerning immigrants and the harm principle. I conclude that neither of these claims—while

undoubtedly powerful—refutes Wellman’s conclusion, thus leaving it sound.

The second way to solve the dilemma is to concede that Wellman’s argument is sound but deny that it is compatible with libertarianism. I will set out several strong libertarian objections to Wellman’s conclusion. Firstly, that in the resulting conflict between individual and state rights, libertarians should always side with the individual, so the state cannot force an immigration policy on its citizens. Secondly, that there should be no borders at all, let alone ones with restrictive entrance criteria. Finally, libertarians could point to the “utopian” libertarian society and argue that immigration policy should align with that. I believe that all three of these charges can be met and adequately responded to so that the fears of the libertarian are assuaged, and that the state can be shown to have a right to exclude.

This leads to the conclusion that the third solution to the dilemma is the correct one: that, although it may not seem so initially, Wellman’s argument is compatible with libertarianism, so libertarians are not necessarily committed to open borders.

PART I

LIBERTARIANISM AND OPEN BORDERS

Very few libertarians are in favor of immigration controls, because libertarianism seems to go hand in hand with open borders. People, like goods and money, should be able to cross national boundaries as freely as possible. Certainly, the state should not stop immigration, just as it should not impose tariffs on imported goods. But even at this early stage the analogy fails. Goods are never imported without somebody wanting to buy or receive them. This is obviously not the case for immigrants.

The core tenets of libertarianism indicate a commitment to open borders. Robert Nozick is considered by many to be the father of right libertarianism, and in his influential book *Anarchy, State, and Utopia* (1974) he explains the foundations of the ideology. A brief look at them furthers the argument that libertarianism should be committed to open borders.

Self-ownership is perhaps the fundamental element of libertarianism. Nozick views the individual as a self-aware, rational

agent, able to form a plan for life, and it is for this reason that he calls humans “self-owners.” That people are self-owners also precludes their treatment as objects or instruments. This is essentially the definition of self-ownership: that it is wrong to subject an individual to nonconsensual and unprovoked manipulation, enslavement, or killing.

If people are self-owners, then it follows that they must have certain rights. More specifically, the single right of self-ownership generates many other rights, not least of which are property rights. If one owns oneself, then one owns one’s labor, and if one owns one’s labor, then one owns the fruit of that labor. Owning something amounts to possessing a bundle of rights in that thing: the rights to possess it, dispose of it, and determine what to do with it. The property rights I have in my laptop mean that I can use it whenever I want, can sell it if I wish, and can use it however I please (so long as I do not violate anyone else’s rights with it). One also has property rights in one’s home (if one owns it), and it is this that allows one to invite people onto one’s property, while anyone who enters uninvited is trespassing and liable to be punished accordingly.

Neither self-ownership nor property rights give any indication that immigration restrictions would be justified. In fact, they seem to point the other way. If I own my property, then I can invite whomever I want onto it, be they compatriots or foreigners. It seems that any attempt to limit immigration would be to limit property rights. A look at the basics of libertarianism therefore seems to lead to a commitment to open borders.

WELLMAN’S ARGUMENT FROM FREEDOM OF ASSOCIATION

But the basics of libertarianism are just that: the basics. Any conclusion drawn from such a cursory and simplistic overview is bound to be premature. To really test whether libertarianism is necessarily committed to open borders, one must apply it to an argument *against* open borders. Wellman’s argument from freedom of association is an obvious choice. It is perhaps the most liberal argument against open borders, and one which is (until its conclusion) very complimentary to and compatible with libertarian principles.

Self-determination is a key component of libertarianism, and it seems to go hand in hand with self-ownership. When one is

murdered, self-ownership is denied. Self-ownership means a right to life, insofar as our existence shouldn't depend on anyone else. I cannot call myself truly self-owning if I owe my continued survival to the mercy of someone else who chooses to not kill me. But beyond this self-ownership means being free to live your life as you see fit. You own yourself, so can do as you please (while respecting other people's rights). This is self-determination.

Because of the deep connection between self-ownership and self-determination, Wellman's argument begins with appealing foundations for libertarians. He starts with an assumption of the importance of self-determination. It seems impossible to live one's life as one wishes without having self-determination. In fact, it is impossible to be free without being self-determining, without "being the author of one's own life" (Wellman 2011, 30). If I choose your career, home, pets, and pastimes for you, then I am restricting your freedom and determining the course of your life. You must be free to choose your own path and determine the course of your own life—otherwise, quite simply, you are not free. Individual liberty, which is at the heart of libertarianism, necessitates self-determination. Because libertarians firmly believe that individuals have their own lives to lead, it is impossible for them to deny that individuals must be self-determining. In every aspect that one is not self-determining, one is no longer free. Self-determination is, indeed, an incredibly appealing foundation for libertarians, and one which resonates at the heart of the ideology.

Wellman goes on to explain that self-determination in turn necessitates freedom of association. If you are to determine your own life, then you must be able to choose with whom you associate. To show that "freedom of association is a crucial element of self-determination," Wellman (2011, 30) asks us to consider a society in which this freedom is denied us:

Suppose, for instance, that a governmental agency were empowered to decide not only who would marry and who would remain single, but who would get married to whom, whether or not various couples would get divorced (and after what duration of marriage), and which children would be assigned to be raised by whom. Thus, this agency might tell Jennifer that she is to remain unmarried and raise five children who will be assigned to her; it may tell Jill and Jack that they are to be married for the duration of their lives but may not raise any children (any children borne by Jill would be reassigned to others of the government's

choosing); and it might tell John and Joe that they are to be married for twelve years before divorcing and remaining single and childless for the remainder of their lives.¹

It might well be that the government prescriptions lead to the maximally efficient, happy, and prosperous lives for these characters. On the other hand, it is eminently possible that they would not: our personal preferences, likes, and dislikes are our own, and to be free we must be able to act on them. So, whether happy or not, “the lives of the citizens in this society would not be self-determined,” because they would not be free to associate as they please. Wellman has, of course, chosen the most extreme and personal form of association in marriage, but would it be acceptable for the government to choose your friends or pets? It seems that the same problems would arise, and that once again one would not be self-determining.

Having established freedom of association as a necessary factor in self-determination, Wellman (2011, 31) makes the crucial point that freedom of association is meaningless without including the freedom to not associate, or disassociate:

One is fully self-determining only if one may choose whether or not to marry a second party who would have one as a partner, whether or not to raise children with this partner, and whether to stay married to this partner. And crucially, one must not only be permitted to join with a willing partner, a potential partner must not be allowed to associate with you unless you too are willing. In other words, one must have the discretion to reject the proposal of any given suitor and even to remain single indefinitely if one so chooses.

Just as one does not have free speech if one is only allowed to toe the party line, neither does one have freedom of association if one must accept all offers that come one’s way. When Jack proposes to Jill, Jill must be able to reject his advances if she so wishes—it is neither right nor fair for her to have to accept his offer against her wishes. Thus, a necessary part of freedom of association is the ability to reject a potential association, or, in other words, the right to exclude. This is intuitively appealing: after all, if we don’t like someone, we shouldn’t have to be friends with them, and if we did

¹ Wellman’s example here seems to be adapted from Nozick’s (1974, 263) own marriage metaphor in *Anarchy, State, and Utopia*. This is yet more evidence of Wellman’s libertarian influence.

have to, then it would be hard to see how we are free to choose our associations. The libertarian appeal is equally clear. Just as freedom of speech is vacuous if it does not include the freedom for you to say things which I dislike, so too must the freedom to associate as we please include the possibility of your excluding me from associating with you.

The right to exclude brings with it the thorny topic of rights. Although Wellman has written extensively about rights, I believe that Nozick's definition is equally compatible, and more insightful. Nozick's definition of rights is a key component of libertarianism, and by borrowing his definition, we can illuminate further the links between freedom of association and libertarianism.

Nozick (1974, 92) defines rights quite simply and succinctly as "permissions to do something and obligations on others not to interfere." The first part of this is the simpler: if you have a right to do x , you obviously have permission to do x . The second part—others' obligation not to interfere—requires surprisingly more explanation. Nozick introduces moral side constraints as a particular property of rights. Side constraints entail a negative view of rights: you have a right to something insofar as your right to it is not infringed. "They specify types of conduct that may not be done to individuals rather than types of conduct that must be done for people" (Mack 2015). In other words, they do not tell us what the right holder is permitted to do so much as what we are not permitted to do to the right holder. This is because for each right you enjoy there is a corresponding moral constraint upon everyone else to not violate it. X 's right to life entails the corresponding moral constraint on everyone else to not murder X . And this right is unconditional: Matthew is forbidden from murdering Luke, even if, by some strange turn of events, Matthew murdering Luke is the only way to prevent John killing the England football team. It is simply the case that murder is always morally wrong. To act morally, we must not violate any constraints.

The alternative to moral side constraints is a consequentialist system which attempts to maximize overall rights. This may seem intuitively preferable: after all, if something is valuable, shouldn't we act to promote as much of it as possible? If you have a right to free speech, it is not the case that you have the right only insofar as you say controversial things—it seems that you possess it even if you never use it. Nor does it seem to be that you have more free

speech if you are outlandish but less if you're not. In short, your right to free speech isn't something that *you* possess. Rather, your right to free speech entails an obligation on everyone else to let you say whatever you want. Rights are, in this sense, inherently negative: a right to do *x* means that everyone else is obligated to allow you to.

The way rights work means that the only way to maximize overall rights is to minimize the total number of rights violations. But this would "require us to violate someone's rights when doing so minimizes the total (weighted) amount of the violation of rights in the society" (Nozick 1974, 28). For example, imagine that you are the mayor of a town in which someone has been wrongly killed by the police. Now a mob is rampaging through the streets, demanding that Policeman Pat be punished, even though you know he is innocent. This mob is violating the rights of many townsfolk, so it would be justifiable to punish Pat, because violating his rights would stop the mob and minimize overall rights violations. But this seems wrong to us. It just doesn't seem right that an innocent man should be made a sacrificial lamb. This is because rights reflect the "moral inviolability of individuals," and Pat would not be morally inviolable—nor would any of us be—were he vulnerable to violations by the mayor, even if only to protect the rights of other townsfolk (Mack 2015). The inviolability of individuals means that there are certain things we cannot do to others *under any circumstances*, so "not even the minimization of the violation of the right against being killed can justify the violation of that right" (Mack 2015). Likewise, "our core reason for abstaining from murder is not that abstention advances the goal of minimizing murders," but rather that there is something inherently bad about murder. Nozick's definition is grounded on the belief that no matter what one's goals or motivations, one would be acting immorally by violating moral constraints.

With Nozick's definition of rights, Wellman's first point becomes clearer. A right to freedom of association entails a right to exclude; therefore, others are morally constrained in their actions to not violate that right. When Jack proposes to Jill, she is free to turn him down. Her right to do so means that Jack is constrained in his potential actions: namely he would be acting immorally were he to force marriage upon her. Defining rights in the negative way that Nozick does strengthens Wellman's intuition that a right to

exclude is a necessary part of self-determination. For Jill to be self-determining, others, such as Jack, must respect her decisions. It is impossible to see how she would be self-determining in any meaningful way were her choices to be ignored. Thus, for her to be self-determining Jack is morally obliged to constrain his possible actions according to her wishes, and vice versa.

Nozick's definition of rights also further highlights Wellman's libertarian appeal. When Wellman writes that "self-determination involves being the author of one's own life," he echoes Nozick, who writes that "there are only individual people, different individual people, with their own individual lives" (Wellman 2011, 30; Nozick 1974, 33). The message in both is clear: individuals must be the masters of their own fate. When Wellman (2011, 31) later claims "that each of us enjoys a privileged position of moral dominion over our self-regarding affairs," he is expressing the idea of the inviolability of individuals just as Nozick was. He seems to intuitively employ a negative conception of rights when he argues for the wrongness of state-arranged marriages. That the state must abstain from interfering in Jill's associations is based on an essentially negative definition of her right to freedom of association. Thus, Wellman's argument is to this point not only compatible with libertarianism, but seems to grow out of the same assumptions.

It is not just individuals who possess the right to exclude. Wellman claims that it is equally important for groups. A golf club may have membership criteria such as respecting the rules of the course and contributing to the upkeep of the club. It seems perfectly permissible for the golf club to exclude potential members who fail to meet or subject themselves to these criteria. It is not *their* association, achieving *their* goals, if they cannot exclude people whom they deem inappropriate. To illuminate further the prima facie necessity of a group's right to freedom of association, imagine if no group were granted the right. Sports teams would not only be prohibited from discriminating based on sex, but also on sporting ability. Clubs for children would be powerless to stop adults joining. Groups for ethnic minorities would include members of the ethnic majority. There is an inherent and important interest in the makeup of the membership of the group, because it is the members of the group who determine its future. It is for this reason that, as Stuart White (1997, 373) writes, "we cannot simply repudiate the right to exclude, for we correctly intuit that this right

is, to some degree, an integral and important part of freedom of association, and we most certainly do not want a society in which people lack this freedom.”

The appeal of groups’ right to freedom of association is clear for libertarians. Libertarianism has long held a commitment to the freedom of private education, for example, and the right of a private educational establishment to limit its membership to a single sex, social group, or based on other qualifications. The belief is that if someone wishes to start his own school, then no one should be able to stop him from making it an all-boys one. Equally, libertarians have often been voices against government incursions into group freedom of association. For example, Jim Crow laws in certain states imposed segregation upon businesses by making it illegal for restaurants and hotels, among other businesses, to serve white and black customers together. Libertarians were against this, claiming that businesses should be free to choose who their customers should be, though they ultimately believed that establishments that made the choice of segregation would be penalized in the free marketplace. This libertarian belief rests upon a commitment to groups as well as individuals having a right to freedom of association.

It is only at his next, final, step that Wellman takes libertarians into uncomfortable ground. Wellman claims that if individuals and groups have a right to exclude, then so too do states. Of course, it does not logically follow that if individuals and groups have this right then states must too. Rather, states—like individuals—are entitled to self-determination, so they too must be entitled to freedom of association and its corresponding right to exclude. Having proven that self-determination requires freedom of association, which entails the freedom to exclude, all that is left is to show that states are, indeed, entitled to self-determination. Wellman makes a good claim that this is the case. Again he takes a negative approach and asks us to imagine what it would be like if states were not self-determining. Firstly, supranational bodies provide evidence of state self-determination. If states were not self-determining, then the EU could force Switzerland to join, or force the UK to remain, as neither country would have the ability to control its future. Secondly, by denying self-determination, one denies sovereignty, and so it would be permissible for one state to interfere in another’s legal system. There is therefore no

reason to stop the United States, for example, from imposing stricter drug laws on Mexico, such as the death penalty for drug dealers. But the idea of the USA unilaterally punishing Mexicans for selling drugs in Mexico seems wrong, because Mexico and only Mexico should have this power. Both of these examples are elements of a greater fear: denying self-determination essentially makes it permissible to annex another state. If Portugal has no self-determination, and no sovereignty, then what is wrong with Spain annexing it? If it is done peacefully, and Spain is benevolent, then it is hard to see what is wrong. And yet it *is* wrong, and it is wrong precisely because Portugal is entitled to autonomy, which means that it cannot be subjugated against its will. But this is not just a question of international law. Without self-determination, states would lose what makes them states: self-determination is an integral part of the definition of a state. It is not even a matter of whether or not states *ought* to be self-determining: Wellman is arguing that if a state does not possess self-determination then it is no longer a state in any meaningful sense. Even if the state in question were nothing more than Nozick's minimal state, it would still have to meet his two criteria: that within its territory it has a monopoly (or close to) of legitimate force, and that it provides protective services for all. Wellman's examples demonstrate that a state without self-determination fails to meet these criteria: Mexico does not possess anything close to a monopoly of legitimate force if the USA punishes drug dealers in Cancún, and Portugal cannot provide protective services for all if it has been annexed by Spain.

And so, if states are self-determining, then they (like all self-determining individuals and groups) must have freedom of association, and thus its corresponding right to exclude. This, of course, does not seem acceptable to a libertarian. However, it is not immediately apparent why this is the case. Wellman has drawn his conclusions from premises which are very appealing to libertarians; and it is certainly the case that libertarians would not wish to deny either that individuals or groups have a right to exclude.

If states, like individuals and groups, are self-determining, then they must have the right to freedom of association, as it is a necessary component of self-determination. With a right to freedom of association comes the right to exclude. I have used Nozick's definition of rights as moral side constraints, meaning that one is morally constrained in one's actions to respect a state's

right to exclude. If a state wants to exclude you, then you cannot force yourself—and your association—upon it. In fact, it would be immoral if one were to do so, as one would be violating the state's autonomy, albeit in a small way. This, therefore, provides a moral justification against open borders.

PART II

INTERNAL OBJECTIONS TO WELLMAN'S ARGUMENT

Wellman's premises seem to be compatible with libertarianism, and yet his conclusion does not. But on what grounds can libertarians disagree? There are three possible solutions to this dilemma. Firstly, it could be the case that there is some internal error in his argument, which renders it unsound. Secondly, it may be the case that, although sound, his argument is at odds with libertarian principles and therefore must be rejected as being unlibertarian. I hope to show over parts II and III, respectively, that neither of these is the case and that the third option must be true: that Wellman's conclusion is compatible with libertarianism, even though it may initially seem otherwise.

Perhaps the reason why libertarians disagree with Wellman's conclusion is that his argument is internally unsound. It could be the case that his argumentation does not justify the step he took from groups to states having a right to exclude. There are two objections that support this. The first is that Wellman has drawn the wrong conclusion from his examples of annexation and other international affairs and that these examples show why states have an international right to exclude but not necessarily an intranational one. The other objection is that the right to exclude cannot be as general or absolute as Wellman assumes, because he fails to take into account exclusion's harmful effect on a group's or state's nonmembers. If one, or both, of these objections is true, then Wellman's argument is unsound, and his conclusion that states have a right to exclude would be refuted.

IMMIGRATION AND ASSOCIATION

Wellman provides the examples of annexation, supranational bodies, and interference in another state's laws to support his claim that states are by definition self-determining, and his point is both persuasive and correct. The examples show that states

must be self-determining and that they have a right to freedom of association, and thus a right to exclude or disassociate from other states or international bodies. However, it does not seem obvious that Wellman's examples prove that states have a right to exclude *individual immigrants*. Annexation is bad, because it ignores the right of a state to choose its own path, but how do economic immigrants threaten this right? It appears that Wellman has shown that states have a right to freedom of association between states, but not that they have this right when it comes to the people within the state. In other words, states have an international right to exclude, but not an intranational one.

Wellman's argument can be summarized in the following points:

- (1) States' right to self-determination gives them the right to choose with whom they wish to associate.
- (2) Immigrants associate with the state.
- (3) Therefore, states with a right to self-determination have a right to choose whether or not they allow immigration.²

Wellman's international examples may well demonstrate (1), but they do not demonstrate (2). In fact, set out this way, this objection evolves into one which is troubling on a far more fundamental level for Wellman. Point (2) begs the question of what it means for immigrants to *associate with the state*, and some, including Bas van der Vossen (2015), respond that it is *not* the case that immigrants actually associate with it. In analyzing Wellman's position, Van der Vossen differentiates between the collective and individualist conceptions of group self-determination. In the case of the former, which Wellman implies is at play, "groups as a whole are seen as agents that are capable of acting freely and as having a right to self-determination" (Van der Vossen 2015, 6). This is certainly the conception Wellman uses in his examples. But in this sense immigrants do not associate with the state, so (2) is false. Immigrants do not seek relations with states in the same way that Estonia does with the European Union, that the United States does with Canada, or that Catalonia does with Spain. Instead, immigrants "seek to *join* the state, to become an indistinguishable part of the collective body that constitutes the state as it is" (Van der Vossen 2015, 12).

² Van der Vossen (2015, 11).

It must be the case, then, that Wellman's examples were just meant to establish that states are self-determining entities and should not be read into any more than that. Instead of the collective conception of group self-determination, perhaps Wellman intended a more individualist one—which sees group self-determination “as an extension of the individual autonomy of its members” (Van der Vossen 2015, 6). In that case (2) becomes true, because immigrants do indeed associate with the *members* of the state. As we saw with groups, one necessary element of self-determination is the ability to control the membership of the group. Therefore, because states are self-determining, they must be able to control who is and who is not a citizen. Controlling membership is not important because the citizens of a state should be free to choose who they simply meet on the street—“the mere presence of immigrants within the state's borders cannot be a serious problem with regard to the associational rights of the citizens” (Fine 2010, 343). Equally, foreign tourists, those on business trips, and those just passing through are of no meaningful importance. Rather, the right to control membership reflects the importance of citizens' right to choose their political associates. The political community determines the future of the state, so of course it is vital that citizens be able to control who enters it.

The right of a populace to control its members, though, rests on the assumption that letting someone into the country indefinitely will lead to them becoming a member of the political community, or conversely that there is no way to prevent an indefinite immigrant resident from becoming a member. Joseph H. Carens (2013) argues that this is the case. His popular theory of social membership argues that living in a society generates social membership claims.³ Being a resident over time generates justified moral claims to legal rights and other aspects of social membership, one being the ability to vote. The longer an immigrant is in a country, the more “they sink roots in the place where they have settled” (Carens 2013, 159). People establish careers, families, friends, and other vital interests over time, making social membership unavoidable for long-term immigrants, and this social membership establishes moral claims

³ Popular in academia but evidently not so with the layman or politician, hence the recent Windrush Scandal.

for legal rights such as voting, if not full-blown citizenship.⁴ Thus, since long-term immigrants would eventually become members of the political community, the only way to prevent them from joining the community would be to prevent them entering the country in the first place. This answers the objection. States are self-determining, and a necessary part of self-determination for any group is control of its membership. Regarding the state, this means controlling membership of the political community. All long-term residents have social membership claims, meaning that they have a moral claim to membership in the political community. Therefore, the only way to control the membership of a state's political community is to control the admission of immigrants.

But there is no reason to assume that libertarianism supports a social membership theory such as Carens's. In fact, libertarians would probably disagree with Carens in one of two ways, leading to two different scenarios. In scenario one, libertarians would claim that the state should undertake few, if any, of the social projects that it currently does. There should be no national healthcare, no unemployment or disability benefits, and no social housing, among others. In this scenario, there would not be much for one to be a social member *of*. The legal rights and social programs that Carens assumes to be in place, which an immigrant would become entitled to, simply would not exist. Social membership would not amount to much, so immigrants would miss out on very little (if anything) by not being citizens. This would massively weaken Carens's claims for social membership, because social membership itself would not be as valuable as he assumes. However, Carens's argument and reasoning still stand as far as voting and political membership. If people are in a society long enough, then one could say that they build up claims to have a political say in it. In this sense, immigrants would be associating with their society (politically), making both (1) and (2) true and validating Wellman's conclusion.

The second scenario is more problematic, and arises because it seems perfectly acceptable for libertarians to deny that immigrants even have claims to political membership. If this is the case, then it is hard to see in what meaningful way immigrants

⁴ I do not intend to discuss Carens's theory of social membership in great depth, but only enough to set it out as a viable argument that long-term residence necessarily leads to inclusion in the political community.

are associating with the society—making (2) false. When it comes to group membership or employment, for example, libertarianism advocates contracts. One may join a club or take up a job so long as one accepts certain conditions. If Luke offers John a job paying £8 per hour, then John faces a choice: Does he want to do the work in return for £8 compensation per hour? If not, then he is free to refuse the offer, and Luke may well offer him more money, or else look elsewhere for employees. Libertarianism is against minimum wage laws, because they undermine this reasoning. It is equally plausible for a libertarian to claim that one could be granted permission to enter a country indefinitely on the condition that one will never possess political membership. If immigrants entered on these terms, then one could claim that just living in the country and obeying its laws means that immigrants would not be associating any more meaningfully with the state than temporary residents or holidaymakers, so there would be no more grounds for restricting immigration than for restricting visits.

However, for this to be a meaningful offer there must exist the possibility to exclude those who do not agree to its terms. If the state offers potential immigrants indefinite residency, so long as they forgo political membership claims, there is the implication that those who refuse this offer will be rejected. After all, what would be the point of making the offer if the state in question let you in anyway (with political membership rights) if you refused? The borders are clearly not “open”—they are only open to those who accept the offer.

THE PROBLEM OF HARM

The next internal critique of Wellman’s argument is that the right to exclude is not as general or absolute as Wellman assumes (and requires), because exclusion can harm excluded nonmembers. The major worry that comes along with unbridled freedom of association is the potential for discrimination. If a group can exclude potential members, then it can exclude them based on skin color, for instance, so we find ourselves with a conflict between two widely accepted liberal values: How is the right to freedom of association compatible with the right to freedom from discrimination? For some libertarians, though, this is no problem. It is not uncommon for libertarians to believe in the right to discriminate, even if doing so is reprehensible, or if (as is more commonly believed) doing so

would be detrimental in a free market. In a sense this argument is similar to theist counterarguments to the problem of evil. If God truly gave man freedom, then He must have given man the freedom to be evil. Likewise, how are we really free if we are not free to do the “wrong” thing? If we have a right to liberty, then we have a right to discriminate (Levy 2016).

In the sense of state-enforced prohibition, it is hard to see how a libertarian could be in favor of banning discrimination in the private domain. Nearly all economic behavior is discriminatory: universities discriminate in their intake based on grades while employers discriminate based on experience and personality. Yet these seem perfectly acceptable. The retort would be that these, though, are not real discrimination. But it is impossible to adequately define “real” discrimination. Antidiscrimination laws have often arisen in response to previously discriminatory laws: for example, the 1964 Civil Rights Act in the United States repealed and replaced the Jim Crow laws. The ideal libertarian position would have been to have neither of these laws, and certainly not to have laws which infringe on the key rights to freedom of speech, religion, and association. Antidiscrimination laws by restricting freedom proscribe behavior and deny individuals their self-ownership.

A more sophisticated and potent formulation of this objection to exclusion utilizes the harm principle. One of the central tenets of libertarianism is that one may not wrongfully harm another. Nozick (1974, 34) clearly states that a nonaggression principle is at the heart of libertarianism, so the intentional and unprovoked harm of others must be avoided. So, although libertarians would aim to be absolutists about freedom of speech and association, they would stop short when doing so would harm others. For example, freedom of speech would not extend as far as inciting harm or violence against someone. When it comes to freedom of association, this would be limited by a group’s ability to harm nonmembers through exclusion. Sarah Fine (2010, 346) shows that groups do have the potential to (often indirectly and unintentionally) harm third-party nonmembers. She argues that, if a private club on your road frequently organizes parties that go on well into the night, then “while seemingly going about its own business, the private club has the potential to harm the interests of non-members.” A libertarian may respond that although this is true, it misses an important nuance. If the club existed on your

road long before you moved there, then you cannot really claim it is harming you. By deciding to move to that house, you have accepted the conditions on the road, much in the same way as I live under the Heathrow Airport flightpath and so cannot justifiably claim that the 5 a.m. flights harm me, as I knew this was “part of the deal” of living where I do (or at least I would have known had I done adequate research). On the other hand, the club may have been established after you bought the property. In this case, it would seem that you are being harmed by its parties, especially as there is no reasonable way that you have consented. Either way, this highlights the importance of time in determining harm, and time must be considered when it comes to immigration, as will become clear later.

But because immigration is more important than moving house—and possesses a greater potential for harm—could the analogy be bolstered up? Perhaps there is a point at which the club would be harming you even though you had in some way consented. Could it throw parties every night? There is no immediate reason why not. Many people live above or near nightclubs, for example, and in each instance a tradeoff is made: sleep versus the cheaper cost of the property. If one chooses the former, then one should live elsewhere; if the latter, then sleep is a cost that must be accepted.

Fine’s next example is more closely related to the members of a group harming nonmembers in the same manner as immigration could. It is the example of membership in a national teachers’ union being a necessary condition for working in education. The previous counterargument also applies here. If this rule had always been in place, then it would in effect be no different from being required to join a professional body to practice in an industry, such as having to be a member of the Law Society to be a barrister. It is a requirement, but not a harmful one. It would be irrational and unreasonable for me to say that my dream of being a barrister was thwarted, and so I was harmed, because I did not want to join the Law Society. Membership requirements, if they have been in place prior to one’s desire to join the group, cannot be harmful. But this is to miss the uniqueness of state-imposed rules. For one school to require teachers to be union members is one thing, but for the state to require it is another. This is because the state offers no options, no shades of grey, and simply prohibits alternatives. It restricts the freedom of both schools and potential teachers. Libertarianism

would be against such a law. The implication for immigration is that immigrants should not be at the whim of membership rules like this because they are unnecessarily restrictive. The fact that one school does not wish to hire nonunionized teachers should not mean that no school can; similarly, that some people might not want to associate with immigrants should not mean that no one can.

This is a powerful objection—and one I shall return to later—but it does not shed further light on the *harm* aspect. It does not counter the point that, if the rule were always in place, it would be hard to see where the harm lies. Obviously, if the rule had not always been in place, then it seems clear that the would-be teacher or barrister *could* be harmed. This is the case in Fine's other example: a public park which is bought and made private, for members only.

Is it then the case that a group could harm third-party nonmembers by exercising its right to exclude? If a group has always existed with a certain admission criteria, then it is hard to see how one could be harmed by being excluded. If the golf club only accepts residents of a certain area, then, although I may feel it unfair, I cannot be harmed by it because I was never entitled to membership. On the other hand, it seems that rule changes or changes in circumstances have potential to harm, and so, if a group changes its rules for membership, then it is eminently possible that it may harm third party nonmembers. This problem of the harm principle will arise again later, not least as it seems there is now a strict rule governing avoiding harming third parties: rules must not change.

Is it the case that exclusion from a nation would harm the excluded individual? Looking again at the golf club example is insightful. The potential for harm to nonmembers comes from the fact that golf clubs are often more than just golf clubs: they are places where valuable contacts and business deals are made and better employment can be found. In short, exclusion from a club like this can restrict one's future success. In this sense, it is very similar to immigration. Being restricted access to a nation such as the United Kingdom or the United States limits one's potential for earnings, education, good healthcare, and more. For example, Paul lives in Togo but wants to move to the US. If we think about it counterfactually and compare the Paul who was granted access to the Paul who was not, it is hard to see how the excluded Paul is not harmed. Or, at the very least, that he is much worse off. This is indeed a serious worry.

But if we were to define harm as the violation of rights, then although Paul's position is still troubling, it is not harmful, because no rights are being violated. Being denied membership in a club, or entrance to a country, is not a violation of any right one possesses. There is no right to having the best possible life. This assertion is bolstered by the definition of rights as moral side constraints. To claim that Paul has a right to a better life is to obligate people to facilitate it, be it by allowing him access to clubs and countries or giving him a job. But this is clearly wrong. No one has an obligation to employ someone because they should provide people with better lives. It seems that this is an egalitarian criticism, but not a libertarian one.

Even if conceded that restricting immigration can be harmful, it would not entail fully open borders. Setting aside cold analysis, it is very hard to see how Paul from Togo isn't being harmed in very meaningful ways by not being allowed into the US. But that is not to say that *all* immigration restrictions are harmful. Exclusion does not harm immigrants from the UK to the USA or from France to Germany to anywhere near the same level as it does Paul. It would seem to devalue the meaning of "harm" if we were to say that a Swiss banker moving to Hong Kong would be harmed were he denied entrance. Even if we concede that immigration restrictions can be harmful, it does not follow that all immigration restrictions are. Therefore, because it is not necessarily the case that all closed borders are harmful, so too is it not necessarily the case that all borders must be open.

Wellman's freedom of association argument survives the objections aimed at undermining this conclusion. It does not appear to be the case that the argument suffers from a failed analogy, or that it is undermined by the harm principle. So Wellman's argument can still provide a sound argument against open borders.

PART III

LIBERTARIAN OBJECTIONS

Having shown that Wellman's argument is not unsound, there are only two routes available to resolve the tension between libertarianism and Wellman's conclusion. Either Wellman's conclusion is incompatible with libertarianism, or else it is compatible

despite not appearing so. To prove the latter, the former must be eliminated. I will therefore lay out and respond to three arguments which seek to show that libertarianism cannot accept Wellman's conclusion that states have a right to exclude immigrants.

THE EXISTENCE OF BORDERS

Perhaps libertarianism is opposed to the existence of borders at all. It is sometimes said by libertarians that the border between nations should be of no greater importance than the boundary between my property and that of my neighbor. This is meant to signify the libertarian commitments to free trade and the general privation of state interference in people's lives, but it is an analogy which is also used to back the claim that the state should not enforce a formal and coercive border, which limits movement and so unnecessarily restricts the freedom of individuals.

But this charge is easily rebutted. For libertarians, the role of the state is to enforce contracts and protect its citizens' rights. One aspect of this is protecting its citizens from external attack or invasion. This is the reason why libertarians are (generally) in favor of government spending for a strong, efficient, and effective police and military. To refute the allegation that libertarians are against the existence of borders, all that must be shown is that borders are at least a justified extension of the state's arsenal for defending the rights of its citizens, if not a necessary one. And this is clearly the case. It is wholly justifiable to claim that knowing who is entering a country is a valid and effective way of protecting the citizens. After all, the best medicine is prevention: so, the best way to stop a foreign terrorist from attacking your country is to stop him from entering it in the first place. To stop someone entering, or even to just keep track of who is, there must be some physical location at which you stop entrants and check their identification. This is all a border is. Therefore, the existence of borders in general is wholly acceptable to libertarians.

One might object that this is a naïve and simplistic view of borders, as they do not just stop people to check their passports, reject terrorists, then let everyone else through. They are far more restrictive than that. This may well be the case, but the claim here is simply that even in a country with a completely open-door immigration policy, where everyone except known terrorists is let in, it would still be justifiable and acceptable to libertarians that the country has an

enforced border. Therefore, it is not valid to claim that libertarianism entails a belief that borders should not exist in any form.

INDIVIDUAL VERSUS STATE RIGHTS

A second, and stronger, libertarian objection to Wellman's conclusion is that a policy of closed borders causes a conflict between individual and state rights and that in these conflicts libertarians should side with individuals. If the state restricts immigration, then individuals' freedom is likewise limited. Imagine Mr. McDonald has a farm. When harvest time comes along, he wishes to employ cheap immigrant labor and, because it is his land and his farm, he should be able to do as he wishes. But because he lives in a country with a points-based immigration system, none of the low-skilled workers he wants can enter. He therefore must settle for more expensive, less experienced, local workers. Clearly his freedom has been curtailed here. As a property owner, he should be able to invite whomever he wants onto his land, and yet this is exactly what has been denied him.

The first response is that nothing in Wellman's argument explicitly stops the farmer from hiring immigrant workers. The argument specifically refers to immigrants who are staying in a nation indefinitely and are thus able to build up social membership claims, which would entitle them to membership in the political community. Therefore, if Mr. McDonald wished to hire temporary migrant laborers for the harvest, Wellman's argument would not stop him. But this is an unsatisfactory response, and flounders once the example is bolstered up. Perhaps Mr. McDonald wishes to hire migrant laborers to stay and work on his land indefinitely, doing all manner of jobs throughout the year. In this case, it is a conflict of the right of the property owner to do as he wishes on his property against the apparent right of the state to exclude potential immigrants.

The point is that immigration restrictions are beyond the bounds of the libertarian state, whose power should be limited to the protection of rights and contracts. Hillel Steiner (1992, 90) claims that immigration restrictions are "defending neither contractual agreements nor property rights," and so are illegitimate. He points out that immigration restrictions only protect the *value* of rights, such as what one's property is worth (thanks to there being no competition from immigrants), rather than protecting the right to property itself—and libertarianism believes that this is acting

beyond the state's remit. For libertarians, it is just as wrong for the state to restrict immigration as it would be for it to impose tariffs or redistribute wealth.

However, Steiner has not considered the state's right to freedom of association. If there is a collective right to control political membership, then the state *can* act to protect that right. Now the question becomes whether Mr. McDonald's right to invite whomever he wants onto his property violates the collective right to control political membership. To claim that an individual's right should always triumph over the group would be to assume it to be completely general and absolute—but this is not the case. No libertarian believes that any right is perfectly general or absolute. I have the right to freedom of speech, but I cannot use it to incite harm. The right to freedom of movement does not entitle me to walk into your house uninvited. My rights are restricted by other people's rights. The rights of other people are the limits of my rights: the right to freely move my fist, for example, is limited by the proximity of your chin. I have the right to do *x*, so long as doing so does not violate anyone else's rights. When we see it as Mr. McDonald versus the rest of the members of the state, we see that the crux of this objection is the tension between individuals, rather than the conflict between an individual and a state.

It is not the case that there is some individual trump card in these situations. Wellman (2011, 81) argues that the existence of even the most minimal state requires some violation of individual property rights, in disagreement with Nozick.⁵ To Wellman the debate hinges on weighing up costs. To what extent are the rights of the group to freely associate violated compared to the rights of Mr. McDonald? If he only wants to hire one worker, then it is hard to see that the group's right is being violated in any meaningful way. On the other hand, if he wishes to hire ten thousand workers, then it certainly is. This is what must be decided by the political community, including Mr. McDonald. However, that there is a decision to be made is a testament to the fact that the border must not *necessarily* be open, for it would not seem right to violate the right to freedom of association of every other member of the community simply to protect one member's property right. The

⁵ Even if one were to side with Nozick and agree that the minimal state does not violate rights, Wellman's overarching objection to Steiner still stands.

right to freedom of association may not be so perfectly general and absolute as to perpetually deny Mr. McDonald from hiring immigrant workers, but neither are property rights so general and absolute as to justify unflinching support of him.

LIBERTARIAN UTOPIA

The final objection is to look at the libertarian “utopia,” because some claim that in the perfect libertarian society there would be open borders and that therefore libertarianism is indeed opposed to restricted immigration. As said before, it is widely believed that the minimal state would not have a restrictive immigration policy, because it would only act to protect the rights of its citizens and enforce contracts, neither of which restricting immigration would do. Therefore, if the goal of libertarianism is the minimal state, and the minimal state would have open borders, then libertarianism does indeed lead to open borders.

However, there are two problems with this argument. First, as mentioned previously, it fails to account for protecting the right to freedom of association. Imagine a small sovereign island whose citizens are mildly xenophobic and are content living without immigration. In fact, they agree that they want a totally closed-door immigration policy. In this case, it would seem both strange, and at odds with libertarianism, to insist that they have an open immigration policy. Their right to freedom of association would unilaterally be violated if this were the case. Therefore, even if only in such niche circumstances, Wellman’s freedom of association argument explains why libertarianism does not necessarily entail open borders.

But there is a second, even stronger rebuttal to this point which not only refutes it but shows that the minimal state could in fact necessitate *closed* borders. Many libertarians see the anarcho-capitalist state (or something not far removed), as envisioned by Nozick (among others), as the ultimate goal of libertarianism. In the anarcho-capitalist society, all land would be privately owned by some person or group, and communities would be independently run, with no state-owned property. One key feature of owning property is that no one can enter your property without your permission—trespassing violates your rights. Onora O’Neill (1992, 117) outlines the consequences of this:

The only legitimate restrictions on movement and association are those imposed by the individual owners on access to their property or their company. These, of course, may be legion; in a world without public provision or public spaces, they could be infinitely more restrictive than immigration and emigration constraints now imposed by states.

Murray N. Rothbard (1994, 7) builds upon this, writing:

Rethinking immigration on the basis of the anarcho-capitalist model, it became clear to me that a totally privatized country would not have "open borders" at all. If every piece of land in a country were owned by some person, group, or corporation, this would mean that no immigrant could enter there unless invited to enter and allowed to rent, or purchase, property. A totally privatized country would be as "closed" as the particular inhabitants and property owners desire. It seems clear, then, that the regime of open borders that exists *de facto* in the U.S. really amounts to a compulsory opening by the central state, the state in charge of all streets and public land areas, and does not genuinely reflect the wishes of the proprietors.

In a nation where all land is privately owned, all immigrants would have to be invited. Essentially, the whole question of immigration would need rethinking. The question of who should be let in would no longer be a valid one, rather it would be a question of who has been invited, and everyone else would be a trespasser.

Van der Vossen (2015, 14) astutely observes that the freedom of association argument fails to explain "why *the state* is the unit with the right to exclude immigrants." It is almost as if Wellman has employed circular reasoning by assuming that the state has a right to exclude in an effort to prove so. After all, freedom of association gives no indication of why subgroups within the state could not likewise exclude outsiders. The argument seems to just as validly support England's right to exclude Scots, or London's right to exclude everyone else, as it does the UK's right to exclude foreigners. Wellman is begging the question: Why the state? Why not anything smaller?

The anarcho-capitalist model provides an answer to Van der Vossen's problem. Subgroups within the state *may* exclude outsiders, as is their property right, but so too does the state have that right—they are not mutually exclusive. Just as a privately owned Alabama would have a right to exclude outsiders, so too would the USA have a responsibility to protect the rights of property owners by not allowing entrance to uninvited immigrants—in other words, by not having open borders.

Libertarianism is not so much a proponent of open borders so much as it is “against the control of international movement by any actor other than the individual property owner.” It says “nothing about what migration policies individual property owners morally ought to enact” (Higgins 2013, 92). To protect its citizens’ property rights, the state should prevent trespass, and this would require closed borders. Any libertarians who follow Nozick in aspiring toward the anarcho-capitalist state should bear in mind that even this would not necessarily have open borders.

Obviously, in reality many immigrants would be “invited,” so, in practice, borders would probably be very much open. However, there is a huge difference between this and a necessary commitment to open borders.

All three of these objections fail to refute the conclusion that Wellman’s freedom of association argument is compatible with libertarianism. Libertarianism is not, as is sometimes claimed, against the existence of borders. It is also not a valid argument to claim that open borders are necessary because they are the only way to prevent rights violations. And finally, it is not the case that the ideal libertarian state would have open borders. Therefore, the conclusion that libertarians should accept Wellman’s freedom of association argument is still valid, and therefore libertarianism does not necessarily entail open borders.

CONCLUSION

Wellman’s freedom of association argument provides a tenable position for libertarians to defend restricted immigration. Because of this, libertarianism does not necessarily entail a commitment to open borders.

Whether any libertarians would, or should, accept Wellman’s argument is a different question. Most likely libertarians will maintain their commitment to open borders, and Wellman’s argument certainly does not provide a refutation of that. However, what it does do is open a debate. Is it legitimate to close borders on the grounds of freedom of association, and if so, when? I believe that the freedom of association argument challenges the assumption that libertarians must be committed to open borders, and it is not a challenge that can be easily brushed away. It is a valid argument against open borders which makes it possible for one to consistently and without contradiction be both a libertarian and against open borders.

Libertarians seem to have a penchant for being purists. There is a joke about libertarians: they love freedom so much that they would be happy seeing a twelve-year-old child on her way down a mine so that she can earn enough money to buy herself some heroine. For example, Gary Johnson (the US Libertarian Party's 2016 presidential candidate) was derided by some as watering down libertarianism in pursuit of centrist votes when he described his ideology as fiscally conservative and socially liberal—which is by no means an unfair summary of libertarianism. Likewise, immigration is treated as a shibboleth for libertarians, whereat those in favor of open borders can be labeled libertarians, while those opposed can easily be dismissed as more traditional conservatives. I believe that Wellman's argument provides an alternative to this assumption: libertarians can be against open borders.

There is no question that there are many good arguments in favor of open borders. However, freedom of association is a strong argument against it. Until it can be refuted, it cannot be claimed that libertarians must necessarily be committed to unrestricted immigration.

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