

JUSTICE, LEGITIMACY, AND MOVEMENT ACROSS BORDERS

A Political Theory of International Migration

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ABSTRACT

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Existing moral reflection on immigration law and policy is caught in an impasse between (1) proponents of an individual right to free international migration and (2) proponents of a state's right to control its borders. In Chapter 1, I examine arguments supporting an individual right to free international migration. I show that the case for this putative right cannot be settled solely by considering the strength of individuals' interest in being able to cross international borders according to their choice. Rather, at a crucial point, the argument for an individual right to free migration turns on the truth of a particular conception of global justice. In Chapter 2, I examine arguments supporting a state's right to control its borders. I contend that these arguments do not seek to defend the substantive justice of restrictive immigration policies, but rather the legitimacy of processes of political decision-making by which states unilaterally determine their own immigration policies.

Abandoning this right-versus-right paradigm, I recast the debate by focusing on two distinct questions: (1) the question of *justice in immigration*, which substantively evaluates immigrant admission policy; and (2) the question of the *legitimacy of immigration law* enacted by procedures responsive only to states' internal political decisions. I further propose that in articulating principles of justice in immigration, we should first develop a conception of *global justice* which will provide the background for our evaluation of immigration policy.

In Chapter 3, I develop and defend a conception of global justice I call *cooperation-based internationalism*. I argue that co-citizens are joint participants in a scheme of cooperation which provides them with the social goods they need to lead autonomous lives. They therefore owe each other special duties of *social justice*. In addition, I argue for a *duty of assistance* which applies among all human persons globally. This duty requires developed states to assist developing states in establishing minimally just institutions. In Chapter 4, I develop a conception of justice in immigration against the background of cooperation-based internationalism. I argue that there is no requirement for states to allow open immigration. Nevertheless, I argue that co-citizens owe each other duties which impose significant moral constraints on immigration policy: states must (1) allow for family unification; (2) eschew policies that select immigrants based on criteria that unjustly call into question the fitness for citizenship of certain current members; (3) regulate labour immigration so that all current citizens benefit equally unless unequal gains benefit worse-off citizens. The duty of assistance is also imposes constraints on immigration policy. Developed states should (4) avoid immigration policies which cause brain drain harmful to international development and (5) admit and resettle refugees.

In Chapter 5, I turn to the distinct question of the legitimacy of unilaterally-enacted immigration law. I argue that the application and enforcement of immigration law counts as a coercive exercise of political power which stands in need of justification. I examine the consent and natural duty of justice theories of political legitimacy, concluding that these influential theories cannot establish the legitimacy of immigration law. I conclude by considering the implications of the illegitimacy of immigration law for the evaluation of irregular migration.

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‘Of course, immigration is an important question and must be discussed at some stage. I surmise this is best done in discussing the appropriate relations between peoples, or the law of peoples...’

- John Rawls

‘I wish to offer a standpoint that demonstrates why one should think of immigration as a moral problem that must be considered in the context of global justice.’

- Mathias Risse

INTRODUCTION

Immigration and Political Theory

I. WHY MIGRATION MATTERS

We live in an age of migration. Since 1945, international migration has steadily increased in every region of the world, such that migration has become, in its scope, a truly global phenomenon.¹ International migration has also reached a historically unprecedented scale; the United Nations has estimated that in 2013, there were about 232 million migrants worldwide.² While the overwhelming majority of humanity will still never leave their state of birth for any extended time, large-scale international migration has significant effects even on those who do not themselves cross international borders: in sending states, emigration results in the loss of human capital but also the receipt of valuable remittances; in receiving states, immigration impacts the domestic labour market and the provision of public services, and transforms the cultural character and ethnic composition of society. It is no exaggeration, therefore, for Stephen Castles and Mark Miller to claim that there are ‘few people in either industrial or less-developed countries today who do not have personal experience of migration and its effects’.³

The significant and pervasive effects of contemporary migration on (individuals and groups within) sending and receiving states are certainly one important reason why migration raises moral questions which demand sustained attention.⁴ But we must also consider the

¹ Stephen Castles and Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World* (London: Palgrave Macmillan, 2003); Douglas S. Massey et al, *Worlds in Motion: Understanding International Migration at the End of the Millennium* (Oxford: Clarendon Press, 2008).

² United Nations Department of Economic and Social Affairs, *Trends in International Migrant Stock: The 2013 Revision* (New York: United Nations, 2013).

³ Castles and Miller, *Age of Migration*, p. 5.

⁴ I will use the term ‘moral’ broadly, to encompass both interpersonal morality as well as distinctively political morality. I thank David Miller for urging me to clarify this point.

perspective of migrants themselves – and of those prospective migrants who would migrate but for immigration restrictions imposed by receiving states. The significance of this perspective comes into view when we ask why contemporary migration has reached such an unprecedented scale. In part, the enormous expansion of international migration can be explained by globalization. Greater global economic integration has improved transnational transportation and communications. This, in addition to the stronger economic, social and cultural links between states that has also accompanied global integration, has facilitated international mobility.⁵ However, it would be a mistake to suppose that high levels of international migration are an inevitable feature of globalization: after all, the cross-border movement of goods and capital is an *alternative* to the cross-border movement of labour in achieving greater global economic integration.⁶

Fundamentally, the current trend of high international migration – which primarily involves the movement of *workers* across borders – can be traced to two factors: the large gap in average wages and economic opportunities between developing and developed societies that has opened up since the 1960s, and the difficulty of substituting the movement of capital for the movement of labour given the weakness of basic political and economic institutions in developing states.⁷ The importance of economic inequalities between the developed and developing world in explaining the emergence of large-scale international migration is reflected in the comparative development levels of typical sending and receiving states. Whereas late nineteenth- and early twentieth-century migration had been dominated by large-scale European emigration to regions intensive in land such as North America and Australia,⁸

⁵ Ibid., p. 29; Rosenblum and Tichenor, 'Introduction', pp. 3-4; and James F. Hollifield, 'Migration and International Relations', in M. R. Rosenblum and D. J. Tichenor (eds.), *The Oxford Handbook of the Politics of International Migration* (Oxford: Oxford University Press, 2012), p. 345.

⁶ Paul Collier, *Exodus: Immigration and Multiculturalism in the 21st Century* (London: Allen Lane, 2013), p. 36.

⁷ Ibid., pp. 37-40.

⁸ Timothy J. Hatton and Jeffrey G. Williamson, *The Age of Mass Migration: Causes and Economic Impact* (Oxford: Oxford University Press, 1998).

post-war migration has been characterized by dramatic increases in migration from Africa, Asia, and Latin America to North America, Western Europe, and other parts of the developed world.⁹

The fact that large-scale migration from developing to developed states takes place against the backdrop of stark international economic inequalities and indeed mass poverty in the developing world clearly makes such migration and the legal barriers that developed states erect against it a matter for urgent moral reflection. If many migrants seek only to escape the poverty and stunted economic opportunities they face in their native societies, then it is a serious question how immigration policies which restrict them from entering wealthy developed states can be justified. Indeed, the justification of the international order as a whole, given that it is marked by mass poverty in developing states and by serious international economic inequality, *in combination with* widespread legal restrictions on movement from developing to developed states, is called into question.

Equally serious questions are raised by the plight of those migrants who seek entry to developed states to escape threats to their physical security and most basic freedoms. Since the early 1980s, the number of asylum claims received by developed states has risen dramatically, the result of growing numbers of refugees and other forcibly displaced persons escaping states afflicted by war and political repression – the United Nations reported that at the end of 2012 there were 10.5 million refugees and 28.2 million internally-displaced persons.¹⁰ The pressing needs of those who have or might make asylum claims, coupled with the capacity of developed states to provide relief for at least a large number of these actual or potential migrants, in themselves testify to the clear moral significance and indeed urgency of ‘forced’ migration of this type.

⁹ Marc C. Rosenblum and Daniel J. Tichenor, ‘Introduction’, in M. R. Rosenblum and D. J. Tichenor (eds.), *The Oxford Handbook of the Politics of International Migration* (Oxford: Oxford University Press, 2012).

¹⁰ See Matthew J. Gibney, *The Ethics and Politics of Asylum* (Cambridge: Cambridge University Press, 2004), pp. 3-4 and United Nations High Commissioner for Refugees, *Global Trends 2012* (Geneva: United Nations, 2013).

But we can again appreciate the wider significance of forced migration by considering the contemporary trend of high refugee numbers within the context of an international order which features large inequalities between the developed world and developing world, and deeply dysfunctional institutions in many developing states. As Matthew Gibney has argued, the ‘current refugee crisis’ has its driving force in the prevalence of civil and international wars and ethnic conflicts in the developing world, which is itself rooted fundamentally in ‘the grave difficulties involved in maintaining durable and humane state structures in conditions of economic underdevelopment and poverty.’¹¹

We have seen that migrants are often motivated to seek work or settle in another state in response to conditions in their native states which reflect wider features of the international order which are deeply troubling independently of their effects on migration: underdevelopment and severe poverty on a mass scale, war and political repression, vast international inequalities in economic prospects and in the general quality of life. To that extent, restrictive immigration policies should receive moral scrutiny because they reinforce, maintain in existence, or fail to alleviate, morally objectionable situations outside the domain of migration.¹²

Nevertheless, immigration law and policy would still be a matter of considerable moral significance even in the absence of large global inequalities and of mass poverty and repressive or dysfunctional governments in the developing world. As we have seen, international migration is not merely an effect of objectionable conditions in developing states: it generates effects of its own on both sending and receiving states, and these effects would make immigration policy an important matter for moral evaluation even assuming the blights of global poverty and underdevelopment were eradicated.

¹¹ Gibney, *Ethics and Politics of Asylum*, p. 4.

¹² This view has been suggested by Samuel Scheffler in his ‘Immigration and Justice’, unpublished MS.

Furthermore, immigration restrictions raise moral questions in themselves because they are a deliberate constraint on human freedom, namely the freedom of persons to move across international borders according to their choice; as Joseph Carens famously observed, '[b]orders have guards and the guards have guns.'¹³ To the extent that there is a 'general presumption in favor of liberty'¹⁴ – that is, a 'general presumption against imposing legal and other restrictions on conduct without sufficient reason'¹⁵ – coercively enforced immigration restrictions raise a demand for justification.

II. IMMIGRATION AND POLITICAL THEORY

For all the reasons explained above, international migration and the legal restrictions states impose to limit immigration into their territories call for sustained moral reflection. Although this thesis is an exercise in such reflection, it would be overly ambitious to address all the moral questions that international migration and immigration restrictions raise. I will be concerned almost exclusively with what we might call matters of *immigrant admission*: I will evaluate those laws and policies by which receiving states accept (or reject) those persons who seek entry into their territory as immigrants – understood broadly as a person who crosses an international border 'for the purpose of temporary or permanent settlement'.¹⁶ I will therefore leave aside any investigation of how a receiving state should relate to those immigrants it does admit, and will also mostly omit discussion of how a sending state should respond to

¹³ Joseph H. Carens, 'Aliens and Citizens: The Case for Open Borders', *Review of Politics* 49 (1987), p. 251.

¹⁴ A. John Simmons, 'Justification and Legitimacy', in his *Justification and Legitimacy* (Cambridge: Cambridge University Press, 2001), p. 124.

¹⁵ John Rawls, *Justice as Fairness: A Restatement*, (ed.) E. Kelly (Cambridge, MA: Harvard University Press, 2001), p. 44.

¹⁶ Chandran Kukathas, 'Immigration', in H. LaFollette (ed.), *The Oxford Handbook of Practical Ethics* (Oxford: Oxford University Press, 2003), p. 570.

emigration. My task in this thesis will to formulate a response to the moral questions raised by immigrant admission, or as I will also more simply say, *immigration*.

What seems especially striking as we begin to formulate that response is the considerable degree to which these matters are subjects of moral and political controversy. I do not have in mind the mere sociological fact of disagreement: such disagreement might simply be the upshot of judgments reached by reasoning which has been distorted by ignorance, bigotry, political opportunism, or simply a lack of adequate reflection. But while I do not doubt that some of the controversy surrounding migration and immigration policy reflects reasoning that has been tainted by distorting influences, we can also discern disagreement in the considered judgments of persons who are *competent moral judges* reasoning in good faith.¹⁷

Indeed, these interpersonal conflicts of considered judgments seem to me to characterize moral reflection about immigration ‘at all levels of generality’.¹⁸ Moreover, it seems to me that our moral judgments about immigration and immigration restrictions, though considered, are not ones in which we are able to place a high degree of confidence; often, our judgments are ‘in doubt, and given with hesitation’.¹⁹ This feature of our moral judgments about immigration and immigration restrictions seems to mark it out from controversies about, say, basic civil and political rights, or even about distributive justice within a single society.

Despite these doubts and disagreements, moral reflection on immigration policy is not entirely adrift, for there are a number of ‘fixed points’ – that is, considered judgments in

¹⁷ For the idea of ‘competent moral judges’, see John Rawls, ‘Outline of a Decision Procedure for Ethics’, in John Rawls, *Collected Papers*, (ed.) Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), pp. 2-5. For the idea of ‘considered judgments’ or ‘considered convictions’, see *ibid.*, John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), pp. 19-21, §9, and Rawls, *Justice as Fairness*, §10.

¹⁸ John Rawls, ‘The Independence of Moral Theory’, in his *Collected Papers*, (ed.) Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), p. 289.

¹⁹ *Ibid.*, p. 19.

which we have the highest levels of confidence and would be extremely reluctant to withdraw – on which such reflection can be anchored.²⁰ Among these might be the judgment that restrictive policies motivated by racial prejudice are unjust, the judgment that those prospective migrants who have a well-founded fear of persecution in their habitual territories of residence have among the strongest claims to admission, and the judgment that immigration that would pose a serious risk to public safety or public health can be restricted without injustice. On their own, however, these fixed points cannot offer a complete guide for the assessment of alternative policies and institutional regimes of immigration control.

This is where political theory has a role: it can help to clarify our doubts and hesitations, providing ‘guidance where guidance is needed’,²¹ and it can help to overcome good faith disagreement by attempting to find ‘some underlying basis of philosophical and moral agreement’.²² On this conception of the aims of political theory, we begin with the thought that in many cases – such as the case of moral reflection about international migration and immigration restrictions – ‘we are of divided mind and our judgments conflict with those of other people’.²³ In the face of these doubts and disagreements, we look to political theory for guidance, with the hope of achieving greater intrapersonal confidence and greater interpersonal convergence in our judgments about the assessment of alternative institutional schemes and basic social arrangements.

This aim of reaching reasoned agreement on judgments about basic social and political arrangements informs the further social, or ‘practical’, aim of political theory, which is to identify the political and social ideals which we should, as moral agents with a sense of justice, jointly try to realize. As Rawls expresses this point, ‘political philosophy provides a long-term

²⁰ For the idea of ‘fixed points’ in moral reflection, see Rawls, *Justice as Fairness*, §10.

²¹ Rawls, *Theory*, p. 20.

²² Rawls, *Justice as Fairness*, p. 2. See also T. M. Scanlon, ‘The Aims and Authority of Moral Theory’, *Oxford Journal of Legal Studies* 12 (1992).

²³ Rawls, *Justice as Fairness*, p. 30.

goal of political endeavor, and in working toward it gives meaning to what we can do today.’²⁴ Notice that, on this understanding, political theory claims practical authority only to the extent that it can provide a basis for reasoned moral agreement on the fundamental principles which should order the social and political world; the ideals that it calls on moral agents to work toward are simply those that they, as persons with a sense of justice, can be brought to agree on – with the guidance of political-theoretical principles – after careful reflection and without abandoning their deepest commitments.²⁵

Taking this view of the aims of political theory, it appears that little of what has been written in the contemporary theoretical literature about migration successfully achieves those aims. Crucially, far from helping to resolve the disagreements about immigration policy found in current political controversies, the debate among political theorists reproduces that disagreement. Indeed, the theoretical debate is in many ways more polarized than the popular debate. Political theorists themselves have often noted this. Thus, in their book on what they call ‘the ethics of immigration’, Phillip Cole and Christopher Heath Wellman acknowledge that they each defend one of ‘two “extreme” positions’, which they nevertheless favour over more ‘centrist’ or ‘intermediate’ positions presumably more current in everyday political debate about immigration.²⁶ Similarly, Samuel Scheffler observes that the influential discussions of immigration by Michael Walzer and Carens argue for two strongly contrasting positions – with Walzer defending as legitimate a wide range of restrictive policies and Carens

²⁴ John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), p. 128.

²⁵ In this sense, I am in agreement with David Miller’s suggestion that the ‘final aim’ of political philosophy is to ‘guide action’, an aim which presumably distinguishes it from endeavours which have a ‘merely speculative purpose’ (‘Political Philosophy for Earthlings’, in his *Justice for Earthlings: Essays in Political Philosophy* [Oxford: Oxford University Press, 2013], p. 34). However, I would stress that its practical or action-guiding authority relies on a prior, essentially theoretical, task of resolving deep conflicts of considered judgments and providing a basis for reasoned agreement about fundamental political questions.

²⁶ Phillip Cole and Christopher Heath Wellman, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (New York: Oxford University Press, 2011), pp. 6-7.

defending open borders – which mark out the extreme ends of a range of ‘intermediate positions’.²⁷

The two polarized positions occupied by many theorists of immigration may be described in the following terms. On one side of the debate, (almost) all legal restrictions on immigration are condemned as unjust, and the control that states unilaterally exercise over movement across their territorial borders is also denounced. Thus, Carens not only argues for what he calls ‘open borders’ or ‘free migration’, he also denounces restrictive immigration policies in the strongest terms, comparing restrictive citizenship in wealthy liberal states with ‘feudal privilege’.²⁸ Likewise, Arash Abizadeh rejects current norms of the international system whereby states unilaterally determine their immigration regimes according to internal political choices, claiming that ‘in terms of their democratic legitimacy, today’s regimes of border control cannot get much worse.’²⁹

On the other side of the debate, states are considered to have very wide moral discretion in setting their immigration policies. Theorists who occupy this polar extreme of the debate recognize few, if any, moral constraints on immigration policy. For example, Walzer insists that ‘[a]cross a considerable range of the decisions that are made, states are simply free’ to decide which prospective immigrants to admit.³⁰ Embracing an even more extreme position – one that he is well aware goes against ‘ordinary moral thought’ – Wellman

²⁷ Samuel Scheffler, ‘Immigration and the Significance of Culture’, in his *Equality and Tradition: Questions of Value in Moral and Political Theory* (New York: Oxford University Press, 2010), p. 267n.

²⁸ Carens, ‘Aliens and Citizens’, p. 252. See also Joseph H. Carens, *The Ethics of Immigration* (Oxford: Oxford University Press, 2013), p. 226.

²⁹ See Arash Abizadeh, ‘Democratic Theory and Border Coercion: No Right to Control Your Own Borders’, *Political Theory* 36 (2008), pp. 54-56.

³⁰ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), p. 61.

insists that ‘legitimate states are entitled to reject *all* potential immigrants, even those desperately seeking asylum from tyrannical governments.’³¹

When presented in this way, the current theoretical debate on immigration is unlikely to be able to provide guidance where guidance is needed: faced with a range of theoretical accounts which defend divergent yet trenchantly held conclusions, someone seeking guidance for their own moral reflection on immigration policy can hardly hope to formulate or revise her judgments in the direction of greater confidence. Without claiming that the existing literature on the political theory of immigration is uniformly unhelpful, I want to offer a diagnosis of the generally unsatisfactory state of the theoretical debate. I highlight in particular two influential but unhelpful approaches to systematic moral reflection about immigration and immigration restrictions.

III. THE ‘APPLIED ETHICS’ APPROACH

Consider, to begin with, the tendency to frame the debate in terms of its participants’ concrete policy recommendations. This *applied ethics approach* to questions of immigration is primarily concerned with conclusive judgments in favour of specific policy prescriptions, eschewing investigation of more foundational, abstract and systematic matters. One example can be found in Carens’s highly influential article, ‘Aliens and Citizens’, where he actively avoids in-depth development of abstract philosophical ideas in favour of an ecumenical approach, showing how very different background theories – Rawlsian liberalism, Nozickean

³¹ Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (New York: Oxford University Press, 2009), pp. 187-188. For stylistic reasons, I will omit reference to Altman in the main text: this is, of course, in no way intended to diminish his role in co-authoring the text cited.

libertarianism, and utilitarianism – converge on his favoured institutional scheme, namely open borders.³²

The applied ethics approach suffers from a number of problems. Its preoccupation with reaching conclusive, all things considered, judgments about specific policy positions tends to crowd out philosophical attention to the reasons that might play a role in leading us to endorse different conclusive judgments. This is generally unsatisfactory insofar as political theory should be concerned not only with conclusive policy recommendations but also with ‘the force and implications of particular lines of argument’; in Joshua Cohen’s helpful formulation, ‘[w]hat matters are not simply the conclusions we arrive at but how we arrive at them.’³³

But the reductive tendencies of this approach may also explain the polarization of the theoretical debate. By flattening disagreement into a single dimension concerning the conclusive judgments about immigration policy that each participant in the debate is taken to endorse, this way of thinking encourages a dialectical framework in which different views are aligned along a spectrum of positions according to the degree to which they favour more or less restrictive immigration policies, from open borders at one end of the spectrum, through more ‘intermediate positions’, to highly restrictive policies at the other end.

A further danger is that the disputes between the various participants in the debate will be misunderstood by wrongly assuming that they are joint participants in the same theoretical project, answering the same questions, albeit giving different answers; any such reading of the theoretical literature on immigration would be a significant distortion. Again, by reducing disagreements to a single dimension, the applied ethics approach leads us to

³² As Carens himself writes, ‘My strategy is to take advantage of three well-articulated theoretical approaches that many people find persuasive to construct a variety of arguments for (relatively) open borders. I will argue that all three approaches lead to the same basic conclusion: there is little justification for restricting immigration’ (‘Aliens and Citizens’, p. 252).

³³ Joshua Cohen, ‘Is There a Human Right to Democracy?’ in *The Arc of the Moral Universe* (Cambridge, MA: Harvard University Press, 2010), p. 353.

overlook how there is not one debate about immigration but multiple debates along distinct dimensions of moral enquiry. This paradigm may therefore mislead by taking two theorists to be (fully) in agreement when they embrace similar institutional schemes but for very different reasons, and more importantly, it may mislead by identifying disagreement when in fact two quite distinct questions are being addressed.

Consider as an example some telling remarks from Wellman's response to Abizadeh's arguments. While Wellman acknowledges that 'strictly speaking, Abizadeh does not argue for open borders', he goes on to nevertheless classify Abizadeh as presenting 'the democratic case for open borders.' In explaining why he takes this unusual interpretative step, Wellman claims that because Abizadeh argues for the inclusion of prospective immigrants in the decision-making processes which determine the immigration laws they will be subject to, his conclusions are incompatible with Wellman's central claim that legitimate states are entitled to unilaterally determine their own immigration policies, and that Abizadeh is therefore effectively arguing for open borders.³⁴ What Wellman fails to notice, however, is that Abizadeh is not arguing in favour of any particular immigration policy such as a policy of open borders, but is rather concerned with evaluating the processes by which the immigration policies that states enact and enforce are determined.

Wellman's mistake offers a stark illustration of the flattening and distorting effects of the applied ethics approach: we are led to neglect the full range of distinctive considerations that might properly affect our conclusive judgments; and to misrepresent and misunderstand the arguments that are raised within the theoretical debate about immigration and immigration controls. Both of these problematic tendencies will undermine the ability of political theory to deliver on its tasks of guiding moral reflection in the face of conflicting pre-theoretical judgments, and of attempting to uncover deeper bases of moral agreement.

³⁴ Cole and Wellman, *Debating the Ethics of Immigration*, p. 95.

IV. THE RIGHTS-BASED APPROACH

The second unhelpful way framing of the theoretical debate about the political morality of immigration and immigration controls is immensely influential, indeed dominant, within the literature and will be the concern of much of this thesis. Viewed in terms of what I call the '*rights-based*' approach, moral reflection on immigration and immigration restrictions is centred on two conflicting rights: on the one side, the individual right to free international migration, and on the other, the right that states have to control immigration into their respective territories. According to this framing of the basic questions of the political theory of immigration, we have a case of conflicting or competing rights – the political theory of immigration is a case of *right versus right*.³⁵ This right-versus-right paradigm is succinctly captured by Seyla Benhabib when she writes:

Migrations pit two moral and legal principles, foundational to the modern state system, against each other. On one hand, the human right of individuals to move across borders whether for economic, personal or professional reasons or to seek asylum and refuge is guaranteed by Articles 13 and 14 of the 1948 Universal Declaration of Human Rights. On the other hand, Article 21 of the declaration recognizes a basic right to self-government, stipulating that 'the will of the people shall be the basis of the authority of government.' Under the current regime of states, that fundamental right includes control over borders as well as determining *who* is to be a citizen as distinguished from a resident or an alien.³⁶

As Abizadeh has observed, this right-versus-right paradigm is a widely accepted way of framing the theoretical debate on migration:

³⁵ This formulation is due to Jeremy Waldron.

³⁶ Seyla Benhabib, 'The Morality of Migration', *NYTimes.com*, 29 July 2012.

The tendency in the received literature is to frame debates in the ethics of borders in terms of a conflict between the individual “liberal” right to freedom of movement and the collective “democratic” right to self-determination and then to weigh the liberal and democratic reasons for and against open borders.³⁷

When we adopt this paradigm, the fundamental terms of the debate are focused on the extent and weight of each of these competing rights: we ask how extensive the putative individual right to free migration is, and whether this is compatible with immigration restrictions of any kind; we also ask how states should exercise their putative right to control immigrant admission, and whether there are any constraints on their exercise of this right.

Carens adopts this framework when he suggests that the ‘key question’ of the political theory of immigration asks, firstly, what rights individuals have ‘to travel freely across state borders’ and settle in new territories of their choice, secondly, what rights political communities have ‘to limit immigration’, and third, if political communities have ‘the moral right to exclude’, whether there are some ‘criteria of exclusion that are morally objectionable’. Theoretical work on the question of immigration consists in considering each competing rights claim and ‘bringing them up against’ each other.³⁸

In introducing their book on ‘the ethics of immigration’, Cole and Wellman adopt the same framework, with a particular emphasis on the first two questions. For them, ‘the argument is about rights, the state’s right to control membership versus the individual right of freedom of international movement.’³⁹ Miller, too, follows the rights-based approach when setting up his discussion of immigration and immigration restrictions. He proceeds in three steps, asking, first, if the individual has the ‘right to cross state boundaries and situate [herself] on the territory of another political community’, which he calls a ‘right to immigrate’ or a

³⁷ Abizadeh, ‘Democratic Theory and Border Coercion’, p. 54.

³⁸ Joseph H. Carens, ‘The Rights of Immigrants’, in J. Baker (ed.), *Group Rights* (Toronto: University of Toronto Press, 1994), pp. 143-4.

³⁹ Cole and Wellman, *Debating the Ethics of Immigration*, p. 7.

‘right to migrate’; second, if states have a ‘general right to decide who is admitted to their territory’; and finally, which immigration policies among those that states might choose are ‘consistent with justice’.⁴⁰

Note that what distinguishes the rights-based approach is not simply the use of the language of rights. In particular, when writers such as those mentioned above speak of an individual right to freely migrate, or the right a state has to control immigration, they are not simply expressing conclusive moral judgments about particular prospective migrants or particular immigration policies by using the language of Hohfeldian incidents – that is, moral privileges, claims, powers and immunities.⁴¹ Rather, rights are being appealed to as *principles* of political morality which guide us in reaching conclusive judgments about particular cases. More specifically, rights enter the arguments of these theorists as a distinctive class of moral principles whose role in moral reasoning is to accord special protection to the free choice of the right-holder against the competing claims of other – especially social or impersonal – values and goals.

Take for example the views of those theorists who insist that individuals have a right to migrate freely across international borders. This is not, directly, a claim that states have a duty to admit specific prospective immigrants or even immigrants of a particular category, or that certain migrants do no wrong in crossing an international border. It is, rather, the claim that there is a principle of justice which grants special priority or especially stringent protection to the choices that individuals might make to migrate as against other legitimate moral concerns such as the pursuit of the general welfare of current members or indeed the general welfare of all human persons. Of course, if individuals have a right to migrate in this sense, then almost all existing states contravene their duties of justice in respect of immigration policy, since these states enact policies that restrict the freedom of individuals to

⁴⁰ David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), pp. 201-202.

⁴¹ See Leif Wenar, ‘The Nature of Rights’, *Philosophy & Public Affairs* 33 (2005).

immigrate, without reasons that are sufficient to meet the high burden of justification implied by the right. This moral judgment about specific immigration policies, however, is *explained* rather than simply *expressed* by the claim that individuals have a right to free international migration.

This rights-based approach is problematic for a number of reasons. Firstly, the right-versus-right paradigm encourages the thought that proponents of an individual's right to free migration and advocates of a state's right to determine its own immigration policy are defending competing rights. This framing obscures the fact that they are intervening in two different debates about two distinct dimensions of the institutional evaluation of immigration law and policy: those who defend an individual's right to freely migrate are making a claim about *justice in immigration*, while those who defend a state's right to choose its immigration policy are making a claim about the *legitimacy of immigration law* as it is enacted in the current international system of territorial states.

Secondly, the rights-based approach masks the true bases of disagreement between different theorists: in particular, it reconfigures a conflict between different conceptions of *global justice* and their implications for immigration policy into an apparent disagreement about the type and strength of interests that individuals or states have in more or less restrictive immigration policies. The rights-based framework encourages the thought that the fundamental question is about the nature and urgency of the interest that prospective migrants have in moving freely into the territory of their choice, and about how that interest should be balanced with the interests that a state's current members may have in restricting free access to the territory of their state. Moreover, it pushes us into thinking of the interests of the members of receiving states *as a collective*, neglecting the obvious and salient fact that immigration will impact the interests of different classes and groups in the receiving society in different ways.

Despite their serious deficiencies, both the applied ethics approach and especially the rights-based approach continue to dominate the current theoretical debate on immigration law and policy. My overarching task in this thesis will be to expose the problems of the rights-based approach in particular, and to propose and execute a different strategy to developing a political theory of international immigration and immigration restrictions. My proposed strategy departs from the rights-based approach in two main ways. Firstly, I will distinguish clearly between the question of justice in immigration and the question of the legitimacy of immigration law. Secondly, in answering the former question, I propose to follow Rawls's 'surmise' that making progress on the 'important question' of immigration might be 'best done in discussing the appropriate relations between peoples, or the law of peoples'.⁴² In other words, I join Risse in suggesting that 'immigration as a moral problem that must be considered in the context of global justice.'⁴³ According to this *global justice-based approach*, we can best articulate principles to substantively evaluate immigration policy by locating those principles within a background conception of global justice.

V. AN OUTLINE

In Chapter 1, I examine the arguments advanced by Joseph Carens and Phillip Cole in support of an individual right to free international migration. I show that the case for this putative right cannot be settled solely by considerations relating to the strength and nature of individuals' interest in being able to cross international borders according to their choice. What divides Carens and Cole from their critics is not disagreement about how prospective migrants' good might be served by free migration; rather, it is disagreement about whether citizens of a state have duties to promote the good of non-citizens in this way. Hence, at a

⁴² John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 136n.

⁴³ Mathias Risse, 'On the Morality of Immigration', *Ethics & International Affairs* 22 (2008), p. 25.

crucial point, the arguments of Carens and Cole depend on the truth of the background conception of global justice they accept, namely *globalist liberalism*.

In Chapter 2, I turn to consider the other side of the right-versus-right paradigm: I examine the arguments that Michael Walzer, Christopher Heath Wellman and David Miller put forward to justify a state's right to determine its own immigration policies. I argue that, on the best reading of their arguments, Walzer, Wellman and Miller are not defending the substantive justice of restrictive immigration policies, but rather the *legitimacy* of a process of political decision-making where states choose their own immigration policies, whatever these may be. To claim that a state has the right to choose its own immigration policies is to claim that the regime of immigration law which the state unilaterally enacts is legitimate. Any such right, therefore, does not *compete* with an individual right to free migration; the right-versus-right paradigm misleads by conflating two distinct dimensions of the institutional evaluation of immigration law and policy: the legitimacy of immigration law, and the justice of particular immigration policies.

I propose to abandon the right-versus-right paradigm and recast the debate by focusing discussion on two distinct questions: (1) the question of *justice in immigration*, which evaluates the substantive justice of immigrant admission policy; (2) the question of the *legitimacy of immigration law* enacted unilaterally according to states' internal political procedures. I further propose that in articulating principles of justice in immigration, we should first develop a conception of *global justice* which will provide the background for our evaluation of immigration policy. In the rest of the thesis, I endeavour to develop an account of the political theory of immigration according to this programme.

In Chapter 3, I develop and defend a conception of global justice I call *cooperation-based internationalism*. I refute the globalist liberal contention that principles requiring equal basic rights, equality of opportunity, and some degree of distributive equality apply among all human persons globally. I deny that membership in a state is morally arbitrary, arguing that as

joint participants in a scheme of cooperation which provides them with the social goods they need to lead autonomous lives, co-citizens stand in a distinctive and morally significant relation. For that reason, citizens owe each other special duties of justice that they do not owe to all persons globally: familiar principles of *social* justice – equal basic rights, equal opportunities, and distributive equality – properly apply among those who share a state.

In addition to these principles of social justice, cooperation-based internationalism recognizes further principles with global or international scope; these principles supplement rather than displace the demands of social justice. The *duty of assistance* is one principle which applies among all human persons globally. This duty forms part of cooperation-based internationalism's *non-ideal theory*, dealing with how developed states, which have themselves achieved some minimal level of social justice, should respond to serious injustices in developing states. The duty requires developed states to assist developing states in establishing minimally just institutions which can regulate and stabilize a system of social cooperation that reliably provides social goods adequate for all their members to lead autonomous lives.

In Chapter 4, I develop a conception of justice in immigration, taking seriously the background commitments of cooperation-based internationalism. I argue that there is no requirement for states to allow open immigration. Nevertheless, I argue that co-citizens owe each other duties which impose significant moral constraints on immigration policy. Firstly, because citizens are required to protect one another's basic right to a family life, immigration policy must allow for family unification. Secondly, states must not enact policies which select immigrants based on racial identity or sexual orientation; selective criteria based on religious beliefs and cultural traits are also generally suspect. By contrast, selection according to language competence, willingness to cooperate with co-citizens on fair terms, and employment-related skills is not unjust. Thirdly, states must regulate labour immigration so that its distributive impact is acceptable to all current citizens: all social classes must benefit

equally from labour immigration, unless unequal gains favour worse-off classes and groups over better-off classes and groups.

The duty of assistance is also relevant to labour immigration policy: developed states should avoid immigration policies which cause brain drain, at least when skilled emigration from developing states impedes economic and political development in those states. This follows from the long-term goal of the duty of assistance, namely to establish minimally just and effective institutions in developing states. In the shorter term, serious injustices in developing states call for more immediate relief: developed states must admit and resettle refugees – those whose basic human rights are threatened in their home states, and who cannot be helped in situ.

In Chapter 5, I turn to the distinct question of the legitimacy of unilaterally-enacted immigration law. I argue that the application and enforcement of immigration law counts as a coercive exercise of political power which stands in need of justification according to the *liberal principle of political legitimacy*. I then ask when, if ever, immigration laws which are enacted according to the internal political choices of states are legitimate. First, I examine the consent theory of political legitimacy; on this view, laws are legitimate when they are enacted by procedures which have received the consent of those subject to them. I argue that since prospective immigrants do not consent to be ruled by immigration law, this theory suggests that immigration law is illegitimate.

I argue, however, that the consent of the ruled is not necessary for political legitimacy. I turn to consider the natural duty of justice view, according to which laws are legitimate when they serve justice. This view must be further elaborated to deal with the problem of reasonable disagreement about justice. I endorse the democratic solution to this problem, which insists that disagreement must be accommodated by fair decision procedures that give each person subject to the laws an equal say in the processes by which they are enacted. However, I note that immigration law is not democratically enacted in this sense: prospective

immigrants, though bound by immigration law, lack a fair chance to determine its content. I therefore argue that immigration law is illegitimate by the standards of the most influential and plausible liberal theories of political legitimacy. I conclude by discussing the implications of the illegitimacy of immigration law from the perspective of irregular migrants.

CHAPTER ONE

Globalist Liberalism and an Individual Right to Free Migration

I. THE RIGHTS-BASED APPROACH

In the Introduction, we saw that a popular but in my view unhelpful framing of the political-theoretical debate on immigration appeals to the idea of conflicting or competing rights: the right of individuals to move freely across state borders and settle in the territory of their choice, on the one hand, against the right of legitimate states to determine their own immigration regimes and hence to control the flow of immigrants into their respective territories, on the other. I called this the *right-versus-right* paradigm which is characteristic of the *rights-based approach* to moral reflection on international migration and immigration restrictions. A basic goal of the thesis as a whole, I explained, is to reveal the deficiencies of this influential framework and the merits of my proposed alternative: a global justice-based approach.

In this chapter, I begin this task by examining the arguments of Joseph Carens and Phillip Cole within the parameters of the rights-based approach. Both of these theorists often take themselves, and are often taken by their interlocutors and critics, to be defending an *individual right to free migration*. Within the right-versus-right paradigm, Carens and Cole are taken to be defenders of the individual's right to move freely across international borders, and of the special importance or priority of that freedom in cases of conflict with competing social goals. Moreover, these theorists themselves frame their arguments within this paradigm.

For example, although he registers some general doubts about rights-talk,⁴⁴ Carens identifies the 'key question' that a theory of justice in immigration must address as follows: '[W]hat rights would political communities have to limit immigration, and what rights would

⁴⁴ Joseph H. Carens, 'The Rights of Immigrants', in J. Baker (ed.), *Group Rights* (Toronto: University of Toronto Press, 1994), p. 142.

individuals have to travel freely across state borders and settle wherever they chose’⁴⁵ Within this framework, Carens sees himself as defending the latter right – the individual’s right to freedom of movement across international borders. He urges that we accept an individual ‘right to migrate’, that is, a ‘right to move across state borders’.⁴⁶ Moreover, Carens is not simply using the language of Hohfeldian incidents to express a moral judgment; rather, he is invoking the idea of a right as a *principle of justice* which accords its object priority or special resistance against trade-offs with other goals and values.

He expresses this point in Dworkinian terms, noting that rights are to be understood as ‘trumps’ – when a right conflicts with other values or goals ‘that we would normally regard as morally important’, these are properly ‘ignored’ in favour of protecting the right and its ‘priority’.⁴⁷ This idea that freedom of movement across borders is a right in the sense that it should be given special protection seems to explain Carens’s claim that limitations on freedom of movement have to be ‘justified by special circumstances’, specifically a justification which shows how such limitations are consistent with taking seriously the moral equality of those excluded from moving into an area of their choice.⁴⁸

Carens’s critics and interlocutors also take him to be a defender of an individual right to migrate freely. Thus, David Miller associates Carens with the argument that there is an individual ‘right to immigrate’. It is also clear that Miller takes Carens to be invoking the idea of rights as trumps – he analyses this putative right as expressing ‘the *presumption* ... that people should be free to choose where to live unless there are *strong reasons* for restricting their

⁴⁵ Ibid., p. 144.

⁴⁶ Joseph H. Carens, ‘Aliens and Citizens: The Case for Open Borders,’ *Review of Politics* 49 (1987), p. 258 and Joseph H. Carens, ‘Migration and morality: A liberal egalitarian perspective’, in B. Barry and R. E. Goodin (eds.), *Free Movement: Ethical Issues in the Transnational Migration of People and of Money*, (London: Harvester Wheatsheaf, 1992), p. 27.

⁴⁷ Joseph H. Carens, ‘Immigration and the Welfare State’, in A. Gutmann (ed.), *Democracy and the Welfare State* (Princeton, NJ: Princeton University Press, 1988), p. 215. On rights as trumps, see Ronald Dworkin, ‘Rights as Trumps’, in J. Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984).

⁴⁸ Carens, ‘The Rights of Immigrants’, pp. 146-147 and Carens, ‘Migration and morality’, p. 27.

choice.’ Moreover, Miller understands Carens’s argument for the individual right to immigrate as itself rights-based: Carens is understood to start from ‘the general right to freedom of movement’, and to go on to argue that this right must include the freedom to enter, and settle in, the territory of some other state.⁴⁹

This reading of Carens as a defender of an individual right to cross-border freedom of movement is echoed in Christopher Heath Wellman’s discussion of what he calls the ‘libertarian case for open borders’. For Wellman, Carens’s essential claim is that ‘restrictive immigration policies’ are unjust because they ‘violate foreigners’ rights to freedom of movement’. Moreover, Wellman also understands Carens’s argument to be in itself rights-based: again, Carens is understood to be arguing that if we are to take seriously the individual right to freedom of movement – which protects individuals’ choices to travel freely *within* the territory of their state of residence – we must understand that right to encompass the choice to cross international borders and enter the territories of other states.⁵⁰

Cole’s arguments are framed and understood in a similar way. Indeed, he explicitly frames the debate about immigration in terms of the right-versus-right paradigm: he writes that ‘the argument is about rights, the state’s right to control membership versus the individual right of freedom of international movement’.⁵¹ Within this paradigm, Cole sees himself as defending the latter right; he takes his project to be that of setting out ‘the ethical case for a human right to freedom of international movement’, one part of which he calls a ‘right to immigration’.⁵² In particular, Cole argues that ‘one cannot consistently assert that

⁴⁹ David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), pp. 201-5, emphases added.

⁵⁰ Christopher Heath Wellman and Philip Cole, *Debating the Ethics of Immigration* (Oxford: Oxford University Press, 2011), p. 79, pp. 87-89.

⁵¹ *Ibid.*, p. 7.

⁵² *Ibid.*, p. 225; Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh: Edinburgh University Press, 2000), p. 46.

there is a fundamental human right to emigration but no such right to immigration'.⁵³ Moreover, like Carens, Cole understands the right to immigrate as a principle of justice which accords special moral protection to individuals' freedom to move across borders. For Cole, to say that there is a right to immigrate is to say that immigration controls 'stand in need of stringent justification'.⁵⁴

Again, like Carens, Cole's arguments have been understood by his critics according to the rights-based approach. Miller reads Cole to be defending an individual's 'right to entry into other states' by appeal to a rights-based argument: the widely-accepted right to emigrate would have no value unless it is accompanied by the right to immigrate.⁵⁵ Similarly, Wellman takes Cole to be arguing for an individual right to free migration by appeal to an 'inference from the right to exit to the right of entry'.⁵⁶ As such, Miller and Wellman see their task as undermining the case for an individual right to free migration by showing the consistency of affirming an individual right to emigrate while denying an individual right to immigrate.

It seems, then, that major theorists in the debate on immigration have adopted the right-versus-right paradigm. Carens and Cole are identified as proponents of an individual right to migrate, and those who have sought to resist their conclusions have accordingly tried to show that no individual right to *immigrate* can be established by arguing from the widely accepted individual right to *emigrate*, and that no individual right to *international* freedom of movement can be established by arguing from the widely accepted individual right to *domestic* freedom of movement.

I doubt, however, that this rights-based approach is helpful in understanding what is really at stake in these debates. The focus it encourages on whether individuals have a right to migrate internationally according to their choice, and on arguments which try to show that

⁵³ Cole, *Philosophies of Exclusion*, p. 46.

⁵⁴ Wellman and Cole, *Ethics of Immigration*, pp. 305-306.

⁵⁵ Miller, *National Responsibility*, p. 205, p. 208.

⁵⁶ Wellman and Cole, *Ethics of Immigration*, p. 89.

such a right is implied by familiar and widely-accepted rights to free domestic movement and to free emigration, obscures the real bases of the disagreements between theorists like Carens and Cole, on the one hand, and Blake, Miller and Walzer, on the other. I will argue that the arguments that Carens and Cole make, and the objections raised by their critics, can better be understood according to an alternative framing – that provided by disagreements about *global justice*.

II. BEYOND THE RIGHTS-BASED APPROACH: CARENS AND MILLER

We begin by considering Miller's critique of Carens's argument that individuals have a right to migrate. Miller construes Carens's argument as follows: the widely-accepted right to (domestic) freedom of movement, when properly understood, extends to movement across international borders. To this argument, Miller offers the objection that the interest which individuals have in cross-border movement is not sufficiently urgent – it lacks enough 'weight or significance'⁵⁷ – to ground a human right. While he accepts that freedom of movement is a human right, he denies that it protects a range of choice so extensive as to include the option of moving into and settling in another state's territory.

Miller suggests that the value of freedom of movement is due mostly to the instrumental importance of accessing options unavailable in the agent's immediate vicinity, and goes on to argue that the extent of the human right to freedom of movement will largely depend on the range of options to the protection of which we can plausibly say an individual has a *human rights-based* claim. Since Miller holds that human rights are grounded in the moral demand to protect what he calls 'basic human needs', which are the necessary social conditions for someone to live a minimally decent human life in *any* society,⁵⁸ he argues that

⁵⁷ Miller, *National Responsibility*, p. 204.

⁵⁸ Ibid., pp. 178-182.

the human right to free movement tracks the right-holder's ability to access only that range of options necessary for her to meet her basic human needs. As such, only *refugees* – understood as those persons who in their current state of residence are unable to meet their basic human needs and who are therefore faced with (the threat of) violations of their human rights – have a human rights-based claim against other states to be allowed to move into and settle in their territories. Even then, these individuals do not have a right to be admitted to the territory of their choice, but only to *any* territory in which their basic human needs will be met.

Given their starkly opposed conclusions, it is interesting to note that Carens and Miller in fact largely agree about the interests that individuals might have in being free to migrate internationally. Like Miller, Carens holds that the value of free movement is partly instrumental; the freedom to move within and across international borders is important partly because migration opens up access to new options and is often a 'prerequisite for other freedoms'.⁵⁹ Listing the economic, cultural, and even romantic opportunities that might lie out of reach if individuals were forced to remain within their current state of residence, Carens urges that freedom of movement is fundamentally important for individuals because the freedom to move into and settle on the territory of one's choice 'might prove essential to one's plan of life'.⁶⁰

The importance of free movement is therefore, for Carens, connected to a basic commitment in the 'liberal tradition' to individual autonomy – as he puts it, liberals believe that individuals 'should be free to pursue their own projects and to make their own choices about how they live their lives'.⁶¹ Indeed, in this sense the right to freedom of movement is not unique or unusual for it shares with other familiar liberal rights or basic liberties a common justification, namely the importance of its object for the right-holder's personal

⁵⁹ Carens, 'Migration and morality', p. 25.

⁶⁰ Carens, 'Aliens and Citizens', p. 258.

⁶¹ Carens, 'Migration and morality', p. 26.

autonomy. As Carens puts it, ‘the right to live and work where one chooses can be as vital to one’s plan of life as the right to practice one’s religion or to associate with whomever one chooses.’⁶²

This connection between freedom of movement and individual autonomy is not lost on Miller. As we have seen, he is aware that individuals often have an interest in migrating in order to access options that would be otherwise unavailable to them. Sometimes, these options will be ‘central components’ in an individual’s ‘plan of life’, such that ‘he will find it very frustrating if he is not able to move.’⁶³ It seems that Carens and Miller are united in identifying roughly the same interests that individuals have in freedom of movement, and yet they draw very different normative conclusions: while for Carens the autonomy-based interest in free movement is precisely what grounds the individual’s right to migrate, for Miller no such right is demanded by justice since he believes the idea of personal autonomy is too parochial to liberal societies and ways of life to count as a basic need in the sense required to ground a *human* right. The interest that individuals have in living an autonomous life is, in Miller’s terms, a ‘societal need’ recognized in liberal societies, rather than a basic need common to all human persons.⁶⁴

Notice that by claiming that individual autonomy counts only as a societal and not a basic need, Miller is not denying that an individual’s interest in living an autonomous life is a morally important interest: he explicitly claims that the distinction between societal and basic needs ‘does not depend on the relative urgency of the two kinds of need’; rather, the distinction turns on whether the fulfilment of an interest is a need only in a particular social context and form of social life, or whether its fulfilment is a need common to all forms of a minimally decent human life.⁶⁵ Since human rights represent a global minimum which all

⁶² Carens, ‘Immigration and the Welfare State’, p. 215.

⁶³ Miller, *National Responsibility*, p. 207.

⁶⁴ Ibid., p. 177, pp. 182-183.

⁶⁵ Ibid.

societies are responsible for meeting in Miller's conception of global justice, he supposes that the grounds of a human rights claim must not be parochial to specific societies but must be acceptable to members of all societies.

The disagreement between Carens and Miller can therefore neither be cast as one about whether an individual's interest in living an autonomous life is sufficiently urgent or weighty to ground a right, nor as one about the instrumental importance of international freedom of movement for an individual to pursue her chosen plan of life. Indeed, Miller agrees with Carens that in liberal societies the importance of freedom of movement for individual autonomy would be sufficient to ground a right to domestic freedom of movement – the right to free movement would number among what he calls the 'liberal rights of citizenship'.⁶⁶ However, for Miller these *liberal rights* are not relevant to the question of justice in immigration because they concern what the citizens of a liberal society owe to each other, whereas a right to migrate must be a *human* right: a right to migrate would by its nature impose correlative duties on members of societies *other* than the right-holder's own, and therefore it must be a human right – a right which concerns 'what one human being can demand of other human beings as a matter of basic rights'⁶⁷ – which can impose duties on members of other societies, and not only on one's co-citizens or co-nationals.

These considerations suggest that the core of the disagreement between Carens and Miller comes down to their differing conceptions of *human* rights. For Miller, while the social conditions for individual autonomy may appropriately be the objects of liberal rights of citizenship, they are too parochial to liberal societies and forms of social life to be the objects of human rights. Since human rights can impose correlative duties even on persons who are not members of the right-holder's state or national community, their justification must be

⁶⁶ Ibid., p. 207n6.

⁶⁷ Ibid.

acceptable to all societies.⁶⁸ Moreover, this conception of human rights and their justification is in turn rooted in Miller's broader views about global justice.

As we will see in Chapter 2 and 3, Miller endorses a form of *internationalism* about global justice. The crucial point about this view for present purposes is the fundamental distinction it draws between principles of *social* justice and principles of *global* justice – those who hold this view deny that 'global justice is simply social justice with a wider scope'.⁶⁹ For Miller, social justice has a distinctive subject: it concerns the 'citizen relationship with fellow-members of [a] political community', and therefore its principles are – at least within liberal societies – largely a matter of ensuring the conditions for these fellow-members 'to act as free and equal citizens'. On this view, many of the equal rights of citizenship demanded by liberal justice, such as the right to freedom of religion and indeed the right to freedom of movement, have a role attuned to the special subject of social justice, namely that of constituting and protecting the status of the co-members of a political community as citizens who are recognized as equals and as autonomous individuals.

Global justice, on the other hand, again has a distinctive subject: it concerns the relations between persons not as co-citizens but as the collectively-organized members of independent political communities. In light of the very different subjects of social and global justice, the principles of global justice – whatever they might be – will not simply be 'social justice writ large'.⁷⁰ One important and obviously relevant implication of this view is that the list of human rights will quite properly be distinct from the list of the rights of liberal citizenship.

By contrast, it is precisely this fundamental distinction between social and global justice – and hence between the rights of liberal citizenship and human rights – that Carens

⁶⁸ Ibid., pp. 164-165.

⁶⁹ Ibid., p. 13.

⁷⁰ Ibid., p. 15.

denies. Now, Carens certainly agrees that a liberal conception of social justice can be understood as essentially concerned with establishing the conditions necessary for citizens to be free and equal. But he urges that since the liberal commitment to ‘civic equality’ is based on a recognition of the ‘moral equality of all human beings’, justice demands that the conditions for free and equal citizenship be established and maintained not only between co-members of a discrete political society, but among all human persons.⁷¹ Thus, if freedom of movement is among the rights that must be equally guaranteed to all co-members of a political community in order to satisfy the liberal commitment to civic equality, it must also be among the rights that must be equally guaranteed to all human persons – that is, a human right.

Carens’s argument is not best understood, therefore, as a discrete attempt to generalize or extrapolate from the individual right to domestic freedom of movement to a right to international free movement by reference to the similar interests at stake in the freedom to move domestically and internationally. Rather, it should be understood in the context of a broader generalizing or extrapolating move: generalizing or extrapolating from familiar principles of liberal justice for a domestic society to principles of global justice, including justice in immigration, by appeal to the moral arbitrariness of citizenship or to a conception of all human beings as free and equal moral persons.

In other words, Carens’s argument for international free movement should be understood as simply one part of his broader *globalist liberal* view about global justice. While globalist liberalism will be examined in greater detail in later sections of this chapter and in Chapter 3, the essential point to note for now is that globalist liberals hold that the familiar principles of liberal justice are properly understood to apply among all persons globally, rather than only between co-citizens or co-nationals. As Richard Miller puts it, this perspective on global justice claims that principles of justice should ‘be extrapolated from one’s compatriots

⁷¹ Carens, ‘Immigration and the Welfare State’, p. 214 and Carens, ‘Aliens and Citizens’, pp. 256-257.

to the world at large.’⁷² One way to express this basic globalist liberal thought is to say that the *scope* of the familiar liberal principles of justice is global, where the ‘scope’ of a principle refers to the relevant population of agents whose relations, and whose claims and duties as a matter of justice, it claims to regulate.⁷³

We can now see that Carens rejects David Miller’s view that the liberal right to free movement does not have global scope not because he accords a comparatively greater weight to the interests that individuals have in moving across borders according to their choice, but because, as a globalist, he holds that *any* disparity in fundamental matters of justice, including basic rights, between the global and the domestic levels is unjustified. What divides Carens and Miller should not, then, be understood in terms of a disagreement about whether an individual’s interest in being free to choose which areas to move to and settle in is urgent or weighty enough to ground a right to migrate. Instead, their disagreement about justice in immigration is traceable to deeper disagreements about human rights and global justice.

As an internationalist, Miller holds that the principles of social justice and global justice apply to distinctive subjects, such that the familiar *liberal* rights – including the right to freedom of movement – should not simply be extended to populate our list of *human* rights. As a globalist, Carens holds instead that to take seriously the moral equality of all persons, we should accept that the fundamental principles of global justice are simply a global generalization or extrapolation of the familiar liberal principles of social justice. On this view, *any* fundamental disparity between the avowed list of liberal rights and the list of human rights is objectionable. The real action in this debate lies therefore in the question of whether we should accept Carens’s *globalist liberal* conception of global justice, or Miller’s *internationalist* conception of global justice – or if not perhaps some third view.

⁷² Richard Miller, *Globalizing Justice: The Ethics of Poverty and Power* (Oxford: Oxford University Press, 2010), p. 31ff. Although Miller calls this view of global justice ‘cosmopolitan’, he intends by this term to characterize the perspective or view on global justice that I call ‘globalist’; the difference is merely terminological.

⁷³ See Mathias Risse, *On Global Justice* (Princeton, NJ: Princeton University Press, 2012), p. 4.

III. BEYOND THE RIGHTS-BASED APPROACH: COLE AND HIS CRITICS

We have seen in Section II that the disagreement between Carens and Miller about justice in immigration can be traced to a deeper disagreement about global justice: we should not understand their disagreement to be premised on differing views about the urgency or weight of individuals' interests in (international) freedom of movement. In this section, I will show that the debate between Cole and his critics can likewise be understood more perspicuously when approached as a clash between Cole's globalist conception of global justice and the internationalist conceptions affirmed by his critics, rather than when approached as a debate about the implications of the widely-accepted right to free emigration.

We begin by considering the essentials of Miller's and Wellman's critique of Cole. Recall that both writers understand Cole to be arguing for an individual right to free immigration by appeal to the implications of another right that is already widely-accepted, namely an individual's right to leave her current state of residence. Thus, Miller takes Cole to be making the argument that individuals have a 'right to enter other societies', since without this right to immigrate, their 'right to leave the society they currently belong to' would be 'practically meaningless'.⁷⁴ Similarly, Wellman reads Cole as making an argument in favour of an individual right to free immigration by appealing to 'an inference from the right to exit to the right of entry'.⁷⁵

These critics try to resist Cole's conclusions by blocking any inference from the right to emigrate freely to a right to immigrate freely. Wellman argues, for example, that it is not conceptually incoherent to accept an individual right to emigrate while denying a right to immigrate. For him, when a prospective migrant is refused entry to the territory of her choice,

⁷⁴ Miller, *National Responsibility*, p. 208.

⁷⁵ Wellman and Cole, *Ethics of Immigration*, p. 89.

what is affected is the *value* of her right of exit, not her right of exit itself. Thus, when a migrant's immigration application is rejected, her right to exit is rendered less valuable, but the rejection does not violate – because it is not conceptually inconsistent with – her right of exit.⁷⁶

Miller argues along similar lines. He supposes that the right to exit can be formally exercised just when at least one other society is willing to grant entry to a prospective migrant. Hence, in a world where 'states are generally willing to consider entry applications from people who want to migrate', and where 'most people would get offers from at least one ... state', then only very few people would be unable to formally exercise their right to exit.⁷⁷ Miller also proposes that the right to emigrate is justified because in its absence, individuals may be 'forced to remain in association with others who they may find deeply uncongenial'.⁷⁸ It follows from this account of the justification for the right to emigrate that a given individual's right has value if she has the opportunity to move into a state where she is no longer forced into association with people she is strongly averse to. The crucial point for Miller is that the role of the right to emigrate is not to protect an individual's *freedom of choice*; hence, the right does not extend protection to an individual's ability to enter and settle in any territory, according to her 'unlimited choice'.⁷⁹

These critical attacks, however, seem to me insufficient to explain why we should endorse what Cole calls the 'liberal asymmetry' between the right to exit and the right of entry.⁸⁰ If we accept that the right to free emigration is a basic right, it seems we cannot rest content with Wellman's argument: it is not obvious that it matters only that an individual's right to exit be conceptually consistent with the lack of a meaningful option to enter other

⁷⁶ Ibid.

⁷⁷ Miller, *National Responsibility*, pp. 208-209.

⁷⁸ Ibid., p. 208.

⁷⁹ Ibid., pp. 208-209.

⁸⁰ Cole, *Philosophies of Exclusion*, p. 46.

states. To take seriously free emigration as a basic right, states must presumably act to ensure that the right is not simply an empty formality but that the right has value, just as states should act to ensure that an individual's lack of education or material means does not render her right to political participation a merely formal right.

Miller's argument, which takes seriously the *value* of the right to exit, therefore seems more promising. However, Miller's claim that we should understand the importance of the right to free emigration simply in terms of avoiding association with individuals we find uncongenial or repugnant strikes me as implausible. As he has himself noted, the large size of contemporary political communities means that if an individual member finds associating with certain others uncongenial, that individual can fairly easily take steps to avoid the unwelcome association.⁸¹ It is difficult to imagine a case where these steps must involve the radical solution of emigration. It seems, then, that Miller's account of value of the right to emigrate does not offer an adequate reply to Cole's argument.

Can Miller's argument against Cole be successfully reformulated when we adopt a more plausible understanding of the value of the right to emigration? I am doubtful, since it seems to me that any plausible conception of the right to emigrate as it is understood in liberal societies must make reference to the importance of the right-holder's *choice*. Consider, for example, the case of a potential migrant who wants to migrate simply in order to access opportunities –education, employment, or some other important life goal – in some other state. Under most circumstances, we would judge her right to emigrate to have been violated if her state prevents her from leaving. We would not say that only if interfering with her attempt to exit forces her into association with others she finds repugnant would her right be violated. This reflects our belief that what is objectionable about restrictions on emigration is that such restrictions frustrate the attempts of citizens to pursue their legitimate personal goals and plans of life. Indeed, Cole himself urges that the basic right to emigrate are grounded in

⁸¹ Miller, *National Responsibility*, p. 211.

personal autonomy, or what he calls ‘the development of human agency’ – the ability to shape one’s own ‘life story’, to be its ‘author’ and to ‘create it as it goes along’.⁸²

If this choice-protecting or autonomy-protecting conception of the right to emigrate and its value is correct, then neither Miller nor Wellman have provided a plausible justification for the asymmetry between exit and entry that Cole finds problematic. If Cole’s argument and conclusions are to be resisted, there must be an alternative justification for the asymmetry. Ironically, I believe that Cole himself points the way to such a justification, when he notes the possibility of construing ‘the right to emigrate as simply imposing a duty upon one’s state not to interfere’ with one’s attempt to exit the state’s territory.⁸³ The idea here is that an individual citizen’s right to emigrate correlates with duties *on the part of her co-citizens* not to interfere with her attempts to exit, or to support state policies which so interfere with her freedom of exit. However, this right to exit does not correlate with duties on the part of (members of) *other societies* to facilitate her attempt to migrate.

This conception of the right to emigrate rests on the view that those persons who share membership in a state – that is, co-citizens – are mutually obligated to promote the basic rights to freedom of each. One implication of this is that citizens owe it to each other not to restrict *domestic freedom of movement*, and another implication is that they owe it to each other not to restrict the *freedom to emigrate*.⁸⁴ Indeed, we might even think of the freedom to emigrate as simply a special case of the freedom of domestic movement: citizens should not interfere with each other’s freedom to move around, and out of, the state’s territory. By contrast, those who do not share membership in a state are not mutually obligated to promote each other’s equal freedom to pursue their personal projects and plans of life. The citizens of societies other than my own do not, on this view, owe me a duty not to restrict my freedom

⁸² Wellman and Cole, *Ethics of Immigration*, p. 296.

⁸³ Cole, *Philosophies of Exclusion*, p. 56.

⁸⁴ A similar analysis of the right to freedom of movement is sketched in Adam Hosein, ‘Immigration and freedom of movement’, *Ethics & Global Politics* 6 (2013), p. 30.

to enter their respective states' territories. In this way, we reach precisely the 'liberal asymmetry' that Cole argued against: the right to exit my own state's territory does not in itself imply a right to enter the territory of other states.

Notice that in reaching this asymmetrical conclusion we did not try to show, à la Miller and Wellman, that the *interest* which grounds the right to exit in itself leads to an asymmetry with the right to enter. Indeed, on this account the interest that an individual has in the freedom to emigrate and the freedom to immigrate are the same, namely, the interest in individual autonomy. What is asymmetrical, rather, are the *duties* that are owed between co-citizens, on the one hand, and between all persons in the world, on the other. The question of whether it is plausible to endorse this asymmetry in duties is the question which fundamentally divides internationalists and globalists about (global) justice: while internationalists hold that what co-citizens or co-nationals owe each other differs from what we owe each other as human beings, globalists claim that, at the fundamental level, whatever we owe our co-citizens or co-nationals in political justice, we also owe to all persons in the world.

Certainly, Cole himself explicitly adopts the globalist liberal view. He argues that taking seriously the 'moral equality of persons' will lead us to the view that 'moral principles apply to all equally in the absence of any morally relevant differences.'⁸⁵ Moreover, Cole claims that because membership of a particular national or political community is a factor beyond a person's control, it is a 'morally arbitrary' factor, and hence he argues that moral principles – including principles of justice – must apply regardless of national membership.⁸⁶ My suggestion is that we can best understand Cole's views on justice in immigration when we see them as rooted in his globalist liberal conception of global justice.

⁸⁵ Wellman and Cole, *Ethics of Immigration*, p. 177.

⁸⁶ Ibid., pp. 179-180.

Conversely, the most plausible objections to Cole's argument are not those offered by Miller and Wellman. Rather, the most compelling objections to Cole's argument will appeal to premises that are located within a background internationalist conception of global justice: such a conception claims that the primary duties to respect and protect the basic rights of liberal citizenship, such as the right to freedom of movement, are owed only among co-citizens, and not between all persons in the world.

We have already seen that Miller, as an internationalist, makes this claim. For him, duties correlative to the liberal rights of citizenship are owed between co-citizens of a liberal state, while human rights impose duties that all human persons can demand of each other. Miller is not alone, however: this conception of the scope of basic liberal rights is shared by many internationalists about global justice. For example, Mathias Risse argues that 'states provide the environment in which basic rights are, or fail to be, realized', such that whether individuals can be said to freely exercise their basic liberal rights 'is a function of their immediate environment.' He notes that we do not commonly understand someone's right of free speech to be violated when governments other than her own refuse to allow her views to be published in their jurisdictions. Likewise, we do not think that someone in Michigan has her freedom of conscience violated when her religious practices are prohibited in Mecca. Equally, the right to free association is commonly understood to protect the freedom 'to associate with like-minded persons in an area where we are subject to the same jurisdiction'.⁸⁷

Of course, internationalists cannot simply rely on the fact that this is how basic liberal rights are *commonly* understood; globalists can quite rightly object that this amounts to no more than a question-begging appeal to conventional moral beliefs. Internationalists must provide a *normative* argument that basic rights are *properly* understood as applying among co-citizens. We have already encountered in this regard Miller's argument that the basic liberal rights are grounded in interests that are too parochial to liberal societies to appropriately ground

⁸⁷ Risse, *Global Justice*, p. 27.

universal human rights. Another account of why the basic right to free movement is properly understood as applying only among co-citizens has been offered by Michael Blake – like Miller and Risse, a prominent internationalist about global justice.

Blake's argument is that if a state's system of coercive law is to be justified to those subject to it, it must respect the basic liberal right to free movement, among other basic individual rights. Hence, respect for the basic right to free movement is owed by a particular state only to those who are collectively liable to its coercive political power, that is, to its citizenry and those resident on its territory. For Blake, then, the right to free movement is 'applies only within the context of shared liability to the state.'⁸⁸ As he writes:

[I]n order to be justified to its citizens, a government must offer certain guarantees, including specific guarantees of liberty. The liberties which must exist before government authority could be justified include both political liberty and non-political liberties such as the right to mobility.⁸⁹

My aim in pointing to these arguments by Blake, Miller and Risse is not to endorse them but to indicate how internationalism about global justice can provide the resources to resist Carens's and Cole's essentially globalist liberal arguments in favour of an individual right to free international migration. My suggestion is that what I have been calling the rights-based approach has misdirected theoretical attention to what, following Charles Beitz, we might call the 'demand side' of rights, that is, to 'the reasons why we should regard ... rights as good things for their beneficiaries.'⁹⁰ As we have seen, the interests that individuals have in freedom of *domestic* movement, in freedom of *emigration*, and in freedom of *cross-border* movement are much the same: in each case free movement is instrumentally important to the individual's

⁸⁸ Michael Blake, 'Immigration', in R. G. Frey and C. H. Wellman (eds.), *A Companion to Applied Ethics* (Oxford: Blackwell, 2005), p. 229.

⁸⁹ Ibid.

⁹⁰ Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), p. 59.

autonomous pursuit of her life plans and personal projects. Framing the debate in terms of the demand side of the putative right to migrate misidentifies where the action is.

Instead, we should focus our attention on the ‘supply side’ of rights, that is, on ‘the perspective of the agent(s) for whom ... rights are supposed to provide reasons for action’.⁹¹ In particular, we should ask which agents have the primary *duties* to respect and protect the basic liberal right to free movement. It is in terms of their differing answers to that question, and ultimately their differing background conceptions of global justice, that we can best understand the disagreement between the globalist liberals Carens and Cole, on the one hand, and their internationalist critics, on the other. To put the same point another way, we should move away from the rights-based approach to justice in immigration and adopt a global justice-based approach.

IV. MORAL COSMOPOLITANISM AND GLOBALIST LIBERALISM

I have been arguing that we should not approach the accounts of justice in immigration advanced by Carens and Cole through the framework provided by the rights-based approach, but rather through the framework of the debate between globalist and internationalist conceptions of global justice. In this section, I will clarify the main features of globalist liberalism, especially by distinguishing it as a controversial doctrine about the scope of familiar principles of liberal justice from *moral cosmopolitanism*, an uncontroversial doctrine about the moral equality of persons. A more in-depth characterization of the globalist liberal conception must wait until Chapter 3.

Drawing attention to the distinction between globalist liberalism and moral cosmopolitanism is important because many writers on global justice have applied the ‘cosmopolitan’ label to the doctrine about the scope of liberal justice that I am calling

⁹¹ Ibid., p. 68.

globalist. For example, Richard Miller names as ‘cosmopolitan’ the perspective on global justice which argues that the ‘political duties’ we recognize to ‘be extrapolated from one’s compatriots to the world at large.’⁹² Similarly, Beitz writes that ‘*cosmopolitan liberalism* effectively extends to the world the criteria of distributive justice that apply within a single society.’⁹³ Kok-Chor Tan likewise describes the view that ‘distributive principles are not to be constrained or limited by state or national boundaries’ as the ‘*cosmopolitan* idea of justice’,⁹⁴ and Simon Caney calls ‘*cosmopolitan* egalitarianism’ the view that ‘egalitarian principles of distributive justice obtain at the global level’.⁹⁵ Although nothing substantive turns on this terminological difference, much does turn on the substantive distinction between moral cosmopolitanism, on the one hand, and what I call globalism, on the other. To the extent that using ‘cosmopolitanism’ as a term for doctrines about the moral equality of persons *and* the scope of certain principles of justice encourages a slippage between these distinct doctrines and thereby ‘distorts the landscape of our discussions’, I suggest that we avoid calling views about global justice ‘cosmopolitan’, even if I would not go as far as Blake in calling for the term to be ‘retired’ altogether.⁹⁶

The basic idea of moral cosmopolitanism is that all human persons, as individuals and not in virtue of their membership of some group, are members of the moral community. As such, the claims and interests of each individual have moral weight and must count in the deliberations of all others when they decide on how to act or which institutions to support. Moral cosmopolitanism also claims – though this is a more nebulous thought – that all

⁹² Miller, *Globalizing Justice*, p. 31.

⁹³ Charles R. Beitz, ‘Social and cosmopolitan liberalism’, *International Affairs* 75 (1999), pp. 519-520, emphasis added.

⁹⁴ Kok-Chor Tan, *Justice without Borders: Cosmopolitanism, Nationalism, and Patriotism* (Cambridge: Cambridge University Press, 2004), p. 19, emphasis added.

⁹⁵ Simon Caney, ‘Humanity, Associations, and Global Justice’, *The Monist* 94 (2011), p. 507, emphasis added.

⁹⁶ Michael Blake, ‘We Are All Cosmopolitans Now’, in G. Brock (ed.), *Cosmopolitanism Versus Non-Cosmopolitanism: Critiques, Defenses, Reconceptualizations* (Oxford: Oxford University Press, 2013), p. 36.

persons are *equal* members of the moral community. Thus, Miller characterizes moral cosmopolitanism – which he calls ‘weak cosmopolitanism’ – as the doctrine that ‘we owe all human beings moral consideration’ and that ‘*in some sense* that consideration must involve treating their claims equally.’⁹⁷ Thomas Pogge offers perhaps the classic statement of moral cosmopolitanism, capturing both of its distinctive claims, when he writes that ‘the status of ultimate unit of concern attaches to *every* living human being *equally*’.⁹⁸ Following Pogge, Pablo Gilabert sums up the moral cosmopolitan idea in the following slogan: ‘All individual persons are ultimate units of equal moral respect and concern for everyone.’⁹⁹

I say that that the notion of equality appealed to here is nebulous because it is intended to be an uncontroversial claim which captures something basic to the moral point of view, and not a controversial claim that, for example, justice demands distributive equality or equal treatment of some kind. Precisely because it is supposed to be basic and shared by all plausible moral conceptions, this idea of equality is difficult to formulate. Sometimes it is expressed as a claim about value, as when Miller takes it to mean that ‘the various good and bad things that can happen to people should be valued in the same way no matter who those people are’,¹⁰⁰ and when Gregory Vlastos takes it to mean that ‘one man’s well-being is as valuable as any other’s.’¹⁰¹ While they have the advantage of clarity, these value-based formulations of basic moral equality have problematic implications. They may imply, implausibly, that Derek Parfit’s prioritarian principle contradicts basic moral equality, since it affirms that ‘[b]enefiting people matters more the worse off these people are’; indeed, Parfit

⁹⁷ Miller, *National Responsibility*, p. 27.

⁹⁸ Thomas Pogge, ‘Cosmopolitanism and Sovereignty’, *World Poverty and Human Rights*, 2nd ed. (Cambridge: Polity, 2008), p. 175, emphases added.

⁹⁹ Pablo Gilabert, *From Global Poverty to Global Equality: A Philosophical Exploration* (Oxford: Oxford University Press, 2012), p. 10.

¹⁰⁰ Miller, *National Responsibility*, p. 28.

¹⁰¹ Gregory Vlastos, ‘Justice and Equality’, in J. Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984), p. 58, emphasis removed.

explicitly insists that '[w]e should not give equal weight to equal benefits, whoever receives them.'¹⁰²

A better, though perhaps less precise, formulation expresses basic moral equality in terms of the *equal standing* or *equal basic authority* of all persons to make valid moral claims and press legitimate moral demands on each other. For someone to be an *equal* member of the moral community, on this view, is for her to stand in relations of mutual accountability with all other members of the moral community, and to be owed, *just like every other member*, a justification for their treatment of her.¹⁰³ What moral cosmopolitanism claims, then, is that all human persons are part of a universal justificatory community with just one rank, regardless of their particular circumstances and personal characteristics.¹⁰⁴ It is something like this formulation of the basic moral equality of all persons which is captured in Gilabert's principle of 'cosmopolitan justifiability' – the claim that we should 'treat each other on the basis of principles of justice that no one [in the world], as free and equal persons, could reasonably reject.'¹⁰⁵

Unlike moral cosmopolitanism, globalist liberalism is not a doctrine about moral conceptions generally, but is a first-order conception about the scope of particular principles of justice. We can more clearly grasp what distinguishes the globalist liberal position by attending separately to how globalist liberalism is *globalist*, and then to how it is *liberal*. Recall first my earlier suggestion that what distinguishes internationalist and globalist views of global justice is that internationalists accept, while globalists deny, that valid principles of global

¹⁰² Derek Parfit, 'Equality and Priority' (1997), *Ratio* 10, p. 213.

¹⁰³ See Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge, MA: Harvard University Press, 2006).

¹⁰⁴ See Andrea Sangiovanni, 'On the Relation between Moral and Distributive Equality', in (ed.) G. Brock *Cosmopolitanism Versus Non-Cosmopolitanism: Critiques, Defenses, Reconceptualizations* (Oxford: Oxford University Press, 2013). For the idea of a community or society with just one rank, see Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford: Oxford University Press, 2012), p. 34ff.

¹⁰⁵ Gilabert, *Global Poverty to Global Equality*, p. 10.

justice are simply the familiar principles of social justice generalized or extrapolated to the whole world. To be clear, globalists do not claim that in addition to certain principles of social justice, there are principles of global justice whose content mirrors that of the principles of social justice. Rather, for globalists, there are simply no fundamental or non-derivative principles of social justice – they deny that ‘there are *any* norms of *social* as opposed to *global* justice’: the distinctive globalist claim is that all fundamental principles of justice apply to the entire population of the world.¹⁰⁶ Globalist *liberalist* views, then, are those variants of globalism that accept liberal principles of social justice – such as the principles of Rawls’s justice as fairness – but reject the restriction of their scope to a single political society, insisting instead that these principles have global scope, that is, that they apply to the global population taken as a whole.

As I have been urging, we can best understand Carens’s and Cole’s arguments about justice in immigration by locating them within the context of a background liberal conception of global justice – namely, a globalist liberal conception of justice. Over the next sections, I will examine more closely Carens’s argument for a basic individual right to free migration, and show how it is dependent on his globalist liberal commitments. I choose to focus on Carens, firstly, because of his importance to the debate on justice in immigration, and secondly, because his account is the most developed and demonstrates in the clearest way the debt that his arguments owe to globalist liberalism. I will show that (1) Carens’s *intuitive argument* against immigration restrictions depends on an appeal to the moral arbitrariness of citizenship that is distinctive of *non-relational* arguments for globalism;¹⁰⁷ and that (2) Carens’s *global original position argument* for a basic right to cross-border freedom of movement depends on an appeal to a

¹⁰⁶ Samuel Scheffler, ‘Conceptions of Cosmopolitanism’, in his *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001), pp. 116-7.

¹⁰⁷ In calling this Carens’s ‘intuitive argument’, I am following Blake, ‘Immigration’, p. 229.

claim about the universality of liberal moral personality that is also distinctive of non-relational accounts of globalism.

V. CARENS'S INTUITIVE ARGUMENT

Consider first Carens's intuitive argument against immigration restrictions. This argument claims that when a state restricts the movement of aliens into its territory, it subjects them to unequal treatment based on a personal characteristic that is morally arbitrary. Such restrictions are therefore unjust in the absence of some compelling justification for them. The intuitive argument is dramatically expressed in a famous comparison of contemporary practices of restricting immigration to rich and free states to medieval practices of feudal privilege:

Citizenship in the modern world is a lot like feudal status in the medieval world. It is assigned at birth; for the most part it is not subject to change by the individual's will and efforts; and it has a major impact upon that person's life chances... If the feudal practices were wrong, what justifies the modern ones?¹⁰⁸

This illustrative comparison with feudalism is intended to show that, in an international states system in which individuals are largely assigned their particular country of citizenship at birth and cannot easily change their particular citizenship through their own choice or effort, nationality or citizenship status is 'arbitrary from a moral point of view': since an individual's citizenship or nationality is very largely a product of her circumstances rather than her own choices and efforts, it seems that 'whether one is a citizen of a rich nation or a poor one, whether one is already a citizen of a particular state or an alien who wishes to become a

¹⁰⁸ Carens, 'Migration and morality', pp. 26-27. See also Carens, 'Rights of Immigrants', p. 145 and 'Aliens and Citizens', p. 252.

citizen' are personal characteristic that are just as morally arbitrary as 'race or sex or social class'.¹⁰⁹

The key claim in the argument is that because country of citizenship is *unchosen* and in that sense 'morally arbitrary', unequal levels of opportunity or advantage that track different individuals' particular country of citizenship are unjust. Call this the *moral arbitrariness of citizenship* claim. This reasoning is not unique to Carens's intuitive argument; indeed, Caney claims that it is 'present in almost all defences of cosmopolitanism', by which he means the view I have been calling globalism about (liberal) justice. This moral arbitrariness of citizenship claim is summarized by Caney as follows: 'people should not be penalized because of the vagaries of happenstance, and their fortunes should not be set by factors like nationality or citizenship.'¹¹⁰ This claim is taken by Caney – and Carens – to commit us to globalism about justice, since if people should not be worse (or better) off in virtue of their state or national membership, then the scope of principles of justice should not be confined within discrete nations or states; rather, they should have global scope.

In fact, Caney's claim that the moral arbitrariness of citizenship claim features in arguments for 'almost all' forms of globalism about justice is overbroad: the moral arbitrariness of citizenship claim is central only to *non-relational* accounts of globalist liberalism. For non-relational globalists, 'all [non-derivative] principles of justice apply among all human beings regardless of what relations they share':¹¹¹ nationality and particular citizenship would still be morally arbitrary, and for that reason an unjust basis for substantive inequalities in opportunities and advantage, even in a world where there was very limited interaction between different states and between citizens of different states. Globalist liberalism of this type can be contrasted with what I will call *relational* globalist liberalism: views of this latter

¹⁰⁹ Carens, 'Aliens and Citizens', p. 256.

¹¹⁰ Simon Caney, 'Cosmopolitan Justice and Equalizing Opportunities' (2001), *Metaphilosophy* 32, p. 115n3, p. 115.

¹¹¹ Risse, *Global Justice*, p. 7ff.

type argue for their globalist conclusions by appeal to facts about the social and political relations in which all human persons (now) stand. In particular, they point to how the process of globalization has resulted in increasingly dense levels of global economic and political cooperation, arguing that these relations of interdependence or cooperation are grounds for global principles of (liberal) justice.¹¹²

Carens, in common with many non-relational globalists, sees the moral arbitrariness of citizenship claim as an implication of moral cosmopolitanism, and especially of the moral equality of all persons.¹¹³ Sometimes, he takes it as self-evident that if we begin with the starting point that all human persons are moral equals, and that individual human persons are morally ‘prior to the community’ – that is, if we accept the normative individualism and universal moral equality that are the central ideas in moral cosmopolitanism – then we will simply find ‘little basis for drawing fundamental distinctions between citizens and aliens’.¹¹⁴ At other points, he suggests that taking seriously the moral equality of all human persons will lead us to reject inequalities of opportunities and advantages between persons throughout the world unless these flow from ‘the particular choices and commitments that individuals make’.¹¹⁵

While the line of argument here is not wholly clear, I suggest that we can perhaps reconstruct the basic thought as follows. If, as moral cosmopolitanism holds, all human persons are members of a one-rank justificatory community, then social practices and institutions which result in or allow deep inequalities in opportunities and advantages between different persons across the world stand in need of justification. However, when these inequalities track features of persons which are the result of their unchosen circumstance and

¹¹² For the distinction between relational and non-relational conceptions of justice, see Andrea Sangiovanni, ‘Global Justice, Reciprocity, and the State’ (2007), *Philosophy & Public Affairs* 35, pp. 5-6.

¹¹³ See Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005) and Gilibert, *Global Poverty to Global Equality*.

¹¹⁴ Carens, ‘Immigration and the Welfare State’, p. 214 and ‘Aliens and Citizens’, p. 252.

¹¹⁵ Carens, ‘Aliens and Citizens’, p. 270.

not features for which they can be held morally responsible, no successful justification can be given. Hence, these inequalities are unjust, violating the basic commitment to respect the standing of all human persons as equal members of a universal justificatory community.

It is this claim – and not some view about what rights individuals have or about the kinds of interests which could ground a right – which ultimately motivates Carens’s intuitive argument against immigration restrictions. We can appreciate this by re-considering the remarks which likely motivated Miller’s rights-based reading of Carens’s argument but are really a development of the intuitive argument:

[F]reedom of movement *within* the nation-state is widely acknowledged as a basic human right... If it is so important for people to have the right to move freely within a state, is it not equally important for them to have the right to move across state borders? Every reason why one might want to move within a state may also be a reason for moving between states... The radical disjuncture that treats freedom of movement within the state as a moral imperative and freedom of movement across state borders as merely a matter of political discretion makes no sense from a perspective that takes seriously the freedom and equality of all individuals.¹¹⁶

Carens’s strategy here is not to mount an independent argument which shows that the reasons that individuals might have to move between states or their interests in doing so are sufficiently compelling to ground a right. Rather, the argument is conditional: *if* we are committed to protecting domestic freedom of movement, *then* we must similarly be committed to cross-border freedom of movement. The force of the argument depends on pointing out the *disparity* between the current treatment of claims to free movement by co-citizens, on the one hand, and claims to free movement by non-citizens, on the other. This inequality in treatment is considered significant precisely because it tracks differences in

¹¹⁶ Carens, ‘Migration and morality’, pp. 27-28.

citizenship status, which is taken to be morally arbitrary and hence a basis for unequal treatment which cannot be reconciled with the moral equality of all persons.

I have been arguing that Carens's intuitive argument that immigration restrictions are unjust depends on accepting the moral arbitrariness of citizenship claim, a claim which is also central to many arguments for, and indeed seems to directly imply, non-relational globalism. We can therefore best understand and evaluate the intuitive argument by reflecting on the plausibility of the moral arbitrariness of citizenship claim, and its alleged foundation in respect for the moral equality of all persons, rather than by considering whether an independent case can be made for a right to cross-border freedom of movement. Evaluating the plausibility of the moral arbitrariness claim is also crucial to evaluating Carens's global original position argument, to which we now turn.

VI. CARENS'S GLOBAL ORIGINAL POSITION ARGUMENT

The essential claim of the global original position argument is that international freedom of movement would be chosen by the parties in a globalized version of Rawls's original position as 'a basic liberty in a global system of equal liberties', which system or scheme of liberties has, under ideal conditions, priority over other considerations such as the general welfare or even improving the economic condition of those who are worse off.¹¹⁷ Notice that the global original position argument is a more complete and secure argument for free migration than the intuitive argument. The latter judges restrictive immigration policies unjust either because they play a part in maintaining an international order in which there are very large substantive inequalities which track differences in nationality or citizenship, or because allowing free domestic movement while restricting cross-border movement involves treating citizens and aliens differently which is in itself unjust.

¹¹⁷ Carens, 'Aliens and Citizens', p. 258.

The intuitive argument, therefore, simply condemns disparities in treatment between citizens and non-citizens and has no essential connection to free migration or any other freedom. It would lose much of its force in a world in which opportunities and advantages were much more equally distributed across different states, or in which states restricted domestic movement as much as they did cross-border movement. The global original position argument, on the other hand, mounts a specific case for free international migration as an especially important human freedom which should not be traded off against other values and goals. We might say that while the intuitive argument is essentially an argument for globalizing principles of justice wrongly thought to be confined to domestic societies, the global original position argument endorses not simply *globalism* about justice but globalist *liberalism* more specifically. Indeed, the global original position argument is even more specifically a globalist *Rawlsian* liberal argument in that it globalizes justice as fairness, Rawls's favoured conception of liberal justice.

Rawls famously argued that we can use the following heuristic to arrive at valid principles of justice: we imagine parties, representing individuals, who select principles of justice to regulate their society's basic institutions from behind a veil of ignorance. This veil excludes information which could improperly influence their choice of principles. Rawls argued that in this 'original position', the parties would select distinctively liberal principles of justice, including a principle equally protecting the basic liberties of all citizens – including their freedom of movement – and that they would give this principle priority over other, even justice-based, values and goals such as limiting distributive inequalities. Rejecting Rawls's focus on the basic structure of a single society for reasons we will shortly address, Carens proposes a 'global view of the original position', in which all individual persons in the world are represented and knowledge of each person's particular citizenship or nationality status is excluded by the veil of ignorance. In this global original position, Carens argues that the same principles of justice would be selected, with the crucial difference that these would not be

principles of justice for a single society; rather, these principles ‘would apply globally’. Using the heuristic of the global original position, then, we arrive at the conclusion that a sound conception of global justice would include freedom of movement as a basic liberty. Crucially for Carens’s argument, the principle of free movement as a basic liberty would, unlike that selected in Rawls’s domestic original position, have global scope: it would be a right to free *international* migration.¹¹⁸

Notice that Carens’s global original position argument for free international migration as a basic liberty follows a strategy familiar from the work of early globalist liberal critics of Rawls including Beitz, Pogge, and David A. J. Richards.¹¹⁹ Indeed, we can think of Carens’s global original position argument as an example of a more general argument for globalizing liberalism which goes beyond the specifics of Rawls’s conception of justice as fairness. We begin to see this by noting that the very construction of the original position builds in a number of deeply liberal assumptions. In particular, it reflects the fundamental importance liberals assign to *personal autonomy*, or as I will also say, *rational autonomy* – that is, a human person’s capacity to make her own judgments about the ends of life, to act on these judgments in developing and realizing her life plans and projects. In Rawls’s formulation, this is the ‘moral power to form, to revise, and rationally to pursue a conception of the good’.¹²⁰

Depriving the parties in the original position of knowledge of their particular controversial judgments and beliefs about the good life, and stipulating that in selecting principles they are motivated to select those principles which would most protect their ability to pursue their own life plans and projects successfully, are both features of the original

¹¹⁸ Ibid., pp. 256-258.

¹¹⁹ Charles R. Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1979), Part 3; Charles R. Beitz, ‘Cosmopolitan Ideals and National Sentiment’ (1983), *Journal of Philosophy* 80; Pogge, *Realizing Rawls* (Ithaca, NY: Cornell University Press, 1989), Ch. 6; and David A. J. Richards, ‘International Distributive Justice’, in J. R. Pennock and J. W. Chapman (eds.), *Ethics, Economics, and the Law: NOMOS XXIV* (New York: New York University Press, 1982).

¹²⁰ Rawls, *Political Liberalism*, p. 72.

position which model the fundamental liberal conception of persons as free or autonomous. The reasoning of the parties in selecting freedom of movement as a basic liberty in the global original position also reflects the general liberal concern for personal autonomy. Behind the veil of ignorance, and hence not knowing the particulars of anyone's determinate conception of the good, the parties 'would insist that the right to migrate be included in the system of basic liberties' because 'it might prove essential to one's plan of life.'¹²¹ Besides the obvious point that 'the right to live and work where one chooses can be ... vital to [realizing] one's plan of life',¹²² freedom of movement is often also 'a prerequisite for [exercising] other freedoms.'¹²³

Recall that Miller comes to very different conclusions than Carens despite agreeing with him that being free to move will often be a precondition for an individual to live an autonomous life, and that liberal conceptions of justice attach great importance to personal autonomy. Recall also that Miller's essential objection is that while liberals hold that what matters from the social and political point of view is that individuals are free to live a life that they choose, this idea that we should treat individuals as free in this sense is not shared by many non-liberal cultures and traditions, for whom 'what matters is that people should live a good life', and not that they live a life that they have chosen.¹²⁴ If, as Miller believes, global justice must be 'justice for a world of difference', then we should not appeal to this strong conception of individual autonomy in justifying principles of justice – including a principle protecting freedom of movement – that are to have global application. To do so would be to improperly impose controversial liberal values on all persons and all cultures, neglecting the

¹²¹ Carens, 'Aliens and Citizens', p. 258.

¹²² Carens, 'Immigration and the Welfare State', p. 215.

¹²³ Carens, 'Migration and morality', p. 25.

¹²⁴ Miller, *National Responsibility*, p. 177.

fact that ‘people greatly value living under their own rules and according to their own cultural beliefs.’¹²⁵

Miller’s objections bring out the reliance of Carens’s global original position argument on both aspects of the globalist liberal conception of justice, that is, on its globalism *and* its liberalism: the argument depends on accepting the extension of a distinctively *liberal* conception of justice to the whole world. Whether the argument succeeds, therefore, will turn on whether we have reason to believe that familiar principles of liberal justice, including the basic liberty or right to move to and settle in the area of one’s choice, were properly developed for application to a single domestic society, or whether we should instead hold that these principles apply to the entire population of the world.

We can cast this as a question about how original position reasoning should be structured: should we, as Carens proposes, reason about global justice using the heuristic of a *global* original position representing all individual persons in the world, with knowledge of the particulars of any person’s nationality or citizenship status hidden by the veil of ignorance, or should we perhaps, as Rawls himself proposes, reason about global justice using two sessions of the original position – a first, *domestic* original position to work out principles of social justice, and only then a second, *international* original position representing independent societies?¹²⁶ The former approach implies that all fundamental principles of liberal justice are principles of global justice, while the latter approach implies not only that social and global justice are distinct, but also that the familiar principles of liberal justice properly apply to domestic societies and not to the whole world. It is crucial for Carens’s global original position argument, therefore, that he adequately motivates the choice of a global original position rather than the two-level approach followed by Rawls and other internationalists. I will show that he argues for a global original position by appeal to two claims, both of which

¹²⁵ Ibid., p. 21.

¹²⁶ See John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).

are ultimately anchored in moral cosmopolitanism: firstly, the moral arbitrariness of citizenship claim which we have previously encountered; secondly, a claim about the universality of liberal moral personality.

Carens appeals to the moral arbitrariness of citizenship claim in arguing that the veil of ignorance should exclude knowledge of any particular person's national or civic membership. The role of the veil of ignorance in original position reasoning is to exclude knowledge of 'natural and social contingencies' that are 'arbitrary from the moral point of view', lest these morally arbitrary characteristics improperly influence the choice of principles. But nationality and citizenship are, according to the moral arbitrariness of citizenship claim, precisely such morally arbitrary characteristics. Hence, the veil of ignorance should exclude knowledge of nationality and citizenship status; this thick veil of ignorance is then taken by Carens to be equivalent to adopting 'a global, not a national, view of the original position.'¹²⁷

Carens further appeals to the thought that liberals accept as a deep commitment that we should 'treat all human beings, not just members of our own society, as free and equal moral persons'.¹²⁸ In other words, for Carens the liberal conception of the person as free and equal has universal validity and universal application; this is what I call the *universality of liberal moral personality claim*. As Carens sees it, the universality of this conception of the person has two implications. First, the demand to recognize and respect persons as free and equal is not morally binding only for those societies whose members already accept the validity of this conception; the validity of the liberal conception of the person does not depend on the *beliefs* of particular persons, cultures, or societies. Carens points to the example of racist members of otherwise liberal societies, noting that we do not think their racist views – views which are clearly incompatible with accepting the liberal conception of moral personality – exempt them from the moral demand to treat their co-citizens as free and equal. Generalizing from this

¹²⁷ Carens, 'Aliens and Citizens', p. 256.

¹²⁸ Ibid.

case, it seems that the liberal conception of moral personality is still valid, and its moral implications still binding, even when people hold beliefs that reject the validity of that conception.

Second, for Carens, taking seriously the universal validity of the liberal conception of the person requires that we reject any restriction on the scope of principles of justice grounded in that conception of the person. Indeed, Carens argues that our commitment to free and equal *citizenship* as an ideal is best understood as derivative from a deeper commitment to treating *all human persons* in ways that honour their standing as free equals. As he puts it, ‘our commitment to civic equality is derived from our convictions about moral equality, not vice versa.’ If the universality of liberal moral personality claim is correct, then liberals must subject ‘all institutions and social practices’ to the test of whether they are compatible with treating ‘all human beings as free and equal moral persons’:¹²⁹ the idea that all persons should relate to each other as free equals must constrain the way we think about how all social and political institutions can permissibly treat and affect all human persons. While a domestic original position models the idea of citizens as free and equal and helps us to see what principles of *social* justice would follow from taking seriously that ideal of citizenship, we should in fact reason about principles of justice using the device of a *global* original position that models the idea of all human persons as free and equal.

I have been arguing that Carens’s two main arguments for free migration – the intuitive argument and the global original position argument – rely on accepting both the *moral arbitrariness of citizenship* claim and the *universality of liberal moral personality* claim. These claims, taken together, imply a commitment to globalist liberalism, and specifically to its *non-relational* variant. An appeal to the moral arbitrariness of citizenship to argue against substantively unequal treatment which tracks citizenship status does not depend on the social and political relations in which citizens and non-citizens currently stand. Similarly, an appeal to a

¹²⁹ Ibid., pp. 256-257; Carens, ‘Immigration and the Welfare State’, p. 214.

universally valid conception of moral personality to argue for the global scope of liberal principles of justice does not depend on any thesis about current levels of cross-border interaction or the kinds of social and political relations in which members of different societies stand to each other. If I am correct, Carens's arguments for free migration crucially depend on whether non-relational globalist liberalism is plausible as a conception of global justice.

VII. CONCLUSION

In this chapter, I have argued that we should not construe the arguments that Carens and Cole develop to defend free international migration in terms of the rights-based approach. While we can describe the conclusions that these writers reach on justice in immigration in terms of rights – Carens and Cole might be described as defending an individual right to free migration – it is more perspicacious to read their arguments for these conclusions through the lens of their wider views about global justice. The arguments that Carens and Cole mount in favour of free migration depend at crucial points on their endorsement of a particular background conception of global justice, namely *globalist liberalism*. Moreover, their disagreements with Miller and Wellman about justice in immigration are traceable to a deeper disagreement between globalist and internationalist views of global justice. Turning to examine Carens's arguments in greater detail, I have also tried to show how they reflect Carens's affirmation of a specifically *non-relational* form of globalist liberalism. In thinking about justice in immigration, therefore, much turns on the plausibility of non-relational globalism or indeed of globalist liberalism more generally. We will take up that question in Chapter 3.

CHAPTER TWO

Legitimate Immigration Law and a State's Right to Choose Its Immigration Policy

I. THE RIGHTS-BASED APPROACH AGAIN

In Chapter 1, we discussed one side of the problematic right-versus-right paradigm: the supposed individual right to freely move across state borders and to settle in the territory of the right-holder's choice. In this chapter, we will be concerned with what, according to the rights-based approach, is the competing right to the putative individual right, namely the right of states to make collective decisions regarding their immigration laws and policies, and thereby to determine which prospective migrants are allowed to enter and reside in their respective territories. In particular, we will examine the arguments that David Miller, Michael Walzer and Christopher Heath Wellman have made in defence of a state's right to unilaterally choose its own immigration policy, or as I will call it more briefly, a state's *right to choose its immigration policy*.

My argument in this chapter will make two main claims. Firstly, I suggest that this rights-based framing of Miller's, Walzer's and Wellman's accounts obscures the distinction between the different roles that a conception of *justice* in immigration and a conception of the *legitimacy* of immigration law play in the political theory of international migration. Secondly, I urge that the rights-based framing obscures the fundamental basis of the disagreement between Miller, Wellman and Walzer, on the one hand, and theorists like Carens and Cole who favour free movement across borders, on the other. The rights-based approach distracts our attention from where it should be focused – on these theorists' differing background conceptions of global justice – and instead encourages a polarized debate between proponents of two competing rights claims.

I will begin by showing how Miller, Wellman and Walzer – like Carens and Cole, their counterparts in Chapter 1 – have followed the rights-based approach, framing their accounts in terms of the right-versus-right paradigm. Notice, firstly, how Miller’s discussion of the political theory of immigration follows closely the framework provided by the rights-based approach. He sets the terms of the debate by asking, firstly, if there is an individual ‘right to cross national borders and live in a territory of one’s own choosing’, and secondly if there is, as states in the current international system claim, a ‘general right’ which gives states the moral power ‘to decide who is admitted to their territory’.¹³⁰ He emphasizes that the state-level right is a choice-protecting principle: it protects the ability of the members of a state to collectively choose or ‘decide’ which persons, if any, to admit into their territory. The core of the right is that it allows a state ‘to *determine* who can and who cannot be admitted to the territory it controls’;¹³¹ it is a ‘right to *control* entry’¹³², a ‘right to *decide* who has the right to enter’.¹³³

Consider, secondly, how Wellman explicitly locates his argument within the right-versus-right paradigm: in the theoretical debate about immigration, for Wellman ‘the argument is about rights, the state’s right to control membership versus the individual right of freedom of international movement.’¹³⁴ Within this paradigm, he takes himself to be defending the ‘state’s right to set its own immigration policy’; as he puts it, ‘Legitimate states have the moral right to determine the criteria by which outsiders are permitted to enter their territory or become citizens’.¹³⁵ He writes elsewhere that ‘legitimate political states are morally

¹³⁰ David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), p. 202.

¹³¹ Ibid., p. 213, emphasis added.

¹³² Ibid., p. 222, emphasis added.

¹³³ David Miller, ‘Territorial Rights: Concept and Justification’, *Political Studies* 60 (2012), p. 265.

¹³⁴ Christopher Heath Wellman and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (Oxford: Oxford University Press, 2011), p. 7.

¹³⁵ Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009), pp. 187-188.

entitled to unilaterally design and enforce their own immigration policies'.¹³⁶ Note that, like Miller, Wellman conceives of the state's right as choice-protecting: it protects the ability of states to *set, design* or *determine* their own immigration policies, and thereby to *decide on* and *control* which persons are admitted into their territories and their political memberships. The emphasis is on ensuring that a state's immigration laws and policies are determined by the internal political choices of the state's members, and not by the choices of external agents such as prospective immigrants and more generally members of other states.

Consider finally how Walzer takes himself to be defending the claim of 'something like the sovereign state' to have the 'right to control immigration'.¹³⁷ Although he sometimes speaks of a 'right to restrain the flow'¹³⁸ of immigrants or a '(limited) right of closure',¹³⁹ which seems to suggest a concern with restrictive policies as such, taken as a whole, Walzer's discussion indicates that he joins Miller and Wellman in thinking that the right in question is choice-protecting: it protects the collective choices that members of a state might make about their common immigration policy, whether the chosen policy turns out to be permissive or restrictive. We see this when Walzer speaks of 'the right to choose an immigration policy' and when he insists that the 'members of a political community have a collective right to shape the resident population'.¹⁴⁰

II. JUSTICE OR LEGITIMACY?

It is significant that all three defenders of a state's putative right to choose its own immigration policy share a *choice-protecting* conception of that right. For each of these theorists,

¹³⁶ Wellman and Cole, *Ethics of Immigration*, p. 13.

¹³⁷ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), p. 39.

¹³⁸ Ibid., p. 51.

¹³⁹ Ibid., p. 63.

¹⁴⁰ Ibid., p. 61, p. 52.

to say that a state has a right to choose its own immigration policy is not to say that it has a moral permission to implement any particular restrictive policy. Rather, the putative right's role is to accord special protection to a state's *choice* of an immigration policy. Moreover, these theorists are not simply claiming that states have a Hohfeldian privilege – they have no duty not – to exclude certain prospective immigrants; rather, they are appealing to rights as a distinctive class of principles which accord special protection to the free choice of the right-holder against competing claims grounded in other values.

One important implication of taking the state's right to determine its immigration policy to be a choice-protecting right is that the putative right's coverage is independent of the specific content of particular immigration policies. Whatever correlative duties the putative right imposes, they apply when and because a policy was collectively chosen by the state's members and not because of the content of the chosen policy. What we may call the *content-independence* of the right's coverage is not lost on Miller, Walzer and Wellman; indeed, each of them distinguishes between the question of whether states have the right to choose their immigration policies, *whatever they might be*, and the question of whether a particular immigration policy would be just, prudent, or otherwise *choice-worthy*.

For example, Miller distinguishes between the claim that states 'have the right to control entry', the separate claim that 'states *ought* to exercise that right', and the further question of '*how* they should exercise it, if they do.'¹⁴¹ His defence of states' right to choose their own immigration policies and control movement across their borders is 'not meant to be directly prescriptive': what Miller argues for is the ability of the members of each state to collectively 'decide who has the right to enter' their territory, and to have their decision respected. He cautions that this argument does not in itself 'determine which exercises of that right are *justified* and which are not.'¹⁴²

¹⁴¹ Miller, *National Responsibility*, p. 222.

¹⁴² Miller, 'Territorial Rights', p. 265, emphasis added.

Similarly, Walzer cautions his readers not to confuse the claim that states have a right to choose their immigration policies with the claim that any particular choice they make is worthy – either prudentially or morally – of being chosen. As he puts it, ‘To say that states have a right to act in certain areas is not to say that anything they do in those areas is right.’ He therefore stresses that we must separate the enterprise of defending the idea that ‘the distribution of membership ... in any ongoing society [should be] a matter of political decision’ from the enterprise of defending ‘any particular set of qualifications and categories’ that might feature in a state’s immigrant admission policy.¹⁴³

Wellman likewise emphasizes that ‘in defending a legitimate state’s right to exclude potential immigrants, [he is] offering no opinion on the separate question as to how countries might best exercise this right.’ This follows from the choice-protecting conception of a right, according to which ‘there is a big difference between defending a person’s right to X and recommending that a person actually do X’.¹⁴⁴ To argue for a state’s right to choose is distinct from arguing for more (or less) restrictive policies – indeed, Wellman indicates that in general he would favour ‘more open borders than the status quo’, and suggests that states may be acting irrationally if they choose to enact strict immigration policies. Nevertheless, since legitimate states have a right to freely choose their immigration policies, Wellman insists that ‘whether [states] exercise this right rationally or not, it is their call to make.’¹⁴⁵

It seems, then, that all three defenders of the right of a state to choose its immigration policies take its coverage to be content-independent: the right in question protects the ability of members of a state to collectively choose *some* immigration policy, or at least some policy within a certain wide range, and not any *particular* policy. Bearing in mind this choice-protecting conception of the state’s right will help us see what the normative implications of

¹⁴³ Walzer, *Spheres of Justice*, p. 40.

¹⁴⁴ Wellman and Cole, *Ethics of Immigration*, p. 46.

¹⁴⁵ Ibid., p. 48.

such a right might be – that is, what it would come to, morally speaking, for a state to have such a right.

As we have seen, the normative implication of such a right cannot be that states *should* – that is, that they have sufficient or conclusive moral reasons to – restrict immigration. The right’s role is to protect the choices that states make, whatever they might be, and not to express a judgment about or an evaluation of the particular choices that states might make. Following a distinction articulated by Jeremy Waldron, we might say that since certain rights have the distinctive role or ‘function’ in our practical reasoning of *protecting* the right-holder’s choices, they do not and indeed cannot also have the role of *guiding* right-holders in the selection of particular choices – they do not aim to direct right-holders in *evaluating* or *assessing* the particular choices that they might make.¹⁴⁶ As Waldron points out, on the choice-protecting conception of rights, to say that an agent has the right to perform some action ‘is not thereby to acknowledge any reason for performing that action’, let alone to say that the agent has sufficient or conclusive moral reason for performing the action.¹⁴⁷

What a choice-protecting right does imply is that the right-holder’s choice within some domain should be respected and therefore in some sense be allowed to stand – in particular, that others should not interfere with or undermine the right-holder’s choice. The normative upshot of a choice-protecting right is therefore that it is wrong for *others* to block access to the option that the right-holder has chosen, or otherwise to act so as to prevent the right-holder from freely exercising her capacity to choose within the domain protected by the right.¹⁴⁸ Walzer captures this neatly when he writes:

¹⁴⁶ Jeremy Waldron, ‘A right to do wrong’, in his *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993), p. 85.

¹⁴⁷ Ibid., p. 71.

¹⁴⁸ See *ibid.*, p. 80.

Rights ... distribute decision-making authority. When we describe individual rights, we are assigning to individuals a certain authority to shape their own lives, and we are denying that officials, even well-meaning officials, are authorized to interfere. The description of communal rights makes a similar assertion and a similar denial. In the individual case, we fix a certain area for personal choice; in the communal case, we fix a certain area for political choice.¹⁴⁹

Applying this conception of a right to a state's putative right to choose its immigration policy, a successful defence of that right will not amount to a moral ratification or endorsement of that state's immigration policies but rather will show that agents external to the state (or perhaps even members of the state who dissent from the policies chosen by the majority) must not interfere with or undermine the collective choice that (the majority of) members of the state have made – that is, the immigration policies and the regime of immigration law that members of the state have collectively enacted through their established procedures for political decision-making. Wellman conveys this point when he notes that what the right he defends implies is that '*external parties* must respect a legitimate state's dominion over its borders'.¹⁵⁰

But who exactly are these 'external parties' who bear duties to respect the choices of states regarding their immigration policies? In the case of individuals' choice-protecting rights familiar from liberal theories of social justice, the identity of the relevant duty-bearers is clear: they are the 'officials' of that society, that is, they are the agents of the government or other persons who wield coercive political power in the name of all members of the state. For example, the individual right to freedom of speech imposes a duty on agents of the state to refrain from interfering with individuals' speech. Indeed, Ronald Dworkin has called the

¹⁴⁹ Michael Walzer, 'The Moral Standing of States' in his *Thinking Politically: Essays in Political Theory*, (ed.) D. Miller (New Haven: Yale University Press, 2007), p. 230. See also Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), p. 89.

¹⁵⁰ Wellman and Cole, *Ethics of Immigration*, p. 48, emphasis added.

familiar civil and political rights – which protect certain important choices of individual citizens – ‘rights against the Government’.¹⁵¹

But it is not immediately clear how to identify the duty-bearers in the case of what Walzer calls ‘communal’ choice-protecting rights – that is, rights which protect the collective choices of members of a state or political community. I suggest that the primary duty-bearers are *those persons to whom the immigration laws of the right-holding state are addressed*: partly those persons seeking admission to its territory but also those persons currently resident on that territory who may wish to invite non-citizens to enter and settle in the territory. This is not to deny that there may be secondary duty-bearers, such as other states that might be tempted to interfere with the state in question’s regime of immigration law.

Having identified the relevant duty-bearers, we can now investigate the content of their duties. Recall that the choices the state’s right protects are the collective choices of its members make regarding its immigration laws and policies. This choice is embodied in the regime of immigration law that is enacted through the state’s established constitutional and legislative procedures. The relevant ways in which that collective choice can be respected and allowed to stand, therefore, will involve (1) duties on the part of other states to support, or at least not to undermine and interfere with, the application and enforcement of that regime of immigration law; and (2) individual-level duties, on the part of prospective immigrants and current residents, to support and comply with the requirements of that regime of immigration law. Since type-1 duties are relatively uncontroversial, I will focus on type-2 duties – that is, duties on the part of prospective immigrants and others, to *comply* with the requirements of the regime of immigration law it enacts.

Our discussion so far suggests that, if successful, a case for a given state’s right to choose its own immigration policy will have shown that the addressees of its immigration laws

¹⁵¹ Ronald Dworkin, ‘Taking Rights Seriously’, in his *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), p. 184, p. 190.

have a duty to comply with their requirements. Moreover, these duties are independent of the content of the specific policy that is chosen – they are grounded in respect for the collective choice that a state has made, not in the substantive merits of the chosen policy. This idea of a content-independent (moral) duty to comply with legal directives is of course familiar from Joseph Raz’s influential discussion of practical authority. For Raz, a claim that a command or directive has legitimate practical authority – of which political authority is one form – is a claim that it gives its addressees content-independent reasons for action:

Authoritative utterances can be called ‘content-independent’ reasons. [/] A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason. The reason is in the apparently ‘extraneous’ fact that someone in authority has said so... A certain authority may command me to leave the room or to stay in it. Either way, its command will be a reason. This marks authoritative reasons as content-independent.¹⁵²

A successful case for a state’s right to choose its own immigration policy therefore establishes that the state in question has the *legitimate political authority* to determine which persons can enter and reside on its territory, where to say that a state has legitimate authority over immigration is partly to say that its members collectively have the moral power to issue legal directives to prospective immigrants and others to whom immigration law may also apply, with which they have a moral duty to comply qua legal directives.¹⁵³ Moreover, the addressees of the state’s immigration law are bound to comply because its regime of immigration law was enacted according to the collective choice of its members, and not (simply) because of the substantive moral quality of the laws themselves.

¹⁵² Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 35.

¹⁵³ I have followed here the idea of authority suggested in David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, NJ: Princeton University Press, 2008), p. 2. We will take up the idea of legitimate authority again in Chapter 5.

Miller, Wellman and Walzer are not wholly unaware of this connection between states' putative rights to choose their own immigration policies and the legitimate authority of states' duly enacted immigration laws – even if this connection is not always brought out as clearly as it could be. For example, Walzer writes that the 'right to control immigration' is simply the claim of a 'sovereign state' to have the justified '*authority* to make its own admissions policy'.¹⁵⁴ He further likens the state's right to choose its own immigration policy to the 'authoritative and final' decision-making power that members of a club enjoy regarding which persons to admit as their associates: states claim a similar '*sovereign power* over their own selection processes.'¹⁵⁵ For Walzer, it seems, to vindicate a state's right to choose its own immigration policy is to vindicate its supreme authority in determining the admission of immigrants into its territory.

Wellman and Miller offer similar accounts; they in fact go beyond Walzer's claim that a state has legitimate authority over its borders to argue more generally for the legitimacy of that state's exercise of political power in enacting, applying, and enforcing a regime of immigration law. We might say that they are defending the following basic claim: when certain conditions are met, a territorial state's regime of immigration law can constitute a *legitimate exercise of political power*. Following Allen Buchanan's suggestions that the exercise of political power can be defined as the attempt to 'achieve supremacy in the making, application, and enforcement of laws within a jurisdiction' and that political power is legitimate when its exercise is morally justified,¹⁵⁶ we can say that the *legitimacy of immigration law* has two components: (a) the state's legitimate *authority* over immigration, that is, its moral power to impose content-independent duties on addressees of its immigration laws to comply with the

¹⁵⁴ Walzer, *Spheres of Justice*, p. 39, emphasis added.

¹⁵⁵ Ibid., p. 41, emphasis added.

¹⁵⁶ Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), p. 233.

requirements of those laws; and (b) the moral permission that the state has to use *coercion* to enforce compliance with its immigration laws.¹⁵⁷

Consider, for example, how Wellman's argument in favour of a (legitimate) state's right to set its immigration policy appeals to its members' collective right to freedom of association, where this right is itself 'simply one component of the [right of] self-determination.'¹⁵⁸ This 'moral right of self-determination' is understood to include various 'sovereign powers', including the power 'to make, enforce, and adjudicate valid legal rules within a defined territory', and the power 'to be free from outside interference in ordering its legal, political, and economic system and other aspects of its basic structure'.¹⁵⁹ These sovereign powers which jointly constitute the right to political self-determination confer on the right-holding state 'the right to rule a territory'.¹⁶⁰

Hence, Wellman's claim that a legitimate state has the right to choose its own immigration policy is best understood as a claim that a legitimate state's exercise of political power over immigration regulation is one component of – or perhaps an extension of – its legitimate exercise of political power throughout its territory, which includes not only the moral power to impose duties of compliance with its legal directives but also the moral permission to enforce compliance through coercion. Wellman refers to this permission to coercively enforce compliance with legal requirements in the specific case of immigration law when he insists that there is nothing wrong with the members of a legitimate state 'unilaterally coercing foreigners in order to protect their right to freedom of association'.¹⁶¹ Wellman's defence of a state's right to choose its immigration policy as one component of its right to

¹⁵⁷ This understanding of political legitimacy follows A. John Simmons, 'Justification and Legitimacy', in his *Justification and Legitimacy: Essays on Rights and Obligations* (Princeton, NJ: Princeton University Press, 2001), p. 130 and Jonathan Quong, *Liberalism without Perfection* (Oxford: Oxford University Press, 2010), p. 108.

¹⁵⁸ Altman and Wellman, *Liberal Theory of International Justice*, p. 162.

¹⁵⁹ Ibid., p. 4.

¹⁶⁰ Ibid., p. 13.

¹⁶¹ Wellman and Cole, *Ethics of Immigration*, p. 98.

political self-determination, then, is a defence of the legitimacy of its regime of immigration law.

Similarly, Miller's argument in favour of states' right to choose their own immigration policies appeals to states' *territorial rights*. According to Miller, among the constituents of a given state's territorial rights is the right to 'determine who can and who cannot be admitted to the territory it controls'.¹⁶² Note, however, that this right is simply an application of the core territorial right – what he variously calls the 'right of jurisdiction', 'the right to *make* and *enforce* law throughout the territory in question' and 'the right to apply law and other instruments of public policy to everyone and everything within a particular geographical area'.¹⁶³ As Miller points out, a state's right of jurisdiction, which we can understand as its legitimate exercise of political power over the geographical area of its territory, 'will include the right to make rules governing border crossings.'¹⁶⁴

It seems, therefore, that Miller, Wellman and Walzer should be understood as defenders of the legitimacy of states' exercise of political power in enacting, applying and enforcing a regime of immigration law. But if the claim that a state has a right to choose its own immigration policy amounts to the claim that its regime of immigration law is *legitimate*, then the question of the *justice* of substantive policies remains unanswered. As we have seen, the legitimacy of a law means that its addressees have a duty to comply with its requirements, and that the coercive enforcement of that compliance is morally permissible, (partially) *independent of the substantive merits of its particular requirements*. This distinction between justice and legitimacy, and the relationship between the two ideas, is insightfully if roughly expressed by Rawls when he writes:

¹⁶² Miller, *National Responsibility*, p. 213.

¹⁶³ Miller, 'Territorial Rights', p. 253, emphases added; *National Responsibility*, p. 214.

¹⁶⁴ Miller, 'Territorial Rights', p. 253.

A legitimate procedure gives rise to legitimate laws and policies in accordance with it... Neither the procedures nor the laws need be just by a strict standard of justice, even if, what is also true, they cannot be too gravely unjust. At some point, the injustice of the outcomes of a legitimate ... procedure corrupts its legitimacy... But before this point is reached, the outcomes of a legitimate procedure are legitimate *whatever they are*.¹⁶⁵

Hence, even if Miller, Wellman and Walzer could successfully establish that, when they meet certain conditions, states can legitimately exercise political power over matters concerning immigrant admissions, they would not have thereby established anything about the justice of specific immigration laws, except perhaps that those laws do not fall below some threshold of grave, legitimacy-undermining, injustice. This further suggests that – contrary to the right-versus-right paradigm – the individual right to free migration and the state’s right to choose its own immigration policy are not *competing* rights after all: they refer to two distinct dimensions along which we might morally assess immigration restrictions.

If Carens, Cole and other globalist liberals are right that individuals have a right to move freely across international borders, then immigration laws and policies which impose restrictions on their movement without meeting an especially stringent standard of justification are *unjust*. It is not clear, however, whether this injustice would be sufficient to undermine the *legitimacy* of immigration law – which is what the defenders of the state’s right to choose its own immigration policy are trying to establish. Of course, Carens and Cole might put forward their own theory of the conditions for the legitimacy of immigration law, and argue that immigration restrictions, because they violate a basic right to free international movement, are *so* unjust that they are also illegitimate. Even so, it would be the *gravity* of the injustice combined with the specific substantive conditions for political legitimacy, and not the

¹⁶⁵ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), p. 428, emphasis added.

mere fact of injustice, that would make restrictions on free international movement illegitimate.¹⁶⁶

Conversely, it is not clear that respect for an individual right to free migration, assuming that defenders of the individual right to migrate affirm the correct conception of justice in immigration, is sufficient for a law's legitimacy. As I will argue in Chapter 5, in the face of reasonable disagreement about justice in immigration, we cannot establish the legitimacy of some law regulating immigration simply by appealing to its compatibility with, or even its necessity under, some reasonably disputable conception of justice in immigration.

I want to suggest that the arguments advanced in defence of the state's right to choose its immigration policy address a fundamentally different question from the arguments advanced in defence of the individual right to free migration. The latter arguments are globalist liberal interventions in a debate about justice in immigration, while the former arguments are interventions in a debate about the legitimacy of immigration law and do not in themselves refute or even necessarily undermine the view that individuals have a right to freedom of international movement. In fact, Miller and Walzer advance, as interventions in a debate about justice in immigration, *separate* arguments in favour of the view that immigration policies are just if they promote collective projects and goals which reflect a national community's communal self-conception or more generally the shared values and understandings of the community. In the framing of the rights-based approach, these arguments offer substantive guidance on how states *should* exercise their right to choose an immigration policy.

By contrast, Wellman seems to have been led by his focus on the right-versus-right paradigm to neglect the distinctiveness of the two dimensions of the political theory of immigration – justice in immigration and the legitimacy of immigration law. He seems to assume that options which fall within the domain protected by a legitimate state's right are not

¹⁶⁶ I am indebted to David Miller for discussion of this point.

only legitimately chosen and enforced but are also substantively morally justified, leaving the only question about how a state ought to exercise its right to be one of efficiency: the relevant ‘ought’ is *prudential* rather than moral, and the answer to the question is taken to ‘depend upon a variety of *empirical* matters that vary from state to state and time to time.’¹⁶⁷ For Wellman, these matters of prudential calculation are not a matter on which he, *qua* moral and political philosopher, can offer any special guidance, and therefore he demurs from offering any such guidance. However, what he does not seem to appreciate is that precisely because the protective domain of a state’s choice-protecting right covers a range of possible choices without reference to their particular moral quality, the fact that a particular immigration policy or law falls within a state’s legitimate domain of collective choice does not plausibly ratify the specific policy or law as just.

In response to this objection, Wellman might resist my interpretative reconstruction of his arguments. He might insist that he holds a strictly rights-based conception of justice, according to which justice reduces to nothing more than moral protections against interferences with the choices of various right-holders, including states. He might further insist that he holds a simple view of political legitimacy according to which political power is legitimately wielded if and only if it is used to enforce duties of non-interference correlative to these choice-protecting rights.¹⁶⁸ While this reply would save his arguments from the charge of incoherence, they also significantly diminish their appeal to anyone who does not hold the narrow rights-based view of justice, and the simple rights-based view of legitimacy.¹⁶⁹

Given the potential for confusion that I have revealed above, I contend that we should move away from the reductive and misleading right-versus-right paradigm and adopt a

¹⁶⁷ Altman and Wellman, *Liberal Theory of International Justice*, p. 165, emphasis added. See also Wellman and Cole, *Ethics of Immigration*, pp. 46-48.

¹⁶⁸ This simple view of political legitimacy is suggested by Wellman’s remarks in Wellman and Cole, *Ethics of Immigration*, pp. 97-98.

¹⁶⁹ I am grateful to David Miller and Kit Wellman for discussion of this point.

different approach to the political theory of international migration. I propose that we re-orient the debate from arguments about rights and how they should be exercised, and shift our attention to two basic questions: (1) the question of justice in immigration; (2) the question of the legitimacy of immigration law. In the remainder of this chapter, I will examine the arguments that Miller, Wellman and Walzer offer in defence of the legitimacy of immigration law, and suggest that while Wellman's account is vulnerable to serious objections, when suitably reformulated it helps us identify what is promising in the accounts of Miller and Walzer. I then show that Miller's and Walzer's accounts rest on their distinctive conceptions of global justice – internationalist (and nationalist) conceptions which represent significant rivals to the globalist liberal view we encountered in the previous chapter.

III. FREE ASSOCIATION AND THE LEGITIMACY OF IMMIGRATION LAW

We have seen that Wellman frames his understanding of the political theory of immigration very much in terms of the right-versus-right paradigm. In this section, we will see that his argument for the legitimacy of immigration law is itself rights-based, appealing as it does to the right to freedom of association. The essentials of this argument are summarized in the following passage, where Wellman writes:

Legitimate political states are entitled to a sphere of political self-determination, one important component of which is the right to freedom of association. And since freedom of association entitles one to refuse to associate with others, legitimate political states may permissibly refuse to associate with any and all potential immigrants who would like to enter their political communities. In other words, just as an individual may permissibly choose whom (if anyone) to marry, and a golf club may

choose whom (if anyone) to admit as new members, a group of fellow citizens is entitled to determine whom (if anyone) to admit into their country.¹⁷⁰

The premise of Wellman's argument that I centrally want to challenge is the claim that there is a state-level analogue of the individual right to freedom of association familiar from liberal conceptions of social justice, such that every state which satisfies his proposed conditions for state legitimacy by respecting and protecting human rights is therefore owed a duty of respect for what we might call its *state-level right to freedom of association*. My argument will be that we cannot make sense of this putative state-level right, since the familiar right to freedom of association serves to protect certain *distinctive* interests of *individual citizens* in the domains of intimate personal relationships and of civil society. The idea of a right to freedom of association no longer makes sense when it is untethered from the interests of individuals as they operate in these specific domains.

We can understand my argument better by first considering the right to freedom of association as one among a familiar list of the basic rights and liberties of liberal citizenship. This list can itself be divided among the 'liberties of the ancients' which broadly concern political participation and public deliberation about justice, and the 'liberties of the moderns' which broadly concern the non-public activities of individuals.¹⁷¹ The rights that number among the 'liberties of the moderns' include freedom of speech and expression, freedom of

¹⁷⁰ Wellman and Cole, *Ethics of Immigration*, pp. 36-37.

¹⁷¹ For the distinction between the liberties of the ancients and the moderns, see Joshua Cohen, 'Procedure and Substance in Deliberative Democracy,' in his *Philosophy, Politics, Democracy: Selected Essays* (Cambridge, MA: Harvard University Press, 2009), p. 157. This distinction is of course originally due to Benjamin Constant; see 'The Liberty of the Ancients Compared with That of the Moderns', in his *Political Writings*, (ed.) B. Fontana (Cambridge: Cambridge University Press, 1988).

conscience and religion, freedom of movement, freedom of occupational choice, the right to hold personal property – and freedom of association.¹⁷²

While this list of the ‘liberties of the moderns’ is familiar from the constitutional practice of democratic regimes, it is not simply drawn up by looking at historical practice or by direct appeal to our considered judgments. Rather, these basic rights share a common justification: respect for them provides the necessary political and social conditions under which a citizen can autonomously deliberate about, develop, revise, and realize various personal projects and plans of life. The ‘liberties of the moderns’, in other words, are grounded in an individual citizen’s interest in her *personal autonomy* or *rational autonomy* – her interest in forming, revising and pursuing her own conception of the good life, consistent with the like interest of other citizens in pursuing their own conception of the good life.¹⁷³

We can see how the right to freedom of association serves individuals’ rational autonomy by reflecting on how it protects individuals’ choices to associate or refuse association with others within two specific domains, namely the domain of intimate personal relationships and the domain of civil society. Consider first the case of intimate personal relationships. As Wellman rightly points out, we have a firm judgment that individuals have a basic right to exercise free choice in the domain of marital relationships, and that government interference with individual choices in this domain is typically unjust. The injustice of such interference is explained by its adverse impact on individuals’ exercise of rational autonomy: individuals who have their choice of marriage partner or other intimate relations dictated or

¹⁷² See *ibid*; Rawls, *Political Liberalism*, p. 291; John Rawls, *A Theory of Justice*, revised ed. (Cambridge, MA: Harvard University Press, 1999), p. 53; John Rawls, *Justice as Fairness: A Restatement*, (ed.) E. Kelly (Cambridge, MA: Harvard University Press, 2001), p. 44; and Waldron, ‘A right to do wrong’, p. 81.

¹⁷³ John Stuart Mill, *On Liberty*, in his *Collected Works*, Volume XVIII, (ed.) J. M. Robson (Toronto: University of Toronto Press, 1977), p. 226; Rawls, *Political Liberalism*, p. 72.

blocked by others will not be authors of their own lives; instead, ‘vital parts of their [lives] scripts’ will be ‘written by the government rather than autobiographically.’¹⁷⁴

Similarly, we have a firm judgment that voluntary associations in the domain of civil society – such as churches, universities, and private clubs of various kinds – should generally be free to determine their own policies for admission to, and indeed expulsion from, membership; except when interference is aimed at upholding other demands of justice such as equality of opportunity, associational choices should be free from official interference. This judgment rests on an appreciation of the fact that in a free society, there will be reasonable disagreement about human flourishing and about personal and associational ideals: different persons will endorse different evaluative ideals, and will therefore pursue different projects in association with willing others, aiming at a diverse range of goals. If the conditions for individuals to exercise their rational autonomy are not to be undermined, we must allow these voluntary associations to order their affairs according to ideals, and in pursuit of goals, of their own choosing.

For the same reason, we must also allow these associations to reject potential associates, and indeed expel existing members, according to internal decisions and procedures. As Stuart White writes of the members of such voluntary associations, ‘What makes it *their* association, *serving their purposes*, is that they can exercise [the] “right to exclude.”’¹⁷⁵ The right to freedom of association – including the right to *refuse* association – in the domain of civil society is necessary to protect the plurality of goals and purposes that individuals might choose to pursue in association with willing others. The value that the right to free association ultimately serves, in the domain of civil society as in the domain of personal relationships, is respect for individuals’ autonomy.

¹⁷⁴ Wellman and Cole, *Ethics of Immigration*, pp. 29-31.

¹⁷⁵ Stuart White, ‘Freedom of Association and the Right to Exclude,’ *Journal of Political Philosophy* 5 (1997), p. 373, emphasis added.

This grounding in citizens' interest in exercising their capacity for rational autonomy explains why the right to freedom of association has the structure of what I have been calling *choice-protecting* rights: rather than protecting particular options, such rights protect the right-holder's freedom to choose within what Waldron calls 'certain key areas of decision-making, which have a special importance for individual integrity and self-constitution.'¹⁷⁶ As Jonathan Quong similarly notes, the interest that grounds the 'liberties of the moderns', including freedom of association, is not an interest in the particular option or course of action that is chosen, but rather the 'higher-order interest' that individual citizens have in 'being able to form, revise, and rationally pursue [their] own conception of the good life.'¹⁷⁷

The fact that freedom of association is a choice-protecting right which extends protection to the choice to refuse association might seem to favour Wellman's view. As we have seen, Wellman conceives of the state's legitimacy in enacting, applying and enforcing immigration law in terms of a right which protects the state's freedom to choose an immigration policy, whatever the substantive content of the policy chosen might be. Moreover, he argues for this right to choose an immigration policy by appeal to freedom of association, including the freedom *not* to associate. Hence a state-level right to freedom of association has the appropriate *structure* to do the work that Wellman's argument needs it to do. Nevertheless, this is not sufficient to show that the legitimacy of immigration law can be justified by appeal to freedom of association. If the familiar right to freedom of association is grounded in citizens' personal autonomy, an appeal to that right is only a promising route to establishing the legitimacy of immigration law if citizens' rational autonomy can be shown to require that they be free to collectively choose an immigration policy, without external interference.

¹⁷⁶ Waldron, 'A right to do wrong', p. 81.

¹⁷⁷ Quong, *Liberalism without Perfection*, p. 306. See also Rawls, *Justice as Fairness*, p. 45.

But it is doubtful that any such case could be made. It seems implausible to suppose that any particular citizen's rational autonomy is compromised when, for example, immigrants enter her state's territory without authorization. Moreover, even large-scale illegal immigration does not undermine the general social and political conditions for citizens to exercise their capacity for personal autonomy. Consider the case of unauthorized migration to the United States. According to a recent estimate, the resident population of undocumented immigrants in the United States stands at 11.5 million.¹⁷⁸ Clearly, there is substantial non-compliance with the requirements of US immigration law; that is, substantial disrespect for the legitimacy-right that the United States putatively enjoys in exercising political power over prospective immigrants. It seems that this non-compliance does not, however, undermine the conditions which provide US citizens in general with auspicious conditions to form, revise, and pursue their own conceptions of the good life.

Wellman might reply that since 'people's lives are obviously affected by substantial changes in population density', immigration policy can affect citizens' ability to realize their personal projects and plans of life.¹⁷⁹ But while population density may affect the likelihood that *particular* plans of life and conceptions of the good will be *successfully* realized, it does not affect individual citizens' more basic ability to exercise their capacity for rational autonomy. As I have been arguing, it is this *higher-order* interest in developing and exercising their capacity for personal autonomy which grounds citizens' right to freedom of association and the other 'liberties of the moderns'. What freedom of association protects are the general social conditions for the pursuit, in common with likeminded others, of a wide variety of personal projects and plans of life; by contrast, no one could have a right against others to provide them with the conditions for the successful realization of their *specific* personal projects and

¹⁷⁸ Michael Hoefer, Nancy Rytina and Bryan Baker, 'Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011' (Washington, DC: Office of Immigration Statistics, Policy Directorate, US Department of Homeland Security, 2012).

¹⁷⁹ Wellman and Cole, *Ethics of Immigration*, p. 39.

plans of life, given the fact of reasonable disagreement and diversity about conceptions of the good and plans of life.¹⁸⁰

It seems, therefore, that citizens' participation in making collective choices to exclude prospective immigrants from their state's territory, unlike the choice that members of a church might make to exclude those whom they believe to be heretics, do not fall within the key domains or areas of choice which have special significance for personal autonomy. Indeed, the two domains we discussed earlier – the domains of intimate, caring relationships and of civil society – are not simply two possible domains in which the right to freedom of association might apply. They are the domains in which this right *distinctively* and *appropriately* applies, because of the special significance of choices about association and disassociation within those domains for an individual citizen's rational autonomy. Wellman's strategy of establishing the legitimacy of immigration law by appeal to a putative *state-level* right to freedom of association stretches the right beyond its appropriate domain of application.

By claiming that the exercise of political power over immigration can be justified by appeal to a right familiar from liberal conceptions of social justice whose point is to preserve the conditions for diverse exercises of rational autonomy within a liberal society, Wellman fails to appreciate the fundamental difference between a caring relationship between particular individuals, or a voluntary association in civil society, on the one hand, and a state wielding political power, on the other. It is exactly this difference that Rawls captures when he describes the properly distinct aims of a political society and of an association:

[W]hat characterizes a democratic society is that people are cooperating ... to assure one another *political justice*. Whereas in an association people cooperate as members of the association to achieve *whatever it is* that moved them to join the association, which will vary from one association to another. As citizens they cooperate to achieve their

¹⁸⁰ See Quong, *Liberalism without Perfection*, p. 306 and Rawls, *Political Liberalism*, p. 74 and pp. 310-315.

common shared end of justice; as members of associations they cooperate to realize ends falling under their different comprehensive conceptions of the good.¹⁸¹

An association should be free to set its own admissions policy, whatever it is, because that freedom is what it requires to be free to set its own collective aims, whatever they are. This associational freedom is justified, in turn, because individuals should be free to pursue their own good, however they conceive it, in association with willing others. But no such justification is available for a state to be free to set its own collective aims; we should reject the idea that ‘the state is a discretionary association for the mutual advantage of its members’, such that state power is simply ‘an instrument to further their interests’, including their private or non-public interests.¹⁸²

Instead, we should see the state as having a *morally required* aim if it is to be legitimate: the demands of political legitimacy set limits to the permissible ends of state action. A legitimate state aims to promote the public ends of political justice and the common good, rather than to promote private ends set by some conception of the human good – for example, the comprehensive evaluative ideal endorsed by the majority of citizens – whose validity some citizens subject to the state’s common system of law and living under its basic institutions could reasonably deny. As Rawls elaborates:

[C]itizens as free and equal have an equal share in the corporate political and coercive power of society, and all are equally subject to the burdens of judgment. There is no reason, then, why any citizen, or association of citizens, should have the right to use

¹⁸¹ Rawls, *Political Liberalism*, pp. 40-44 and p. 42n, emphases added. Similar points are made in Rawls, *Justice as Fairness*, pp. 20-21. See also Christine Korsgaard, ‘Commentary on G. A. Cohen and Amartya Sen,’ in M. C. Nussbaum and A. Sen (eds.), *The Quality of Life* (Oxford: Clarendon Press, 1993), p. 61; and Elizabeth Anderson, ‘What Is the Point of Equality?’ *Ethics* 109 (1999), p. 314.

¹⁸² Allen Buchanan, ‘The Internal Legitimacy of Humanitarian Intervention,’ in his *Human Rights, Legitimacy, and the Use of Force* (Oxford: Oxford University Press, 2010), p. 74, emphasis removed.

the state's police power to decide constitutional essentials or basic questions of justice as that person's, or that association's, comprehensive doctrine directs.¹⁸³

Moreover, this view of political legitimacy is not peculiar to Rawls but is shared by other liberal theorists. Thus, Buchanan has argued that we should not view the state as a 'discretionary association' but instead as an 'instrument of justice.'¹⁸⁴ Indeed, Samuel Freeman has pointed out that this commitment to limit legitimate state power to the pursuit of certain aims is common to liberal conceptions of political legitimacy: liberals have long maintained that political power should be understood as a 'public power'; such power, to be legitimate, must be 'impartially exercised and only for the common good'.¹⁸⁵

In fact, this liberal conception of legitimacy is accepted in its essentials by Wellman in his own account of political legitimacy. Wellman holds that a state's legitimacy rests on its 'ability and willingness ... to adequately protect the human rights of its constituents and to respect the rights of all others', most of all by 'establishing and maintaining institutions that satisfactorily protect and respect [the] human rights' of residents in their territorial jurisdiction.¹⁸⁶ We can think of this account of political legitimacy as a *natural duty of justice* view: it appeals to the duty we have, in Rawls's formulation, to support and comply with just institutions that exist and apply to us, independent of any voluntary undertakings.¹⁸⁷

Natural duty of justice views of legitimacy claim, firstly, that a state legitimately exercises political power just when it exercises that power in order to establish and maintain institutions which discharge the demands of justice – such as the demand to respect and protect human rights – because those subject to a state's political power have an enforceable

¹⁸³ Rawls, *Political Liberalism*, pp. 61-2.

¹⁸⁴ Buchanan, 'Internal Legitimacy of Humanitarian Intervention', §§ 2-4.

¹⁸⁵ Samuel Freeman, 'Illiberal Libertarians: Why Libertarianism Is Not a Liberal View,' *Philosophy & Public Affairs* 30 (2001), pp. 121-122, emphases removed.

¹⁸⁶ Altman and Wellman, *International Justice*, p. 3 and p. 13.

¹⁸⁷ See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 114 and p. 334ff.

duty to do what justice demands, and therefore to support and comply with institutions that are necessary to effectively discharge those demands. Secondly, they also claim that exercises of state power *other than* to establish justice and promote the common good are illegitimate: there is no natural duty to assist others in the pursuit of their personal projects and private aims, though of course particular individuals may freely elect to do so in particular cases.

I should note here that Wellman has explicitly expressed doubts about the natural duty of justice as a ground for a conception of political legitimacy, and has attempted instead to ground political legitimacy on a natural ‘samaritan’ duty to confer certain basic benefits – specifically the benefit of human rights protection – on others.¹⁸⁸ However, I doubt that we can identify the specific benefits that his proposed samaritan duty would require us to confer on others without reference to the idea that these benefits are those whose provision others can claim from us *as a matter of justice*. His conception of political legitimacy based on a natural samaritan duty, therefore, turns out to be a species of the natural duty of justice view. Nevertheless, I believe there are serious problems with Wellman’s *human rights-restricted* version of the view. As a natural duty of justice view, we can understand it to be advancing two essential claims: (1) that adequately respecting and protecting human rights is sufficient for state power to be legitimate; and (2) that respecting and protecting human rights is the only proper end of state power. Both claims strike me as problematic.

The first claim holds that the test of adequately protecting the human rights of its constituents and respecting the human rights of all persons – where human rights are understood as protections against standard threats to leading a ‘minimally decent human life in modern society’¹⁸⁹ – expresses a *sufficient* condition for a state to legitimately coerce its ‘individual constituents ... to comply with its duly authorized rules and regulations’, no matter

¹⁸⁸ See Christopher Heath Wellman, ‘Liberalism, Samaritanism, and Political Legitimacy,’ *Philosophy & Public Affairs* 25 (1996) and Christopher Heath Wellman, ‘Toward a Liberal Theory of Political Obligation,’ *Ethics* 111 (2001).

¹⁸⁹ Altman and Wellman, *Liberal Theory of International Justice*, p. 2.

what those legal rules and regulations direct.¹⁹⁰ But while meeting the minimal standard of protecting basic human rights might plausibly immunize a state from *external interference* in its affairs, it seems too weak to state a sufficient condition for a law to impose duties of compliance on its addressees or for coercive enforcement of compliance to be permissible. The second claim, which makes protecting human rights the sole legitimate end of political power, is too restrictive. While it is plausible that political power should serve justice, and therefore that the ‘moral purpose of endowing an entity with political power is to achieve justice’,¹⁹¹ the idea that political power can properly be exercised *only* to ensure the protection of a minimal list of human rights – presumably a proper subset of the full demands of justice – is much less plausible.

We should reject Wellman’s *human rights-restricted* natural duty account and adopt an *unrestricted* form of the natural duty of justice view: political power is legitimate just when it aims at serving the general demands of political justice. Beyond what I have so far argued, I cannot provide a complete defence of this view of political legitimacy here – we will take up this question again in Chapter 5. But if we accept for now that this conception of political legitimacy is sound, then the legitimacy of state *S*’s regime of immigration law cannot be established, as Wellman suggests, simply by noting that (a) *S* adequately protects and respects the human rights of its constituents or otherwise establishes just institutions *within* its territory, and that (b) *S*’s immigration laws and policies were enacted according to the collective choice of its members. A state’s political legitimacy will depend on whether it adequately serves the general demands of justice, not only the requirement to protect human rights. Moreover, the enactment, application, and enforcement of a regime of immigration law *itself counts as an exercise of political power*, and therefore a regime of immigration law can only be legitimate if it

¹⁹⁰ Ibid., p. 3.

¹⁹¹ Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 247.

aims at serving the demands of *justice in immigration*; it is not sufficient for its legitimacy that the enacting state aims to serve the demands of *social* justice.

We are now in a position to conclude our discussion of Wellman's arguments. His appeal to the right to freedom of association, which we have been reading as a defence of the legitimacy of immigration law, improperly assimilates a state's exercise of political power, according to its established procedures of internal collective choice, to an individual's exercise of her capacity for rational autonomy. *Pace* Wellman, states do not have a right of *political* autonomy or self-determination which is fully analogous to an individual right to *personal* autonomy, such that their ability to 'order their own affairs as they please'¹⁹² – including the ability to choose whatever immigration policies they please – should be morally protected just when they adequately protect the human rights of their constituents and respect the human rights of all other individuals. Rather, to be legitimate, the regime of immigration law that a state enacts, applies and enforces must aim at giving justice to both members and non-members.

While Wellman's argument is unsuccessful, I want to suggest how my diagnosis of its infirmities points the way to a more promising strategy for those sympathetic to the idea that in applying and enforcing a regime of immigration law that is enacted according to procedures which express the collective choices of its members, a state exercises political power legitimately. This strategy is to show that justice in immigration requires that there be some connection between a state's immigration policies and the collective choices of its members regarding the flow of non-members into its territory and political membership. In the next two sections, I document how Miller and Walzer pursue precisely this strategy: they argue that justice in immigration calls on each political community to enact immigration policies which facilitate the successful realization of its collectively-chosen national projects and which

¹⁹² Altman and Wellman, *Liberal Theory of International Justice*, p. 148 and p. 162.

preserve its distinctiveness as a national or cultural community, according to a collectively-chosen or otherwise shared conception of that community's distinctive character.

IV. TERRITORIAL RIGHTS AND NATIONAL SELF-DETERMINATION

Recall that Miller's defence of the legitimacy of immigration law invokes the idea of the territorial rights of a modern state, a constituent element of which is a 'general right to decide who is admitted into [its] territory' – that is, a legitimacy-right to exercise political power in enacting, applying, and enforcing a regime of immigration law.¹⁹³ Miller's arguments justifying this element of a state's territorial rights, then, represent his attempt to defend the legitimacy of immigration law. We can discern two distinct sets of arguments that Miller advances to justify this element of a state's territorial rights. I will argue that the first set of arguments fail, while the second set depend on the plausibility of Miller's favoured conception of justice in immigration, which in turn depends on the plausibility of his internationalist conception of global justice.

Miller's first set of arguments attempt to establish the legitimacy of immigration law by appeal to the idea that a state's legitimate exercise of political power over immigrant admissions is partly *constitutive* of its 'right of jurisdiction', or as I will also say, its *territorial jurisdiction*. For Miller, in the international system of territorial states each state exercises political rule over a defined territorial jurisdiction, such that 'a person who stands on any particular piece of ground is rightfully subject to the authority of the state whose laws apply there, if there is such a state', and that this authority includes 'the right to require him to leave'.¹⁹⁴ According to this way of conceptualizing the exercise of political authority or political power over immigration, it is primarily the authority or power 'to decide who resides

¹⁹³ Miller, *National Responsibility*, p. 202.

¹⁹⁴ Ibid., p. 215.

on a particular part of the earth's surface and who does not'.¹⁹⁵ Miller argues, in addition, that a state's exercise of political power over immigration is a necessary condition for territorial jurisdiction to adequately *fulfil its distinctive function*: according to this argument, 'a system of territorial authority cannot function without some control over who falls within its scope.'¹⁹⁶

We can quickly reject the argument which urges that the state's power to decide who can (enter and) remain on the territory is simply a constitutive part of the state's general territorial jurisdiction. What we are interested in is the *legitimate* exercise of political power; while the power to expel persons currently present in the territory may be *conceptually* constitutive of territorial jurisdiction, we cannot therefore assume that this power of expulsion is a legitimate exercise of political power. This leaves for our consideration the functional argument – the claim that the state's exercise of political power over entry into its territory is necessary for it to discharge the functions that ground its legitimate exercise of political power within its territory.

Clearly, to assess this argument, we must interrogate the prior question of how a state's territorial jurisdiction can be shown to be legitimate, and the functions served by this way of organizing the application of political power. Miller suggests that assigning exclusive and supreme jurisdiction within a determinate geographical area to one and only one wielder of political power is justified because of the great benefits that this way of organizing the application of political power makes available by comparison with its alternatives. These benefits define the functions whose performance makes a state's territorial jurisdiction legitimate, and include the facilitation of economic activity and the provision of various public goods such as environmental protection and public transportation systems. This appeal to the

¹⁹⁵ Ibid., p. 202.

¹⁹⁶ Ibid., pp. 215-216.

overall benefits made available by adopting one alternative over another might explain why Miller calls his account ‘utilitarian in character’.¹⁹⁷

However, as Miller himself notes in an earlier discussion of political legitimacy, a plausible account of legitimate political power will reject ‘the utilitarian position that all policies that produce a net gain in aggregate welfare are justified’.¹⁹⁸ To claim that political power is justified merely when it produces aggregate gains in welfare, construing welfare widely to include just any kind of interest, fails to take seriously the standing of those subject to political power as free persons with deliberative capacities, who can decide for themselves what forms of human flourishing to pursue. Miller therefore suggests that a plausible benefits-based account must restrict its focus to the fulfilment of human *needs* or ‘*vital* human interests’, according to a conception of human needs or vital interests that is ‘widely shared.’¹⁹⁹

Along the lines of his earlier views, we can reformulate Miller’s justification of territorial jurisdiction as a restricted benefits-based account: territorial jurisdiction is justified because this way of organizing the application of political power makes available the benefit of meeting the vital human interests or needs of those over whom political power is exercised. This reformulated account is very close to Wellman’s samaritan account of political legitimacy: everyone within the geographical area which comprises a state *S*’s territory is legitimately subject to *S*’s jurisdiction because each person has a natural duty to confer certain vital or otherwise morally important benefits to others, and establishing *S*’s exclusive and supreme jurisdiction is the only or the dramatically best way to secure the provision of those benefits.

Unfortunately, as we have seen, this samaritan account of legitimate political power and its jurisdiction is vulnerable to serious objections. We should instead embrace a view of political legitimacy which appeals to the (unrestricted) natural duty of justice, rather than a

¹⁹⁷ Ibid., p. 215.

¹⁹⁸ David Miller, ‘The Justification of Political Authority,’ in D. Schmidtz (ed.), *Robert Nozick* (Cambridge: Cambridge University Press, 2002), pp. 26-27.

¹⁹⁹ Ibid., p. 25 and p. 27.

natural duty to confer vital benefits on others. Certainly, the mere conferral of benefits or net gains is not sufficient for political legitimacy, but limiting the relevant benefits to basic needs or vital interests is too restrictive: the relevant benefits should instead be understood as the benefits that justice *generally* demands that we each assist in providing to others, not simply the benefits that justice *most urgently* demands that we provide to others. Such a general *justice-based* justification of territorial jurisdiction has been developed by Quong, who points out:

Institutions which distribute resources, establish and protect property rights, and capture and punish rights violators require, in order to be effective, exclusive jurisdiction over a given territory. Justice is very unlikely to be realized when there are competing institutions which issue different rules regarding property rights or criminal law within the same territory. Justice is most likely to be established if, for any given area, there is a single legitimate authority with the power to protect and enforce people's rights and ensure a just distribution of resources or advantages.²⁰⁰

On this view, the territorial jurisdiction of a state is legitimate when it adequately discharges the function which justifies its exclusive jurisdiction over its territory, namely the function of maintaining justice among the inhabitants of the territory.

With this justice-based account of justified or legitimate territorial jurisdiction in hand, it might seem that we can establish the legitimacy of states' exercise of political power over immigration by showing that the ability to determine which persons can enter and remain within a state's territory is generally necessary for that state to establish justice within that territory. But once we have accepted as our fundamental account of political legitimacy a conception based on the natural duty of justice, it is unclear why the legitimacy of a state's regime of immigration law should be exclusively dependent on whether it aims to establish justice among those persons *within* its territory – that is, whether it aims to serve *social* justice.

²⁰⁰ Quong, *Liberalism without Perfection*, pp. 129-130. See also Jeremy Waldron's discussion of territory in his 'Special Ties and Natural Duties', *Philosophy & Public Affairs* 22 (1993), p. 15.

Indeed, it is natural to think that the legitimacy of a regime of immigration law should (also) depend on whether it serves justice *in immigration*.

Miller seems to partially recognize this himself when he makes the admission of refugees – conceived broadly to include all prospective immigrants whose human rights are insecure in the territory of their ordinary residence²⁰¹ – a condition of the legitimacy of immigration law. For Miller, the duty to protect the human rights of all persons in the world is a central demand of global justice, and this duty implies the following principle of justice in immigration: each state should do its part in a collective effort among all human rights-respecting states to resettle refugees in their territories. This duty to help resettle refugees correlates to their ‘very strong ... right to be admitted to a place of safety’.²⁰² Presumably, it is this principle of justice in immigration which explains why the rights of refugees ‘place limits on [the] exercise’ of a state’s territorial rights:²⁰³ a state wielding political power over a territorial jurisdiction has a duty of justice in immigration to protect human rights by admitting refugees to its territory, and the regime of immigration law it enacts must aim to serve this justice-given goal as a condition of its legitimacy.

Moreover, notice that Miller’s conception of the limits on a state’s right to choose its immigration policy, which takes the duty to admit refugees to ‘cast a shadow over’, but not to ‘trump’, a state’s territorial rights illustrates how *aiming* to serve justice can be a condition of legitimacy while leaving conceptual space between the two normative ideas. While a state must take its duty to admit refugees seriously if its regime of immigration law is to be legitimate, this requires only that it take ‘reasonable steps’ to contribute to the protection of human rights by resettling refugees or accepting asylum seekers.²⁰⁴ This leaves each state with a range of decisions within which it can legitimately make a collective choice about what exact

²⁰¹ Miller, *National Responsibility*, pp. 224-225.

²⁰² Ibid., p. 227.

²⁰³ Ibid., p. 221.

²⁰⁴ Ibid.

refugee resettlement or asylum policy to enact. As Miller puts it, the ‘final judgment’ about immigration policy regarding refugees and asylum seekers rests with the members of the receiving state; especially in the absence of any formal mechanisms for burden-sharing among rights-respecting states, each state may legitimately determine the point at which ‘they have ... done their fair share of refugee resettlement.’²⁰⁵

Miller’s discussion of the constraints that the duty to admit refugees places on the legitimate range of choice that states have in enacting immigration law seems, then, to resonate with the account of the legitimacy of immigration law I have been arguing for: a state’s regime of immigration law is legitimate when its constituent laws and policies aim to serve the demands of justice in immigration. Miller’s first set of arguments, which claim either that the legitimate exercise of political power over immigration is constitutive of a state’s territorial jurisdiction, or that a regime of immigration law is legitimate just when it aims to serve *social* justice, are inadequate. Miller’s second set of arguments is more promising: these arguments attempt to establish the legitimacy of immigration law precisely by showing how justice in immigration requires that there be some connection between the collective choices that the members of a state make and the immigration policy of that state.

Recall that Miller’s account of the legitimacy of immigration law is embedded in a broader account of the territorial rights of states. These territorial rights, Miller stresses, are *held* by peoples or *nations*, though a particular nation’s territorial rights are typically *exercised* by the state or government which is its representative and instrument.²⁰⁶ Presumably, then, a state can only legitimately exercise ‘the right to control borders’ – as one element of its territorial rights – when it is acting as the representative or instrument of the nation which occupies its territory. However, as we have seen, if political power is to be legitimate, it must aim to serve justice. We should therefore reformulate Miller’s claim as follows: a state legitimately exercises

²⁰⁵ Ibid., p. 227.

²⁰⁶ Miller, ‘Territorial Rights’, p. 253 and pp. 257-258.

political power over immigration only when it acts to advance the *just* aims and purposes of the nation which occupies its territory.

This raises the question of what the just purposes of a national community might be, and leads us to consult Miller's conception of justice in immigration. As I understand it, this conception claims that a state's immigration laws are just when (i) they take seriously the duty to resettle refugees and (ii) they are linked to the 'general goals' and collective projects of the national community the state represents, provided these collective projects and goals 'reflect existing national values' and are selected 'through a continuing process of democratic debate' or at least some other kind of genuinely national or collective decision-making.²⁰⁷ We might say that for Miller, a state's immigration laws and policies are just when they facilitate the *national self-determination* of the nation it represents. This ideal of national self-determination has two elements: (a) the reproduction and preservation of a distinctive national identity and culture; and (b) the ability of the members of a nation to collectively and exclusively settle matters that are important to them.²⁰⁸

Miller points to three ways in which immigration law can facilitate national self-determination. Firstly, reproducing or preserving the national identity and culture may require controlling the level of population density because, for example, historic buildings and landscapes which have special significance for the national identity and culture are often affected for better or worse by the level of population density.²⁰⁹ Secondly, the success of collectively-chosen national goals – such as various economic, social and environmental policies – will often depend on not only the level of population density but also the age and skill profile of the (working) population. Thirdly, because the composition of the body of citizens changes when new members are added through immigration, if current members are

²⁰⁷ Miller, *National Responsibility*, p. 222.

²⁰⁸ David Miller, *On Nationality* (Oxford: Clarendon Press, 1995), p. 100.

²⁰⁹ Miller, 'Territorial Rights', p. 265.

unable to collectively choose which persons are added as new members through immigration, they will suffer ‘a significant loss of control’ which undermines their self-determination.²¹⁰

This last claim requires some clarification. The rough idea is that admitted immigrants will have an equal say in the processes by which public policy is enacted and collective goals are chosen, and that these immigrants may not share the values already held by current members of the nation. We should, however, distinguish between two readings of this argument, one implausible and the other more promising. The implausible reading holds that the loss of control takes place just when current members are unable to control or influence future choices of collective goals and to influence which shared values will be held by members of the nation in the future. It is an unattractive construal of national self-determination which deems national self-determination to have failed simply when a nation’s collective goals and shared values are discontinuous with the national goals and shared values of previous generations. To see this, consider that new members can be added to the body of citizens not only through immigration but also by the birth of new generations. We can think of these new or as yet unborn generations as, in Samuel Scheffler’s phrase, ‘immigrants from the future.’²¹¹ It is natural, and indeed desirable, that such generational change is accompanied by changes in the national culture, in the nation’s shared values, and in the national projects that are collectively chosen and pursued. For national self-determination to be ‘a reasonable or even a coherent’ ideal, it cannot be understood to involve resistance to change over time.²¹²

A more plausible construal of Miller’s point will restrict the argument to (current and potential) members of a nation who are contemporaries. When new members who have been added through immigration *within the lifetime* of existing members – or, in the case of addition through birth, new members who live in *overlapping* generations – hold very different values

²¹⁰ Ibid.

²¹¹ Samuel Scheffler, ‘Immigration and the Significance of Culture’, in his *Equality and Tradition: Selected Essays* (Oxford: Oxford University Press, 2010), p. 266.

²¹² Ibid., p. 267.

from existing members, the previous coherence of the national culture is fragmented. In this case, national self-determination is not undermined because of a loss of collective control over future policy choices; what we have is not an obstacle to the collective autonomy of a group of co-nationals, understood as the process of ‘shaping the world in association with others with whom they identify.’²¹³ Rather, national self-determination is undermined because within the territory in question, and at a given point of time, we no longer have a single group who all identify with each other and share a common set of values. The worry then is that the conditions for the constitution of the relevant kind of collective ‘self’ can be undermined by certain kinds of immigration.

Notice that Miller’s conception of justice in immigration rests on a distinctive conception of global justice which is both internationalist and nationalist. It is *internationalist* in rejecting globalist liberalism and holding that the principles of social justice – that is, principles which apply among co-nationals – differ fundamentally from the principles of justice which apply across states: while there is a universal duty to respect and protect human rights, co-nationals owe each other special duties to meet each other’s needs and vital interests. It is *nationalist* in grounding the special duties of social justice in the moral significance of shared nationality and in taking one of the special duties of social justice to be that of meeting co-nationals’ vital interests in achieving collective – that is, national – self-determination.

It is important to note how the special duties of justice co-nationals owe each other play an indispensable role in Miller’s conception of justice in immigration: without invoking these special duties, it is always possible that the interests of prospective immigrants in being admitted will outweigh the interests of current citizens in self-determination. Only if we recognize these special duties can we show that, as Miller puts it, ‘the claims of would-be

²¹³ Miller, *On Nationality*, p. 88.

immigrants ... do not have to be counted in the same way as the interests of those who are already citizens'.²¹⁴

While Miller's second set of arguments are more promising as an account of the legitimacy of immigration law than his first set of arguments or indeed than Wellman's arguments, they unavoidably depend on the plausibility of his conception of justice in immigration and by extension of his conception of global justice. This makes Miller's argument vulnerable to more general doubts about his distinctive conception of global justice. In particular, the central role that *nationality* plays in his conception of justice leaves it open to the following challenges: firstly, we could deny that a national community has any claim or right in justice to conscript unwilling persons to the cause of preserving its distinctive identity and culture, or to promote its national projects and goals, and that indeed, any such conscription would be deeply *unjust*; secondly, we could deny that special obligations between co-nationals are matters of *justice* capable of generating political obligations, rather than obligations that are, from the political point of view, freely assumed.²¹⁵

At this point in the argument, I want to stress how far our discussion has come from the right-versus-right paradigm of the rights-based approach. Miller's disagreement with Carens and Cole about the political theory of immigration is not helpfully understood in terms of a clash between defenders of two competing rights. Rather, their disagreement can ultimately be traced to their fundamentally divergent views about global justice: Miller, on the one hand, endorses an internationalist conception of global justice which assigns a central role to national self-determination and co-national partiality, while Carens and Cole endorse a globalist conception of global justice which denies or substantially limits the moral significance of nationality.

²¹⁴ Miller, *National Responsibility*, p. 223.

²¹⁵ I will say more about these objections to nationality-based internationalism in Chapter 3. For a related discussion, see Richard W. Miller, *Globalizing Justice: The Ethics of Poverty and Power* (Oxford: Oxford University Press, 2010), pp. 37-38.

V. IMMIGRATION LAW AND COMMUNAL SELF-DETERMINATION

An examination of Walzer's defence of the legitimacy of immigration law will similarly show that his disagreement with theorists like Carens and Cole can be traced to deep disagreements about global justice. Indeed, Walzer's account shares many affinities with Miller's. As I will understand them, they both see the legitimacy of immigration law as dependent on its ability to serve justice in immigration, with an immigration policy understood to be just when (a) it facilitates national or communal self-determination; and (b) it helps to protect the human rights of refugees. These points of agreement between Miller and Walzer reflect their agreement about questions of global justice: both endorse conceptions of global justice that are both nationalist and internationalist.

Admittedly, Walzer offers a relatively slender argument for his claim that 'something like the sovereign state must ... claim the authority to make its own admissions policy': his explicit defence of the state's 'right to choose an admissions policy'²¹⁶ simply insists that culturally distinctive and specially cohesive communities could not exist without giving territorial states such a right. Thus, he observes that the 'distinctiveness of cultures and groups depends upon closure', and argues that 'if this distinctiveness is a value', then territorial states enclosing culturally distinctive groups may legitimately exercise political power to control entry into their territories.²¹⁷ Elsewhere, he claims that 'communities of character', with members who have 'some special commitment to one another and some special sense of their common life', must be represented by a territorial state which is able to enact and enforce its

²¹⁶ Walzer, *Spheres of Justice*, p. 61.

²¹⁷ Ibid., p. 39.

own immigration policies and laws. Walzer fears that without this institutional protection, such communities of character could not stably endure.²¹⁸

Taken on its own, this argument is unconvincing. As we have seen, to show that territorial states *legitimately* exercise political power in enacting, applying and enforcing a regime of immigration law is to show that the addressees of immigration law have duties to comply with its requirements, and that states can permissibly use coercion to enforce their compliance. Any defence of the legitimacy of immigration law must therefore explain how prospective immigrants and other addressees of immigration law could be under such duties of compliance and how they could lose their usual immunity against justified coercion. An appeal to the importance of maintaining a plurality of distinctive cultures and communities across the world, as a valuable end in itself, does not seem sufficient to ground political legitimacy. A general conception of political legitimacy which allows for duties of compliance to be imposed and licenses coercion to enforce compliance simply when the law serves some valuable outcome is too weak: it fails to adequately accommodate the respect that is due to those subject to law as persons who can rely on their own deliberative capacities to set ends for themselves based on their judgments about what is valuable.

My suggestion is therefore that we should understand Walzer to claim not simply that the preservation of distinctive cultural communities is *valuable*, but that it is a central requirement of *justice*. It is because a regime of immigration law unilaterally enacted and enforced by a particular state serves (this specific requirement of) justice in immigration that it is legitimate. Although in his discussion of immigration he does not explicitly invoke the natural duty of justice view of political legitimacy, when we inspect Walzer's writings discussing political legitimacy more generally, we find that he defends the legitimacy of territorial states by appealing to their importance for discharging the demands of justice.

²¹⁸ Ibid., pp. 61-62, emphasis removed.

Consider that in discussing the ‘moral standing’ – that is, the political legitimacy, of states, Walzer writes:

The rights of states rest on the consent of their members. But this is consent of a special sort. State rights are not constituted through a series of transfers from individual men and women... Over a long period of time, shared experiences and cooperative activity of many different kinds shape a common life. “Contract” is a metaphor for a process of association and mutuality, the ongoing character of which the state claims to protect against external encroachment. The protection extends not only to the lives and liberties of individuals but also to their shared life and liberty, the independent community they have made... The moral standing of any particular state depends upon the reality of the common life it protects and the extent to which the sacrifices required by that protection are willingly accepted and thought worthwhile. If no common life exists, or if the state doesn’t defend the common life that does exist, its own defense may have no moral justification.²¹⁹

Although he uses the voluntaristic language of social contract or consent theory, it is clear that the conception of political legitimacy Walzer defends here is not voluntaristic. Rather, a state’s legitimacy is taken to depend on its fulfilment of two functions: firstly, protecting the common life of the national or ‘historic community’²²⁰ that (mostly) lives within the territory of the state in question; and secondly, protecting the human rights – the ‘lives and liberties’ – of those who reside within the state’s territory. These dual protective functions are not simply valuable projects, but are *requirements of political justice*; indeed, for Walzer, they constitute the most basic and universal requirements of justice.

Here it is important to note that although Walzer at times seem to endorse simple relativism about justice – he writes, for example, that ‘[a]ll distributions are just or unjust

²¹⁹ Walzer, *Just and Unjust Wars*, p. 54.

²²⁰ Walzer, ‘Moral Standing of States’, p. 220.

relative to the social meanings of the goods at stake'²²¹ – he is best understood to embrace what he calls *reiterative universalism* about justice.²²² This account of (global) justice takes justice to be 'a social invention, variously made',²²³ and therefore expects global diversity of views about justice, but nevertheless recognizes two universal principles.

The first universal principle calls for respect for persons precisely as 'moral makers' – 'creative men and women' who invent and create different ways of communal life, with distinctive cultures and moral codes.²²⁴ It is a principle of respect for 'the rights of ... men and women to live as members of a historic community and to express their inherited culture through political forms worked out among themselves'.²²⁵ We might call this a principle of *respect for communal self-determination*. This focus on the self-determination of culturally and historically distinct communities makes Walzer's conception of global justice *nationalist*. Complementing this first universal principle is a second requiring that the basic needs of all individuals be met and their *human rights protected*. Walzer does not offer a specific list of the human rights he believes are covered by this second universal principle, but it seems to cover only a moral minimum of protections against genocide, torture, ethnic cleansing, slavery, famine, and pandemic disease.²²⁶

These two universal principles of Walzer's reiterative universalism correspond to the two functions that any *particular* state must discharge if it is to have 'moral standing'. Moreover, Walzer argues that the territorial jurisdiction of states *in general* can be justified by showing that territorial jurisdiction is normally required to adequately discharge these functions. Firstly, communal self-determination cannot be achieved if the state which

²²¹ Walzer, *Spheres of Justice*, p. 9.

²²² See Walzer, 'Nation and Universe', in his *Thinking Politically*.

²²³ *Ibid.*, p. 192.

²²⁴ *Ibid.*, p. 189 and p. 199.

²²⁵ Walzer, 'Moral Standing of States', p. 220.

²²⁶ See Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame, IN: Notre Dame University Press, 1994) and Michael Walzer, 'Beyond Humanitarian Intervention,' in his *Thinking Politically*.

represents a particular community lacks territorial jurisdiction. On many matters over which a community might exercise self-determination jurisdiction over a continuous geographical area seems necessary for effective political action, and hence, as Walzer puts it, ‘to give up the [territorial] state is to give up any effective self-determination.’²²⁷ Secondly, states must control territory if they are to protect the human rights of their members. Partly, this reflects the importance of land as a resource – land provides ‘living space’ and is more generally ‘a resource for the destitute and the hungry.’²²⁸ But territorial states do not simply control land as a resource; their territorial *jurisdiction* allows them to enact and enforce a human rights-respecting system of law throughout their territories. In this sense, territory is a ‘*protected* living space.’²²⁹

I suggest that we understand Walzer’s account of the legitimacy of immigration law as having much the same structure as his account of the legitimacy of the territorial state: a regime of immigration law is legitimate if it aims to serve certain basic and universal requirements of justice in immigration, while the general practice of states applying and enforcing regimes of immigration law enacted by procedures sensitive to internal choices alone is legitimate when we consider that this form of political organization is necessary for, or best promotes, the achievement of the basic requirements of justice in immigration.

Notice that this account of the legitimacy of immigration law is incomplete without at least some broad specification of what justice in immigration might require. Walzer outlines two basic constraints which he believes justice imposes on the choices that members of a national or political community make about immigration policy. This ‘double control’ requires, firstly, that the chosen policy reflect, or at least be consistent with, ‘the meaning of membership to the current members’, and secondly, that the policy be consistent with ‘the

²²⁷ Walzer, *Spheres of Justice*, p. 44.

²²⁸ Ibid., pp. 44-45.

²²⁹ Ibid., p. 45, emphasis added.

principle of mutual aid', which requires in the case of immigration policy that refugees be granted asylum when the cost to communal self-determination is not too high.²³⁰ Presumably, the general legitimacy of regimes of immigration law that are unilaterally enacted, applied and enforced by separate states can then be defended by observing that the two principles of justice in immigration – or at least the first principle – are most likely to be respected when the state, which represents the historic community within its territory, exercises unilateral choice over its immigration policy.

Notice also that the two principles of justice in immigration that Walzer defends rest on the two universal principles of his conception of global justice, namely respect for communal self-determination and protection for human rights. The requirement that a state's immigration policies should reflect the understanding of communal membership shared by its existing members is intended to press immigration law and policy into the service of communal self-determination; on this view, '[t]he restraint of entry serves to defend the liberty and welfare, the politics and culture of a group of people committed to one another and to their common life.'²³¹ The requirement that immigration policies give reasonable consideration to the claims of refugees for asylum and resettlement reflects the more general duty of states to ensure that the human rights of all persons are protected by ensuring that each person has access to a 'place where a reasonably secure life is possible'.²³² While Walzer prefers to formulate this principle in terms of basic needs – he calls on states to honour the claims of 'necessitous strangers'²³³ who are 'destitute and hungry, persecuted and stateless'²³⁴ – refugees are presumably 'necessitous' in the sense required to trigger the principle precisely because

²³⁰ See *Ibid.*, p. 40, pp. 50-51, p. 52, and pp. 61-62.

²³¹ *Ibid.*, p. 39.

²³² *Ibid.*, p. 50.

²³³ *Ibid.*, p. 47.

²³⁴ *Ibid.*, p. 45.

their human rights, as identified by Walzer's minimal list, are under threat in their normal place of residence.

Moreover, as we saw with Miller's account, Walzer can only establish the justice of policies which protect communal self-determination, even when they might set back the important interests of prospective immigrants in improving their economic prospects or in accessing opportunities otherwise unavailable to them, by appealing to some idea of special obligations among co-members of a historic or national community. This 'moral specialization' which permits and indeed requires each of us to have 'special concern' for our 'fellow citizens' – while acknowledging that members of *other* communities are equally permitted and required to have special concern for their fellow citizens – is also an avowed element in Walzer's reiterative universalism.²³⁵ We might say that his insistence on special duties of justice among persons who share membership in a sub-global political community makes Walzer's account of global justice *internationalist*.

It seems, then, that Walzer's defence of the legitimacy of immigration law relies on the plausibility of his conception of justice in immigration and of his nationalist and internationalist conception of global justice more broadly. In this way, his account is vulnerable to two kinds of critical attack: firstly, he must defend his view against those who are sceptical that justice requires us to protect the self-determination of 'communities of character'; secondly, he must defend his view against those who deny that co-nationals or co-citizens owe each other special duties of justice. As with Miller's account, we can best understand and assess Walzer's arguments about immigration by investigating the important points at which his arguments rely on his distinctive claims about global justice. Moreover, Walzer's disagreements with Carens and Cole are not best understood as disagreements about which of two competing rights should prevail, but as symptoms of a deeper disagreement

²³⁵ Walzer, 'Nation and Universe', pp. 197-198.

between a proponent of a nationalist and internationalist conception of global justice, and advocates of a globalist liberal conception of global justice.

VI. CONCLUSION

I have argued that the rights-based approach leads us astray in various ways. It blinds us to an important distinction between the legitimacy of immigration law and the justice of particular immigration policies. It misleads us by encouraging the thought that the legitimacy of immigration law can be defended by appeal to the rights familiar from the context of social justice, neglecting the significant difference between associational freedom and the exercise of state power. It obscures the fundamental basis of the disagreement between theorists like Miller, Wellman and Walzer, on the one hand, and Carens and Cole, on the other. For all these reasons, we should abandon the rights-based approach to the political theory of immigration.

Over the next three chapters, I will offer a novel political theory of immigration by following a different approach. I will distinguish the tasks of developing a conception of justice in immigration, on the one hand, and an account of the legitimacy of immigration law, on the other. In approaching the first task, I will begin by elaborating a distinctive conception of global justice which I call cooperation-based internationalism. I will then ask what principles of justice in immigration we can draw from that background conception of global justice. With this conception of justice in immigration in hand, I go on to ask how we might vindicate the legitimacy of immigration law.

CHAPTER THREE

Global Justice and Cooperation-based Internationalism

I. JUSTICE IN IMMIGRATION: A GLOBAL JUSTICE-BASED APPROACH

In previous chapters, I argued that the rights-based approach to the political theory of immigration tends to obscure the true bases of disagreement between proponents of different views. If we are to make progress, we should avoid approaching our subject in terms of a conflict between an individual's right to free migration and a state's right to choose its own immigration policy. Instead, I suggested that we should first be careful to distinguish between a debate about justice in immigration and a separate debate about the legitimacy of immigration law when it is enacted by the internal political choices of a territorial state. I further suggested that disagreements about justice in immigration can be traced to deeper disagreements about what justice requires beyond state borders. We should therefore adopt a *global justice-based approach* to justice in immigration, developing a conception of justice in immigration by considering the implications of our background conception of global justice.

Over the next two chapters, I will identify the most plausible conception of global justice, and proceed to elaborate principles of justice in immigration against the background of that conception. In this chapter, I will develop an *internationalist* conception of global justice, and defend it against its *globalist liberal* rivals, both *non-relational* and *relational*. I proceed to distinguish between my *cooperation-based* conception of internationalism and other prominent internationalist views, which account for what Mathias Risse calls the 'normative peculiarity of the state'²³⁶ in terms of its exercise of *coercive political power* or in terms of the importance of *national identity*. My core argument will be that citizens sharing membership in a

²³⁶ Mathias Risse, *On Global Justice* (Princeton, NJ: Princeton University Press, 2012), p. 10.

state owe each other special duties of social justice in virtue of their joint participation in a system of cooperation which provides the social conditions under which they can develop and exercise their capacity for rational autonomy. I go on to argue that we can articulate principles for the international order which supplement, but do not abolish and displace, the principles of social justice that apply among members of a state. In this way, we can formulate an internationalist conception of global justice that appropriately recognizes the normative distinctiveness of shared membership in a state while drawing on insights from both non-relational and relational globalists.

II. GLOBALISM AND INTERNATIONALISM

I begin my argument by characterizing the fundamental distinction between *globalism* and *internationalism* about justice, elaborating the content of a globalist liberal conception of global justice, and distinguishing between relational and non-relational versions of the globalist liberal conception. Although I believe that the distinctions I draw between globalist and internationalist conceptions, and between relational and non-relational globalist conceptions, are already widely relied on or assumed by different participants in the current theoretical debate on global justice, it is worth spending time on clarifying these distinctions partly because the terminology I am using may be unfamiliar, and partly because many interventions in the global justice debate have, in my view, failed to identify the most fundamental and salient divisions between different views. In anticipation of impatience from my readers, I can only plead, with Derek Parfit, that '[t]axonomy, though unexciting, needs to be done.'²³⁷

In identifying the central divide as that between globalist and internationalist conceptions of global justice, I broadly follow Andrea Sangiovanni, who writes:

²³⁷ Derek Parfit, 'Equality and Priority', *Ratio* 10 (1997), p. 221.

According to *globalists*, equality as a demand of justice has global scope. *Internationalists*, by contrast, believe that equality as a demand of justice applies only among members of a state. This does not commit the internationalist to skepticism regarding the existence of other principles of distributive justice at the global level.²³⁸

Sangiovanni draws this distinction within a discussion of *distributive* or ‘socioeconomic’ justice. To the extent that he takes the disagreement between globalist and internationalist conceptions to hang on their differing commitments about the scope of egalitarian principles regulating the distribution of economic goods, his distinction is too narrow for our purposes.²³⁹ Our subject extends beyond socioeconomic justice to cover political justice more broadly.

Notice that distributive equality as a demand of justice, understood broadly to include demands to constrain or mitigate as well as to eliminate economic inequality,²⁴⁰ is a principle familiar from certain conceptions of *social* justice – a paradigm example in contemporary political philosophy would be the difference principle as a requirement of Rawls’s egalitarian liberal conception of justice as fairness.²⁴¹ But principles regulating distributive shares do not, of course, exhaust the concerns of social justice: other important principles familiar from liberal conceptions of social justice include principles requiring equal civil and political rights and liberties, and principles requiring freedom of occupation and equality of opportunity in some form – again, Rawls’s principles requiring equal basic liberties and fair equality of opportunity are familiar examples.²⁴² Sangiovanni’s focus on *equality* as a demand of justice is

²³⁸ Andrea Sangiovanni, ‘Global Justice, Reciprocity, and the State’, *Philosophy & Public Affairs* 35 (2007), pp. 6-7.

²³⁹ See *ibid.*, p. 3n3. It is unclear if Sangiovanni is only concerned with economic inequalities since while he mentions ‘socioeconomic justice’, he also declares his position to be neutral with respect to the distribuendum of distributive justice.

²⁴⁰ See the idea of a ‘broadly egalitarian’ principle in Risse, *Global Justice*, p. 23.

²⁴¹ See John Rawls, *A Theory of Justice*, (Cambridge, MA: Harvard University Press, 1971), pp. 75-82.

²⁴² See *ibid.*, pp. 53-54 and p. 266. See also David Miller, ‘Social justice *versus* global justice?’, in his *Justice for Earthlings: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2013) for the contention that, at

also overly narrow for our purposes, since some conceptions of social justice do not recognize distributive equality as a requirement, arguing instead for the meeting of basic needs or of some other non-comparative threshold as the principle regulating just patterns of distribution.²⁴³

I propose that we draw the distinction more broadly: internationalists affirm, while globalists deny, that distinctive principles of social justice properly apply only among those who share membership in a state. Moreover, for internationalists, these principles of social justice are *fundamental* – that is, not derivative principles which are significant only because they facilitate the realization of more fundamental global principles. Note that in accepting that the state is normatively peculiar in this way, internationalists need not deny that besides the principles of social justice there are other principles of justice that apply among populations beyond the borders of a state – among all persons in the world, for example, or among participating members in various practices of international cooperation. Hence, the claim that outside of the state we are – beyond ‘a human rights/humanitarian floor’ – in a ‘justice-free zone’ is not a distinctive feature of internationalism as I shall understand it.²⁴⁴

Indeed, internationalists need not even insist that principles of justice within the state are more egalitarian than global principles of justice. There is no reason why internationalists could not accept, for example, Aaron James’s principle of International Relative Gains, which requires that the gains of international trade are equally distributed among trading countries,

least in twentieth-century democratic societies, social justice was ‘the banner under which the battle for equal rights, equality of opportunity [and] the welfare state ... was fought within each separate state’ (p. 165).

²⁴³ For arguments in favour of a basic needs-based distributive principle of social justice, see Elizabeth Anderson, ‘What Is the Point of Equality?’ *Ethics* 100 (1999); David Miller, *Principles of Social Justice* (Cambridge, MA: Harvard University Press, 1999), Ch. 2 and Ch. 10; and Thomas Pogge, *World Poverty and Human Rights*, 2nd ed. (Cambridge: Polity Press, 2008), Ch. 1.

²⁴⁴ Andrea Sangiovanni, ‘Justice and the Free Movement of Persons’, in D. A. Hicks and T. Williamson (eds.), *Leadership and Global Justice* (London: Palgrave Macmillan, 2013), p. 141.

unless unequal gains flow to poor countries.²⁴⁵ Internationalists need only claim that the principles of social justice are not derived from any such global principles, but rather are sui generis principles which regulate, and are responsive to, a distinctive moral subject – namely the social and political form that the modern state constitutes.²⁴⁶

Globalists, by contrast, hold that while principles of social justice are often thought to apply among the members of an independent political society, this is a mistake; properly conceived, they apply among all persons in the world.²⁴⁷ As one prominent globalist puts the point, ‘the intuitive idea’ behind globalism is that ‘it is wrong to limit the application of ... principles of social justice to the nation-state; instead, these principles ought to apply globally.’²⁴⁸ Another influential globalist theorist urges that the principles of justice ‘standardly employed in the domestic realm’ should be understood as principles with global scope.²⁴⁹ It seems then that David Miller’s characterization of the core globalist contention as the claim that ‘theories first developed to explain what social justice means within state boundaries can be stretched to apply at global level’ is apt.²⁵⁰

With this understanding of the basic distinction between internationalism and globalism in hand, we can focus our attention on the kind of globalist view that has been most

²⁴⁵ Aaron James, *Fairness in Practice: A Social Contract for a Global Economy* (Oxford: Oxford University Press, 2012), Ch. 7.

²⁴⁶ For the idea of sui generis normative principles regulating distinctive moral subjects, see Samuel Scheffler, ‘Cosmopolitanism, Justice, and Institutions’, in his *Equality and Tradition: Selected Essays* (Oxford: Oxford University Press, 2010), p. 169.

²⁴⁷ Notice that, in taking globalism to be a view about the scope of principles of justice, I use the term differently from Risse, for whom globalism is a view about the *grounds* of justice (*Global Justice*, pp. 8-9).

²⁴⁸ Charles R. Beitz, *Political Theory and International Relations*, 2nd ed. (Princeton, NJ: Princeton University Press, 1999), p. 128.

²⁴⁹ Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005), p. 124.

²⁵⁰ David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), p. 13. See also Miller, ‘Social justice *versus* global justice?’ pp. 165-166. Richard W. Miller develops a similar characterization of the globalist view as a ‘global extrapolation’ of the duties of (social) justice commonly thought to apply among those who share a state (*Globalizing Justice: The Ethics of Poverty and Power* [Oxford: Oxford University Press, 2010], p. 32).

widely defended and which will be of central concern in this chapter. *Globalist egalitarian liberals* (or, as I will also say, *globalist liberals*) believe that familiar liberal egalitarian principles of social justice are properly understood to have global scope, applying among all persons in the world. Although many different accounts of globalist liberal justice have been articulated, I will specify three principles which together represent what I believe to be a paradigmatic globalist liberal conception: (1) equal global civil and political rights; (2) global equality of opportunity; and (3) global distributive egalitarianism. These three principles are of course most closely reflected in the views of specifically those globalists who broadly follow Rawls's conception of (social) justice and have developed theories which 'abandon Rawls's emphasis on domestic institutions in favor of globalizing his entire conception of justice',²⁵¹ but they can be endorsed in some form by many other globalist liberals who affirm other egalitarian liberal conceptions. In order to gain a firmer grasp of the globalist liberal view, it will be helpful to consider each principle more closely.

Kok-Chor Tan offers a formulation of the first principle when he declares that 'individuals are entitled to an equal range of civil and political rights regardless of where they happen to live'.²⁵² Note that the characteristically globalist claim here is not that all human persons are in some sense entitled to the same basic set of civil and political rights – that claim can be endorsed by internationalists – but that the *duties* to protect the rights in the global scheme are owed by all persons to all other persons, rather than reciprocally owed among members of a particular state. As Cécile Fabre has stressed, claims about rights and claims about which agents have duties to protect them are importantly distinct:

²⁵¹ Thomas W. Pogge, *Realizing Rawls* (Ithaca, NY: Cornell University Press, 1989), p. 240. For other prominent representatives of the attempt to globalize Rawls's justice as fairness see Beitz, *Political Theory and International Relations*, Part Three; David A. J. Richards, 'International Distributive Justice', in J. R. Pennock and J. W. Chapman (eds.), *Ethics, Economics and the Law: NOMOS XXIV* (New York: NYU Press, 1982); and Charles R. Beitz, 'Cosmopolitan Ideals and National Sentiment', *Journal of Philosophy* 80 (1983).

²⁵² Kok-Chor Tan, *Justice without Borders: Cosmopolitanism, Nationalism and Patriotism* (Cambridge: Cambridge University Press, 2004), p. 4.

Universalism of rights does not entail universalism of the correlative duties: the claim that all individuals wherever they are have [basic liberal] rights is compatible with both the view that those rights are held against fellow community members only, and the view that they are held against distant strangers as well. It is the latter which is at the heart of the debate between [globalists] and their critics.²⁵³

Although Tan focuses on what individuals are entitled to – what, following Charles Beitz, we might call the ‘demand side’ of rights – the distinctive claim expressed in the first principle concerns the ‘supply side’ of rights.²⁵⁴

It is also important to note that the relevant range of civil and political rights comprises the full list of basic rights and liberties of citizenship familiar from constitutional democratic regimes, not only a more minimal set of basic human rights.²⁵⁵ As Simon Caney puts it, the first globalist liberal principle ‘ascribes to all persons the conventional set of rights that liberal democratic theory affirms’, including ‘the rights to freedom of belief, association, and speech; the right to vote; the right to a fair trial’²⁵⁶ – and, we might add, the right to international freedom of movement.

Consider now the second principle of global equality of opportunity. This principle can be understood in two ways. On the *formal* interpretation, it requires that ‘jobs, promotions, and scarce educational and training places’²⁵⁷ should be equally open to all persons *in the world* in the sense that every person in the world should have roughly equal prospects of

²⁵³ Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012), p. 33.

²⁵⁴ Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), p. 59.

²⁵⁵ Internationalists often hold that all persons in the world have duties to protect the basic human rights of all other persons in the world. See, for example, Risse, *Global Justice*, Ch. 11; Miller, *National Responsibility*, Ch. 7; and John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), §10.

²⁵⁶ Caney, *Justice Beyond Borders*, p. 65.

²⁵⁷ Andrew Mason, ‘Equality of Opportunity, Old and New’, *Ethics* 111 (2001), p. 761.

successfully attaining equivalent jobs,²⁵⁸ relative only to their *actual* level of job-related skill and willingness to exercise those skills and without reference to factors irrelevant to job performance. For the vast majority of jobs, irrelevant factors will include country of birth, residence and citizenship. Hence, satisfying the formal version would require at least the elimination of immigration restrictions: ‘unlimited rights of migration coupled with unrestricted admission to citizenship’.²⁵⁹

On a more demanding interpretation – a globalized form of what Rawls calls *fair* equality of opportunity – it requires that every person in the world should have roughly equal prospects of successfully attaining jobs, relative only to their *potential* level of job-related skill and willingness to develop and exercise those skills. This interpretation is more demanding since it requires not only that the best-qualified candidates be selected for scarce jobs and educational places in competitions from which no one is excluded, but also that each person has an equal chance of gaining the required qualifications through prior training and education.²⁶⁰ Satisfying fair global equality of opportunity would require, in addition to the abolition of immigration restrictions, not only the vast improvement of general infrastructure and educational opportunities in developing countries, but the *equalization* of educational provision and general infrastructure across the globe.²⁶¹

A formulation of the third principle is provided by Pablo Gilabert when he insists that we should ‘pursue social arrangements in which everyone [in the world] has equal access to certain important advantages’.²⁶² I will be construing this principle of *global distributive*

²⁵⁸ Here I am in agreement with Miller’s view that a plausible conception of equality of opportunity will be concerned with equal access to *equivalent* jobs or positions, rather than with equal access to every specific job. See Miller, *National Responsibility*, p. 63.

²⁵⁹ Ibid.

²⁶⁰ See Mason, ‘Equality of Opportunity’, pp. 761-762.

²⁶¹ See Darrel Moellendorf, *Cosmopolitan Justice* (Boulder, CO: Westview Press, 2002), p. 79.

²⁶² Pablo Gilabert, *From Global Poverty to Global Equality: A Philosophical Exploration* (Oxford: Oxford University Press, 2012), p. 165.

egalitarianism broadly. A principle of this type need not require strictly equal access to advantage or indeed equal shares of any metric; any principle qualifies as egalitarian in the sense relevant here which expresses the thought that ‘social life is unjust if it sustains too much inequality in the material conditions of people’s lives.’²⁶³ Clearly, a global difference principle is a form of global distributive egalitarianism,²⁶⁴ but so is Caney’s affirmation of priority for the material claims of the globally worse off is an example of global distributive egalitarianism,²⁶⁵ as long as the latter claim is understood to require more than the alleviation of global poverty or the establishment of minimally just institutions in developing states.

It is crucial to appreciate that global egalitarianism does not simply make the ‘positive claim that there should be [egalitarian] principles of distributive justice with global scope’²⁶⁶ – as we have seen, that claim can be affirmed by internationalists. Although it is common to claim that globalist liberalism ‘extends to the world the criteria of distributive justice that apply within a single society’,²⁶⁷ we must be clear that the relevant form of extension does not merely involve supplementing familiar state-level principles of distributive justice with global principles.

There are broadly two forms of the third principle. In what we might call, following Caney, ‘ambitious’ global egalitarianism, sub-global distributive principles apply only to the extent that they promote the realization of global-egalitarian principles. Pogge provides an example of this view when he insists that any ‘moral rules that hold for some people and not for others’ will only be valid if they are ‘generated pursuant to fundamental principles that hold for all’.²⁶⁸ Such views are ambitious in that they not only affirm that there are principles of distributive justice with global scope, but also deny that there are *any* (non-derivative)

²⁶³ A. J. Julius, ‘Basic Structure and the Value of Equality’, *Philosophy & Public Affairs* 31 (2003), p. 322.

²⁶⁴ See Beitz, *Political Theory and International Relations*, p. 152 and Moellendorf, *Cosmopolitan Justice*, pp. 80-81.

²⁶⁵ Caney, *Justice Beyond Borders*, p. 123.

²⁶⁶ Caney, *Justice Beyond Borders*, p. 105.

²⁶⁷ Beitz, *Political Theory and International Relations*, p. 215.

²⁶⁸ Pogge, *World Poverty and Human Rights*, p. 99.

distributive principles which apply only among compatriots.²⁶⁹ A more ‘moderate’ global egalitarianism might accept some fundamental principles of distributive justice with sub-global scope, but to be distinguished from internationalism about distributive justice, ‘moderate’ versions of global egalitarianism must still insist that global distributive principles have priority over, and hence must constrain, sub-global principles. For example, Beitz claims that any ‘principles of domestic “justice” will be genuine principles of justice only if they are consistent with principles of justice for the entire global scheme’.²⁷⁰

III. GLOBALIST LIBERALISM: RELATIONAL AND NON-RELATIONAL

We have now seen that globalist liberals believe the egalitarian liberal principles requiring equal civil and political rights, equal opportunities, and distributive equality should properly be understood as fundamental principles of global justice, applying among all persons in the world, rather than as fundamental principles of social justice, applying among persons who share membership in a state or domestic society. Globalist liberalism therefore names a view about the *scope* of egalitarian liberal principles of justice – that is, a view about the relevant population among whom the principle applies. Among those who accept that egalitarian liberal justice fundamentally has global scope, however, disagreements arise about the *grounds* of the principles of global justice – that is, the reasons *why* this particular set of (in this case, egalitarian liberal) principles apply among this particular (in this case, global) population. As Risse puts it, the grounds of a principle are ‘those considerations or conditions based on which individuals are in the scope of principles.’²⁷¹

²⁶⁹ Caney, *Justice Beyond Borders*, p. 105.

²⁷⁰ Beitz, *Political Theory and International Relations*, p. 150.

²⁷¹ See Risse, *Global Justice*, p. 2 and p. 5.

We can, I suggest, distinguish between *non-relational* and *relational* views about the grounds of globalist liberalism. I draw here on a distinction articulated by Risse, who writes:

Relationists and nonrelationists disagree about the grounds of justice. “Relationists” think principles of justice hold only among persons who stand in some essentially practice-mediated relation. “Nonrelationists” think all principles of justice apply among all human beings regardless of what relations they share.²⁷²

I propose to modify Risse’s distinction in two ways. Firstly, while Risse makes reference to ‘essentially practice-mediated’ relations, I will refer more broadly to *social* or *political* relations. Two people do not stand in a social or political relation – or, we might prefer to say, a *relationship* – simply when they satisfy some two-place predicate. A social or political relation involves a ‘social tie’ or ‘socially salient’ connection of some kind,²⁷³ such as shared participation in a social or political practice, shared histories of encounter, or personal histories and situations common to *particular* people.²⁷⁴

Note that although some writers speak of common humanity as a relation or relationship of some kind, and while it is surely true that all human persons share a common situation in virtue of their shared experience of living a distinctively *human* life and their

²⁷² Ibid., p. 7. For a similar distinction, see Sangiovanni, ‘Global Justice, Reciprocity, and the State’, pp. 5-6 and Andrea Sangiovanni, ‘On the Relation Between Moral and Distributive Equality’, in G. Brock (ed.), *Cosmopolitanism Versus Non-Cosmopolitanism: Critiques, Defenses, Reconceptualizations* (Oxford: Oxford University Press, 2013).

²⁷³ Samuel Scheffler, ‘Relationships and Responsibilities’ in his *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001), p. 102.

²⁷⁴ See Niko Kolodny, ‘Love as Valuing a Relationship’, *Philosophical Review* 112 (2003), pp. 147-148; Niko Kolodny, ‘Which Relationships Justify Partiality? General Considerations and Problem Cases’, in B. Feltham and J. Cottingham (eds.), *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford: Oxford University Press, 2010), pp. 181-185; and Andrea Sangiovanni, ‘The Irrelevance of Coercion, Imposition, and Framing to Distributive Justice’, *Philosophy & Public Affairs* 40 (2012), p. 110n48.

‘sharing of a single world’,²⁷⁵ common humanity does not count as a social or political relation in the relevant sense. The personal situation shared by people in virtue of their common humanity is evidently not a situation common to *particular* persons, but rather is shared between *all* people. Social and political relations, as I shall understand them, are by contrast *special* relationships between particular persons.

Secondly, I will avoid formulating the distinction as one between ‘nonrelationists’ who believe *all* principles of justice are grounded in features of human persons as such, and ‘relationists’ who believe *all* principles are grounded in the social or political relations in which the persons among whom they apply stand. Risse’s way of drawing the distinction is too restrictive. We can readily articulate a conception of global justice which holds that some principles are grounded in the relations in which people stand, while other principles are grounded in non-relational features of persons – in fact, Risse himself seeks to show how ‘a view combining relational and nonrelational grounds is promising’, and I will myself argue for principles with non-relational grounds later in this chapter.²⁷⁶

Nevertheless, for the purposes of our present discussion of globalist liberalism, I suggest that we can helpfully distinguish between two broad views about the grounds of its three distinctive principles. According to *relational globalist liberalism*, the principles of equal global civil and political rights, global equality of opportunity, and global distributive egalitarianism are grounded in the social or political relations in which all persons in the world now stand; *only* when such social or political relations with global reach obtain do egalitarian liberal principles apply globally. Relational globalist liberals point in particular to those relations that have accompanied the phenomenon of *globalization*, which has led to a world

²⁷⁵ David Miller, *On Nationality* (Oxford: Clarendon Press, 1995), p. 53. See also Scheffler, ‘Relationships and Responsibilities’, p. 102; Christine M. Korsgaard, ‘The Reasons We Can Share’, in her *Creating the Kingdom of Ends: Reciprocity and Responsibility in Personal Relations* (Cambridge: Cambridge University Press, 1996), p. 282; and Samuel Scheffler, ‘Morality and Reasonable Partiality’ in his *Equality and Tradition*, p. 60ff.

²⁷⁶ Risse, *Global Justice*, p. 10.

with very significant levels of institutional interconnection and economic interdependence across borders, in contrast to the world comprising many relatively closed societies and economies of the past.

For example, Beitz stresses that, in the current state of the world, ‘national boundaries cannot be regarded as the outer limits of social cooperation’: the growth of intense ‘international economic interdependence’, involving a ‘complex and substantial pattern of social interaction’ across borders which systematically produces a range of benefits and burdens that would not exist but for this international interaction and interdependence, means that the world economy now constitutes a global scheme of social cooperation.²⁷⁷ Moreover, because the benefits and burdens produced by this global scheme of cooperation are not trivial, and because participation in the global scheme is effectively non-voluntary, the ‘structure of economic and political institutions’ which together constitute the ‘constitutional structure of the world economy’ have inescapable and ‘pervasive effects’ on the welfare of all persons in the world.²⁷⁸

The claim that the world now displays such ‘extensive global interdependence’²⁷⁹ that there is effectively a constitution for the world economy or global institutional order which exerts profound and inescapable effect on the prospects for well-being of (almost) all persons in the world is echoed by two other prominent relational globalist liberals, Pogge and Tan. Pogge speaks of a ‘global basic structure’ which produces ‘*institutional* inequalities that are inescapable and present from birth’;²⁸⁰ these inequalities moreover are not trivial but rather ‘profoundly shape’ the lives of ‘the vast majority of human beings’ in the world.²⁸¹ Tan likewise insists that partly as a result of globalization, which has made all persons in the world

²⁷⁷ Beitz, *Political Theory and International Relations*, p. 143ff.

²⁷⁸ Ibid., pp. 148-149 and pp. 166-167.

²⁷⁹ Pogge, *Realizing Rights*, p. 241.

²⁸⁰ Ibid., p. 240 and p. 247, emphasis added.

²⁸¹ Ibid., pp. 262-263.

much more ‘vulnerable to each other’s economic decisions and activities irrespective of borders’, there is now a ‘global basic structure’ comprised of ‘global institutions and practices’.²⁸² This ‘global institutional order’ – including ‘global norms’, international ‘economic practice’, and ‘international laws and principles’ – generates advantages and disadvantages which ‘affect the interests of persons pervasively and profoundly by shaping their life prospects among various dimensions’.²⁸³

For all these relational globalist liberals, then, globalization has so transformed the global scene, and so diminished the special moral significance of shared membership in a state, that it is no longer appropriate to apply egalitarian liberal principles within states. Their argument is that since principles of justice regulate institutional arrangements which have inescapable and profound effects on the well-being or life prospects of those who live under them, given the existence of a global institutional order with important effects on the well-being and life prospects of all persons globally, principles of justice must have global scope. Moreover, if the current global institutional order mirrors, in every morally relevant way, the kind of institutional arrangements formerly found in domestic societies, then it is the familiar *egalitarian liberal* principles of justice that should be globalized.

The relational globalist position can therefore be distinguished by its principal objection to internationalism: for relational globalists, internationalists affirm a conception of justice that is now *obsolete*, given the empirical realities of a world transformed by globalization. By contrast, non-relational globalist liberals maintain that the application of egalitarian liberal principles to some sub-global population is always a deep mistake. According to *non-relational globalist liberalism*, egalitarian liberal justice is grounded in features of human persons, such as their moral capacities or their natural vulnerabilities, which do not depend on the social or

²⁸² Tan, *Justice without Borders*, p. 27 and p. 30, emphasis removed. Note that Tan’s view in *Justice without Borders* seems to be that we can sufficiently ground egalitarian liberal justice in non-relational features of the human persons who share the earth. Only in *Justice, Institutions, and Luck* does he dearly embrace the relational view.

²⁸³ Tan, *Justice, Institutions, and Luck*, pp. 153-155 and p. 158, emphasis removed.

political relations in which they stand. As such, the presence or absence of a global institutional order or global scheme of social cooperation is not relevant to the scope of these principles; on this view, all ‘persons should be included within the scope of ... justice simply because they are fellow human beings.’²⁸⁴

Non-relational globalist liberals typically ground liberal egalitarian principles of justice by appeal to some universal conception of the human person – what Caney calls a ‘universalist “moral personality”’²⁸⁵ – and of the human good. They begin by identifying certain important aspects of human flourishing or well-being that are common to all persons: a set of ‘common needs, common capacities, and common ends’.²⁸⁶ Next, they ascertain the social conditions, such as the protection of civil and political rights and freedoms and the provision of opportunities and material resources, which are necessary for human persons to realize these important aspects of their good; these are what Gilabert describes as ‘important advantages that arguably all human beings have reason to value having access to’.²⁸⁷ Finally, they argue that political justice consists in ensuring that all persons have *equal* access to the relevant set of social conditions.²⁸⁸

Note that despite the central role that a conception of the human good plays in non-relational accounts of justice, the principles of justice affirmed by these accounts remain recognizably *liberal* because the idea of identifying aspects of the human good *common to all* exerts pressure to abstract from particular conceptions of the good life and to focus on interests that can be widely shared. For example, Beitz and Gilabert identify the development

²⁸⁴ Simon Caney, ‘Humanity, Associations, and Global Justice: In Defence of Humanity-Centred Cosmopolitan Egalitarianism’, *The Monist* 94 (2011), p. 507.

²⁸⁵ Caney, *Justice Beyond Borders*, p. 77.

²⁸⁶ Caney, *Justice Beyond Borders*, p. 37.

²⁸⁷ Gilabert, *From Global Poverty to Global Equality*, p. 195.

²⁸⁸ See Beitz, ‘Cosmopolitan Ideals’; Caney, *Justice Beyond Borders*; Caney, ‘Humanity, Associations, and Global Justice’; Fabre, *Cosmopolitan Justice*; Gilabert, *From Global Poverty to Global Equality*; and Pablo Gilabert, ‘Cosmopolitan Overflow’, *The Monist* 94 (2011). Note that in ‘Cosmopolitan Ideals’, Beitz repudiates his earlier relational argument for globalist liberalism.

and exercise of individuals' capacity for rational autonomy as (among) the human interests that political justice calls on us to promote precisely because it is a higher-order interest that all human persons can share.²⁸⁹ Other non-relational globalist liberals appeal to aspects of the human good that they claim are somehow universal and uncontroversial; Caney, for example, appeals both to the minimal idea of human 'needs and vulnerabilities' as well as the idea of a set of universal human capabilities.²⁹⁰

Since this view appeals directly to an imperative to promote human interests, the non-relational account of globalist liberalism does not depend on the presence of social or political relations – such as common subjection to a global institutional order, or intense levels of economic and other interactions across borders – in which all persons across the world may be said to stand; the processes associated with globalization play no role in grounding globalist justice, on this view. Indeed, for non-relational globalist liberals, any view which grounds principles of justice on the social or political relations in which persons stand is objectionable because it seems to permit some to enjoy better opportunities or to control greater resources than others, simply in virtue of their membership in a particular institutional scheme. Since '[i]nstitutional schemes do not track any properties that would generate entitlements', non-relational globalists claim that it is 'wholly arbitrary' to permit some to do better than others on the basis of their membership in particular institutional schemes.²⁹¹

IV. AGAINST NON-RELATIONAL GLOBALIST LIBERALISM

With the distinction between relational and non-relational justifications for globalist liberalism in hand, I will mount two broad challenges to non-relational globalist liberalism in this

²⁸⁹ Beitz, 'Cosmopolitan Ideals', p. 595 and Gilibert, *From Global Poverty to Global Equality*, p. 196.

²⁹⁰ Caney, *Justice Beyond Borders*, pp. 36-7.

²⁹¹ Ibid., p. 111. See also Beitz's claim that relational views 'arbitrarily favor the status quo' ('Cosmopolitan Ideals', p. 595).

section, leaving my objections to the relational variant to later sections. These two challenges focus firstly, on the weakness of the positive arguments for non-relational views, and secondly, on the weakness of the negative arguments non-relational globalists have deployed against internationalists (and relational globalists). Both challenges are fundamentally aimed at non-relational globalists' appeal to a universal duty of *beneficence* – my doubts are essentially directed at their claim that all persons are under duties to provide all other persons with access to social goods and advantages, simply because having access to these goods and advantages is necessary for the enjoyment of certain aspects of the human good.²⁹² I therefore join Rawls's complaint that the 'ultimate concern' of (non-relational) globalist views is 'the well-being of individuals and not the justice of societies'.²⁹³

I will begin by evaluating the positive case that non-relational globalist liberals make for globe-spanning principles of equal basic liberal rights, equal opportunities, and distributive egalitarianism. Recall from the previous section that the non-relational case for globalist liberalism starts by identifying certain universal forms of human flourishing, proceeds to specify certain resources or advantages that human persons need to achieve these universal aspects of the human good, and finally claims that all human persons are entitled to equal access to these resources or advantages. In defending a global scheme of 'civil and political human rights', for example, Caney argues that these rights 'enable human beings to flourish and lead fulfilling lives'.²⁹⁴ In defending global distributive egalitarianism, Gilabert argues that once we have identified those advantages that 'all human beings have reason to value' as 'important to protecting and promoting their autonomy and well-being', we will demand that

²⁹² Note that I am not appealing here to a conceptual distinction between negative duties of justice and positive duties of beneficence or humanity, as if normative debates can be decided by conceptual fiat.

²⁹³ Rawls, *Law of Peoples*, p. 119.

²⁹⁴ Caney, *Justice Beyond Borders*, pp. 72-75.

each human person has ‘equal access to at least some of these important advantages’, simply because ‘[e]veryone’s autonomy and wellbeing matters’.²⁹⁵

The non-relational argument for globalist liberalism therefore centrally appeals to a duty on the part of all human persons to promote the flourishing or well-being of all other persons.²⁹⁶ The problem for the non-relational view is that – at least if we assume a broadly non-consequentialist moral theory – it is doubtful that we have general and open-ended duties to promote the well-being of others simply in virtue of their humanity. As Risse has noted, in general someone cannot have a valid demand or claim against others to be provided with a benefit ‘*merely* because of the significance of [that benefit] for the claimant’; specifically, the ground of a duty to confer a benefit cannot simply be that it would be good for the potential beneficiary that she receive the benefit in question.²⁹⁷ This is especially clear when we consider the matter from the perspective of claimants rather than duty-bearers: I cannot validly demand that others provide me with some benefit simply because having that benefit would be good for me. In order to ground a duty to provide a putative beneficiary with (access to) certain goods and advantages, further reasons must be adduced – such as the special urgency of those goods and advantages, or reasons rooted in the social or political relations in which duty-bearers and beneficiaries stand.

Notice that my objection does not rest on scepticism about duties with non-relational grounds in general. I accept that there are some non-relational duties of justice to promote the interests of others – in fact, I will argue in Section IX that, in virtue of a kind of solidarity born of mutual identification as persons having the capacities to live a distinctively human life, we have non-relational duties to ensure that all human persons have access to membership in

²⁹⁵ Gilibert, *From Global Poverty to Global Equality*, pp. 195-197.

²⁹⁶ I use ‘well-being’ here as a placeholder for any account of human flourishing; I am not claiming that non-relational globalist liberals endorse a specifically welfarist or hedonic conception of human flourishing and therefore of beneficence.

²⁹⁷ Risse, *Global Justice*, p. 54.

some minimally just scheme of social cooperation. However, these duties are not grounded merely in the fact that promoting the interests of the duty's patients benefits them. Rather, there is some further reason which specifies why we have duties to promote interests of a particular type.

For example, the special urgency of receiving certain benefits grounds a duty to provide those benefits which goes beyond the mere fact that receipt of the benefit promotes the well-being of the beneficiary. This explains why there are duties of justice to provide others with the resources required to meet their basic needs,²⁹⁸ and why more generally, it is plausible to posit non-relational duties of beneficence when these duties do not 'surpass a basic level' and pertain to 'elementary human concerns'.²⁹⁹ It is no coincidence, in my view, that the most compelling non-relational globalist accounts are not egalitarian, but rather 'sufficientist', calling for the provision to all human beings of the 'freedoms and resources' necessary to lead a 'minimally decent life'.³⁰⁰

Some non-relational globalists might reply to these objections by claiming that the global principles they affirm are not grounded simply in the significance of certain social goods for human well-being, but in an appeal to the moral equality of persons. This argument begins with the idea that, since all persons have equal moral worth, each person's well-being is of equal moral concern. Hence, each person's interests are to be promoted, and promoted

²⁹⁸ Here I have in mind roughly the conception of urgency – as opposed to intensity of preference – developed by T. M. Scanlon in 'Preference and Urgency', in his *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2003). See also Thomas Nagel, *The View from Nowhere* (Oxford: Oxford University Press, 1986), p. 166-171.

²⁹⁹ Risse, *Global Justice*, p. 54.

³⁰⁰ Fabre, *Cosmopolitan War*, p. 20 and p. 33. See also Gillian Brock, *Global Justice: A Cosmopolitan Account* (Oxford: Oxford University Press, 2009), Ch. 3. While in her *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Harvard University Press, 2006), Martha C. Nussbaum takes her non-relational capabilities approach to represent only a 'partial, minimal' account of justice, it is also notable that her account arguing for globalizing the capabilities approach only delivers a duty to secure 'central' capabilities 'up to a suitable threshold level' (p. 281).

equally. Perhaps the most explicit attempt to pursue this strategy has been made by Gilabert. As we have seen, once he has identified those ‘advantages’ that are the ‘material and social conditions’ required for human persons to enjoy ‘autonomy and wellbeing’,³⁰¹ he proceeds to claim that if we take seriously the ‘equal moral worth of *all* persons’, we must support global distributive arrangements which ensure that all human persons have equal access to these advantages, since ‘*[e]veryone’s* autonomy and wellbeing matters, *and matters equally*.’ For Gilabert, if there is a set of advantages that help human persons achieve autonomy and well-being, then it would be ‘morally arbitrary’ to claim that ‘some but not all humans are entitled to those advantages’.³⁰²

On one reading of this argument, Gilabert seems to be making the following claim: *if* there is a duty of justice, incumbent on all capable of discharging it, to provide all human persons with access to advantages important for personal autonomy and well-being, *then*, in virtue of the equal moral worth of each human person, it would be unfair and arbitrary to provide access to these advantages unequally. Since the point of the duty is to promote the human good or human well-being, and the well-being of all persons matters equally, the principle of distributive justice we should endorse is that of global egalitarianism.

Gilabert’s argument, on this reading, has the form of a more general argument against distributive inequality that T. M. Scanlon describes as follows:

Suppose that the members of a group have equal claims to a certain form of benefit... If a distributive procedure is supposed to be responsive to these claims, then it will be unfair if (absent some special reason) it gives some of these people a higher level of benefit than others. This provides, in schematic form, an argument which leads us to a *prima facie* case for equality in a certain dimension of benefit. Its starting points include an idea of fairness together with substantive premises about the claims that the

³⁰¹ Gilabert, *From Global Poverty to Global Equality*, pp. 195-196, emphasis added.

³⁰² Ibid. pp. 196-197.

people in question have to this benefit and about the function of a particular procedure.³⁰³

When we consider its general structure, we see that although Gilabert's argument appeals to an idea of fairness specified by a commitment to honouring the moral equality of all persons, it also relies on a background duty to provide all human persons with access to certain benefits, namely those advantages that would promote their autonomy and well-being. It is therefore vulnerable to an objection we have already encountered. It is doubtful that we have general duties to promote the well-being and flourishing of others; the mere fact that receiving some benefit would promote someone's well-being cannot ground a valid demand against others to provide her with that benefit. As Scanlon has put it, 'It does not seem that in general we are under even a "prima facie" duty to promote the equal welfare of all.'³⁰⁴

On a different reading of the argument, it centrally involves an appeal to the *comparative unfairness* of *undeserved or unavoidable inequalities* in (access to) well-being and the conditions of autonomy. Gilabert offers an explicit formulation of this reading in an earlier article:

[I]t is unfair for some to face harsher life-prospects than others through no choice or fault of their own. It is wrong for some to see themselves as entitled to better initial life-prospects than others. What is the scope of this concern about fairness? Well, if we committed to [the moral equality of all persons], then we must assume that it is in principle universal. Isn't the wellbeing of all persons morally important, and equally so?³⁰⁵

³⁰³ T. M. Scanlon, 'The diversity of objections to inequality', in his *The Difficulty of Tolerance*, p. 206.

³⁰⁴ *Ibid.*

³⁰⁵ Gilabert, 'Cosmopolitan Overflow', p. 589.

The idea is that it is unfair or arbitrary for any person in the world to have worse access to important advantages than any other person, when this inequality of access comes about through an accident of birth in one state's territory rather than in another's, and not through any choice or fault of the worse-off person, since such undeserved and unchosen inequalities are in themselves unfair or unjust.³⁰⁶

While the complaint that undeserved or unavoidable inequalities involve comparative unfairness has some force, it is unclear what should follow from a judgment that a particular inequality is undeserved or unavoidable and therefore unfair in this 'cosmic' sense.³⁰⁷ Notice that there seem to be many cases where undeserved or unavoidable inequalities are not held to be unjust:³⁰⁸ to take just one example, it may be through no choice or fault of her own that someone lacks the academic ability to gain admission to a selective university or professional school, yet academic selection in higher education does not seem in itself unjust. More generally, it is simply unclear that someone can press a conclusive demand on others to provide her with benefits just when she has a lower level of well-being or resources than others through no choice or fault of her own, such that we all have duties of justice to eliminate or even to mitigate all undeserved inequalities. To draw on Risse's formulation, 'inferences from "X is not deservedly held" to "X is illegitimately held," and to "others have a duty to ensure X is not [*sic*] longer so held," fail.'³⁰⁹

³⁰⁶ This conception of egalitarianism as fundamentally concerned with comparative fairness has been powerfully articulated by Larry Temkin. See Larry S. Temkin, 'Egalitarianism Defended', *Ethics* 113 (2003), especially pp. 767-769 and Larry S. Temkin, *Inequality* (Oxford: Oxford University Press, 1993), p. 200.

³⁰⁷ Anderson, 'Point of Equality', p. 288.

³⁰⁸ On this point, see Samuel Scheffler, 'What is Egalitarianism?' and Samuel Scheffler, 'Choice, Circumstance, and the Value of Equality', both in his *Equality and Tradition*; Seana Valentine Shffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation', *Philosophy & Public Affairs* 29 (2000); Seana Valentine Shffrin, 'Egalitarianism, Choice-Sensitivity, and Accommodation', in R. J. Wallace, P. Pettit, S. Scheffler, and M. Smith (eds.), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford: Clarendon Press, 2004).

³⁰⁹ Risse, *Global Justice*, p. 83.

That justice does not demand social and political reform to redress any and all undeserved or unavoidable inequalities is especially plausible when we understand principles of justice to issue ‘normally conclusive reasons for action’, rather than in ‘mere pro tanto reasons to promote an ideal’.³¹⁰ Admittedly, Gilabert explicitly accepts that the globalist principles he defends only generate ‘*pro tanto* demands of global justice’.³¹¹ One problem with understanding principles of justice in this way, however, is that any conception of justice will have radically indeterminate normative implications: it is one thing to say that in some cases we should, all things considered, set aside certain requirements of justice because they conflict with some *other* requirements of justice or because of some other weighty moral reason; it is quite another to say that justice-given reasons are simply one kind of consideration among many, to be traded off in an ad hoc way against other considerations.

Another problem is that most interlocutors in the debate on global justice have not understood globalist liberal principles to merely provide pro tanto reasons for action. Recall my earlier arguments about how to characterize globalist liberalism: I suggested that conceptions of this type hold that the three paradigmatic egalitarian liberal principles have global scope. These principles of justice have generally been understood to provide normally conclusive reasons for action: to judge a social practice or policy unjust is to condemn it as seriously wrong and to provide a basis on which validate moral demands that the practice or policy be reformed. Moreover, justice is understood to have a special priority or weight against other values; as Rawls puts this idea, ‘laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.’³¹²

These two problems with taking justice-given reasons to be pro tanto reasons only suggest that we should construe principles of justice to place agents under *duties*. But it seems

³¹⁰ Aaron James, ‘Equality in a Realistic Utopia’, *Social Theory and Practice* 32 (2006), p. 704.

³¹¹ Gilabert, *From Global Poverty to Global Equality*, p. 195.

³¹² Rawls, *Theory of Justice*, p. 3.

doubtful that we have a general duty to redress undeserved or unavoidable inequalities. Indeed, it is striking that Larry Temkin – one of the most prominent proponents of the view that undeserved inequalities involve comparative unfairness – is careful to claim only that ‘inequality among equally deserving people makes an outcome *bad in one respect*’, avoiding the stronger claim that the unfairness of undeserved inequalities grounds a ‘*duty* to promote equality’.³¹³ He stresses that because equality-as-comparative-fairness is only one ideal among many, the unfairness of undeserved inequalities will not always, and perhaps even rarely, issue in conclusive reasons to mitigate or eliminate those inequalities.³¹⁴

At most, then, an argument appealing simply to the comparative unfairness of global inequalities which arise through no fault or choice of those who are worse off provides a general consideration of indeterminate moral weight to favour more globally egalitarian distributive arrangements over inegalitarian arrangements. What such an argument does not provide, however, is an adequate case for normally conclusive duties to bring about globally equal access to the advantages required for human flourishing. In particular, considerations of comparative unfairness of the kind Gilabert and other non-relational egalitarian liberals appeal to are insufficient to condemn as *unjust* those inequalities which result from relational (distributive) principles with sub-global scope – principles which arise from the special duties which are owed among those who participate in sub-global practices or stand in sub-global social or political relations, and are grounded in the special moral significance of membership in those practices and relations. We cannot move directly from a judgment that distributive arrangements across the world allow undeserved or unavoidable global inequalities to the claim that such an arrangement is unjust.

This brings our discussion to the second challenge I mount against non-relational globalist liberalism. I will defuse a central critical attack that non-relational globalists have

³¹³ Temkin, ‘Egalitarianism Defended’, p. 768, emphasis added.

³¹⁴ This view of equality as one ideal among many Temkin labels ‘pluralist’. See *ibid.*, p. 769.

launched against views – both globalist and internationalist – which claim that the egalitarian liberal principles of justice have *relational* grounds: this is the complaint that restricting the scope of liberal egalitarian principles of justice to either those who share membership in a state, or to those who happen to stand in certain social or political relations, is *morally arbitrary*.

As Miller and Fabre have both pointed out, there are two ways in which we can make sense of a charge that some form of differential treatment is moral arbitrary: firstly, it might mean that differences in treatment track characteristics of persons for which they are *not responsible*, for example, those characteristics which arose through no fault or choice of their own; secondly, it might mean that differences in treatment are motivated by considerations which are *morally irrelevant*, that is, considerations which ultimately lack moral significance and do not give rise to reasons for differential treatment that can be rationally and morally ratified.³¹⁵

Now it is certainly true that membership in a particular state – and indeed in many other social practices and institutional schemes – is morally arbitrary in the sense that individuals often happen to be or not be members in particular schemes through no choice or fault of their own; their membership or non-membership is not something for which they can be held responsible. Moreover, it follows from this that those inequalities which track, for example, individuals' particular state membership are undeserved and not reasonably avoidable. But as we have seen, the mere fact that some inequality is undeserved or unavoidable is not enough to ground normally conclusive duties of justice to mitigate or eliminate that inequality. The charge that internationalists endorse a conception of global justice that is sensitive to factors that are morally arbitrary in this sense is well-founded, but it is unclear that this charge undermines the case for internationalism.

Consider now the charge that relational conceptions of justice, whether internationalist or globalist, license unequal treatment that is morally arbitrary in the sense that

³¹⁵ See Miller, *National Responsibility*, p. 32 and Fabre, *Cosmopolitan War*, p. 21.

it is motivated by morally irrelevant considerations. Fabre provides a succinct account of this complaint:

The rationale for broadening the scope of justice to the whole of humanity is the simple thought ... that if possession of a particular characteristic x provides a justification for treating one individual who has x in certain ways, then one must treat all bearers of x in those same ways unless one can point to morally relevant differences between members of the set such as to justify differential treatment... [But] political borders are arbitrary [i.e. irrelevant] from the moral point of view.³¹⁶

This objection to internationalism, I will argue, either misconstrues relational views of the grounds of justice, or is question-begging. Because non-relational globalist views conceive of egalitarian liberal justice on the model of beneficence – aimed at promoting the well-being of individual human persons – their attention is typically trained on the characteristics of persons *as such*, in virtue of which they might attract the beneficent concern of others. From this perspective, it is natural to think that when ‘we consider the sorts of reasons given to explain why one person is entitled to certain goods it is difficult to see how and why the fact that one group of people is linked together by interaction should impact on their entitlements’,³¹⁷ and therefore to suppose that, in their insistence on the moral relevance or significance of shared membership in a state, internationalist views are morally arbitrary. After all, if justice is fundamentally concerned with promoting the well-being of persons as such, then a person’s membership in a particular state would indeed be morally irrelevant.

However, this objection misconstrues the internationalist conception and underestimates the depth of the disagreement between that view and non-relational globalist views. Internationalists (and relational globalists) reject, at a fundamental level, the beneficence-based and essentially allocative model of justice that non-relational globalists

³¹⁶ Fabre, *Cosmopolitan War*, p. 33.

³¹⁷ Caney, *Justice Beyond Borders*, p. 111.

embrace; for internationalists, the principles of egalitarian liberal justice – equal civil and political rights, equal opportunities, and egalitarian distribution – are grounded in the special significance of the social or political *relations* in which persons stand. In other words, egalitarian liberal justice is a *social and political* ideal, oriented to establishing and maintaining the right kind of relations between members of a political society or between participants in some other social practice or political project. On this view, justice is fundamentally concerned with how societies and other social practices can be *well-ordered*.

By contrast, for non-relational globalist liberals, egalitarian liberal justice is an *individualistic* and *allocative* ideal, concerned with how a ‘stock of benefits’ is to be divided in order to meet the ‘given desires and needs of known individuals’.³¹⁸ On this non-relational approach, egalitarian liberal justice is oriented to establishing and maintaining certain patterns in the distribution of divisible goods or of human well-being, divorced from any consideration of the value and significance of existing social and political relations.³¹⁹

Of course, whether it is ultimately plausible to ground principles of egalitarian liberal justice in the significance of social and political relations, or whether we would do better to adopt the individualistic and distributive model of the non-relational globalist liberals, is a question which we cannot settle on the basis of the above observations alone. My point here is merely that, in advance of a careful study of internationalist conceptions of global justice, and more generally of conceptions which include, and indeed give a central place to, principles with relational grounds, it is premature and question-begging to simply assert that

³¹⁸ Rawls, *Theory of Justice*, p. 76.

³¹⁹ The contrast I draw roughly tracks Rawls’s distinction between ‘pure procedural justice’ and ‘allocative justice’ (*Theory of Justice*, pp. 75-7) and Nagel’s distinction between what he (misleadingly) calls the ‘communitarian’ and ‘individualistic’ arguments for equality as an intrinsic value (Thomas Nagel, ‘Equality’, in his *Mortal Questions* [Cambridge: Cambridge University Press, 1979], p. 108). For more discussion of justice as a social and political ideal, see Anderson, ‘Point of Equality’; Scheffler, ‘What is Egalitarianism?’; Scheffler, ‘Choice, Circumstance, and the Value of Equality’; Scheffler, ‘Cosmopolitanism, Justice, and Institutions’; and Aaron James, ‘The Significance of Distribution’, in R. J. Wallace, R. Kumar, and S. Freeman (eds.), *Reasons and Recognition: Essays on the Philosophy of T. M. Scanlon* (Oxford: Oxford University Press, 2011).

‘[i]nstitutional schemes do not track any properties that would generate entitlements’.³²⁰ The moral significance of the social and political relations in which we stand is more difficult to dismiss than that.

V. THE NORMATIVE PECULIARITY OF THE STATE

Having revealed the deep problems that a non-relational globalist conception faces, I now move on to consider *relational* globalist liberalism. My strategy is to undermine relational globalist views by arguing for a claim that this type of view crucially denies – and that internationalist views affirm – namely that there are some non-derivative principles of *social as opposed to global* justice that apply only within states, principles which are grounded in the distinctive social and political relations which bind co-members of a state. This is the claim that the state is *normatively peculiar*. Note that, as I mentioned earlier, affirming the normative peculiarity of the state is compatible with recognizing principles of justice which apply beyond state borders, and indeed with accepting that these global principles call for material equality of some kind. As I shall understand it, to say that the state is normatively peculiar is simply to say that there are *sui generis*, non-derivative principles that apply among those who share membership in a state.

Some may wonder why a conception of global justice which recognizes principles of social justice – that is, which affirms the normative peculiarity of the state – but also includes egalitarian principles for the regulation of the various practices of cross-border cooperation should not be understood as a globalist liberal view. To give this worry a more determinate form, consider Tan’s puzzlement at why James’s principle of International Relative Gains that we encountered earlier should not be considered a ‘global egalitarian commitment’ having the

³²⁰ Caney, *Justice Beyond Borders*, p. 111.

‘general form of the [global] difference principle’, and why James’s conception of global justice is not therefore a form of globalist liberalism.³²¹

But notice that while clearly International Relative Gains is a principle with egalitarian content which applies beyond state borders, it is quite different from a global difference principle: International Relative Gains only regulates the distribution of the *gains of trade*, whereas a global difference principle applies to economic activity in the world generally, and thus regulates the distribution of income and wealth generated by domestic economic activity as well as by international trade. Hence, while International Relative Gains *supplements* principles of social justice, a global difference principle *abolishes* and *displaces* them as fundamental principles.

This point can be generalized. Recall that for internationalists, global or international principles only supplement and sometimes constrain, while for relational globalists they abolish and displace, fundamental principles of social justice. While both views take the grounds of egalitarian liberal principles of justice to be relational, internationalists see the relation between those who share a state as distinctive and morally significant, whereas relational globalists see that relation as no longer having the significance it may once have had. We can therefore join Miller in characterizing the central claim of relational globalist liberalism as follows: because the ‘relationships that exist between people inside [state borders] are not qualitatively different from the relationships that exist across them’, ‘valid principles of global justice must be the same as valid principles of social justice, but with a wider scope.’³²² Against this view, internationalists insist that co-members of a state do indeed stand in a relation that is different in its moral significance from other relations in which members of different states

³²¹ Tan, *Justice, Institutions, and Luck*, pp. 194-195, emphasis removed.

³²² David Miller, ‘Justice and boundaries’, in his *Justice for Earthlings*, pp. 145-146, and Miller, *National Responsibility*, pp. 14-15.

may stand, and that shared membership in a state therefore grounds distinctive principles – egalitarian liberal principles of social justice.

The challenge for internationalists, then, is to identify the distinctive and morally significant relation which binds those who share a state, and to explain how this relation grounds egalitarian liberal principles of justice. This is precisely the task of accounting for the normative peculiarity of the state. While I will develop my own account of the normative peculiarity of the state in Section VIII, over the next two sections I will consider and reject two alternative accounts which point, firstly, to a relation of a *common national identity*, and secondly, to a relation of *shared subjection to a common system of coercive law*, as the morally significant relation between those who share a state which grounds principles of (social) justice that apply distinctively among them.

VI. NATIONALITY-BASED INTERNATIONALISM

My discussion of what I will call *nationality-based* internationalism focuses on David Miller's influential account, as I take it to be the best developed representative of this view. In mounting the challenges that I do to Miller's account, my aim is not to conclusively refute nationality-based internationalism. Rather, I seek to undermine the plausibility of views of this type by pointing to what I believe are serious difficulties for their most developed representative, and thereby to motivate the search for a plausible alternative, which I believe my favoured cooperation-based account can provide.

Moreover, I will engage with only those aspects of Miller's views that appeal to the moral significance of shared nationality. This is slightly artificial, since he explicitly stresses that when we search for the grounds of social justice, we should be attentive to the fact that the 'ideal-typical nation-state' brings together a number of different relationships and modes of association in addition to a shared national identity – such as the relations of common

citizenship in a political community, shared subjection to political coercion, and common participation in a scheme of economic cooperation and production.³²³ Nevertheless, we can distinguish certain elements of social justice – particularly its demands for material egalitarianism or solidarity – which Miller believes are grounded in a common national identity. The basic argument is that the members of a national community have obligations to contribute to meeting each other's needs as these are specified within the nation's public culture. When those who share a state also share a national identity, therefore, these compatriots are bound by a principle of social justice which calls for distribution according to need; moreover, it is this solidaristic principle of provision according to need which underpins the egalitarian or redistributive elements in familiar egalitarian liberal thinking about social justice.³²⁴

For Miller, then, a solidaristic and egalitarian principle of distributive justice is grounded in the relation of sharing a common national identity. To support this claim, he must explain why and how compatriots can appeal to their common nationality to justify demands for distribution according to need. Sometimes, he seems to assume that once we understand what it is to be a member of a stable community with a shared identity and a common ethos, the imperative of solidarity among members will be self-evident. In this regard, Miller sees the relation of common nationality as being no different than other social and political relations of which it is also true that 'by virtue of being so related [persons] can advance particular claims of justice against one another'; for all such relations, he suggests, '[o]nce we understand the relationship ... we will see why those particular principles apply.'³²⁵ Each kind of social or political relation is taken to have a distinctive nature, and the principle which appropriately regulates the demands that those who stand in that relation can make on

³²³ See Miller, *Social Justice*, Ch. 2; Miller, *National Responsibility*, pp. 15-16; and Miller, 'Justice and boundaries', pp. 161-163.

³²⁴ Miller, *On Nationality*, Ch. 3 and Miller, *Social Justice*, pp. 26-27 and p. 31.

³²⁵ Miller, 'Justice and boundaries', p. 150.

each other will be responsive to the distinctive nature of that relation. If each principle is therefore *sui generis*, appropriate only to the particular relation it regulates and the distinctive nature of that relation, then a request for further explanation regarding how the relation grounds the principle is misplaced.

Nevertheless, it seems unsatisfying to simply assert that once we are properly guided by the distinctive nature and moral significance of sharing a national identity, it will simply be self-evident that egalitarian distribution or distribution according to need is the appropriate regulative principle. When faced with dissent from those unmoved by the putative significance of nationality, the disagreement between nationality-based internationalists and their opponents reduces to a brute clash of intuitions.³²⁶ In fact, Miller provides a powerful argument explaining the moral significance of nationality which appeals to what it is to value a social relation non-instrumentally.

This strategy assimilates common nationality to personal relationships comprising shared histories of encounter, such as bonds of family or friendship, which are valued non-instrumentally and which do not necessarily involve injustice or create agent-neutral disvalue. As both Miller and Samuel Scheffler have stressed, personal relationships of this type are by their nature solidaristic, in the sense that such relationships are oriented to the provision of mutual care.³²⁷ For example, a family tie is partly constituted by the special obligations to care for each other that family members take themselves to have; a parent cannot value her relationship with her child non-instrumentally without being disposed to treat her child's needs, interests and desires as providing her with special reasons to act, reasons which she

³²⁶ See Pogge's critical discussion of what he calls '*dogmatic* contextualism' in Miller, in particular his point that we can avoid the implausible view that all principles of justice must simply be applications or derivatives of a single master principle without embracing dogmatic contextualism, since there is a plausible alternative: we should be able to give reasons to *justify* or *ground* the content and scope of each *sui generis* principle (*World Poverty and Human Rights*, pp. 108-109).

³²⁷ See Miller, *National Responsibility*, pp. 34-35; Scheffler, 'Relationships and Responsibilities'; Samuel Scheffler, 'Projects, Relationships, and Reasons' in *Reason and Value*; and Scheffler, 'Morality and Reasonable Partiality'.

lacks when faced with the comparable needs, interests and desires of other children.³²⁸ On pain of rigoristically condemning these personal relationships, which have a fundamental place in almost all human lives, we must recognize the legitimacy of the special obligations that they generate. To the extent that the relation of common nationality can indeed be assimilated to solidaristic personal relationships, we have an argument which explains why distribution according to need is a moral or ethical principle which applies among those who share a national identity.

Unfortunately, any such assimilation is dubious. The solidaristic personal relationships that obtain between friends or between family members typically include ‘patterns of engagement and forms of mutual familiarity, attachment and regard developed over time’.³²⁹ It is only because of these temporally extended patterns of engagement, and the mutual familiarity which naturally results from this, that it makes sense for me to expect my friend or my brother to have special knowledge of, and to be especially attentive to, my needs. We might say that, given the typical shape and characteristic features of friendship and family relationships, it makes sense to conceive of them as social relations which have as (one of) their distinctive purposes the provision of mutual care.

By contrast, it would not be reasonable for me to form an expectation that the countless millions with whom I may share a national identity – almost all of whom I will never meet, let alone share a history of encounter with – will have special knowledge of, and show special care for, my needs. Unlike friendship or family ties, shared nationality seems not to be a social relation distinctively concerned with mutual care, and therefore it is difficult to see how a solidaristic principle of distribution according to need could be grounded in the relation of common nationality.³³⁰

³²⁸ Scheffler, ‘Relationships and Responsibilities’, p. 100 and Scheffler, ‘Projects, Relationships, and Reasons’, p. 248.

³²⁹ Scheffler, ‘Morality and Reasonable Partiality’, p. 59.

³³⁰ I am indebted to Jeff Howard for this point.

To be clear, I am not raising the worry that those who share a common nationality do not really stand in a social relation that has distinctive value and significance at all. I agree with Miller that although membership in a national community does not involve personal histories of encounter and must be mediated through shared understandings expressed in the public culture, it is no less ‘real’ for that.³³¹ My worry, rather, is that the attempt to assimilate common nationality to solidaristic personal relationships is false to its distinctive value and significance. Without claiming that these are the best available accounts of how common nationality might ground certain *sui generis* normative principles, I briefly sketch two (similar) ways of thinking about the significance of sharing a national identity which seem to me to better capture the distinctive nature and value of that social relation.

The first suggestion, due to Scheffler, is that those who share a national identity see themselves as *members* of a national community. To the extent that they value their membership in that national community, they will take themselves to have ‘membership-dependent reasons’ to do their share in sustaining, preserving and promoting the distinctive identity, culture, ideals, and projects of the nation in question.³³² The second suggestion, due to Niko Kolodny, is that those who share a national identity, and who value that identity and engage with its associated culture, share a *common personal situation*. Each person who bears that particular national identity can therefore *identify with* others in that common situation, and therefore has special reason not only to continue engaging with, and to preserve, this national culture on an individual basis, but also to contribute to, or perhaps even to initiate, joint efforts to ensure the survival and flourishing of the culture.³³³

Indeed, Miller himself has pointed to how bearers of a national identity typically value that distinctive identity and its associated national culture, and has argued that the protection

³³¹ See Miller, *National Responsibility*, p. 38.

³³² See Scheffler, ‘Morality and Reasonable Partiality’, pp. 50-52.

³³³ Kolodny, ‘Which Relationships Justify Partiality?’ pp. 184-185.

and preservation of a national culture is a valuable and legitimate collective project.³³⁴ But notice that this way of understanding the moral significance of shared nationality does not support in any obvious way egalitarian or needs-based redistribution. Hence, it remains unclear how common nationality can account for the normative peculiarity of the state: sharing a national identity cannot ground egalitarian liberal principles of social justice.

Nationality-based internationalism is also problematic as an account of the normative peculiarity of the state because it adopts a fundamentally *illiberal* conception of social justice. It mistakes a project, valuable though it may be, that citizens should be free to pursue according to their own choices, for a collective goal that all persons within a political society are compelled by justice to join in promoting. In order to motivate this challenge to nationality-based internationalism, I will argue for two related claims: firstly, that we are not morally required to value our national identity non-instrumentally; secondly, that principles of justice, at least according to liberal views, name moral requirements that all persons within a political society have reason to accept, given the fact of reasonable pluralism about the good.

We saw that, for Miller, sharing a national identity grounds principles of social justice because taking this social relation to be the source of special reasons for action is an ineliminable part of valuing that relation non-instrumentally. The problem is that no one is under a duty of justice to value her national identity non-instrumentally in the first place. Joseph Raz makes this point with respect to valuable relationships and projects in general, writing:

Most forms of legitimate partiality are more or less optional. We may be required to favour our children or friends, but it is up to us whether to have children or friends... We have reason to engage with what is valuable, and it is intelligible that we should do so. Sometimes it is foolish, rash, weak, defective in some other specific way, or even irrational to fail to engage with what is of greater value than available alternatives, or

³³⁴ Miller, *On Nationality*, pp. 85-8.

to engage with what is of lesser value. But it is not, generally speaking, wrong to do so.³³⁵

For this reason, Miller's response to the objection that some people 'attach no value at all to their [national] membership' is inadequate. He insists that such people, in failing to value their national identity, are living 'impoverished' lives, and are 'missing out on the opportunity to place their individual lives in the context of a collective project' of great value.³³⁶ But while engaging with one's national culture in common with others may be a collective project of great value, it is but one valuable project among many others; as such, a life devoid of this particular human good is unlikely to be, simply for that reason, impoverished overall. As Miller himself notes, nationality is only '*one* of the human goods that have intrinsic value'.³³⁷ Moreover, we are not morally required either to ensure that we ourselves live flourishing lives, or to join in valuable collective projects simply because this would contribute to others living such lives.

The problem for nationality-based internationalism and its account of the normative peculiarity of the state is that since compliance with *principles of (social) justice* is not morally optional, it is difficult to see how these principles could be grounded in a relation which, no matter how valuable, seems at most to instantiate one human good among many. It is dubious that all members of a political society have a duty to engage with or promote the specific good of nationality. I am therefore in agreement with Richard Miller when he maintains that although '[c]o-participation in an ongoing project of cultivating a shared way of life inherited from past generations and passing it along to generations to come is worthy of a central place

³³⁵ Joseph Raz, *Value, Respect, and Attachment* (Cambridge: Cambridge University Press, 2001), p. 4 and p. 6. Nagel similarly insists that most of our aims, goals, projects and relationships are 'optional' in his *View from Nowhere*, p. 168.

³³⁶ Miller, *National Responsibility*, p. 39.

³³⁷ Ibid.

in someone's personal goals', it is doubtful that 'there is a duty to take on this nationalist goal'.³³⁸

Indeed, to ground principles of social justice in common nationality is in effect to assert that there is such a duty, thereby contravening a fundamental liberal tenet by conscripting all members of a political society to the service of a goal that is given by a sectarian conception of the human good. As Rawls has urged, a 'crucial assumption of liberalism' is that 'equal citizens have different and indeed incommensurable and irreconcilable conceptions of the good'.³³⁹ As such, a liberal conception of justice will 'allow for a plurality of different and opposing, and even incommensurable, conceptions of the good'. Liberal principles of social justice are those that could be agreed to by 'free and equal moral persons with different and opposing conceptions of the good' as standards for the assessment of common social and political institutions, with the understanding that role of such institutions is to 'set up a framework within which citizens may further their ends', consistent with the equal freedom of all citizens.³⁴⁰

A corollary of this fundamental liberal tenet is that the promotion or realization of intrinsic, final goods as direct aims of political action is disqualified; on the liberal view, matters of basic justice are directly concerned only with 'instrumental or primary goods, the things that everyone pursuing a good life has reason to want'.³⁴¹ Since a successful argument for the normative peculiarity of the state, according to the nationality-based view, depends on the claim that all persons who share a state have a duty in political justice to engage with a particular human good – to value their common nationality non-instrumentally – it seems that nationality-based internationalism is fundamentally illiberal. Moreover, this objection survives

³³⁸ Miller, *Globalizing Justice*, p. 37.

³³⁹ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), p. 303.

³⁴⁰ John Rawls, 'Social Unity and Primary Goods', in his *Collected Papers*, (ed.) S. Freeman (Cambridge, MA: Harvard University Press, 1999), pp. 360-361.

³⁴¹ Christine M. Korsgaard, 'Commentary on G. A. Cohen and Amartya Sen,' in M. C. Nussbaum and A. Sen (eds.), *The Quality of Life* (Oxford: Clarendon Press, 1993), pp. 56-57.

even when we leave aside the obvious fact that few if any modern states have resident populations who uniformly share a common national identity. I submit, therefore, that nationality-based internationalism does not offer a plausible account of why egalitarian liberal principles distinctively apply among those who share a state.

VII. COERCION-BASED INTERNATIONALISM

Having cast doubt on the plausibility of nationality-based internationalism, we can move on to consider the account of the normative peculiarity of the state offered by *coercion-based internationalism*: on this view, those who share a state owe each other the duties specified by egalitarian liberal principles of social justice, and these principles are grounded in their common subjection to a system of coercively enforced law. In this section, I examine and reject the views of three prominent proponents of coercion-based internationalism, namely Michael Blake, Thomas Nagel and Mathias Risse.³⁴² I do not thereby claim to have conclusively refuted coercion-based views; as with my discussion of nationality-based internationalism, my aim is simply to undermine the plausibility of rivals to my favoured cooperation-based view.

Moreover, I stress that the three coercion-based accounts I examine do not represent contributions to a single, monolithic view. There are significant differences between them: notably, while Blake focuses on *distributive* egalitarianism as a demand of justice, Nagel and Risse are concerned with egalitarian liberal justice more generally. Thus, Blake claims that individuals must share liability to a system of coercive law if a ‘concern with relative economic

³⁴² See Michael Blake, ‘Distributive Justice, State Coercion, and Autonomy’, *Philosophy & Public Affairs* 30 (2002); Thomas Nagel, ‘The Problem of Global Justice’, *Philosophy & Public Affairs* 33 (2005); and Risse, *Global Justice*, especially Ch. 2. I do not discuss here Michael Blake’s revised account in Ch. 4 of his *Justice and Foreign Policy* (Oxford: Oxford University Press, 2013), largely because he no longer seems to take distributive inequalities to be unjust in themselves, but only for their effects.

shares' is to be a matter of liberal justice; his account seeks to explain what could ground principles condemning 'relative deprivation' and 'disparities in the holdings of goods'.³⁴³ Nagel, by contrast, is concerned not only with principles which demand the 'amelioration through public policy of unfairness in the distribution of social and economic goods', but also with principles requiring 'equal citizenship' and 'equality of opportunity'.³⁴⁴ Similarly, Risse asks what grounds principles requiring, as a default, 'an equal distribution of social primary goods' generally, including the (social protection of) basic rights and liberties.³⁴⁵

The three coercion-based accounts I examine also differ in how they explain why special, egalitarian liberal, principles of justice apply among those who share subjection to a system of coercive law. Nagel holds that special principles apply among co-citizens because 'fellow citizens of a sovereign state' stand to each other in a 'relation that they do not have with the rest of humanity', namely the 'institutional relation' of being 'joined together ... in a political society under strong centralized control'.³⁴⁶ He argues that those subject to a system of coercively enforced social practices are made complicit in the predictable outcomes of those practices, including the patterns of social advantage and disadvantage that are thereby generated and sustained. This enforced complicity, Nagel suggests, gives those subject to coercion the standing to demand a justification for the particular practices and arrangements that are imposed. Those with this standing – members of a political society – have the moral authority to reject institutional arrangements that predictably generate arbitrary inequalities among themselves, thus grounding egalitarian liberal principles of social justice.³⁴⁷

³⁴³ Blake, 'Distributive Justice', pp. 259-260 and p. 258.

³⁴⁴ Nagel, 'Problem of Global Justice', p. 127.

³⁴⁵ Risse, *Global Justice*, p. 38.

³⁴⁶ Nagel, 'Problem of Global Justice', p. 120 and p. 127. This institutional relation of shared subjection to coercive law is a necessary condition for egalitarian liberal principles to have application; another necessary condition is the 'profound effect on people's lives' that a system of social institutions and practices has (p. 128).

³⁴⁷ The essential points of this argument are captured in *ibid.*, pp. 128-129.

Blake offers a different argument for the coercion-based view which appeals to the value of individual autonomy and the prima facie violation of autonomy that coercion represents. He proposes that we conceive of liberalism as a conception of justice ‘committed to the global protection of autonomy’: all human persons ‘ought to have access to those goods and circumstances under which they are able to live as rationally autonomous agents’.³⁴⁸ Coercive practices and institutions prima facie violate the autonomy of those subject to them by *bending their will*, and must therefore ‘be either justified or eliminated’.³⁴⁹ Since state coercion should not be eliminated, given the necessity of ‘some form of political coercion’ for ‘the protection of autonomy’, it must be justified by showing that the coercively imposed system of law could receive the ‘hypothetical consent’ of those subject to it.³⁵⁰ Blake’s claim is that this demand for justification, when applied to private law – which regulates property rights, including contracts, taxation and other transfers – grounds distributive egalitarianism: since private law and the pattern of holdings that it generates must receive the hypothetical consent of all those subject to it, including ‘the least favored members of society’, the demand for the justification of coercion will ‘constrain the forms of material inequality permissible within the confines of the state’.³⁵¹

Risse offers yet another coercion-based account. He argues that those who share membership in a state are all subject to the ‘immediate’ or ‘unmediated’ coercion of that state. What Risse calls the *immediacy* of state coercion refers not to the mode but to the *function* of such coercion: through its law-making and law enforcement agencies, the state protects its citizens from other individuals and other states, and provides the social conditions under which citizens’ basic rights can be respected and protected. The unmediated power of the state, at least in ‘ideal theory’, is directed to ensure that ‘no power in between the state and

³⁴⁸ Blake, ‘Distributive Justice’, pp. 266-267 and p. 271.

³⁴⁹ Ibid., p. 265. See also Sangiovanni, ‘Irrelevance of Coercion, Imposition, and Framing’, p. 85.

³⁵⁰ Ibid., p. 265 and pp. 281-282.

³⁵¹ Ibid., pp. 283-284.

citizens undermines equal citizenship.³⁵² For Risse, the shared subjection of co-members of a state to coercion of this type, together with their common participation in a system of social cooperation, is ‘jointly sufficient’ to ground equality in the distribution of social primary goods.³⁵³ Presumably, he means that while shared subjection to unmediated coercion is not in itself a necessary condition for egalitarian liberal principles to apply, it is a *non-redundant* member of a set of jointly sufficient conditions, the other member of that set being ‘joint participation in the maintenance and reproduction of the state’.³⁵⁴

For Risse, then, shared subjection to immediate coercion partly grounds egalitarian liberal principles of social justice because shared membership in a state is the distinctive relation which grounds those principles, and shared subjection to immediate coercion is an ineliminable part of membership in a state. The cooperative systems for the production of primary social goods that states house must be coercively regulated, since without coercive enforcement of its rules we cannot expect a system of cooperation among persons with normal motivational capacities to be stable. Shared membership in a state therefore involves ‘dense relationships of coerciveness and cooperativeness’,³⁵⁵ such that members of a state are ‘*equally and significantly* invested in and subject to a state’. Because co-members of a state relate to each other in these ways, they are ‘fundamentally alike’, and this fundamental symmetry among those who share a state ‘creates a default status for an equal distribution of social primary goods’.³⁵⁶

Each of these coercion-based accounts is vulnerable to serious objections. Recall that Nagel’s argument relies on the claim that citizens of a state are complicit in or morally responsible for the predictable outcomes of the social institutions and practices that they are

³⁵² Risse, *Global Justice*, pp. 25-29.

³⁵³ Ibid., p. 35.

³⁵⁴ Ibid., p. 29 and p. 38. For the idea of an individually unnecessary but non-redundant member of a set of jointly sufficient conditions, see J. L. Mackie, ‘Causes and Conditions’, *American Philosophical Quarterly* 2 (1965).

³⁵⁵ Risse, *Global Justice*, p. 33.

³⁵⁶ Ibid., p. 38.

coerced into collectively upholding. However, it is unclear how citizens could be held morally responsible for the relevant outcomes, since their role in upholding the norms and arrangements of their society is one they cannot reasonably avoid. As Nagel himself acknowledges, ‘most people have no choice’ in the matter of becoming or remaining a member of a political society, and their role in their society is one they are assigned ‘[w]ithout being given a choice.’³⁵⁷ But it is usually thought, as Sangiovanni has noted, that an agent is (at least partially) *relieved* of moral responsibility for the outcome of an action which she was forced to do.³⁵⁸

Blake’s coercion-based account fares no better. Firstly, it is too narrow: it speaks only to the principle of material or distributive equality, and it is unclear how his account could be expanded to justify the special duties citizens owe each other to protect the basic rights and liberties of each. Secondly, his argument for distributive egalitarianism is dubious. While I agree with Blake’s claim that coercion is morally significant because it stands in need of justification, this *demand* for justification nevertheless does not, in itself, determine the *content* of a successful justification. This point is implicitly acknowledged by Blake himself, since he claims that ‘each case of coercion will give rise to different forms of justification’.³⁵⁹ Hence it remains unclear how citizens’ shared subjection to coercion can explain either the content or the scope of principles of (distributive) justice. Indeed, nothing in Blake’s account explains why the content of a successful justification for state coercion does not imply globalism rather than internationalism. Suppose we have a natural duty to comply with laws which serve justice, and that coercion is justified if it is used to enforce that duty. Suppose also that the global difference principle proposed by some globalist liberals is a valid principle of justice. In that case, state coercion would be permissible when it is used to enforce laws which realize a

³⁵⁷ Nagel, ‘Problem of Global Justice’, pp. 128-129.

³⁵⁸ Sangiovanni, ‘Irrelevance of Coercion, Imposition, and Framing’, p. 105.

³⁵⁹ Michael Blake, ‘Immigration and Political Equality’, *San Diego Law Review* 45 (2008), p. 968.

global difference principle, and *im*permissible if used to realize a domestic difference principle.³⁶⁰

In response to this objection, Blake might insist that although he refers generally to the idea of hypothetical consent to coercion, the best conception of hypothetical consent is in fact what we might call, following A. J. Julius, ‘justification by benefit’.³⁶¹ On this understanding of how to justify coercion, will-bending coercion is justified when the interests of the agent whose will is bent are advanced relative to the counterfactual where her will is not bent. This seems to be the conception of justification Blake has in mind when he explains how his coercion-based account supports Rawls’s domestic difference principle: a coercive scheme of private law is justified to the least advantaged when there are no alternative arrangements that ‘could have made them any *better off*’.³⁶²

But there are two problems with this response. Firstly, justification by benefit does not deliver distributive egalitarianism, but only minimalist principles such as protection of physical security and subsistence. On plausible assumptions, life in the counterfactual situation in which state coercion is absent would be dire; as Blake himself admits, ‘[w]ithout some sort of state coercion, the very ability to autonomously pursue our projects and plans seems impossible’.³⁶³ There seem to be a large range of distributive principles well short of equality which satisfy the test of promoting the interests of those subject to state coercion – even the least advantaged of these – relative to the counterfactual where coercion is entirely absent.

Secondly, justification by benefit is unsound as a general conception of political legitimacy. Notice that Blake avoids this conception of the justification of coercion when he considers the criminal law.³⁶⁴ Although criminal punishments must be such that they can be

³⁶⁰ For a similar objection, see Sangiovanni, ‘Irrelevance of Coercion, Imposition, and Framing’, p. 98.

³⁶¹ Julius, ‘Value of Equality’, p. 328, emphasis removed.

³⁶² Blake, ‘Distributive Justice’, p. 283, emphasis added.

³⁶³ *Ibid.*, p. 280.

³⁶⁴ *Ibid.*, Section III.

justified to those punished, this justification clearly need not involve some *benefit* to those who are punished. Rather, justified coercion in the infliction of criminal punishment depends on whether the punishment satisfies coercion-*independent* principles of justice in punishment – for example, the principle of proportionality.³⁶⁵ Just as the coercive nature of criminal law cannot in itself explain why proportionality is a valid principle of justice in criminal punishment, the coercive nature of private law cannot in itself explain why egalitarian principles of distributive justice have the content and scope that they do. It seems, then, that state coercion cannot *ground* principles of social justice.

Risse's account is also problematic, not because it cannot successfully ground egalitarian liberal principles of social justice, but because it is not a genuinely *coercion-based* account of the normative peculiarity of the state. Although Risse claims that 'it is hard to subtract coerciveness from ... the ideal of equal citizenship',³⁶⁶ coercion only plays an *instrumental* role by stabilizing the system of cooperation among co-citizens by which primary social goods necessary for equal citizenship are jointly produced; there are no *morally* relevant features of subjection to coercion which explain the content and scope of principles of social justice. The idea that egalitarian liberal principles of justice are the morally proper response to the will-bending involved in the coercive enforcement of law, so central to Nagel's and Blake's accounts, is absent from Risse's arguments.

Hence, Risse's account is not a coercion-based account in the relevant sense. Recall that coercion-based internationalism takes the social relation of shared subjection to state coercion to *ground* egalitarian liberal principles of justice, in the sense that morally relevant features of that relation explain the content and scope of those principles. As a number of theorists have stressed, coercion-based accounts of the normative peculiarity of the state do not simply argue that coercion facilitates or is instrumentally necessary to the implementation

³⁶⁵ Ibid., p. 275.

³⁶⁶ Risse, *Global Justice*, p. 30.

of arrangements which are just according to principles that are independently grounded – few, if any, plausible conceptions dispute *that* claim.³⁶⁷

While Risse identifies coerciveness and cooperativeness as twin features of shared membership in a state, his argument ultimately only appeals to the morally relevant features of social cooperation. We should therefore understand Risse to be proposing a form of *cooperation-based* internationalism. Even the distinctive feature of state coercion that Risse identifies – its ‘immediacy’ – is best understood in terms of the particular *social goods* that coercively-enforced systems of law organize citizens into jointly providing: systems of criminal and constitutional law are taken to be morally significant not because compliance with their requirements involved will-bending, but because they protect the basic rights of citizens and provide the social conditions under which their status as free and equal can be securely realized. It is to such cooperation-based accounts that our attention now turns.

VIII. COOPERATION-BASED INTERNATIONALISM

In this section, I will articulate a cooperation-based account of the moral significance of shared membership in a state. I begin with a liberal conception of the person and with a thin conception of her good. As we have seen in earlier chapters, in liberal thought a human person is conceived as having the moral power or capacity to form, revise and pursue a conception of the good life, and thereby to be part author of her own life; this is the capacity for *rational autonomy*.³⁶⁸ As human persons we have an interest in successfully pursuing our

³⁶⁷ Miller, ‘Justice and boundaries’, pp. 155-156; Nagel, ‘Problem of Global Justice’, p. 120; and Sangiovanni, ‘Irrelevance of Coercion, Imposition, and Framing’, pp. 80-81.

³⁶⁸ For the idea that human persons have the capacity for rational autonomy, see Rawls, *Political Liberalism*, §I.5 and §II.5; and Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), pp. 154-155. For the invocation of this idea by non-relational globalists and by coercion-based theorists, see Beitz, ‘Cosmopolitan Ideals’, p. 595; Blake, ‘Distributive Justice’, pp. 267-271; and Gilibert, *From Global Poverty to Global Equality*, p. 196.

determinate conception of human flourishing but we also have a higher-order interest in developing and exercising our capacity for rational autonomy. This higher-order interest is one that all human persons can recognize in each other. As Jeremy Waldron puts the point, there is ‘something like *pursuing a conception of the good life* that all people, even those with the most diverse commitments, can be said to be engaged in.’³⁶⁹

If this shared higher-order interest is to be advanced, certain social conditions must be present. Here my cooperation-based view is in agreement with non-relational globalist views: I too affirm that human persons are ‘dependent upon material and social conditions in order to develop and exercise their capacities’, specifically their capacity for rational autonomy.³⁷⁰ Besides the protection of physical security and the provision of resources to meet basic physical needs, these social conditions include civil and political rights and freedoms, opportunities, and material resources such as income and wealth. Following Rawls, we may call the social conditions necessary for the development and exercise of the capacity for rational autonomy the *primary social goods*, or as I will also say, *social goods*.³⁷¹

Where my favoured internationalist conception begins to diverge from other accounts that have also focused on a conception of the person as rationally autonomous is in noticing that these social goods are not manna from heaven but must be continually produced by human effort.³⁷² Moreover, no one person could, by her solo efforts, produce the social goods she needs to develop and exercise her capacity for rational autonomy over a complete life. Each person is reliant on the *joint* efforts of countless persons to sustain, as Rawls puts it, ‘the social world in which our character and our conception of ourselves as persons, as well as our comprehensive views and their conceptions of the good, are first acquired, and in which our

³⁶⁹ Jeremy Waldron, ‘Theoretical Foundations of Liberalism’, in his *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993), p. 56.

³⁷⁰ Gilibert, *From Global Poverty to Global Equality*, p. 196.

³⁷¹ See Rawls, *Political Liberalism*, Lecture V; and John Rawls, *Justice as Fairness: A Restatement*, (ed.) E. Kelly (Cambridge, MA: Harvard University Press, 1999), §17.

³⁷² See Sangiovanni, ‘Global Justice, Reciprocity, and the State’, p. 20.

moral powers are to be realized, if they are to be realized at all.³⁷³ In the contemporary context, the relevant social worlds are sustained by cooperative systems housed within states. Citizens and long-term residents of a state cooperate to jointly produce the social goods which enable each of them to develop and exercise their capacity for rational autonomy over the course of their lives.³⁷⁴

This cooperative activity takes three main forms. Firstly, co-members of a state support and maintain the system of criminal and constitutional law which protects the physical security and basic civil and political rights of each member. What is of moral significance is not that the enforcement of criminal and constitutional law bends the wills of those subject to it but that the entire system of such law represents a collective effort to protect certain basic civil and political rights as necessary social conditions for individuals' autonomy. This cooperative effort to define and protect basic rights has been incisively described by Anna Stilz, who notes:

[Those who share a state] sustain the political authority that defines and enforces their rights. It is their cooperative activity, by obeying the law and paying taxes, that creates their state institutions. Laws ... depend ... pervasively on large-scale patterns of behavior on the part of the people, who orient their actions to these laws. By paying taxes, the people also uphold the institutions that enforce their rights against those who refuse to respect them.³⁷⁵

Secondly, the development and exercise of our capacity for rational autonomy, and indeed the pursuit of a determinate conception of the good, requires the maintenance of an entire structure of opportunities for education and training, and for employment within a complex division of labour. Such educational and employment opportunities represent the

³⁷³ Rawls, *Political Liberalism*, p. 41.

³⁷⁴ Ibid., p. 189.

³⁷⁵ Anna Stilz, 'Nations, States, and Territory', *Ethics* 121 (2011), p. 592.

primary occasions for individuals to train and exercise their various abilities and to ‘engage in valued and valuable work’.³⁷⁶ This structure of opportunities is created and sustained by the joint activity of citizens as a collective body, who together support and comply with the legal rules which define and constitute the structure of opportunities and coordinate the division of labour, and whose taxes finance investments in education and training which help individuals develop the skills required to fill the various roles in the division of labour. The derivatives trader, the neurosurgeon, the corporate lawyer, and others who occupy favoured positions in the division of labour, are able to fulfil the responsibilities of their roles, and to reap the attached rewards, only because other members of the state supported institutions which have heavily invested in training their abilities, and act collectively to develop and implement the legal rules which make an advanced division of labour possible.

Thirdly, economic activity largely takes place within a ‘system of cooperative, joint production’³⁷⁷ among those who share membership in a state. It is the state’s system of private law that defines and enforces a stable system of property rights, and that provides for the peaceful adjudication of commercial disputes according to settled rules. This system of private law is supported and financed by the cooperative activity of all members of the state, who thereby make possible a well-functioning market economy. In addition, it is only through the cooperative activity of the various members of society, who fulfil the tasks of their respective roles in a complex division of labour, that highly productive modern economies are possible. As Elizabeth Anderson notes, ‘the productivity of a worker in a specific role depends not only on her own efforts, but on other people performing their roles in the division of labor’.³⁷⁸

It is tempting to think that those who perform tasks which require scarce or highly-trained skills contribute disproportionately more to the social product, but this is only true in

³⁷⁶ Miller, *Globalizing Justice*, p. 48.

³⁷⁷ Anderson, ‘Point of Equality’, p. 321.

³⁷⁸ Ibid., p. 321-326; Sangiovanni, ‘Global Justice, Reciprocity, and the State’, pp. 19-27.

an importantly restricted sense – the exercise of their talents is highly productive, not on its own, but *against a background of cooperative activity by many others*. Their greater market productivity of highly-skilled workers derives from the particular role they occupy in the division of labour, and that productivity is therefore dependent on the efforts of others who occupy different roles in the cooperative system. The famous labour union anthem ‘Solidarity Forever’ captures this point when it contends that it was workers ‘who ploughed the prairies’, ‘built the cities’, and ‘[d]ug the mines’: even though they may have been occupying relatively low-skilled roles, the labour of these manual workers was and is indispensable to the system of industrial production as a whole, for ‘without [their] brain and muscle not a single wheel can turn.’

Armed with this understanding of those who share a state as jointly engaged in a system of cooperation which provides the social goods they need to be rationally autonomous, we are now in a position to understand the normative peculiarity of the state. We should affirm, with the non-relational globalists, the fundamental significance for justice of the human capacity for rational autonomy, and the instrumental importance of various social goods, without which human persons could not develop and exercise their capacities for rational autonomy or pursue their chosen conception of the good. Unlike non-relational globalists, however, we should not assume that justice requires ensuring each person in the world equal access to these social goods.

It is morally significant that these goods must be produced, and it is within states – and not at the international or global level – that the systems of cooperation which provide individuals with the social conditions for their autonomy are housed. As Sangiovanni notes, the international order ‘does not have the financial, legal, administrative, or sociological means to provide and guarantee the goods and services necessary to sustain and reproduce a stable market and legal system, indeed to sustain (on its own) any kind of society at all’; as such, international cooperation has not supplanted but in fact relies on states which house well-

ordered systems of *social* cooperation.³⁷⁹ The primary importance of social rather than international cooperation in the production of social goods is confirmed by the findings of Dani Rodrik, who has shown that it is the quality of state-level institutions which best predicts which countries experience sustained economic development and growth, rather than the degree of their integration into world markets.³⁸⁰

Members of a state are therefore bound together by a distinctive social and political relation with deep moral significance. They are co-participants in a system of cooperation which mainly provides them with the primary social goods required for their rational autonomy. Since no single person could, by her own efforts, provide herself with even minimally adequate levels of the relevant social goods, each co-participant is *mutually dependent* on the efforts of others who play a part in the overall system of cooperation.

It is this relation of ‘particularly deep and pervasive ... mutual dependence’³⁸¹ among those who share membership in a state that, I contend, grounds principles of social justice which call for (a benchmark of) equality in the distribution of the primary social goods – basic rights, opportunities, and material resources. My argument for this *cooperation-based* account of the normative peculiarity of the state echoes and expands on similar accounts central to Sangiovanni’s *reciprocity-based internationalism* and Risse’s *pluralist internationalism*.³⁸² Indeed, the essentials of my argument appear in compressed form in this passage from Risse:

Membership in a state is participation in its maintenance and reproduction, an intensely cooperative, reciprocal endeavor... Primary goods are provided through everybody’s cooperation... [Those who share membership in a state] are in relevant

³⁷⁹ Sangiovanni, ‘Global Justice’, p. 21.

³⁸⁰ Dani Rodrik, ‘Introduction: What Do We Learn from Country Narratives?’ in D. Rodrik (ed.), *In Search of Prosperity: Analytic Narratives on Economic Growth* (Princeton, NJ: Princeton University Press, 2003). I am indebted to Paul Billingham for directing me to Rodrik’s work.

³⁸¹ Sangiovanni, ‘Justice and the Free Movement of Persons’, p. 143.

³⁸² Sangiovanni, ‘Global Justice, Reciprocity, and the State’, and Risse, *Global Justice*.

ways *equally* and *significantly* invested in ... [that] state, and *in that sense*, as participants in this endeavor, are fundamentally alike. It is this fundamental likeness ... that creates a default status for an equal distribution of social primary goods, placing a heavy burden of proof on those who prefer an unequal distribution.³⁸³

We can unpack this argument for egalitarian liberal principles of social justice into three main claims.

Firstly, co-citizens of a state are, in virtue of their radical mutual dependence, *equal participants* in the system of social cooperation that provides them with the social goods they require for their rational autonomy. We have seen that in the absence of social cooperation, no one could provide herself with even a minimally adequate bundle of the social goods she needs to lead an autonomous life; moreover, even those who occupy relatively higher-skilled roles in the division of labour rely for their productivity on the labour and productive activity of persons who occupy relatively lower-skilled roles. Hence, each member of a state is radically and reciprocally dependent on the cooperation of other members, whose joint efforts in a complex division of labour are required to produce the social goods necessary for her rational autonomy.³⁸⁴

Secondly, co-citizens each have *prima facie equally weighty claims* to a share of the social goods produced by social cooperation. As equal participants in social cooperation, citizens each presumptively have a claim of equal weight to the fruits of the cooperative system as a fair return on their contribution. Thirdly, this presumption in favour of equality among citizens is *not defeated* by considerations independent of their shared participation in social cooperation. Each citizen's interest in developing and exercising her capacity for rational autonomy is of equal moral importance; in that respect, therefore, each citizen has a

³⁸³ Risse, *Global Justice*, p. 38.

³⁸⁴ Given the limitations of this discussion, I bracket here the difficult case of the severely disabled and others who may naturally lack the capacities to engage fully in social cooperation on an equal footing.

symmetrical claim to have access to the social primary goods produced by all members' cooperation. Moreover, no member has a special claim to a larger share of the social product than any other member simply in virtue of various aspects of her identity, such as her race, gender, social class, or other morally arbitrary characteristic – including the possession of natural talents that happen to be scarce.

The question of social justice is therefore: how should the primary goods produced by social cooperation be distributed among members of a state, given their equal participation in social cooperation, and their equally weighty claim to a share of the social product? I argue that the appropriate default or benchmark for the distribution of social goods among citizens, from which departures must be justified on the basis of morally compelling reasons, is *equal division*. We have therefore seen how principles requiring (a benchmark of) equality in the distribution basic liberal rights, economic opportunities, and material resources are justified by premises which make ineliminable reference to citizens' shared participation in a system of cooperation that produces the primary goods needed for their rational autonomy.

When are departures from this benchmark of equality justified? It is unlikely that unequal protection of basic rights or inequality of opportunity can be justified under favourable conditions: social justice requires that those who share membership in a state ensure equal protection for the basic rights and liberties of each member, and that they maintain the background social conditions necessary for substantive or fair equality of opportunity. By contrast, it is plausible that some inequalities in the distribution of income and wealth are acceptable. It is commonly thought that inequalities of income and wealth provide economic incentives. Moreover, without allowing for some inequalities in income and wealth, it will be impossible to implement a market economy, a proven mechanism for generally allocating resources to their most productive uses. As such, it seems by allowing some such inequalities, all can benefit relative to the benchmark of equal division.

However, proper recognition that all members – even those least skilled – are equal participants in the social world which makes possible the rational autonomy of all, and have symmetrical claims on the social product, will make acceptable only those inequalities which satisfy the condition that ‘the more advantaged are not to be better off at any point to the detriment of the less well off’.³⁸⁵ Inequalities in the distribution of income and wealth are therefore seriously constrained, not only by a requirement that departures from equal division be justified, but also by an insistence that any justification for inequality must take seriously the standing of all members as equal participants with symmetrical claims on the social product.

I have been arguing that the members of a state are all equal participants in a system of social cooperation necessary for the rational autonomy of each, and that this special relation among them grounds egalitarian liberal principles of social as opposed to global justice. Relational globalists might object that, given current levels of international trade and of international capital and even labour flows, economic activity does not take place exclusively within national economies; as such, it is inaccurate to suggest that primary social goods are produced only or even primarily through closed systems of cooperation within independent states. Relational globalists will claim that under current conditions there is a system of global economic cooperation and a global division of labour – the appropriate benchmark is therefore the equal distribution of social goods *globally*, not among those who share membership in a state.

There are two broad replies to this objection. The first defends the distinctiveness of social cooperation within the state by emphasizing the important differences between cross-border economic activity and social cooperation within states. Most obviously, the important social goods of physical security and the protection for basic rights are provided, or fail to be provided, by state agencies. Moreover, while it is true that as a result of economic

³⁸⁵ Rawls, *Justice as Fairness*, p. 124.

globalization, economic production no longer involves a purely domestic division of labour, world markets are only very partially integrated: there is no equivalent at the global level to the market economy of a developed state.³⁸⁶ Indeed, as James notes, the global economy is ‘embedded within the state system’: international trade and other forms of cross-border economic cooperation involve the integration of, and therefore presuppose the existence of, national markets and national economies – and these are, as we have seen, sustained by the cooperation and joint efforts of citizens as co-participants in state-level systems of social cooperation.³⁸⁷ This dependence of global economic cooperation on state-level social cooperation has been stressed by Sangiovanni, who notes that the ‘global order’ lacks the ‘financial, legal, administrative, or sociological means to provide and guarantee the goods and services necessary to sustain and reproduce a stable market and legal system’.³⁸⁸

The second reply attempts to accommodate the central insight of relational globalism by recalling that an internationalist view need not deny that principles of justice apply beyond state borders. Recall that the state is normatively peculiar only in the sense that distinctive or *sui generis* principles apply among those who share a state; internationalism need not deny that principles of justice apply beyond state borders. The cooperation-based internationalism I endorse certainly rejects the view that ‘outside the state ... justice simply does not impose determinate requirements for anyone to (fail to) fulfill.’³⁸⁹

Cooperation-based internationalism is *pluralist* in the following sense: it affirms Scheffler’s slogan that ‘new social forms may require new moral norms’, and accepts that in a world with many distinctive social forms and social relations, a plurality of principles of justice will appropriately apply. In particular, we can recognize that the ‘new human practices and

³⁸⁶ James, *Fairness in Practice*, p. 22.

³⁸⁷ *Ibid.*, p. 13.

³⁸⁸ Sangiovanni, ‘Global Justice’, p. 21.

³⁸⁹ Joshua Cohen and Charles Sabel, ‘Extra Rempublicam Nulla Justitia?’ in J. Cohen, *The Arc of the Moral Universe and Other Essays* (Cambridge, MA: Harvard University Press, 2010), p. 377.

institutional arrangements' that accompany globalization 'require regulation by distinctive principles of justice.'³⁹⁰ Just as principles of social justice are appropriate to regulate the distinctive social and political relations in which members of a state stand to each other, there are global principles of justice suited to regulate the 'new relations and novel forms of association' that are features of the current global order.³⁹¹

Hence, while the conception I defend is internationalist in its insistence that those who share membership in a state stand in a distinctive relation which grounds egalitarian liberal principles of social justice, it nevertheless incorporates an important insight from the relational globalist view. It recognizes that the intense forms of global economic interdependence and integration that characterize the current global order are morally significant, requiring regulation by *sui generis* principles of justice which apply beyond state borders. Global principles of this type have *relational* grounds. In the next section, I will discuss an important global principle with a *non-relational* ground. This reveals another sense in which cooperation-based internationalism is pluralist: not only does this view recognize multiple principles of justice with different grounds and different scopes of application, but it also accepts that some of these principles have relational grounds, while others have non-relational grounds.³⁹²

IX. COMMON HUMANITY AND THE DUTY OF ASSISTANCE

We can think about what we owe each other, as a matter of political justice, and in virtue of our common humanity, by appealing to the moral significance of sharing a *common personal*

³⁹⁰ Scheffler, 'Cosmopolitanism, Justice, and Institutions', p. 170.

³⁹¹ Cohen and Sabel, 'Extra Republicam', p. 400.

³⁹² This second understanding of how an internationalist view can be pluralist I take from Risse, *Global Justice*, p. 10.

situation – the situation of living a ‘recognizably human life’³⁹³ or, as I will say following Griffin and Risse, a *distinctively human life*. As human persons, we are divided in many ways: we differ in the determinate conception of the final human good that we endorse, we pursue divergent personal and collective projects, and we participate in different systems of social cooperation. Nevertheless, simply as a human person I can recognize that other human persons, like me, face the special challenge of living a distinctively human life, and I can identify with other human persons on that basis. This basic form of mutual identification among human persons grounds a duty on the part of all of us to support efforts which help ensure that all human persons are able to lead a distinctively human life. This is the *individual-level* duty of assistance.

To elaborate the content of this duty, we have to specify a conception of a distinctively human life that all human persons can recognize and accept. Recall that the account of the normative peculiarity of the state affirmed by cooperation-based internationalism begins with the idea that a human person has the capacity for rational autonomy. If we take seriously this conception of the person for the purposes of developing a conception of social justice, we should take seriously this same conception for the purposes of developing a conception of global justice. I therefore propose to identify what is distinctively valuable about a human life by reference to the human person’s capacity to form, revise and pursue a conception of the good. A recognizably or distinctively human life is one which is lived, at least to some degree, *autonomously*: someone lives a distinctively human life when she is part author of it, shaping it through the exercise of her capacity for deliberation and practical reason. Here I echo the conception of a distinctively human life that has been offered by James Griffin, who writes:

³⁹³ Gillian Brock, ‘Introduction’, in G. Brock (ed.), *Necessary Goods: Our Responsibilities to Meet Others’ Needs* (New York: Rowman and Littlefield, 1998), p. 15.

We human beings have a conception of ourselves and of our past and future. We reflect and assess. We form pictures of what a good life would be... And we try to realize these pictures. This is what we mean by a distinctively *human* existence... [Our] status [as humans] centres on our being agents – deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves.³⁹⁴

Recall further that in order for someone to develop and exercise her capacity for rational autonomy, she must have access to various primary social goods, and that these social goods must be continually produced through social cooperation. As such, a duty to ensure that human persons are able to live distinctively human lives is most effectively discharged by ensuring that all human persons are members of some system of social cooperation that is *minimally just* in the sense that all members are able to access sufficient primary social goods to effectively develop and exercise their capacity for rational autonomy and thereby live a distinctively human life. Note that the standard of minimal justice does not simply require that all members have access to those social goods needed to sustain what we might call ‘mere life’ – sufficient biological and psychological functioning – but also to effectively form, revise, and pursue their own conception of the good life.

A system of social cooperation could fail to be minimally just in three main ways: by lacking sufficient productive capacity to provide all members with sufficient social goods to lead a distinctively human life, by being structured unfairly, such that the product of the joint efforts of participants in the system of cooperation is so disproportionately channelled to the benefit of a few that many lack access to sufficient social goods for their autonomy, or by failing to provide social protection for the most basic freedoms of all members. An appropriate response to our common humanity, then, demands that those who live in *developed states* – that is, reasonably just and affluent states – authorize their governments to assist in the

³⁹⁴ James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), p. 32.

establishment of at least minimally just systems of social cooperation in states where they do not currently exist – call these *developing states*. This is the *state-level* duty of assistance.

We can distinguish between two broad types of developing states.³⁹⁵ Following Rawls, I will call the first type of developing state *burdened societies*: these are states which experience serious societal poverty or maldistribution of otherwise adequate societal wealth because they ‘lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources needed to be [minimally just]’. These states, however, would welcome external assistance aimed at promoting the reforms necessary to achieve minimally just domestic institutions.³⁹⁶ Discharging the duty of assistance to a burdened society will typically involve assisting in the development of its institutional capacity, assisting in the implementation of economic and political reform, technology transfers, and especially in the short term, providing direct financial assistance.

The second type of developing state I will call, again following Rawls, *outlaw states*: these are states that lack minimally just domestic institutions but would not welcome external assistance to implement domestic reforms.³⁹⁷ Such states may enjoy high levels of societal wealth, but social goods in such societies are unfairly distributed and the regime will typically not only fail to provide adequate protection for basic freedoms but may even actively disrespect those freedoms through authoritarian and abusive exercises of state power. While the aim of assistance is the same for both burdened societies and outlaw states, the internal resistance to reform on the part of outlaw states greatly complicates the means that developed states can take to promote the establishment of minimally just institutions in such states, and in many cases there will simply be little that developed states can do, especially in the short term. A complete account of the duty of assistance to outlaw states will require a discussion of

³⁹⁵ Of course, many if not most actual developing states will embody features of both types outlined here: ‘pure’ cases of burdened societies or of outlaw states will be rare.

³⁹⁶ Rawls, *Law of Peoples*, p. 106.

³⁹⁷ See *ibid.*, p. 5 and pp. 80-81.

when forceful intervention to impose reforms is permissible, but such a discussion would take us far from our present concerns.

For now, the crucial point to note about the (state-level) duty of assistance is that it does not aim to reduce international inequalities as such, nor is it even concerned with raising the average income in developing states as an aim in itself; rather, the duty of assistance aims, at least as a long-term goal, to help developing states achieve a minimally just system of social cooperation. Ultimately, the duty aims to establish the social worlds which allow all human persons to provide themselves, through social cooperation, with the primary goods necessary to live a distinctively human life.

Note that although cooperation-based internationalism recognizes a duty which aims to ensure that all human persons are able to develop and exercise their capacity for rational autonomy, it does not therefore collapse into a globalist liberal conception. Nagel's remark is apposite here: 'Everyone may have the right to live in a just society, but we do not have an obligation to live in a just society with everyone.'³⁹⁸ The basic idea this slogan expresses seems to me correct: what each person can claim in political justice from all other human persons is to ensure that she can participate in *some* system of cooperation that provides her with the social goods necessary for a distinctively human life, not to bring about a just *global* system of cooperation in which all human persons are participants. This is not to suggest that there is anything wrong with favouring greater global integration. But because membership in a minimally just state is sufficient for a person to develop and exercise her capacity for rational autonomy, the social worlds we are *morally required* to assist others to bring about, in virtue of our common humanity, can be realized without the global integration of all existing systems of social cooperation.³⁹⁹

If, as I have been arguing, egalitarian liberal principles of social justice are grounded in a relation of equal mutual dependence in which the co-participants of a system of social cooperation distinctively stand, then a conception of global justice for a world of states, each

³⁹⁸ Nagel, 'Problem of Global Justice', p. 132.

³⁹⁹ For the formulation of this point, I am indebted to Jeff Howard.

enclosing a relatively discrete system of social cooperation, will be an *internationalist* rather than a globalist conception. At the same time, by recognizing the duty of assistance, my cooperation-based internationalist conception takes seriously the equal moral worth of every human person and the standing each person has to make certain binding moral demands on others by appeal to their common humanity.

X. CONCLUSION

My goal in this chapter has not been to develop a comprehensive conception of global justice – that task would extend beyond the concerns of developing a political theory of immigration. My discussion has been limited to those aspects of global justice that I believe are most relevant to developing a conception of justice in immigration. My fundamental aim has been to illuminate the basic distinction between globalism and internationalism about global justice, and to argue in favour of cooperation-based internationalism.

Negatively, I have argued that non-relational globalists must rely either on an objection to the comparative unfairness of undeserved or unavoidable global inequalities, or on a strong duty of universal beneficence. These arguments, I have suggested, are inadequate to justify the global application of egalitarian liberal principles of justice that displace rather than supplement principles of social justice. I have further argued that globalist liberals who point to the moral significance of globalization correctly insist that novel forms of intensive international interaction and interdependence require regulation by transnational principles of justice, but wrongly deny that the state is nevertheless normatively distinctive.

Positively, I have accounted for the normative peculiarity of the state in terms of the special relation of equal mutual dependence that binds co-members of a state, a relation which grounds the application of egalitarian liberal principles of justice among those who share a state. I have also insisted that recognizing the normative peculiarity of the state does not

preclude recognizing principles of justice which apply beyond state borders. Some transnational principles have non-relational grounds, such as the duty of assistance: what we owe each other in political justice just in virtue of our common humanity, and apart from any social or political relation in which we may stand, is to ensure that all persons are included as members in *some* system of cooperation that provides them with the social goods necessary to develop and exercise their capacity for rational autonomy. Other transnational principles have relational grounds; these principles are each a sui generis response to new, transnational, relations and practices that have accompanied the emergence of a globalized international order.

CHAPTER FOUR

Cooperation-based Internationalism and Justice in Immigration

I. COOPERATION-BASED INTERNATIONALISM AND IMMIGRATION

In the previous chapter, I defended a conception of global justice that I called *cooperation-based internationalism*. This conception is *internationalist* rather than globalist in holding that those who share membership in a state stand in a morally significant relation, which grounds distinctive principles of social as opposed to global justice. It is *cooperation-based* in identifying as that morally significant relation their joint and equal participation in a system of cooperation that produces the social goods necessary for each member's rational autonomy. Cooperation-based internationalism is also recognizes, in addition to these principles of social justice, principles of justice which apply beyond state borders. Some of these global principles, such as the duty of assistance, are non-relational, applying among all human persons as such; others are relational, aiming to regulate the new social forms that have come about as a result of globalization.

In this chapter, I will develop principles of *justice in immigration* – that is, principles to guide the evaluation of immigrant admission policy – against the background of cooperation-based internationalism. I begin by contrasting the implications for justice in immigration of globalist liberalism and cooperation-based internationalism, adopting the framework of *ideal theory*. I will argue that, in ideal theory, while globalist liberalism generally condemns restrictions on international migration as unjust, cooperation-based internationalism does not similarly require an open-border immigration policy.

Nonetheless, cooperation-based internationalism endorses background commitments which morally constrain the kinds of immigration restrictions that states may impose. I first consider cases where immigration policies are unjust because they violate duties that *current*

citizens owe *each other* as a matter of justice. I will argue that immigration policies which prevent family unification, or select immigrants based on certain suspect criteria, are unjust for this reason. Moreover, labour immigration policies should be designed to benefit all classes of current citizens equally while protecting each class from unwarranted harms.

Having considered justice in immigration from the perspective of duties owed among co-citizens, I turn to consider the relevance of duties that cooperation-based internationalism insists are owed between states and between citizens of different states. Here I primarily adopt the perspective of *non-ideal theory*. When we relax the assumptions of ideal theory and ask how to respond to injustice, the global duty of assistance becomes salient. I will suggest that discharging this duty will often require developed states to admit and indeed resettle refugees, and to avoid enacting brain drain-inducing labour immigration policies when this is harmful to institutional reform in developing states.

II. THE REJECTION OF GLOBALIST LIBERALISM

In Chapters 1 and 2, I argued that the justification of any conception of justice in immigration will rely at crucial points on commitments drawn from some background conception of global justice. In this section, I seek to bring out what is distinctive about an internationalist conception of justice in immigration by examining the outlines of a contrasting globalist liberal account. I suggest that the basic principles of globalist liberalism are difficult to reconcile with any restrictions on immigration, at least when we assume, as we do in ideal theory, strict compliance with the demands of justice. Globalist liberalism therefore implies a position on justice in immigration which normally requires open borders. By contrast, on an internationalist view, while social justice requires the removal of obstacles to domestic migration, free international migration is not a requirement of ideal justice.

We begin by examining why globalist liberalism rejects restrictions on international migration. Recall that globalist liberals affirm a global scheme of equal basic rights and liberties; every person in the world owes every other person, as a duty of justice, protection for the basic liberal rights of each. One prominent argument that globalist liberals have advanced against immigration restrictions appeals to international freedom of movement as one of these basic rights. We encountered two examples of this argument in Chapter 1. Joseph Carens argues that freedom of movement ‘among states’, and not only within states, should be accepted as a ‘basic liberty in a global system of equal liberties’.⁴⁰⁰ If international freedom of movement is a basic right or basic liberty, then there is a strong ‘presumption ... for free migration’, such that immigration restrictions are unjust unless they are required to protect other basic liberal rights.⁴⁰¹ Likewise, Phillip Cole argues for a ‘universal human right to freedom of international movement’.⁴⁰² If freedom of international movement is a basic right, then immigration restrictions ‘stand in need of stringent justification’.⁴⁰³

As we have seen, these writers provide two reasons to affirm international freedom of movement as a basic liberal right within a global scheme of rights. Firstly, freedom of movement is an essential background condition for individuals to effectively pursue their chosen conception of the good. As Carens puts it, the ability to migrate freely within and across borders ‘might prove essential to one’s plan of life.’⁴⁰⁴ As Cole puts it, free international movement might be needed for a ‘human agent’ to have a ‘life story’ and to have ‘the power

⁴⁰⁰ Joseph H. Carens, ‘Aliens and Citizens’, *Review of Politics* 49 (1987), p. 258.

⁴⁰¹ Joseph H. Carens, ‘Migration and morality: A liberal egalitarian perspective’, in B. Barry and R. E. Goodin (eds.), *Free Movement: Ethical Issues in the Transnational Migration of People and Money* (London: Harvester Wheatsheaf, 1992), p. 25.

⁴⁰² Christopher Heath Wellman and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (Oxford: Oxford University Press, 2011), p. 160.

⁴⁰³ *Ibid.*, p. 306.

⁴⁰⁴ Carens, ‘Aliens and Citizens’, p. 258.

to be its author'.⁴⁰⁵ Secondly, freedom of movement is 'often a prerequisite for the effective exercise of other freedoms.'⁴⁰⁶ Without free movement, individuals will often be unable to give effect to the choices that their other basic rights entitle them to make. If an individual is to give effect to her decision to cohabit with a partner of her choice, or to pursue a job opportunity, or to associate with willing others in pursuit of shared aims and projects, she must often be able to move into, and settle in, a new geographical area – including geographical areas outside the territory of her state of citizenship.⁴⁰⁷

Indeed, we can extend these arguments by noting that freedom of movement is a prerequisite for the effective exercise of not only those basic rights connected with an individual's personal autonomy such as freedom of occupational choice, liberty of conscience, and freedom of association, but also of those rights connected with participation in public deliberation and in political life more generally. Notably, globalist liberalism exerts pressure to embrace global democracy in some form, and it seems likely that the effective exercise of rights to equal political participation on a global scale will be difficult without free movement across the globe.

There is a clear case, then, for those who affirm a globalist liberal conception of justice to count freedom of movement across international borders among the basic rights that each individual in the world is entitled to. Given the special weight or priority of basic rights against other valuable goals and ideals, recognizing a basic right to international freedom of movement provides, on its own, a powerful argument for the injustice of immigration restrictions. In fact, globalist liberals recognize two other principles which also commit them to oppose immigration restrictions, especially restrictions on labour immigration.

⁴⁰⁵ Wellman and Cole, *Ethics of Immigration*, p. 296.

⁴⁰⁶ Joseph H. Carens, 'Immigration and the Welfare State', in A. Gutmann (ed.), *Democracy and the Welfare State* (Princeton, NJ: Princeton University Press, 1988), p. 215.

⁴⁰⁷ Carens, 'Aliens and Citizens', p. 258. See also Hillel Steiner, 'Hard Borders, Compensation, and Classical Liberalism', in D. Miller and S. H. Hashmi (eds.), *Boundaries and Justice* (Princeton, NJ: Princeton University Press, 2001), p. 79.

Firstly, globalist liberals affirm a *global principle of equality of opportunity*, which condemns restrictions on international labour migration. As we saw in the Introduction, migrants in the present phase of international migration tend to move from the developing world to the developed world, searching for better employment and wage prospects. But restrictions on labour migration limit this route of economic advancement. In order to achieve a global economy with greater worldwide economic mobility – let alone a world with *equal* economic opportunities, in which similarly talented and motivated individuals anywhere in the world have similar prospects of winning scarce educational places and jobs – these restrictions must be abolished.

Indeed, immigration restrictions would be incompatible with global equality of opportunity even if the comparative prospects provided by labour market participation in different states were more similar. Here I disagree with Kok-Chor Tan, who suggests that if we could achieve ‘a more egalitarian international order’ in terms of the distribution of socio-economic resources, then restrictive immigration policies ‘need no longer be in conflict with [a globalist] commitment to equal opportunity’.⁴⁰⁸ Tan’s suggestion neglects the requirement, necessary for equality of opportunity, that jobs and other positions be ‘open to all’, as Rawls puts it;⁴⁰⁹ selection procedures for jobs and other positions must pick out candidates with the best job-relevant skills, ‘in competitions that no one is excluded from entering’.⁴¹⁰ Clearly, country of citizenship as such will only very rarely bear on the job-relevant skills of a candidate, and legal restrictions on the labour market participation of non-citizens will therefore always count as an objectionable form of exclusion which violates global equality of opportunity.

⁴⁰⁸ Kok-Chor Tan, *Justice without Borders: Cosmopolitanism, Nationalism, and Patriotism* (Cambridge: Cambridge University Press, 2004), p. 126.

⁴⁰⁹ John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 60.

⁴¹⁰ Andrew Mason, ‘Equality of Opportunity, Old and New’, *Ethics* 111 (2001), p. 761.

Secondly, globalist liberals affirm some principle of *global distributive egalitarianism*. Especially over the long run, free migration would substantially reduce global wage differentials. Philippe van Parijs captures this mechanism for reducing global economic inequality neatly when he writes:

Removing all obstacles to ... transnational migration ... would allow workers in poor countries to share in the benefits currently enjoyed by workers in rich countries by eroding all those wage differentials that are not the reflection of unequal labour productivities.⁴¹¹

Even in a world with a substantially more egalitarian global distribution of income and wealth, free labour migration would help to maintain global distributive equality by *continually* eroding global wage differentials and evening out cyclical effects across different national economies. When one national economy experiences a downturn, it would experience labour emigration, reducing unemployment and the fiscal pressures associated with recessions such as reduced tax revenues and higher welfare payments; conversely, national economies enjoying stronger growth would attract labour immigration, thus increasing the supply of workers and limiting wage increases. The role that international labour migration can play in constraining global inequalities over time provides yet another reason for globalist liberals to favour free migration.

It seems, then, that globalist liberals have multiple grounds to condemn immigration restrictions as unjust, at least as a matter of ideal theory. Following Rawls, I take ideal theory to be concerned with specifying a conception of perfect justice; this conception serves as a standard by which institutional arrangements are to be assessed. In non-ideal theory, we relax ideal theory's assumption of 'strict compliance' with the requirements of justice, asking 'how

⁴¹¹ Philippe van Parijs, 'Marxism and migration', in his *Marxism Recycled* (Cambridge: Cambridge University Press, 1993), p. 147.

we are to deal with injustice’.⁴¹² In a slogan: where ideal theory specifies what justice demands of us, non-ideal theory specifies how we should respond to the injustice of others. One part of non-ideal theory – the one relevant to justice in immigration, as we will see in Sections VI and VII – concerns *transitional justice*. The theoretical task of this kind of non-ideal theory is to identify social and political reforms which can transform an unjust status quo in the direction of ideal justice.⁴¹³ A transitionally just reform is therefore a ‘morally permissible part of a feasible overall program to achieve perfect justice’.⁴¹⁴

With this division between ideal and non-ideal theory in view, we can safely say that globalist liberals should call for open immigration as a matter of ideal justice, although it is less clear what they should say from the perspective of non-ideal theory. Most globalist liberals who have written on immigration do not propose lifting all immigration restrictions as an immediate or short-term political goal because they believe that this may undermine the long-term transition from the unjust status quo to future arrangements which more fully realize globalist liberal justice. The worry is that open immigration policies and consequent large-scale migration to existing liberal democratic states will, due to sheer numbers as well as adverse selection effects, undermine the proper functioning of public services, reduce the commitment that citizens have to egalitarian liberal values, and threaten the fiscal sustainability of redistributive and social insurance programmes.

Thus, Carens cautions that while globalist liberals are committed to free international migration, that goal ‘is not politically feasible today’: if we are to satisfy globalist liberal justice ‘in the long run’, we may have to accept restrictions on migration for the foreseeable future, since trying to enact open borders now may ‘jeopardize those liberal egalitarian institutions and practices that currently exist and slow their development elsewhere’, ultimately setting

⁴¹² Rawls, *Theory of Justice*, p. 8.

⁴¹³ See Rawls, *Theory of Justice*, p. 8 and pp. 245-246; and John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), pp. 89-90.

⁴¹⁴ A. John Simmons, ‘Ideal and Nonideal Theory’, *Philosophy & Public Affairs* 38 (2010), p. 22.

back the cause of instituting a globalist liberal world order.⁴¹⁵ Similarly, Thomas Christiano warns that if what he calls ‘open immigration’ undermines the stability of existing democratic states, and if such states are essential to the ‘long-term realization’ of a globalist liberal justice, then insisting on free migration in the short term is unwise, for such a policy runs the risk of destabilizing ‘the very institutions that give us some hope for realizing cosmopolitan justice in the future.’⁴¹⁶ Finally, van Parijs argues that until greater global distributive equality is achieved, states with robust internal redistribution should ‘not let people in too easily from poorer countries’, for fear that this will undermine support for these redistributive policies. As a globalist, van Parijs does not take redistribution within states to matter for its own sake; rather current welfare states matter because they provide proof that ‘a strongly redistributive economy’ is more than a ‘fancy dream’, and therefore serve as a ‘tangible model’ for a hoped for egalitarian global order to be realized in the future.⁴¹⁷

By contrast, cooperation-based internationalism denies that free international migration is a demand of justice, even in ideal theory. Recall that for internationalists, freedom of movement as a basic liberal right, equality of opportunity, and distributive egalitarianism are principles of *social* justice that apply among persons who share membership in a state, and not global principles that apply across international borders. They can therefore consistently hold that social justice demands free domestic or *intra*-national migration, while also insisting that there is no demand in ideal justice for states to enact open immigration policies to allow for free *international* migration – in fact, certain considerations of justice may require states to *restrict* immigration.

Consider first how internationalism and globalist liberalism diverge in their understanding of freedom of movement as a basic right. Cooperation-based internationalism

⁴¹⁵ Carens, ‘Migration and morality’, p. 28 and p. 45.

⁴¹⁶ Thomas Christiano, ‘Immigration, Political Community, and Cosmopolitanism’, *San Diego Law Review* 45 (2008), p. 935 and p. 956.

⁴¹⁷ Van Parijs, ‘Marxism and migration’, p. 150.

agrees that freedom of movement is among the institutional conditions essential for an individual to form, revise and pursue her conception of the good. There is also agreement that freedom of movement must be protected if many of the *other* basic rights necessary for rational autonomy are to be effectively exercised. There is further agreement that freedom of movement is also necessary for the effective exercise of basic rights unconnected to an individual's autonomy, such as her basic rights to equal political participation.

However, cooperation-based internationalism insists that the duty to protect a given person's freedom of movement and her other basic liberal rights does not fall on all other human persons; in the first instance it falls only *on her co-citizens*. As I argued in Chapter 3, the institutional capacity required for the protection of basic rights – including, but not limited to, the system of constitutional and criminal law – is maintained by the joint efforts of members of a state. Co-citizens can therefore press demanding claims on each other for the protection of their basic liberal rights, but they cannot press the same claims on non-members.⁴¹⁸ While an individual's interest in pursuing her conception of the good and plan of life may be frustrated if she is denied free movement into another state's territory by that state's immigration policies, she is not wronged since the members of other states lack a primary duty to protect and promote her freedom.

Moreover, to the extent that the case for freedom of movement as a basic right depends on its importance for *other* basic liberal rights, it is significant that, on an internationalist view, the duties to protect these other rights also apply in the first instance among co-citizens. A clear example is the basic right to equal political participation. While globalist liberals may favour global democracy, internationalists understand the right as a claim to equal participation in *state-level* political processes. A justification for freedom of movement

⁴¹⁸ Members of different states are, however, responsible to each other for the protection of basic *human* rights, as we will see in Section VI.

as a basic right which relies on its importance for the right to equal political participation implies a right to *domestic*, but not international, freedom of movement.⁴¹⁹

Similarly, according to cooperation-based internationalism, an individual's freedom from restrictions in moving *out* of her state's territory – her freedom to emigrate – is a basic liberal right that only her co-citizens are bound to honour. An individual's ability to pursue her personal projects and conception of the good may sometimes be seriously burdened if she is prevented from migrating. Since co-citizens of a state have a duty to equally protect the essential social conditions for each other's rational autonomy, they have a duty not to constrain a citizen from leaving the state's territory if she so chooses. However, the members of other states lack a parallel duty not to constrain her from entering their respective states' territories according to her choice. This asymmetry between the duties of co-citizens and the duties of non-citizens in respect of basic protections for an individual's rational autonomy explains why an asymmetry between emigration and immigration can be justified. While globalist liberals may accept Lea Ypi's 'general principle of justice in migration' that 'if R provides a valid reason for restricting incoming freedom of movement, R also provides a valid reason for restricting outgoing freedom of movement', internationalists are able to reject Ypi's principle.⁴²⁰

According to the cooperation-based internationalism that I endorse, therefore, an individual's freedom to move within, and out of, her state's territory is a basic right whose protection is the duty of her co-citizens only. Since a prospective immigrant's freedom to enter the territory of *other* states according to her choice is not a freedom that the citizens of those states owe it to her to protect, there is no global basic right to free international migration. Hence, immigration restrictions are not unjust on the ground that they violate prospective immigrants' freedom of movement as a global basic right, or indeed any other

⁴¹⁹ See Adam Hosein, 'Immigration and freedom of movement', *Ethics and Global Politics* 6 (2013), pp. 32-33.

⁴²⁰ Lea Ypi, 'Justice in Migration: A Closed Borders Utopia?' in J. S. Fishkin and R. E. Goodin (eds.), *Population and Political Theory: Philosophy, Politics and Society* 8 (Oxford: Wiley-Blackwell, 2010), p. 256.

basic right whose protection prospective immigrants can claim from the current members of their would-be receiving state.

Restrictive immigration policies similarly escape criticism for violating equality of opportunity. Cooperation-based internationalism requires that those who share a state have equal access the framework of educational and employment opportunities that their joint efforts sustain and reproduce; hence, each citizen must have similar chances of obtaining jobs or educational places if they are similarly motivated and talented. But while equality of opportunity among co-citizens requires free domestic migration – since that principle is ‘flouted if an individual is unable to take a job because she is prohibited from traveling to the part of the country where that job is offered’⁴²¹ – this principle clearly does not require an open immigration policy.

While considerations of distributive justice are relevant for immigration policy, as we will see in Section IV, states are under no duty in justice to maintain open immigration policies in order to serve some principle of distributive equality which applies to the global economy as a whole, since cooperation-based internationalism recognizes no such principle. As equal co-participants in the cooperative system which produces the social goods they need for their autonomy, citizens have a reasons in justice to limit inequalities among themselves in the distribution of these social goods, but they lack any similar reason to limit global economic inequalities.

Taking cooperation-based internationalism as a background conception of global justice, I have argued against the globalist liberal contention that there is a general duty of ideal justice to allow free international migration. Even if (ideal) justice does not condemn any immigration policy short of generally open borders, however, justice is not indifferent between different possible immigration policies: cooperation-based internationalism does not leave states full moral discretion over the regime of immigration law they enact. In the rest of

⁴²¹ Ibid., p. 34.

this chapter, I articulate some principles to guide the justice-based assessment of immigration policy, taking for granted the internationalist view that immigration restrictions are not in themselves unjust.

III. FAMILY UNIFICATION AND THE RIGHT TO A FAMILY LIFE

We have seen that, according to cooperation-based internationalism, freedom of movement as a basic liberal right does not require states to maintain an open immigration policy because protection for basic rights is something co-citizens owe each other only, at least when we bracket the question of *remedial* duties which become salient only in non-ideal theory. In this section, I will point out one basic liberal right that does in fact require states to grant certain prospective immigrants special eligibility for admission even in ideal theory – the right to a family life, or more broadly, the right to the social bases of significant caring relationships.

My primary argument in this section is that duties of justice that *current* members of a state owe each other require immigration policies which allow *family unification*: the spouses and minor children of current citizens, if they are not already citizens themselves, must be granted special immigration eligibility. Without this eligibility, these non-citizen family members may be prevented by border restrictions from living with their citizen relations, thereby imposing severe burdens on the family life of the affected persons. A state whose immigration policies impose such burdens wrongs affected current members by failing to meet its duty to protect one of their basic rights – namely what I will call their *right to a family life*, following Article 8 of the European Convention on Human Rights, which proclaims an individual's basic right to a 'private and family life'.

In affirming a duty to allow family unification, and in grounding that duty in the basic right of current members to a family life, my argument joins a broad consensus among internationalist theorists who have written on immigration. For example, Michael Blake

stresses that a state must not undermine the ‘familial interests of a current member’,⁴²² while David Miller insists that ‘*existing* citizens’ have a right to ‘have the opportunity for a family life’.⁴²³ Yet perhaps because of this broad agreement, there has been little in-depth discussion of family-based eligibility for immigration. The only detailed account I am aware of, which can be found in the work of Matthew Lister, departs from my own account in two important ways. I will spend the rest of this section explaining where I believe Lister goes wrong.

Firstly, whereas I argue that the duty to grant special immigration eligibility to non-citizen family members is grounded in current citizens’ right to a family life, Lister appeals to a separate right, the ‘fundamental right to form intimate relationships’ according to the choice of the right-holder.⁴²⁴ While the right to a family life offers special protection to two distinctive kinds of relationship – namely, *marriage* and *legal* (as opposed to biological) *parenthood* – Lister’s right to ‘form and maintain intimate relationships’ is ‘a subspecies of the general right to freedom of association’.⁴²⁵

As Lister is aware, an argument grounding a right to family unification in a right to freedom of (intimate) association is vulnerable to the charge that it proves too much: it might imply that states have a duty to extend immigration eligibility not only to family members but also to members of any (intimate) association, such as social clubs, firms, groups of friends, or even parties to any voluntary contract. Indeed, it might seem that grounding immigration eligibility for family unification in a general right to freedom of association leads us to Hillel Steiner’s view that it is always unjust for current citizens to be ‘prevented from freely associating with [non-citizens] on the terms jointly preferred by and mutually agreeable to

⁴²² Michael Blake, ‘Immigration, Jurisdiction, and Exclusion’, *Philosophy & Public Affairs* 41 (2013), p. 129n43.

⁴²³ David Miller, ‘Justice in Immigration’, Nuffield College Working Papers in Politics 2013-04, p. 17.

⁴²⁴ Matthew Lister, ‘Immigration, Association, and the Family’, *Law and Philosophy* 29 (2010), p. 721.

⁴²⁵ *Ibid.*, p. 722.

them’ – a view that would imply a general requirement of justice to maintain open immigration policies.⁴²⁶

In order to resist Steiner’s radical view, we might note that freedom of association as a *basic right* should not be understood as broadly as he supposes. We might observe that the practice of constitutional democracies has been to distinguish freedom of association proper from freedom of contract or the mere freedom of ‘[p]icking one’s company’.⁴²⁷ Because of the special weight of basic rights, freedom of association as a basic right should be understood to protect only the interest that individuals have in being able to pursue, in common endeavour with like-minded individuals, their significant personal projects and plans of life. Expanding the basic right to freedom of association beyond this would be to overstate the significance of individual choice.

In endorsing this conception of freedom of association as a basic right, we would be echoing the views of a number of canonical liberal authors. For example, Tocqueville defends a ‘right of association’ that protects an individual in ‘combining his exertions with those of his fellow creatures and of acting in common with them’,⁴²⁸ while J. S. Mill identifies the ‘freedom to unite, for any purpose not involving harm to others’ as following from the ‘liberty ... of framing the plan of our life’.⁴²⁹ On their view (and mine), freedom of association is a basic right because of its importance for individual autonomy: individuals’ ability to pursue their plans and projects and thereby to live autonomous lives will be seriously burdened if they are prevented from associating with others who share their ends and who are willing to cooperate to promote those ends.

⁴²⁶ Steiner, ‘Hard Borders’, p. 79.

⁴²⁷ George Kateb, ‘The Value of Association’, in A. Gutmann (ed.), *Freedom of Association* (Princeton, NJ: Princeton University Press, 1998), p. 36.

⁴²⁸ Alexis de Tocqueville, *Democracy in America*, Volume 1 (New York: Vintage Books, 1990), p. 196.

⁴²⁹ John Stuart Mill, *On Liberty*, in his *Collected Works*, Volume XVIII, (ed.) J. M. Robson (Toronto: University of Toronto Press, 1977), p. 226.

However, when freedom of association is conceived in this way, it is not the formation and maintenance of a *relationship* with *particular* other individuals which is primarily at stake, but the ability to engage in common action to formulate and advance collective goals. The core interest protected by freedom of association as a basic right is therefore not frustrated when the right-holder is prevented from associating with *particular* individuals of her choice – what matters is that the right-holder is generally free to join associations which promote the projects she has chosen or is interested in exploring. Freedom of association, understood in this properly restricted sense, is unable to support a duty to allow special immigration eligibility for family members.

An argument which attempts to ground the duty to allow family unification in a basic right to freedom of association therefore either proves too much, or fails to justify special eligibility for family members at all. A better argument will focus on the interest that individuals have in interacting regularly with their spouses or children, that is, with *particular* persons. As Elizabeth Brake points out, in a marriage, the spouses are known to each other ‘in their particularity’; for this reason, the parties to the relationship of marriage ‘are not fungible’; a similar analysis clearly also applies to the relationship between parents and their children.⁴³⁰

I argue that the duty to grant special immigration eligibility to non-citizen family members is grounded in the right to a family life, a right which protects the interest individuals have in maintaining a *caring relationship* with their immediate family members. A caring relationship, to borrow Brake’s account, is an ‘emotionally significant’ interpersonal relationship in which the ‘parties are known personally to one another, share history, interact regularly, and have detailed knowledge of one another.’⁴³¹ While the state cannot guarantee the

⁴³⁰ Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (Oxford: Oxford University Press, 2012), p. 180.

⁴³¹ Elizabeth Brake, ‘Minimal Marriage: What Political Liberalism Implies for Marriage Law’, *Ethics* 120 (2010), p. 310, p. 327.

success of citizens' caring relationships, it can extend institutional protection and support for such relationships.

When family members are separated by an international border, the caring relationships between spouses and between parents and their children are seriously burdened: the parties to these relationships are prevented from living together or maintaining regular personal contact, without which they cannot develop an intimate knowledge of each other and provide each other with the deeply personal form of material care and psychological support that is distinctive to caring relationships of these types. By granting special immigration eligibility for family unification, the state acts to support and protect these caring relationships.

We may nevertheless wonder why the caring relationships of marriage and parenthood ought to be protected by a liberal state. Extending protection to these relationships should not, of course, be motivated by a belief in their superior value as ways of life. Rather, protection is called for by the recognition that these relationships are not only widely valued for their own sake but also instrumentally valuable for many citizens in developing and exercising the moral capacities that fit them for citizenship.

Consider first the parent-child relationship. Parenthood has a profound social importance: without this particular caring relationship, the reproduction of society as a system of cooperation over time will be difficult if not impossible. It is within the parent-child relationship that children typically develop their moral capacities, including their capacity for rational autonomy and their capacity to be an equal cooperating member of society. Thus, Rawls stresses the role of the family in the 'nurturing and development' of children as future citizens,⁴³² while Brake points out that '[n]one of us would have moral powers, or conceptions [of the good] to pursue, were it not for care as children', since the normal psychological

⁴³² John Rawls, 'The Idea of Public Reason Revisited', in his *Collected Papers*, (ed.) S. Freeman (Cambridge, MA: Harvard University Press, 1999), pp. 595-596.

development of children requires caring relationships.⁴³³ Parenthood, while not the only type of caring relationship which can nurture children as future citizens, is by far the most common as well as likely the most effective nurturing relationship, and for this reason is worthy of special protection and support by a liberal state.

Next, consider the relationship of marriage. Like parenthood, the marriage relationship is a critical site of personal development. The process of forming and revising a conception of the good does not end with the advent of adulthood. If we are to exercise our capacity for rational autonomy, we need ongoing social sites for idea formation: typically, an individual does not formulate her conception of the good purely through isolated cogitation, but ‘in colloquy with significant others’.⁴³⁴ Marriage, while not the only social site for idea formation, is surely a key site for many people. In addition, marriage partners typically develop a deep mutual knowledge and on this basis they provide each other with material and psychological care which helps each partner to carry through their plans and projects effectively.⁴³⁵ Because of its importance to citizens in forming, revising and pursuing a conception of the good, marriage as a caring relationship should be specially protected and supported by a liberal state.

A further objection is that my argument – like the argument from freedom of association which I criticized – proves too much: parenthood is not the only caring relationship which can nurture children as future citizens, and marriage is not the only caring relationship which furnishes adult citizens with material and psychological support and a site for idea formation. Especially when we consider that not all caring relationships currently qualify, in both law and common social understanding, as marriages – but only those which

⁴³³ Brake, ‘Minimal Marriage’, p. 328.

⁴³⁴ Brake, *Minimizing Marriage*, p. 178. The claim that to be autonomous individuals require social sites of idea formation is incisively defended by Seana Valentine Shiffrin in her ‘What Is Really Wrong with Compelled Association?’ *Northwestern University Law Review* 99 (2005).

⁴³⁵ See Brake, *Minimizing Marriage*, pp. 178-180.

involve a ‘cohabiting, financially entangled, sexual, monogamous, exclusive, romantic’ partnership⁴³⁶ – we will see that there is a range of alternative relationships that could be just as valuable for citizens’ exercise of their rational autonomy as marriage. In particular, for some adult citizens, a close non-sexual friendship or a network of friendships might be the central caring relationship in their lives.

This objection charges that my argument offers no principled reason to deny special immigration eligibility to non-citizens who are engaged in significant caring relationships with current citizens but who are not their immediate family members. My response is to substantially accept the charge: those non-familial caring relationships which play a role in some citizens’ lives analogous to marriage and parenthood should indeed receive the same institutional protection and support, including the grant of special immigration eligibility. For example, there is no reason why the close and significant *friendships* of current citizens with non-citizens should not be supported by immigration policy – with the crucial proviso that we can devise a feasible administrative mechanism to distinguish between casual friendships and bona fide cases of friendships which as caring relationships genuinely play a role in citizens’ lives analogous to that played by marriage. Immigration policy should not arbitrarily privilege dyadic, monogamous, sexual relationships over other types of caring relationships.⁴³⁷

Indeed, we should not conceive of the right to a family life in isolation; that right is only the most prominent example of a more general right to the social bases of significant caring relationships. If immigration restrictions impose a burden on other kinds of relevantly similar caring relationships, they should also be lifted. While I have chosen to focus my discussion primarily on current citizens’ right to a family life and immigration eligibility for non-citizen family members, this is only because family-based immigration represents the clearest and most familiar case.

⁴³⁶ Brake, *Minimizing Marriage*, p. 144.

⁴³⁷ See *ibid.*, Ch. 4 and Ch. 7.

We turn now to my second point of divergence from Lister's account. He argues that the financial conditions that states commonly impose on eligibility for family unification can be just. For example, currently British citizens can only sponsor a spousal visa if they earn an income of at least £18,600 a year – significantly higher than the annual income of a person in full-time work on the minimum wage. Financial requirements of this kind are intended to minimize the risk that non-citizen family members who are admitted and allowed to settle in the state's territory will be unable to support themselves financially and will resort to public funds.

Lister defends these financial conditions in principle on two grounds: firstly, financial requirements help ensure that family unification 'does not violate reciprocity among citizens', by minimizing the negative fiscal impact of family-based immigration; and secondly, financial requirements help ensure that 'no citizens are used as a mere means to the support of another's choices'.⁴³⁸ Both of these arguments are dubious.

The first argument fails to take seriously the special weight of claims for family unification. Recall that, on my view, granting special immigration eligibility for family unification is required to protect a *basic right*, namely the right to a family life. Because citizens' basic rights are essential institutional conditions for their rational autonomy, liberals have often argued that these rights should not be infringed even for the sake of other morally important goals, including achieving greater socio-economic fairness. Famously, Rawls assigned priority to the principle protecting citizens' equal basic liberties, such that the restriction of basic liberties for the sake of equality of opportunity or socio-economic advantages is deemed unjust.⁴³⁹ If liberal justice properly accords special weight to citizens' basic rights, then burdening the family lives of some citizens cannot be justified by appealing to the goal of mitigating the adverse distributive impact of family-based immigration.

⁴³⁸ Lister, 'Immigration, Association, and the Family', pp. 739-740.

⁴³⁹ See Rawls, *Theory of Justice*, pp. 60-61.

Moreover, many of those current citizens who are affected by financial conditions on family unification are among the least advantaged themselves.

Lister's second argument is dubious because it relies on a strict principle of choice-sensitive cost internalization which is inappropriate to the context of intimate, caring relationships. Lister insists that a citizen should be required to bear the full cost of her choice to marry a non-citizen; if the costs of an individual citizen's choices are not internalized in this way, he argues, the autonomy of other citizens is compromised or disrespected, since they are made to promote ends that are not their own.

While there are indeed contexts in which it is appropriate to hold individuals responsible for bearing the costs of their choices, applying a strict principle of choice-sensitivity to the case of family-based immigration will seriously burden what Sophia Moreau has called the 'deliberative freedom' of citizens, that is, their ability to engage in practical deliberation about how to live, free from the pressures of normatively extraneous considerations.⁴⁴⁰ Citizens cannot properly exercise rational autonomy if central and significant decisions in their lives must be made while subject to pressures which prevent them from responding to the reasons which are directly relevant to the choice at hand.⁴⁴¹ The deliberative freedom of citizens in deciding about marital choices seems to require that immigration policy insulate that decision-making process from the extraneous consideration of whether the expected combined income of the spouses will be sufficiently high to render future reliance on public assistance unlikely. Moreover, when we stand ready to absorb the possible fiscal costs of a co-citizen's choice to marry a non-citizen, we need not see ourselves

⁴⁴⁰ Sophia Moreau, 'What is Discrimination?' *Philosophy & Public Affairs* 38 (2010), p. 147.

⁴⁴¹ See also Seana Valentine Shiffrin, 'Egalitarianism, Choice-Sensitivity, and Accommodation', in (eds.) R. J. Wallace, P. Pettit, S. Scheffler, and M. Smith, *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford: Clarendon Press, 2004), p. 291ff.

as extending support for or endorsing her particular choice, but only as protecting her deliberative freedom.⁴⁴²

IV. DISTRIBUTIVE JUSTICE AND IMMIGRATION POLICY

In the previous section, we saw that because co-citizens are responsible to each other for the mutual protection of their basic liberal rights, they have a duty of justice to support immigration policies which grant special eligibility for admission to the non-citizen spouses and minor children of current citizens – and indeed to all persons with whom current citizens share a significant caring relationship. In this section, I examine another way that duties of justice owed among current citizens might affect our assessment of immigration policy: specifically, I ask how a (labour) immigration policy's *distributive impact* on current citizens matters for the justice of that policy.

Again, my discussion is an exercise in ideal theory: I am concerned to understand what justice in immigration requires of those who share a state in the first instance, not how they should craft their immigration policy in response to injustice. I therefore adopt the perspective of a state whose domestic system of cooperation is just according to the demands of cooperation-based internationalism. I assume that the state whose immigration policies are under scrutiny houses a system of cooperation that is able to produce, independently of opening its borders to migrant workers, sufficient social goods to ensure propitious conditions for the rational autonomy of all its members. Moreover, bracketing the effects of immigration, social goods are distributed among citizens in ways that appropriately reflect their equal participation in social cooperation and their equal claim to the advantages of social cooperation. I also assume provisionally that other states each house at least minimally just systems of social cooperation, although I will relax this assumption at the end of this section.

⁴⁴² Ibid., p. 293.

Few internationalists have offered a sustained account of the relevance of distributive justice for immigration policy in ideal theory. Indeed, Rawls notoriously claims that immigration is essentially a problem for non-ideal theory, and will be ‘eliminated as a serious problem in a realistic utopia’.⁴⁴³ The chief exception is found in the work of Stephen Macedo, whose internationalist account of global justice takes shared membership in a state to be a morally significant relation of co-participation in a system of collective self-governance.⁴⁴⁴ Macedo insists that in assessing immigration policy, ‘concerns about distributive justice are relevant and urgent’; these concerns, moreover, are ‘inward-looking’: they relate to the ‘special obligations we have toward our poorer fellow citizens’.⁴⁴⁵

His core contention is that if ‘high levels of immigration have a detrimental impact on our least well-off fellow citizens’, or if ‘particular patterns of immigration worsen domestic economic disparities’, then there are ‘weighty (but not necessarily conclusive) reasons’ to limit immigration, even if those who seek admission are worse off than those co-citizens that immigration restrictions seek to protect.⁴⁴⁶ For Macedo, to the extent that a particular immigration policy (1) *harms* the least advantaged current citizens, or (2) *widens inequalities* in economic prospects among current citizens, then there are strong (although not indefeasible) reasons in justice to favour alternative policies.

These principles of justice in immigration are explicitly justified by appeal to the background commitments of Macedo’s internationalist conception of global justice, according

⁴⁴³ Rawls, *Law of Peoples*, pp. 8-9. See also Samuel Scheffler, ‘Justice and Immigration’, unpublished MS.

⁴⁴⁴ See Stephen Macedo, ‘The Moral Dilemma of U.S. Immigration Policy: Open Borders Versus Social Justice?’ in C. M. Swain (ed.), *Debating Immigration* (Cambridge: Cambridge University Press, 2007), pp. 73-75; Stephen Macedo, ‘When and Why Should Liberal Democracies Restrict Immigration?’ in R. M. Smith (ed.), *Citizenship, Borders, and Human Needs* (Philadelphia: University of Pennsylvania Press, 2011), p. 311ff; and Stephen Macedo, ‘What Self-Governing Peoples Owe to One Another: Universalism, Diversity, and *The Law of Peoples*’, *Fordham Law Review* 72 (2004).

⁴⁴⁵ Macedo, ‘The Moral Dilemma of U.S. Immigration Policy’, p. 77.

⁴⁴⁶ Macedo, ‘Should Liberal Democracies Restrict Immigration?’ p. 302 and Macedo, ‘The Moral Dilemma of U.S. Immigration Policy’, p. 64.

to which those who are ‘related as coparticipants in a political society have special reasons to be concerned about disparities of wealth and opportunity’ among themselves.⁴⁴⁷ According to what Macedo calls the ‘membership-based view’ of social justice, distributive justice among those who share a state requires them to support public policies that limit economic inequalities among them, since these inequalities arise from the workings of the basic institutions that they jointly uphold and impose. Only then can the system as a whole be justifiable to all who are involuntarily subject to it as ‘citizens with equal standing’;⁴⁴⁸ in particular, constraints on economic inequalities are required to ensure that the system is justifiable even to those who are left the worst off by that system’s operation.⁴⁴⁹ Immigration policy, ‘as part of the basic structure of social institutions’ that affect the comparative economic prospects of different groups and classes of citizens, is morally constrained by these egalitarian demands of distributive justice.⁴⁵⁰

I disagree with Macedo that egalitarian constraints on the distributive impact of immigration policy follow directly, as it were, from distributive egalitarianism as a principle of social justice. Co-citizens should not assess an immigration policy by considering how its likely effects would answer to the demands of an independent principle of social justice requiring distributive egalitarianism among those who share in domestic social cooperation. Rather, they should conceive of (labour) immigration as distinctive a way of restructuring an existing system of social cooperation, and they should ask what *sui generis* principles apply to proposed restructurings of this type.

Nevertheless, I broadly agree that, in virtue of their special relation as co-participants in a system of social cooperation, those who share membership in a state have powerful

⁴⁴⁷ Macedo, ‘Should Liberal Democracies Restrict Immigration?’ p. 302.

⁴⁴⁸ Ibid., p. 314.

⁴⁴⁹ Ibid., pp. 311-316. See also Macedo, ‘The Moral Dilemma of U.S. Immigration Policy’, pp. 73-74; and Macedo, ‘What Self-Governing Peoples Owe to One Another’, pp. 109-111.

⁴⁵⁰ Macedo, ‘The Moral Dilemma of U.S. Immigration Policy’, p. 81; Macedo, ‘Should Liberal Democracies Restrict Immigration?’ p. 317.

justice-based duties to support only those immigration policies whose distributive impact is acceptable to the least advantaged among them. Indeed, I join Macedo in claiming that, bracketing other considerations of justice such as duties to protect the basic liberal rights of co-citizens and remedial duties to members of other states, an immigration policy is unjust when it worsens the economic prospects of the least advantaged current citizens or widens economic inequalities among current citizens. I accept these claims not as implications of egalitarian principles of social justice to the case of immigration, but as implications of a general principle which I will argue specially regulates the choice of immigration policies among those who share a state: an immigration policy's distributive impact on current citizens is just when it *equally promotes* the economic prospects of all citizens, *unless* an unequal distribution of the gains from immigration favours less advantaged citizens over more advantaged citizens.

Before we proceed to a defence of my proposed general principle, two clarifications are in order. Firstly, since there are independent requirements of justice to allow family unification and to admit refugees, and since these requirements, being more morally urgent, have priority over concerns of distributive justice within developed states, our focus should be confined to *labour* immigration policy. Secondly, since it will be excessively costly or even impossible to predict the distributive effects of an immigration policy at the level of specific individuals accurately, it is reasonable to evaluate policies in terms of their economic effects on different *social classes and representative groups*, such as occupational groups or skill groups. We can therefore formulate more precisely the general principle regulating the distributive impact of immigration policy as follows: a labour immigration policy's distributive impact on current citizens is just when it equally promotes the economic prospects of all social classes and representative groups, unless inequalities in the distribution of the gains from labour immigration favour a less advantaged class or group over a more advantaged class or group.

My argument in defence of this general principle begins by asking how economic gains to existing citizens from labour immigration might be generated. Firstly, since immigrants themselves consume goods and services, they might add to demand in the economy, providing profit opportunities for firms and employment opportunities for workers. Secondly, labour immigration might increase the productivity of native workers through production complementarities between their skills and experience and those of native workers, and between their skills and experience and the capital stock of the receiving state's economy.⁴⁵¹ For example, the entry of low-skilled immigrants into the workforce may allow more educated native workers to reallocate their labour toward jobs that better suit their skill levels. Conversely, highly-skilled immigrants may have special skills that are relatively lacking among native workers. Thirdly, when a flexible labour immigration policy allows for domestic labour shortages to be easily met by hiring migrant workers, wage costs are controlled, making firms more competitive and lowering prices of goods and services for consumers.⁴⁵²

Notice that none of these pathways to the generation of gains from immigration rely on the special contribution of any particular social class or representative group among current citizens. Rather, they depend on the restructuring of the economy as a whole by opening the domestic labour market to immigrant labour of certain types. Aaron James has made a similar point with respect to the gains from international trade: "The goal is macro-level change in the allocation of productive resources, for the sake of macro-level ... gains across an economy."⁴⁵³ Current citizens contribute to the generation of the immigration

⁴⁵¹ Alberto Alesina, Johann Harnoss, and Hillel Rapoport, 'Birthplace Diversity and Economic Prosperity', NBER Working Paper No. 18699; George Borjas, *Heaven's Door: Immigration Policy and the American Economy* (Princeton, NJ: Princeton University Press, 1999), p. 88 and pp. 99-102; Paul Collier, *Exodus: Immigration and Multiculturalism in the 21st Century* (London: Allen Lane, 2013), pp. 112-113.

⁴⁵² Christian Dustmann, Tommaso Frattini and Ian Preston, 'The Effect of Immigration along the Distribution of Wages', *Review of Economic Studies* 80 (2012).

⁴⁵³ Aaron James, *Fairness in Practice: A Social Contract for a Global Economy* (Oxford: Oxford University Press, 2012), pp. 119-220.

surplus simply by supporting and complying with the rules of the general structure of institutions which permits a certain controlled level of labour immigration, and by continuing to participate in productive activity, changing their behaviour in response to changing economic incentives.

Since, at least in the significant sense mentioned above, all current members of a state which opens its labour market to immigrant workers contribute equally to the generation of the aggregate gains from immigration, no class or group has a stronger claim than any other class or group to a greater share of the gains from immigration. Moreover, since we conceive of each current citizen as a human person with the capacity for rational autonomy, all have an equally strong interest in receiving a greater rather than a smaller share of the gains from immigration. Hence, there is a presumption in favour of equal division of the gains from immigration: the *prima facie* principle for the distribution of the aggregate gains from labour immigration is *equality of gain*, at least as a benchmark from which departures must be justified by reasons that are acceptable to all citizens.

It may be objected that equal division of the gains from labour immigration is an implausibly inflexible distributive principle. I offer three responses to this objection. Firstly, the metric in terms of which some class or group is to be judged to have gained from labour immigration is the average lifetime economic prospects of its constituents, that is, their average expectations of obtaining employment and gaining income and wealth over the course of their whole lives. While in the short-term variations in the gains from immigration across different classes and groups are of little moral significance, persistent inequalities in the distribution of gains are more troubling, especially once citizens have taken reasonable steps to adapt to changed economic circumstances.

Secondly, the principle does not (presumptively) require that all citizens benefit equally in terms of *market* outcomes; if labour immigration generates market outcomes where some classes and groups gain while others gain less or even suffer setbacks, policies designed to

redistribute the gains from immigration can be implemented so that all classes and groups in society benefit evenly from labour immigration. Finally, and most importantly, equal division of the gains from immigration simply represents a presumptive benchmark; it is not a conclusive principle. If departures from equal division of gains can be justified by reasons acceptable to all classes and representative groups, then unequal gains are not unjust.

I suggest, on the basis of two arguments, that departures from equality will be acceptable to all when they favour a worse-off class or group over a better-off class or group, but not vice versa. The first argument appeals to something like what Martin O'Neill has called 'the diminishing moral significance of greater benefits in well-being.'⁴⁵⁴ If the economic restructuring made possible by a particular labour immigration policy promises to confer benefits on a badly-off class or group but at the same time will likely confer comparably inferior gains or even impose setbacks on some better-off class or group, the potential beneficiaries can answer objections to such a policy from the potential (relative) losers by pointing to how the latter already – that is, independently of immigration – have greater shares of social goods with which to pursue their personal projects and plans of life. The reasons to benefit the well-off class or group are therefore less weighty than the reasons to benefit the worse-off class or group.

The second argument appeals to an idea of reciprocity or fairness among those who share a state and who are hence co-participants in a shared system of social cooperation. This argument seems to be gestured at by Macedo, who maintains, of an immigration policy that would harm the economic interests of the least advantaged current citizens, that 'it is not reasonable to expect our less-well-off citizens to accede to [such] a policy on the grounds that it makes those with the luck of superior endowment by nature and birth even better off.'⁴⁵⁵

⁴⁵⁴ Martin O'Neill, 'What Should Egalitarians Believe?' *Philosophy & Public Affairs* 36 (2008), p. 153.

⁴⁵⁵ Macedo, 'The Moral Dilemma of U.S. Immigration Policy', p. 81. See also Macedo, 'Should Liberal Democracies Restrict Immigration?' p. 317.

Macedo's suggestion seems to be that less-well-off citizens can reasonably object to an immigration policy that further benefits already better-off citizens, especially when these better-off citizens are better off as the result of morally arbitrary factors such as their natural endowment of talents or initial social position.

We can expand on this suggestion with reference to the cooperation-based internationalism I defended in Chapter 3. As we saw in that chapter, those social classes or representative groups more advantaged by domestic social cooperation have no special claim to a privileged position within the domestic economy: their better economic prospects are justified primarily by the importance of economic incentives in spurring productivity, and not by their greater contribution to social cooperation or by their greater need for or worthiness of receiving primary social goods. We have also seen in this section that they do not have a special claim to a greater rather than a smaller share of the gains from immigration.

When deciding whether to restructure the economic system they collectively participate in by opening the labour market to immigrant workers, therefore, those who occupy less advantaged positions in the system of cooperation have strong reasons to oppose any form of restructuring which confers *still greater* benefits on already privileged classes or groups, without comparably promoting – and in some cases even setting back – the economic interests of less well-off classes or groups. Forms of macroeconomic restructuring which benefit already better-off classes and groups at the expense of worse-off classes and groups, or which disproportionately benefit better-off classes and groups, go against reciprocity among the cooperating members of a system of social cooperation, while forms of restructuring that lead to equality of gain or disproportionate benefit for worse-off classes and groups do not.

If these arguments are successful, they vindicate my proposed general principle which, to recall, claims that a labour immigration policy's distributive impact on current citizens is just when it benefits all classes and groups equally, unless an unequal distribution of the gains

from immigration favours classes or groups less advantaged by domestic social cooperation over classes or groups more advantaged by domestic social cooperation. This principle explains why a labour immigration policy which widens economic inequalities among current citizens or worsens the economic prospects of the least advantaged citizens is unjust. It goes beyond Macedo's conclusions, however, since it is concerned not only with the distributive impact of labour immigration on the worst off class or group of current citizens, but also with classes and groups above the minimum; the principle tells against labour immigration policies which channel the gains from immigration towards a better-off class or group and away from any class or group which already occupies a comparably less advantaged position.

As a way of bringing out the implications of the principle I have defended, consider the distributive impact that recent labour migration to developed states has had on current citizens of these receiving states. Admittedly, some economists claim that the labour market impact of immigration has been minimal. Reviewing the case of immigration to the United States, David Card concludes that there is only 'slight' evidence that immigration has harmed the labour market opportunities of native workers.⁴⁵⁶ However, many other economists argue that even if the aggregate effects of immigration have been muted, the large-scale immigration of low-skilled workers has worsened the economic prospects of low-skilled and low-waged native workers.

Thus, economists have found that in the United Kingdom, workers in the low-skilled services sector experienced a serious negative impact on wages;⁴⁵⁷ more generally, there is evidence that while most native workers in the UK experienced wage gains from immigration,

⁴⁵⁶ David Card, 'Is the New Immigration Really So Bad?' *Economic Journal* 115 (2005), p. F300. See also David Card, 'Immigration and Inequality', *American Economic Review: Papers & Proceedings* 99 (2009).

⁴⁵⁷ Stephen Nickell and Jumana Saleheen, 'The Impact of Immigration on Occupational Wages: Evidence from Britain', Federal Reserve Bank of Boston Working Papers, No. 08-6.

low-waged workers experienced declines in their wages.⁴⁵⁸ George Borjas reports a similar adverse impact from immigration on low-skilled US workers' wage and employment prospects. Moreover, he argues that the benefits from immigration to the US have been unequally distributed; in particular, 'immigration has shifted income away from less-skilled natives toward highly skilled natives and owners of capital.'⁴⁵⁹ Paul Collier points to a broadly similar distributional effect: 'most indigenous workers end up gaining, while the poorest end up losing.'⁴⁶⁰

If Borjas, Collier and others are right that past and present immigration policies adopted by developed states have had labour market effects which favoured those already better off among their members over those already worse off, and indeed have worsened the economic prospects of the least-skilled and lowest-waged current citizens, then in the light of the principle I have defended in this section, the justice of such policies is seriously called into question. If such policies are not accompanied by significant redistribution away from these observed market outcomes, or are not otherwise justified by considerations relating to the duty of assistance to non-members, they are unjust.

The appropriate arrangements to redistribute the aggregate gains from immigration will depend on the specific labour market effects of an immigration policy. Presumably, redistribution will involve some forms of relatively direct transfers through progressive taxation, on the one side, and income support, on the other. However, not all setbacks from labour immigration that badly-off current citizens suffer can be compensated through direct financial transfers.⁴⁶¹ Clearly, one important way in which a class or group of current citizens may lose out from labour immigration is when they experience unemployment stemming

⁴⁵⁸ Christian Dustmann et al, 'The Effect of Immigration along the Distribution of Wages', *Review of Economic Studies* 80 (2012).

⁴⁵⁹ Borjas, *Heaven's Door*, p. 103.

⁴⁶⁰ Paul Collier, *Exodus*, p. 113.

⁴⁶¹ I thank James Christensen for discussion of this point.

from more intense labour market competition. As a response to increased unemployment, unemployment insurance schemes could be reinforced. In addition, fiscal and monetary policies aimed at stimulating economic activity and boosting overall employment, as well as arrangements to facilitate the re-training of affected workers, could be implemented. When these policies and schemes are financed through redistributive taxation, the aggregate gains from immigration are redistributed to those adversely impacted by the market effects of labour immigration.

Provided that such redistributive mechanisms are effective and adequately implemented, even an immigration policy that causes unemployment or depresses wages for some groups can be just. Beyond relatively modest levels of labour immigration, especially when immigrant workers are concentrated in particular skill or occupational groups, such redistribution may be ineffective. In particular, very large flows of low-skilled immigration may result in levels of unemployment among low-skilled current citizens that overwhelm redistributive and compensatory mechanisms. In such cases, justice will require – bracketing for now the demands of the duty of assistance – labour market protection; that is, restricting the entry of migrants with similar skill profiles to reduce labour market competition.

This suggests that some form of selection among prospective labour migrants according to their skill profile may be justified as a way of managing the distributive impact of labour immigration on current citizens. When an immigration policy has a labour market impact that benefits better-off classes and groups at the expense of worse-off classes and groups, and redistribution is an ineffective response, moving to protect affected workers from harmful or unfair market outcomes through skills-based selection is not only permissible, but is in fact required by duties of distributive justice among current citizens. However, it should be noted that redistributive mechanisms likely only become ineffective, and hence distributive justice among co-citizens only demands selection among immigrant workers, at relatively high levels of immigration.

Before bringing this section to a close, I must clarify two points about my argument thus far that stem from its location within ideal, rather than non-ideal, theory. Firstly, we must distinguish between the question of when the redistribution of the gains from immigration is ineffective, and the question of when redistribution may be *politically infeasible*. Many writers on immigration have worried that immigration, especially the immigration of low-skilled workers who are culturally and racially different, typically reduces political support for redistributive policies. Collier has argued that the ‘immigration of culturally distant people who disproportionately occupy low-income slots in the economy’ erodes the ‘shared sense of identity’ which sociologically underpins political support for redistribution.⁴⁶² Similarly, Macedo points to empirical studies suggesting that ‘high levels of immigration by low-income people may make transfer payments less politically popular’.⁴⁶³

Although Stuart Soroka, Keith Banting and Richard Johnston provide some empirical evidence that increased immigration has been negatively correlated with spending on public goods and on welfare state programmes, they acknowledge that the actual causal mechanism, if any, between immigration and decreased support for redistribution is not well understood and remains the subject of conjecture.⁴⁶⁴ Since there is copious independent evidence that increased racial and ethnic diversity correlates negatively with support for robust redistributive policies, it seems that one plausible explanation for their observations is that increased immigration has typically led to increased racial and ethnic diversity, and that a negative reaction to racial and ethnic difference among existing voters explains the withdrawal of support for spending on public goods and universal welfare programmes.⁴⁶⁵ Another plausible

⁴⁶² Collier, *Exodus*, p. 84 and p. 113.

⁴⁶³ Macedo, ‘The Moral Dilemma of U.S. Immigration Policy’, pp. 79-80.

⁴⁶⁴ Stuart Soroka et al, ‘Immigration and Redistribution in a Global Era’, in P. Bardhan et al (eds.), *Globalization and Egalitarian Redistribution* (New York and Princeton, NJ: Russell Sage Foundation and Princeton University Press, 2006).

⁴⁶⁵ See Alberto Alesina et al, ‘Public Goods and Ethnic Divisions’, *Quarterly Journal of Economics* 114 (1999); Alberto Alesina and Edward L. Glaeser, *Fighting Poverty in the US and Europe: A World of Difference* (Oxford: Oxford

explanation is that the immigration of low-income workers drives the income of the median resident below that of the median voter, leading to decreased support for economic redistribution.⁴⁶⁶

If these explanations are correct, then the unjust motivations of racial animus and greed drive the political infeasibility of redistributing the gains from immigration. However, in ideal theory we assume that citizens are motivated by a sense of justice and display what Rawls calls a ‘reasoned allegiance’ to just policies and institutions: they are motivated to support just policies – such as just redistributive policies – because they recognize that these policies are just.⁴⁶⁷ The political infeasibility of schemes to redistribute the gains from immigration is therefore not a worry in ideal theory; only the ineffectiveness of redistributive or compensatory schemes is. Of course, when we relax the assumptions of ideal theory to ask how we should respond to injustice as identified by our ideal principles, the political feasibility of various reforms aimed at bringing us closer to justice must be taken into consideration.

Secondly, since my argument has been developed as an exercise in ideal theory, I have not considered the demands of the duty of assistance, that is, the remedial duty to help persons who live in states whose systems of social cooperation are unable to sustain the social conditions under which they can lead autonomous lives. As I will argue in Sections VI and VII, the duty of assistance has substantial implications for immigration policy. In particular, the duty requires developed states to admit, as refugees, persons whose basic human rights to civil and political freedom are threatened in their home states. Furthermore, the duty also requires such states to craft their (labour) immigration policies with an eye to facilitating reforms which will contribute to economic and political development in developing states.

University Press, 2004); and Robert Putnam, ‘*E Pluribus Unum*: Diversity and Community in the Twenty-first Century’, *Scandinavian Political Studies* 30 (2007).

⁴⁶⁶ Nolan McCarty et al, *Polarized America: The Dance of Ideology and Unequal Riches* (Cambridge, MA: MIT Press, 2006), Ch. 4.

⁴⁶⁷ See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), pp. 142-143. See also Ryan Pevnick, *Immigration and the Constraints of Justice* (Cambridge: Cambridge University Press, 2011), pp. 158-161.

This latter requirement may, as we shall see, recommend either more or less restrictive immigration policies toward (especially skilled) migrant workers from developing states, depending on the particular circumstances of the sending state.

The principle I have defended in this section expresses what those who share a state owe each other when deciding whether and how they should restructure their economy by allowing labour immigration. These duties among co-citizens must be balanced against the duties owed to non-members, especially those who live in developing states. I have already suggested that the extremely urgent claims of refugees to admission should be given priority over duties owed to co-citizens. The appropriate balance to be struck in other cases between duties owed among those who share membership in a developed state and duties owed among all persons in virtue of common humanity is less clear. Within the confines of this chapter I can only echo Macedo's insistence on 'the necessity of grappling with the tension between two important moral demands: justice to our fellow citizens and humanitarian concern with the plight of poor persons abroad', even if I would characterize our duties to non-members as going beyond a merely humanitarian response to poverty.⁴⁶⁸

V. CRITERIA OF SELECTION AND DUTIES TO CO-CITIZENS

In our discussion of the distributive impact of labour immigration, we saw one way that justice permits, and may even require, some form of selection among prospective immigrants. We might ask whether other criteria by which states might select prospective immigrants can likewise be just. Note that since we are concerned with criteria of *selection* among prospective immigrants, we are assuming that the *exclusion* of at least some who seek entry can be just. Our focus is therefore on the entry of those prospective immigrants who do not fall into a

⁴⁶⁸ Macedo, 'The Moral Dilemma of U.S. Immigration Policy', p. 81.

category, such as being the spouse or minor child of a current citizen, which normally entitles them to admission – what Michael Blake has called ‘discretionary immigration’.⁴⁶⁹

I will define discretionary immigration in the following way: in principle, states could entirely exclude prospective immigrants of this type without wrongdoing. For example, it is not unjust for a state to close its borders to all labour immigration – although almost no state does in practice, since under a wide range of empirical conditions participating in the practice augments national income and brings other economic benefits. Nevertheless, immigration that is discretionary in this sense is not morally unconstrained: if the citizens of a state choose to open their borders to discretionary immigration, the immigration policies they enact must comply with the duties of justice owed among themselves, as well as to non-members. We have already seen how skills-based selection among prospective labour migrants based on the likely distributive effects of their entry into the domestic labour market can be permissible and even required.

In this section, I will suggest that aside from selection based on employment-relevant skills, language competence, and motivation to integrate into the receiving society as an equal cooperating citizen, other types of selective criteria are unjust. I examine various criteria of selection that states have practised or are defended elsewhere in the literature – criteria which select on the basis of a prospective immigrant’s race, sexual orientation, cultural membership, religious conception or other comprehensive doctrine – and find them to be generally suspect. When, however, prospective migrants with certain religious beliefs, comprehensive doctrines or cultural practices are disfavoured because their admission is likely to undermine the background conditions for the stability of just domestic institutions, or make their integration into the receiving state as free and equal citizens especially costly, such factors can be taken into account without injustice.

⁴⁶⁹ Michael Blake, ‘Discretionary Immigration’, *Philosophical Topics* 30 (2002). See also Joseph H. Carens, ‘Who Should Get in? The Ethics of Immigration Admissions’, *Ethics & International Affairs* 17 (2003), pp. 103-110.

My arguments will focus primarily on the ways in which selection of prospective immigrants according to these suspect selection criteria violate duties owed among current citizens. However, I will also argue that when these criteria are justified by appeal to demeaning beliefs about the group disfavoured for admission, they are objectionable for the further reason that they wrong excluded migrants by violating *moral cosmopolitan* requirements owed among all human persons.

To anchor our discussion, I will begin by considering the paradigm example of a suspect selection criterion, and one which has attracted significant attention in the theoretical literature: selection based on *racial identity*. Much of this attention has been a response to Michael Walzer's notorious discussion of the 'White Australia' policy. This policy heavily promoted European and especially white British immigration while barring entry to non-white migrants. Although Walzer objects to this policy for the reason that Australia claimed jurisdiction over, and hence excluded certain migrants from, a vast territory that was larger than what was needed for Australians to continue their 'way of life', he does not condemn the policy of racial selection for the promotion of a racially-inflected collective way of life as unjust in itself. For Walzer, once we bracket the question of Australia's jurisdiction over large tracts of unoccupied land, there was nothing unjust in its enactment of an immigration policy aimed at achieving racial homogeneity.⁴⁷⁰

Unsurprisingly, Walzer's view has been universally rejected by theorists of justice in immigration. It seems to me, however, that the available critical accounts have failed to identify and resist one of Walzer's fundamental errors. For example, Blake's primary objection points to the fact that Australia was not actually a racially homogeneous society. As such, its racially discriminatory immigration policies sent a demeaning message to its *existing* non-white members by identifying the state with its white citizens only and signalling that non-whites

⁴⁷⁰ Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), pp. 46-47.

were ‘second-class citizens’.⁴⁷¹ Similarly, Andrew Altman and Christopher Heath Wellman condemn the White Australia policy as unjust because any state which excludes prospective immigrants on the basis of some racial classification will ‘wrongly disrespect its own citizens who belong to the dispreferred category’, marking them as ‘second-class citizens’.⁴⁷²

For these theorists, the injustice of immigrant selection based on race depends on the fact that all, or nearly all, societies are in fact racially heterogeneous. When a state whose members are racially diverse enacts a racially selective immigration policy, it wrongs those of its current members who share a racial identity with the disfavoured group or groups by undermining their dignity and self-respect as equal citizens – racially selective policies send a demeaning message to these current citizens and call into question their fitness for citizenship.

While this approach to identifying the injustice of racially selective policies picks out one important objection to such policies, it is nevertheless incomplete. As Blake and Wellman themselves admit, if there were no other objection to such policies, then a state whose members were actually racially homogeneous could justly impose immigration restrictions aimed at preserving that homogeneity.⁴⁷³ Admittedly, very few if any societies are racially homogeneous in reality. Moreover, maintaining such homogeneity will almost certainly be incompatible with discharging independent duties of justice in immigration, such as allowing family unification and resettling refugees. Nevertheless, we can still imagine the possibility of a state that at some point in its history has a racially homogeneous membership. When we do, we are likely to be ‘horried’, as Wellman admits he is, at the prospect of that state adopting an immigration policy goal aimed at preserving its racial homogeneity.⁴⁷⁴

⁴⁷¹ Michael Blake, ‘Immigration’, in R. G. Frey and C. H. Wellman (eds.), *A Companion to Applied Ethics* (Oxford: Blackwell, 2003), p. 233.

⁴⁷² Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009), p. 186.

⁴⁷³ Blake, ‘Immigration’, p. 233; Christopher Heath Wellman and Phillip Cole, *Debating the Ethics of Immigration* (Oxford: Oxford University Press, 2011), p. 149.

⁴⁷⁴ Wellman and Cole, *Ethics of Immigration*, p. 149.

Against Blake and Wellman, I suggest that Walzer's view is flawed not solely because it fails to account for the *effects* of racially selective immigration policies, such as the demeaning message they send to certain current citizens, but because achieving a particular racial composition among its members can never be a just aim of state policy. Hence a state's immigration policies are unjust when they aim at the racial homogeneity – or diversity – of its population. Racially selective immigration policies are unjust *in themselves*, not merely for their effects.

To see why, recall the liberal conception of political society which lies at the foundation of cooperation-based internationalism: the members of a political society are united as citizens participating in a system of social cooperation by which they produce the social goods required for the rational autonomy of each. Given this conception of political society, all persons who are willing and able to participate in social cooperation on fair terms have the capacity to be members. A person's racial identity is therefore wholly irrelevant to her fitness for political membership. Racially selective immigration policies reflect a very different understanding of political society, according to which a state's racial composition or character is fundamental to its point and purpose, such that public policy can and should aim to preserve the particular racial character of the state.

It is a core tenet of liberal thought that only the liberal conception of political society is capable of attracting the unforced support of all persons who are involuntarily subject to political rule. When the state is conceived as a system of fair cooperation for the production of social primary goods, political power is exercised to promote only those interests that all persons can be expected to recognize. In contrast, the idea that each state has a 'racial identity whose preservation is a legitimate ground for immigration policy'⁴⁷⁵ elevates to the status of a common goal what are deeply sectarian social ideals – namely racial homogeneity or racial diversity for their own sake – which some citizens can reasonably reject as pointless, irrational

⁴⁷⁵ See Michael Blake, 'Immigration and Political Equality', *San Diego Law Review* 45 (2008), pp. 973-974.

or as inextricably bound up with empirically and morally mistaken ideas about the inherent superiority or inferiority of different races.

Hence, in addition to unjustly undermining the equal self-respect of current citizens of the disfavoured race, racially selective immigration policies wrong current members more generally by forcing them to promote a goal that they can reasonably reject. This objection to racially selective policies applies even in the (highly unlikely) case of racially homogeneous societies, since the wrong it identifies does not lie in the demeaning message such policies send, but in the way in which they press current members into the service of a goal which they can reasonably reject and may indeed find irrational or repugnant.

Since no mainstream political party would propose explicit racial selection today, my extended discussion of such policies might seem academic. I believe it is worth focusing on the question of racial selection for two reasons. Firstly, in many societies hostility to racial difference remains an important – even the primary – determinant of anti-immigration attitudes. For example, research has found that in the case of the UK, opposition to immigration is strongly linked to the national origin of immigrants; moreover, race-related concerns are a greater determinant of anti-immigration attitudes than concerns about the labour market impact of immigration or the potential burden on the welfare system.⁴⁷⁶ Against the background of such attitudes, the electoral incentives to propose immigration policies which achieve racial selection *indirectly* are strong. Indeed, Michael Dummett has argued that many facially neutral immigration policies enacted in the UK and other Western European states should be understood in this context.⁴⁷⁷ It is therefore important to be clear about why racial selection, overt or covert, is an unjust approach to discretionary immigration.

⁴⁷⁶ Christian Dustmann and Ian Preston, 'Racial and Economic Factors in Attitudes to Immigration', *Berkeley Electronic Journal of Economic Analysis & Policy* 7 (2007).

⁴⁷⁷ Michael Dummett, *On Immigration and Refugees* (London: Routledge, 2001), Part Two.

Secondly, the final objection I developed to racially selective immigration policies has a more general application: it holds for any selection criterion that has no connection to social and political goals that all current members can share. Consider policies which disfavour prospective immigrants based on their *sexual orientation*. Such policies have been in place much more recently than racially selective policies: for example, until the Immigration Act of 1990, so-called ‘sexual deviation’ was an explicit ground for denial of entry to the US.⁴⁷⁸ This policy obviously had the effect of unjustly undermining the self-respect of US citizens who were members of sexual minorities, communicating the false and demeaning idea that their sexuality made them less fit for citizenship than heterosexuals. But this policy was unjust for a further reason: it could not be ‘defended publicly as rationally related to the common good’;⁴⁷⁹ rather, it aimed at promoting a sectarian conception of human sexuality in which heterosexuality is held up as an ideal.

Selection criteria based on *religious affiliation* and *cultural membership* are also generally suspect; however, these cases are more complex than racist and homophobic immigration policies. This complexity is reflected in existing defences of cultural selection. David Miller has argued that justice permits, or even mandates, public policy aimed at the preservation of a state’s national culture. Hence, in selecting among prospective immigrants, states may ‘give precedence to people whose cultural values are closer to those of the existing population’.⁴⁸⁰

Miller nevertheless stresses that we must distinguish between the ‘national culture proper’, which is shared by all current citizens, and ‘private cultures that exist within the state’: while selective policies aimed at preserving the national culture are just, selection which favours certain private cultures over others is unjust. This insistence on neutrality with respect

⁴⁷⁸ See Brian J. McGoldrick, ‘United States Immigration Policy and Sexual Orientation: Is Asylum for Homosexuals a Possibility?’ *Georgetown Immigration Law Journal* 8 (1994).

⁴⁷⁹ Carens, ‘Who Should Get in?’ p. 105.

⁴⁸⁰ David Miller, ‘Immigration: The Case for Limits’, in A. I. Cohen and C. H. Wellman (eds.), *Contemporary Debates in Applied Ethics* (Oxford: Blackwell, 2005), p. 204.

to private cultures stems from concerns very similar to the one I raised above about selection based on race and sexual orientation: selection according to membership of particular private cultures will unjustly signal a privileged status for citizens associated with favoured cultural groups and an inferior status for those associated with disfavoured groups.⁴⁸¹

The significance of Miller's distinction between a national culture and a private culture clearly turns on the claim that all citizens identify with the former, but not the latter. We may doubt, however, whether national cultures are ever shared in the relevant sense by all current citizens. Consider the example of a putative 'national' language. Suppose that a state is linguistically homogeneous – I will leave aside here the obvious objection that in reality most states are linguistically diverse. In this sense, all citizens share one aspect of the national culture. However, notice that some citizens may simply use the national language for communication, without valuing that language and its literary tradition non-instrumentally. These citizens will not support preserving the particular national language; they would not be concerned to prevent the national language from losing out in the face of competition from English or some other international language and may indeed welcome that prospect. State policies – including immigration policies – aimed at preserving the *particular*, distinctive national language force them to join in promoting a goal that they reasonably do not share.

I therefore do not join Miller's endorsement of immigration policies which 'differentiate sharply among prospective immigrants between those who speak the national language and those who don't', with aim of preserving the national language as 'one of the [national] community's most important distinguishing characteristics'.⁴⁸² More generally, I take selective policies which aim at preserving the distinctive cultural practices dominant within the population of the receiving state to be unjust. I do not claim, however, that facility with specific cultural practices can never be a just basis for selecting immigrants.

⁴⁸¹ David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), pp. 228-229.

⁴⁸² Miller, 'Immigration', p. 200.

Language-based selection again provides an illuminating example. A state has many defensible reasons to favour prospective immigrants who display competence in the common language of its citizens. As Blake has noted, without language competence of this kind, admitted immigrants will be unable to effectively engage in democratic political deliberation.⁴⁸³ More generally, an admitted immigrant who is unable to speak the common language will be much less likely to find employment, will be unable to pursue many opportunities available in her new society, and will be unable to effectively exercise her basic rights and liberties as a citizen.

Of course, admitted immigrants who initially lack language competence will often be able to learn, and become proficient in, the common language. Nonetheless, the provision of language instruction will be an additional cost for the receiving state. Moreover, some immigrants may never become fluent in the common language. These considerations imply that the *integration* of immigrants lacking language competence will be costly: it is more difficult for such immigrants, in virtue of their lack of language competence, to acquire the capacities which will enable them to exercise their rights as equal citizens and to fully contribute to social cooperation. For this reason, states are justified in favouring those prospective immigrants with language competence over those who lack it.

Selection based on language competence can also be justified by the goal of maintaining *some* common language. As the number of languages used in communication increases, the transaction costs for various social interactions will also increase. Without a common language or a small number of common languages, social cooperation in general and in particular democratic deliberation would be much more costly. Hence, although the goal of preserving a particular, distinctive national language will only appeal to those who value that language non-instrumentally, the goal of preserving some common language or small number of common languages is one which all citizens can be expected to support. A state can

⁴⁸³ Blake, 'Political Equality', p. 974.

therefore use its immigration policy to maintain relative linguistic homogeneity – though not to preserve any particular language for its own sake.

My argument so far suggests that selection based on cultural traits is not unjust if the traits selected for are valued only instrumentally – specifically, for their role in facilitating social and political cooperation among equal citizens. Nevertheless, very rarely will this condition be satisfied; language competence seems to be the only example, and in general culturally selective criteria are suspect. A similar analysis can be applied to the case of selection based on religious affiliation – or more broadly, selection based on adherence to any comprehensive philosophical or moral doctrine.⁴⁸⁴

It is clear why religious selection is generally suspect: in a religiously plural society, an immigration policy which disfavours adherents of certain religious conceptions sends a demeaning message to those current citizens who share the disfavoured confessional affiliation, implying that their religious beliefs call into question their fitness for citizenship. Moreover, this objection to religious selection applies to all societies, since liberty of conscience is an independent and fundamental requirement of justice, and diversity of religious belief is the expected condition of a society which respects liberty of conscience.⁴⁸⁵

There might seem to be a case for religious selection, however, when prospective immigrants hold religious beliefs which really are incompatible with liberal citizenship. These beliefs are those which enjoin the faithful to give supremacy to religious values over political values in matters of social and political cooperation; following Rawls, I call these *politically unreasonable* religious doctrines.⁴⁸⁶ Because they affirm these politically unreasonable doctrines, certain prospective immigrants are unlikely to have the motivations which fit someone for liberal citizenship: they will likely be unwilling to engage in fair cooperation with other

⁴⁸⁴ See Rawls, *Political Liberalism*, p. 13.

⁴⁸⁵ See *ibid.*, p. 36.

⁴⁸⁶ *Ibid.*, p. 64.

citizens, and may be prepared to use state power, when they can, to repress other comprehensive views and impose their own religious convictions, denying to other citizens freedoms of conscience, speech and association they claim for themselves.

When too many members of a liberal state endorse politically unreasonable doctrines, the stability of its just and democratic arrangements is threatened, since such stability requires that the large majority of its members are willing to cooperate on fair terms with those with whom they share the state, and therefore to accept that ‘political values normally outweigh whatever nonpolitical values conflict with them.’⁴⁸⁷ All citizens in a liberal state can be expected to support state policies which aim to contain unreasonable doctrines ‘so that they do not overturn political justice’.⁴⁸⁸ The exclusion of prospective immigrants who hold politically unreasonable religious views is therefore permissible, perhaps even required.

However, I caution that religious selection is generally suspect, and it is important to ensure that policies of selection against politically unreasonable religious views are not *overbroad*. In particular, we should recognize that religious traditions tend to be internally diverse: although some current within a particular religious affiliation may be politically unreasonable, other currents may not be. Consider the examples of Catholicism and Islam. Some currents within each religious tradition are clearly politically unreasonable. Historically, Catholic doctrine has opposed religious freedom; Pius IX insisted, for example, that Catholicism should be imposed as the state religion, ‘to the exclusion of all other forms of worship’.⁴⁸⁹ Similarly, the teaching of the influential Islamic scholar Sayyid Qutb has maintained that ‘any form of obedience to non-Muslim legislation or subordination to non-

⁴⁸⁷ Ibid., p. 146.

⁴⁸⁸ Ibid., p. 64n.

⁴⁸⁹ Pius IX, *The Syllabus of Errors*. See also Pius IX, *Quanta Cura*, and Gregory XVI, *Mirari Vos*.

Muslim political authority [is] an impermissible setback and defeat for Islamic aims, justifiable only as an unfortunate and hopefully temporary necessity'.⁴⁹⁰

However, there are other currents within these same traditions which are not unreasonable. Catholic teaching since the Second Vatican Council has affirmed religious freedom as an appropriate response to human dignity,⁴⁹¹ while many Islamic scholars have argued that Muslims who share a political society with non-Muslims should enter into social and political relations with them on the basis of civic friendship and solidarity, endorsing liberty of conscience and accepting religious pluralism as an enduring feature of free societies.⁴⁹² There are, therefore, reasonable and unreasonable currents within Catholicism and Islam. Presumably, the same could be said of many other religious traditions besides these two.

For this reason, a state which aims to contain the strength of politically unreasonable religious doctrines among its members cannot broadly exclude on the basis of religious affiliation: such a policy casts too wide a net. An acceptable policy must be more targeted, perhaps by requiring prospective immigrants to demonstrate their willingness to relate to those they propose to live with on terms of equality and mutual respect, and to accept the authority of laws duly enacted by legitimate democratic procedures. Indeed, the justice of this targeted policy reflects the important point that what is being selected against in these cases is not religious affiliation as such, but the lack of a politically reasonable motivation.

Another way that policies that aim to select against adherents of politically unreasonable religious doctrines might be overbroad is by also selecting against traditionalist but politically *reasonable* religious conceptions. An example will serve to illustrate the

⁴⁹⁰ Andrew F. March, 'Islamic Foundations for a Social Contract in non-Muslim Liberal Democracies', *American Political Science Review* 101 (2007), p. 250, emphasis removed.

⁴⁹¹ Vatican Council II, *Dignitatis Humanae*.

⁴⁹² See March, 'Islamic Foundations', p. 250; Andrew F. March, *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (Oxford: Oxford University Press, 2009); and Tariq Ramadan, *To Be a European Muslim* (Leicester: Islamic Foundation, 1999).

distinction between politically unreasonable views and traditionalist but politically reasonable views. In 2006, the Dutch government started requiring prospective immigrants to view a film about life in the Netherlands which vividly depicts its socially liberal national culture; the film includes scenes with same-sex activity and with a woman sunbathing topless.⁴⁹³ To the extent that the Dutch policy was intended to select against prospective immigrants who, motivated by their religious or other comprehensive views, reject equal rights of citizenship for gays and lesbians or reject equal civic freedom for women, and who will likely be unwilling to engage in social and political cooperation on fair terms with their proposed co-citizens, it is not objectionable. However, this policy seems to go beyond selecting against politically unreasonable views to disfavour those prospective immigrants who simply hold traditionalist religious views.

The film is problematic to the extent that it reflects a restrictive idea about what it is to be a Dutch citizen in good standing, identifying membership in the Dutch political community with endorsement of socially liberal ideals about human sexuality *beyond* what is required to be a politically reasonable citizen of the Netherlands. More generally, selection policies aimed at containing politically unreasonable religious conceptions should be attuned to the possibility of a traditionalist religious conception that is politically reasonable, accepting gays and lesbians as equal citizens and affirming equal rights and freedoms for women, even while disapproving of homosexual activity as sinful or holding socially conservative views about sexual modesty. It is important not to mistakenly select against prospective migrants with politically reasonable religious beliefs, since this will unjustly stigmatize current citizens with similar views.

I have been arguing that immigration policies which select prospective immigrants based on suspect categories such as racial identity, sexual orientation, cultural membership

⁴⁹³ See Gregory Crouch, 'Dutch immigration kit offers a revealing view', *New York Times*, 16 March 2006. I am grateful to David Miller for pointing this example out to me.

and confessional affiliation are normally unjust for two reasons. First, they express a demeaning message about current citizens who belong to the groups selected against, calling into question their fitness for citizenship. Second, they use public policy to achieve sectarian goals that not all citizens can be expected to share. These objections to criteria of selection which involve suspect categories focus on injustice to *current citizens*. But often selective criteria are unjust for a further reason: they wrong *prospective immigrants* who are denied admission, because they fail to recognize and respect them as equal moral persons. To put the same point another way, some selective immigration policies violate not only the special demands of justice among co-citizens, but also violate the requirements of moral cosmopolitanism, which apply among all human persons.

As I argued in Chapter 1, moral cosmopolitanism affirms that at a basic level, all persons are included in a one-rank justificatory community: each human person has equal and independent standing to demand justification from others for their treatment of her and for the social and political institutions they require her to support. While prospective immigrants are not owed the special duties of justice which apply distinctively among those share a state, they have the standing as members of this universal justificatory community to demand reasons they can accept for the immigration policies that are enforced against them.

I will mention two minimal conditions for a selective immigration policy to pass this moral cosmopolitan test. Firstly, prospective immigrants must be given reasons for their exclusion that do not treat them as simply less deserving or inferior; excluded immigrants cannot be expected to accept reasons that would require them to ‘agree to their own moral inequality’.⁴⁹⁴ Secondly, the reason for exclusion must appeal to some consideration that is

⁴⁹⁴ Blake, ‘Political Equality’, pp. 970-971.

morally relevant or significant. Typically, this will require that the selective policy has some rational connection to a valuable goal that the receiving state is pursuing.⁴⁹⁵

These conditions explain why many selective immigration policies will fail to be justified to prospective immigrants. Selective policies based on race, sexuality, and confessional affiliation are often motivated by the belief that those persons they exclude are morally inferior in virtue having the disfavoured traits. In addition, it is clear that selection based on race cannot be grounded in any relevant reasons; as Niko Kolodny has put it, having ‘the somatic basis associated with a certain racial classification’ lacks any significance in itself and is as irrelevant as having attached earlobes or a widow’s peak.⁴⁹⁶ It is less obvious, however, that a prospective immigrant’s religious beliefs or cultural practices lack any significance. For example, a policy favouring certain immigrants as a means of preserving the state’s dominant culture for its own sake need not deny the standing of persons from different cultures as moral equals. Selective policies of this type are indeed unjust, but they are unjust because they are illiberal, not because they violate the requirements of moral cosmopolitanism.

VI. REFUGEES AND THE DUTY OF ASSISTANCE

My arguments thus far have been focused on assessing immigration policy from the point of view of current citizens. I now refocus our discussion on how duties owed to *non-members* are relevant for immigration policy. In Section III, we saw that states should normally extend special immigration eligibility to the non-citizen spouses and minor children of current

⁴⁹⁵ See Miller, ‘Immigration’, p. 204; Miller, *National Responsibility*, p. 229; and Miller, ‘Justice in Immigration’, p. 15.

⁴⁹⁶ Niko Kolodny, ‘Which Relationships Justify Partiality? General Considerations and Problem Cases’, in B. Feltham and J. Cottingham (eds.), *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford: Oxford University Press, 2010), p. 190.

citizens, if not also to those with whom citizens share a significant caring relationship. In this section, we will consider another category of prospective immigrants whom states normally have a duty to admit: refugees.

Broadly following – but also adapting – the definition of the 1951 Convention and the 1967 Protocol, I will understand refugeehood as follows:

A *refugee* is any person (1) whose basic human rights to civil and political freedom – including the basic human right to physical security – are unprotected because her state of citizenship or habitual residence violates, threatens to violate, or is unwilling or unable to protect her from violations of, her rights; and (2) who has left the territory of her state of citizenship or habitual residence in order to seek protection for those rights, or who is otherwise situated so that the international community can extend protection for her rights.⁴⁹⁷

I advance three main claims about the admission of refugees so defined. Firstly, I argue that the duty of assistance grounds two more specific duties that a developed state owes to refugees: (1) a duty of non-refoulement, that is, a duty not to refuse admission to asylum seekers – that is, refugees who have reached their territories – if this would force these asylum seekers back to a state where their basic human rights to civil and political freedom are endangered;⁴⁹⁸ and (2) the duty to participate in international efforts actively to resettle refugees in safe territories. Secondly, I argue that refugee status should not be extended to those who suffer deprivation of their basic material needs but who are not faced with threats to their basic civil and political rights; while such persons clearly have claims to assistance

⁴⁹⁷ See the 1951 Convention relating to the Status of Refugees, and the 1967 Protocol relating to the Status of Refugees.

⁴⁹⁸ See Matthew J. Gibney, *The Ethics and Politics of Asylum* (Cambridge: Cambridge University Press, 2004), p. 10.

which are of great moral urgency, admission to a safe territory is not an appropriate remedy for their distinctive needs. Thirdly, I argue that the prevailing definition of refugeehood in international law should be expanded by abolishing the conditions that to be classified as refugees, persons must (i) suffer persecution on certain specified grounds, and (ii) be outside their state of citizenship or habitual residence.

Recall from Chapter 3 my argument that on the basis of our mutual identification as fellow human persons, each person has a non-relational duty to assist all other persons who lack access to the social conditions under which they can lead distinctively human lives – lives they are able to shape by exercising their capacity to form, revise and pursue a conception of the good life. Given the importance of social primary goods for individuals' autonomy, and the necessity of social cooperation for the production of these goods, this individual-level duty implies a duty on the part of developed states to help developing states establish minimally just systems of social cooperation. This *duty of assistance* – in both its individual-level and state-level specifications – is part of the non-ideal theory of cooperation-based internationalism: it is a response to a status quo in which even the minimal demands of ideal justice are not satisfied, either through deliberate non-compliance or through lack of resources and institutional incapacity.

In its state-level specification, the duty of assistance is primarily a duty of *transitional* justice: the duty calls on developed states to adopt policies which will promote the reforms required to transform an international order in which many millions of human beings lack access to the social conditions necessary for their autonomy, to one in which all states – including (formerly) developing states – have established domestic systems of social cooperation that are minimally just, reliably providing their members with at least the minimally adequate social conditions for an autonomous life.

Notice, however, that achieving the final goal of this transitional duty is a challenging task which will likely only be achieved over the long term. Building even minimally just

institutions in developing states will involve not only institution-building – establishing political arrangements which are responsive to the interests and views of all citizens, creating stable systems of property rights, entrenching the rule of law and the independence and impartiality of the courts, and developing bureaucratic capacity more generally – but will also involve improving the overall quality of civil society, especially by promoting social trust.⁴⁹⁹ Clearly, even in a scenario where developed states have the political will to take serious action to promote the required reforms, these are tasks which cannot feasibly be accomplished within a few years.

A further consideration is the difficulty of knowing ‘what it takes to build institutions, and how outsiders could possibly contribute to it.’⁵⁰⁰ There is little consensus in the relevant social-scientific literature about how domestic institutional reform in developing states should proceed, and still less about how external assistance can promote and support reform. The case of *outlaw states* presents further difficulties. As we saw in Chapter 3, developing states of this type have regimes which will normally resist rather than welcome external assistance aimed at implementing domestic reforms. Hence, short of coercive external interventions that may be disproportionate or morally problematic in other ways, there will often be few if any reforms that developed states can effectively promote in outlaw states, especially in the short term. For all these reasons, the achievement of a world in which all persons have access to the social conditions in which they can live a distinctively human life can only be a long-term goal.

But in the short term, many millions may live and die in social conditions so deprived and inimical to their freedom that they are unable to live a recognizably or distinctively human life. These persons’ *basic human rights* to material provision and to civil and political freedoms are violated or left unprotected. Without being able here to offer a full account of basic

⁴⁹⁹ See Mathias Risse, ‘How Does the Global Order Harm the Poor?’ *Philosophy & Public Affairs*, 33 (2005), p. 355.

⁵⁰⁰ Ibid., p. 358.

human rights, I stress two key points about such rights. Firstly, basic human rights are ‘a proper subset of the rights founded on justice’.⁵⁰¹ Not all the rights which a fully just state must secure for its citizens are also basic human rights, but only those which are especially urgent, and those whose protection is properly a matter of international concern.⁵⁰² Secondly, basic human rights are minimal conditions for individuals to live distinctively human lives; they comprise social protections for the most basic freedoms and minimally adequate material resources to live an autonomous life. A further implication of this is that a state’s system of social cooperation must secure the basic human rights of all its members if it is to be minimally just.

Considering the infeasibility of transforming the international order over the short term, and in light of the urgent claims of those whose basic human rights are unprotected, we should recognize duties to provide *short-term remedies* for failures by developing states to protect their members’ basic human rights, even when aid of this type will not necessarily advance the long-term transitional goal. Unlike transitional reforms, which aim to implement institutional reforms that will ensure that justice is more fully and systematically achieved, these short-term remedies take the defective institutional arrangements in developing states as to some extent *given*, and simply seek to mitigate the impact of these unjust arrangements on the individuals affected by them.⁵⁰³

Of course, it would be troubling if these short-term remedies are found to be ‘setting back or permanently blocking movement’ toward the long-term transitional goal.⁵⁰⁴ However, given that these short-term remedies are motivated precisely by the difficulty of taking effective transitional action in the short term, taking steps to provide more immediate

⁵⁰¹ Joshua Cohen, ‘Is There a Human Right to Democracy?’ in his *The Arc of the Moral Universe and Other Essays* (Cambridge, MA: Harvard University Press, 2010), p. 349.

⁵⁰² See Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), especially pp. 160-161.

⁵⁰³ See Gopal Sreenivasan, ‘What Is Non-Ideal Theory?’ in M. S. Williams, R. Nagy, and J. Elster (eds.), *Transitional Justice: NOMOS LI* (New York: New York University Press, 2012), p. 242.

⁵⁰⁴ Simmons, ‘Ideal and Nonideal Theory’, p. 24.

remedies will normally represent at most an opportunity cost for progress toward the long-term transitional goal. Moreover, we should not fetishize transitional reform: although building minimally just institutions represents the most effective way to enduringly establish propitious social conditions for individuals to be able to live distinctively human lives, our fundamental concern is to assist in providing all human persons with the social conditions for their autonomy – by whatever means.

The practice of designating certain persons as refugees and granting them special immigration eligibility is one short-term remedy for the injustices suffered by members of developing states. There are two ways in which refugees could be given special immigration eligibility. Firstly, those persons who reach the territory of a developed state and who are determined by some official procedure to meet the criteria for refugeehood should be allowed to settle in the territory and be immunized from forced return to an unsafe state. This is the duty to grant asylum and to abide by the *principle of non-refoulement*. Secondly, those who are determined by some international agency such as the UNHCR or by potential destination states to meet the criteria for refugeehood but who have not managed to reach the territory of a developed state should be helped to move to and settle in such a state. This duty to *resettle refugees* should be taken as seriously as the duty to provide refuge to asylum seekers. As Peter Singer and Renata Singer have rightly stressed, asylum seekers and other refugees have equally weighty claims; for this reason, the former should not be arbitrarily favoured over the latter.⁵⁰⁵

Since both duties are ultimately grounded in the individual-level duty of assistance, which is owed among all human persons, they should be understood as duties held by the whole international community, such that ‘the obligation to offer protection is shared among all those states that are able to provide refuge’.⁵⁰⁶ Moreover, the burden of discharging these

⁵⁰⁵ Peter Singer and Renata Singer, ‘The Ethics of Refugee Policy’, in M. Gibney (ed.), *Open Borders? Closed Societies?* (Westport, CT: Greenwood Press, 1988).

⁵⁰⁶ Miller, *National Responsibility*, p. 226.

duties should be fairly shared among all developed states. Currently, the overall international burden is unfairly distributed; the poorest states – including, perversely, many which are themselves developing states – bear a grossly disproportionate share of the costs of assisting refugees. For example, at the end of 2012, Pakistan was home to more than 1.6 million refugees, while the United States only hosted 262,000 refugees.⁵⁰⁷

A fairer distribution of the total burden of protecting refugees will require new international institutions – for example, an international mechanism which allocates refugee resettlement quotas among developed states according to factors such as societal wealth and population density. Similarly, the link between the state to which a person first applies for asylum and the state which has the specific duty to admit that person once she is determined to be a bona fide refugee might be weakened or dissolved, provided mechanisms are in place to ensure that all those who have been determined to be refugees are resettled in some safe territory.

So far, I have taken for granted my stipulated criteria for refugeehood. I will now offer a defence of my proposed criteria, namely that refugees are those persons (1) whose *basic human rights to civil and political freedom* are unprotected because their state of citizenship or habitual residence violates or is unwilling to protect those rights; and (2) who are, in whatever way, *accessible to international assistance* to protect their rights. This specification of the criteria for refugeehood is at once broader than the accepted definition in international law, but also narrower than what many writers on refugee and asylum matters have argued for.

The proposed specification is *narrower* than what the great majority of theorists favour because it does not extend refugee status beyond those whose basic human rights to civil and political freedom are insecure to those who are unable to meet their basic material needs. By contrast, Ryan Pevnick urges that we should ‘broaden the concept of refugee so that it

⁵⁰⁷ United Nations High Commissioner for Refugees, *Global Trends 2012* (Geneva: United Nations, 2013).

embraces both those fleeing political persecution and those trapped in abject poverty'.⁵⁰⁸ Similarly, Andrew Shacknove argues that we should recognize as refugees not only the victims of political persecution but all those 'whose home state has failed to secure their basic needs',⁵⁰⁹ and Matthew Gibney suggests that all persons who in their home state would suffer persecution *or* be unable to meet their 'vital subsistence needs' should be classified as refugees.⁵¹⁰ Even Miller, who has otherwise defended limits on immigration, has found 'a good case for broadening the definition' of refugeehood to include 'people who are being deprived of rights to subsistence, basic health care, etc.'⁵¹¹

Theorists who have argued for expanding the definition of refugeehood to include those unable to meet their basic material needs point out that those who lack access to a minimally adequate bundle of material goods have equally urgent moral claims to aid as those who lack protection for their basic civil and political freedoms. For Gibney, Shacknove and Miller, it is deprivation of vital or *basic needs* – those conditions required for 'a decent human life in any society' – that fundamentally qualifies a person as a refugee. The economic means to access basic healthcare and to achieve subsistence constitute basic needs in the same way that protection from violations of basic rights to freedom constitutes a basic need.⁵¹² Similarly, Pevnick argues that because both political persecution and severe material deprivation 'undermine core interests' and threaten a person's 'access to sufficient options' to live a decent life, both victims of persecution and of severe poverty have equally urgent needs and hence equally weighty claims to be admitted to a territory where they can live a decent life.⁵¹³

⁵⁰⁸ Ryan Pevnick, *Immigration and the Constraints of Justice: Between Open Borders and Absolute Sovereignty* (Cambridge: Cambridge University Press, 2011), p. 92.

⁵⁰⁹ Andrew E. Shacknove, 'Who Is a Refugee?' *Ethics* 95 (1985), p. 281.

⁵¹⁰ Gibney, *Ethics and Politics of Asylum*, p. 7.

⁵¹¹ Miller, *National Responsibility*, p. 225.

⁵¹² See Shacknove, 'Who Is a Refugee?' p. 277 and Miller, *National Responsibility*, Ch. 7 and Ch. 8, especially p. 182 and pp. 224-225, emphasis removed.

⁵¹³ Pevnick, *Immigration and the Constraints of Justice*, p. 92.

While I agree that those who lack minimally adequate material provision have *equally urgent* needs as those who face threats to their basic civil and political freedom, and therefore have equally weighty claims on our moral concern, I do not agree that the special immigration eligibility conferred by being recognized as refugees is an *equally appropriate remedy* for their needs. We should conceive of the international practice of resettling refugees and granting asylum in the context of a more general concern to ensure that all persons have access to minimally favourable social conditions for a distinctively human life. More specifically, by granting special immigration eligibility to refugees, the international community provides a short-term remedy of a particular type for persons living in developing states while the longer-term project of building minimally just institutions there unfolds. The international refugee protection practice constitutes a distinctive kind of remedy; as Lister has noted, the practice ‘selects out a subgroup of those whose basic needs are not being met whom we can only (or at least best) hope to help through *a particular method* – by allowing them to enter our (safe) countries and seek refuge there, and by not returning them to a country where they face danger.’⁵¹⁴

Using the distinction we drew in Chapter 3 between outlaw states and burdened societies, we can very broadly say that providing refuge in a safe territory is an effective and appropriate remedy in the case of persons living in outlaw states, but not in the case of those living in burdened societies. Since the regime in an outlaw state resists rather than welcomes external efforts to implement political reforms, the only available short-term remedy that developed states can extend to persons living in outlaw states whose basic human rights to civil and political freedom are unprotected is to provide them refuge in a safe territory.⁵¹⁵ Although applying external pressure to force outlaw states to cease persecuting may potentially be an alternative remedy, it is unlikely to be effective in the short term, especially

⁵¹⁴ Matthew Lister, ‘Who Are Refugees?’ *Law and Philosophy* 32 (2013), p. 659, emphasis added.

⁵¹⁵ See *ibid.*, p. 662.

when we consider that the pressure applied – such as the imposition of economic sanctions – should not cause disproportionate harm to (other) members of outlaw states.⁵¹⁶

By contrast, developed states are able to provide short-term relief to persons living in burdened societies who are unable to meet their basic material needs by helping them in situ; for example, by providing food and medical supplies and even by direct financial transfers. Moreover, as both Lister and Thomas Pogge have stressed, it is much more efficient to help the global poor by acting directly to alleviate severe poverty in developing states rather than by admitting deprived persons as a response to severe poverty in their home states.⁵¹⁷ For all these reasons, it is not arbitrary for the international refugee protection practice to limit refugee status to those whose basic human rights to civil and political freedom are violated or unprotected. Victims of severe poverty certainly have equally weighty moral claims to our assistance, but can be more effectively helped by alternative remedies.

While I want to resist the expansion of refugee status to include those suffering from severe poverty, I believe the prevailing legal definition should be *broadened* in two ways. Firstly, while the criteria for refugee status found in the 1951 Convention and 1967 Protocol require that a person be subject to or threatened with political persecution based on certain specific grounds – namely her race, religion, nationality, membership in a particular social group, or political opinion – I do not see why eligibility for refugee status should be restricted in this way.

Persons persecuted on other grounds, such as sexual orientation, have equally weighty claims to refuge. Moreover, many people face serious threats to their basic civil and political human rights due not to persecution, but because their state of citizenship or habitual residence is afflicted by war, foreign invasion, occupation, or some other situation of

⁵¹⁶ I am grateful to David Miller for urging me to clarify this point.

⁵¹⁷ Ibid., p. 660ff and Thomas Pogge, 'Migration and Poverty', in R. E. Goodin and P. Pettit (eds.), *Contemporary Political Philosophy: An Anthology* (Oxford: Blackwell, 2006).

‘generalised violence’.⁵¹⁸ Providing these persons with refuge in a safe territory is an appropriate, and indeed likely the only available, short-term remedy.

Secondly, while according to the Convention and the Protocol a refugee must have left the territory of her state of citizenship or habitual residence, my proposed specification simply requires that she be *accessible* to international efforts to protect her basic human rights. Hence, I endorse Shacknove’s contention that ‘alienage is an unnecessary condition for establishing refugee status’ – what matters is simply the ‘access of the international community to the unprotected person.’⁵¹⁹ While it is sufficient, the crossing of an international border is not necessary for an unprotected person to be accessible to the international community.

Consider the case of *internally-displaced persons*, who were estimated to number 28.8 million worldwide in 2012:⁵²⁰ because their home state has suffered a general breakdown in its capacity to provide protection for the physical security and basic human rights of its members due to war or generalized violence, such persons have fled their former immediate localities but remain within the territorial borders of their state. Resettling such internally-displaced persons will often be the only effective short-term remedy developed states can provide; at the same time, because the war-torn states in question are institutionally incapacitated, they will typically be unable or unwilling to block the international community’s access to these needy persons. There seems no reason not to expand the protections of refugeehood to such internally-displaced persons.

VII. BRAIN DRAIN AND THE DUTY OF ASSISTANCE

⁵¹⁸ See Gibney, *Ethics and Politics of Asylum*, p. 7.

⁵¹⁹ Shacknove, ‘Who Is a Refugee?’ p. 277.

⁵²⁰ United Nations High Commissioner for Refugees, *Global Trends 2012*.

I have argued that the duty of assistance grounds duties on the part of developed states to grant special immigration eligibility to refugees. While granting asylum and resettling refugees provides a short-term remedy for some of the injustices which members of developing states suffer, developed states should not lose sight of the long-term transitional goal of the duty of assistance. In crafting their immigration policies, developed states should be sensitive to the effect that those policies have on the long-term prospects for institutional reform in developing states: developed states have a duty of transitional justice to avoid enacting immigration policies that undermine or impede the establishment of minimally just institutions in developing states, and conversely a duty to enact policies that will promote reform in developing states.

One type of international migration has especially important effects on institution-building in developing states: the large-scale migration from poor, developing states to rich, developed states of adult individuals of working age, whose education and training have helped them develop scarce and valuable skills. Following common usage, I will call this phenomenon *brain drain*. This type of migration involves (1) the movement of *skilled workers* who (2) migrate *from developing states to developed states*, (3) on a *continual basis* and on a *large scale*.⁵²¹ As I conceive it here, brain drain is an ongoing trend and structural feature of international labour migration, and does not simply reflect the isolated decisions of a few skilled workers to emigrate.

Note that brain drain as I am defining it refers to only a subset of the broader phenomenon of skilled migration, which is also sometimes popularly labelled ‘brain drain’. We are concerned here only with movement from developing states (whether burdened societies or outlaw states) to developed states. Hence, for example, the relatively large-scale emigration

⁵²¹ See Alejandro Portes, ‘Determinants of the Brain Drain’, *International Migration Review* 10 (1976), p. 489 and Kieran Oberman, ‘Can Brain Drain Justify Immigration Restrictions’, *Ethics* 123 (2013), p. 428.

of British scientists to the United States does not constitute brain drain in the sense relevant to our present discussion.

Brain drain can undermine reform of basic social and political institutions in developing states in two ways. Firstly, brain drain reduces the supply of skilled labour and depletes human capital in developing states. Workers with specialized skills are often crucial for the successful operation of various cooperative enterprises, especially economic production, which generate essential social primary goods. The large-scale emigration of skilled workers may critically undermine these forms of socially necessary production. Even skilled emigration on a smaller scale can have significant negative effects if it greatly raises the cost of labour and hence of providing essential services, thereby draining public finances or redirecting scarce funds from other uses.

Medical brain drain provides one striking example of the importance of human capital to a state's capacity to deliver essential goods and services. There is ample evidence that the density of resident health workers – doctors, nurses, and midwives – relative to the general population has significant implications for a state's capacity to provide essential healthcare services to its members. The World Health Organization has warned that below a density of 2.5 health workers per 1000 persons, it becomes very difficult to deliver essential health interventions.⁵²² While there are multiple reasons why many developing states fail to meet even this minimal threshold of health worker density,⁵²³ the unplanned and large-scale emigration of health workers from the world's poorest countries is one major factor: this exodus of medical workers 'overwhelms training capacity and threatens workforce stability', compromising the 'knowledge, memory and culture' of developing states' healthcare systems.⁵²⁴ Moreover, these deleterious effects cannot be compensated for by additional

⁵²² World Health Organization, *World Health Report 2006: Working Together for Health* (Geneva: World Health Organization, 2006), p. 11.

⁵²³ Ibid., p. 12.

⁵²⁴ Ibid., p. xxii.

transfers of financial aid or medical supplies, since brain drain greatly increases the risk that ‘the infusion of new money and drugs ... will be either misused or wasted, or both.’⁵²⁵

Secondly, as Devesh Kapur and John McHale argue, brain drain results in the absence from developing states of those individuals who are most likely to provide ‘both the supply of and demand for better institutions’.⁵²⁶ Skilled workers are important not only because they supply scarce skilled labour within a given labour market and a given framework of institutions, but are also valuable as institution *builders*: they are better placed than low-skilled workers to play leading roles in institutional reform.⁵²⁷ Skilled workers are typically better educated and are therefore better equipped to articulate and press demands for reform in the face of inertia or resistance from existing elites. Moreover, since skilled workers have much to gain from improvements in institutional quality – such improvements will lead to institutional environments in which their skills and training can be better utilized – they also have a strong incentive to instigate reform.⁵²⁸

When a labour immigration policy correlates with brain drain that sets back the process of social and political reform in the sending state, that policy is presumptively unjust. However, it is crucial to recognize that brain drain is not always detrimental to institutional reform in developing states. We should take into account what Kapur and McHale call the ‘dynamic effects’ of brain drain, especially the following three: (1) the role that the emigrant *diaspora* can play in facilitating knowledge transfers as well as foreign investment, (2) the effects that *remittance flows* can have on sending states, and (3) the contribution that *return*

⁵²⁵ Vasant Narasimhan et al, ‘Responding to the Global Human Resources Crisis’, *The Lancet* 363 (2004), p. 1469. See also Devesh Kapur and John McHale, ‘Should a Cosmopolitan Worry about the “Brain Drain”?’ *Ethics and International Affairs* 20 (2006), pp. 316-317.

⁵²⁶ Kapur and McHale, ‘Should a Cosmopolitan Worry’, p. 312. See also Devesh Kapur and John McHale, ‘Economic Effects of Emigration on Sending Countries’, in M. R. Rosenblum and D. J. Tichenor (eds.), *The Oxford Handbook of the Politics of International Migration* (Oxford: Oxford University Press, 2012), pp. 134-135.

⁵²⁷ Kapur and McHale, ‘Economic Effects of Emigration’, p. 135, emphasis added.

⁵²⁸ Ibid.

migrants with enhanced human capital can make to institution-building and development.⁵²⁹

These three dynamic effects of skilled emigration imply that brain drain can sometimes *promote* institution-building and institutional reform in developing states.

I will elaborate briefly on the diaspora effect and the remittance flow effect. If members of an emigrant diaspora retain significant connections with the sending state, they can support the integration of the sending state into world markets by increasing trade links and promoting foreign direct investment, and they can also promote economic development by facilitating knowledge transfers to the sending state.⁵³⁰ Remittance flows similarly have beneficial economic effects in sending states. Remittances are an important and stable source of foreign exchange and income, with the total value of remittances from developed to developing states exceeding the total amount of official development assistance since the mid-1990s.⁵³¹ Moreover, income from remittances partially makes up for widespread failures in domestic insurance and credit markets.⁵³²

Return migration has perhaps the most significance for economic and political reform in developing states. Indeed, as AnnaLee Saxenian has argued, it may be more accurate – at least in some cases – to speak of ‘brain circulation’ rather than ‘brain drain’,⁵³³ for it is increasingly common to observe a ‘cyclical migration pattern’ instead of the permanent migration of skilled workers from the developing to the developed world.⁵³⁴ The return of highly-skilled individuals who have worked and been trained in developed states advances efforts to improve institutional quality in developing states by creating a novel channel through which the skills and knowledge required to maintain minimally just institutions can be

⁵²⁹ Ibid., p. 132.

⁵³⁰ Ibid., p. 136. See also AnnaLee Saxenian, *The New Argonauts: Regional Advantage in a Global Economy* (Cambridge, MA: Harvard University Press, 2006).

⁵³¹ Kapur and McHale, ‘Economic Effects of Emigration’, p. 136.

⁵³² Ibid., p. 138.

⁵³³ Saxenian, *The New Argonauts*, p. 7 and p. 18ff.

⁵³⁴ Alejandro Portes and Adrienne Celaya, ‘Modernization for Emigration’, *Daedalus* 142 (2013), p. 179.

transferred to developing states.⁵³⁵ For example, while China and India were once perceived as the principal victims of brain drain, they are now among the main beneficiaries of return migration: skilled workers from these states, having enhanced their human capital and established economically important networks while working in developed states, are returning in substantial numbers, fuelling substantial technological and economic development.⁵³⁶

When crafting their immigration policies, the duty of assistance demands that developed states be guided by all of brain drain's possible effects on development – both positive and negative. Since some effects of large-scale skilled migration from developing to developed states *promote* institutional reform in developing states, thus advancing the transitional goal of the duty of assistance, while other effects of the same phenomenon *impede* development, the likely overall consequences of brain drain will vary from sending state to sending state. Nevertheless, we should note that social scientists have identified a general if rough relationship between a sending state's current level of development and the likelihood that brain drain will harm its future development: very poor states with the least developed institutions are most likely to be harmed by brain drain, while middle-income states with more developed institutions are more likely to benefit from brain drain.

This general relationship has two sources. Firstly, developing states with the worst institutions are most likely to experience overwhelming rates of emigration among their skilled workers. Skilled emigration is not primarily motivated simply by *international* differentials in wages and working conditions; rather, emigration is triggered by low-quality domestic institutions which make it difficult for highly trained individuals to secure employment in which their skills are utilized and they can earn enough to maintain a prosperous lifestyle according to *domestic* standards.⁵³⁷ For example, the key push factors behind the emigration of

⁵³⁵ See Kapur and McHale, 'Economic Effects of Emigration', pp. 140-141.

⁵³⁶ Portes and Celaya, 'Modernization for Emigration', p. 178. See also Saxenian, *The New Argonauts*, p. 14.

⁵³⁷ Portes and Celaya, 'Modernization for Emigration', p. 172.

medical workers were found to be ‘poor remuneration, bad working conditions, an oppressive political climate, persecution of intellectuals, and discrimination’ – largely domestic institutional failures in sending states, rather than differentials between prospects in sending states and the developed world.⁵³⁸

Secondly, sending states with the worst domestic institutions are least likely to experience return migration. Skilled workers from the least developed states who successfully migrate are very unlikely to return so long as their native states remain plagued by deeply dysfunctional institutions.⁵³⁹ Moreover, even if some skilled workers do return, the least developed states are unable to reap the favourable effects on development that developing states with better institutions can expect to benefit from. For a state’s development to be advanced by return migration, there must be ‘a minimum of scientific and technological infrastructure’ which can put to use the additional investment and technical knowledge that return migrants bring.⁵⁴⁰

The least developed states therefore tend to fall into a vicious circle. The very poor quality of their domestic institutions leads to a high rate of skilled emigration, and this deficit of human capital impedes institutional reform and development. In turn, continued underdevelopment discourages return migration which deprives these states of another channel through which reform might have been promoted; institutional quality therefore remains low and the propensity for skilled emigration correspondingly remains high. As Kapur and McHale warn, ‘small, poor countries can fall into a vicious cycle of bad institutions leading to emigration, leading to yet worse (or no better) institutions.’⁵⁴¹

⁵³⁸ Tikki Pang et al, ‘Brain drain and health professionals’, *BMJ* 324 (2002), p. 500.

⁵³⁹ Portes and Celaya, ‘Modernization for Emigration’, p. 179.

⁵⁴⁰ *Ibid.*, p. 180.

⁵⁴¹ Kapur and McHale, ‘Should a Cosmopolitan Worry’, p. 313. See also Portes and Celaya, ‘Modernization for Emigration’, p. 180.

These empirical observations about the effects of brain drain on sending states should inform the evaluation of developed states' immigration policies. They suggest that it is appropriate for developed states to respond differently to labour immigration from the least developed states than to immigration from states which have some minimal level of institutional capacity but which nevertheless are unable to provide the conditions for all their members to live distinctively human lives.

Since the latter likely *benefit* overall from skilled emigration, the duty of assistance does not enjoin developed states to restrict skilled immigration from developing states of this type. In fact, developed states should allow generous levels of skilled immigration from these sending states, while implementing additional measures to mitigate the remaining negative effects of brain drain. For example, developed states should contribute toward the cost of training replacement workers in sending states.⁵⁴² Moreover, they could assist sending states in enforcing and collecting emigrant taxes – so-called Bhagwati taxes – which would also be used to fund the training of replacement workers.⁵⁴³

This policy package, however, is an inappropriate approach to skilled immigration from the poorest and least developed states. Developed states should move to restrict skilled immigration from such sending states, and in particular they should end their systematic reliance on a steady supply of medical workers from such states. At the same time, they should take steps to help the least developed states address the main factors motivating skilled emigration. For example, the least developed states should be helped to equip their hospitals and clinics with the medical supplies, technologies and infrastructure necessary for the provision of basic healthcare.

⁵⁴² See Kapur and McHale, 'Should a Cosmopolitan Worry', p. 318 and Oberman, 'Can Brain Drain Justify Immigration Restrictions', pp. 442-443.

⁵⁴³ See Jagdish Bhagwati, 'The United States in the Nixon Era', *Daedalus* 101 (1972); Oberman, 'Can Brain Drain Justify Immigration Restrictions', pp. 439-40; Kapur and McHale, 'Should a Cosmopolitan Worry', p. 319; Mihir Desai, Devesh Kapur and John McHale, 'Sharing the Spoils: Taxing International Human Capital Flows', *International Tax and Public Finance* 11 (2004), pp. 682-685.

Before concluding this section, I will address briefly one possible objection to my proposals. Kieran Oberman has argued that while the deleterious impact of brain drain on developing states is sometimes a ground for the imposition of immigration restrictions, such restrictions are only justified when an array of exacting conditions are satisfied. He reveals the core intuition behind his complex argument when he writes:

To coerce people to get them to labor for others, without first establishing that they have a duty to labor, is to come too close to treating them merely as a means to be acceptable. Skilled workers are not tools; they are human beings who have their own goals and their own lives to lead. Unless they have a duty to stay and assist their poor compatriots, they should not be prevented from migrating.⁵⁴⁴

Although Oberman accepts that all persons, including skilled workers from developing states, have duties to meet the urgent needs of the global poor, he nevertheless insists that these skilled workers must not be treated merely as means to the end of relieving global poverty. Developed states should only impose immigration restrictions as a counter-brain drain measure, Oberman argues, when would-be skilled migrants have a *specific duty to stay* in their native states and participate in the labour market there.

I broadly share Oberman's concern that skilled workers from developing states should not be instrumentalized, even for the morally urgent cause of global development. For this reason, I endorse his suggestion that these workers have an agent-centred prerogative which permits them to pursue self-interest to some reasonable extent, thereby insulating them from unreasonably demanding requirements to serve otherwise morally required ends.⁵⁴⁵ Hence, I urge that skilled migrants from the least developed states who are entitled to special

⁵⁴⁴ Oberman, 'Can Brain Drain Justify Immigration Restrictions', p. 433.

⁵⁴⁵ Ibid., p. 439. For the idea of an agent-centred prerogative, see Samuel Scheffler, *The Rejection of Consequentialism* (Oxford: Clarendon Press, 1982) and G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008), p. 61.

immigration eligibility on the basis of some independent requirement of justice – for example, skilled migrants who are refugees – cannot be denied admission even if this would in fact promote the development of their native state.⁵⁴⁶

However, I do not agree that unless a migrant excluded by counter-brain drain policies can be shown to have a specific, individual-level ‘duty to stay’, she is used as a mere tool, her own plans and projects unjustly sacrificed for the benefit of others. Oberman’s transactional and individualistic analysis obscures an important perspective that we can illuminate by adopting a more structural and institutional approach. Recall Rawls’s claim that it is often inadequate to evaluate specific transactions or individual decisions taken in isolation; we must also look at the background or structural conditions which shape, and are shaped by, these individual decisions and choices. While specific transactions taken in isolation may look innocuous, when seen from a broader perspective it may become apparent that cumulatively they contribute to a morally problematic pattern or structure; as Rawls puts the point, ‘the upshot of many separate transactions’ may ‘eventually undermine background justice’.⁵⁴⁷

Rawls’s insight about the importance of background or structural justice can be applied to the problems raised by brain drain. Consider an example concerning medical brain drain. When assessed in isolation, there may be nothing wrong with an individual medical graduate from Malawi emigrating to work for the NHS in Manchester: emigrating to take up a skilled job is not, as such, an illegitimate personal project, and this medical graduate’s motives may be perfectly reasonable – perhaps she feels that if she remains in Malawi she will never have the opportunity to exercise fully the advanced skills she has been trained in, or perhaps she is demoralized by the low pay and poor working conditions she faces in her home state. Moreover, the loss of a single health worker will not in itself undermine a developing state’s

⁵⁴⁶ This is similar, though not identical, to the view expressed in Oberman, ‘Can Brain Drain Justify Immigration Restrictions’, p. 441.

⁵⁴⁷ Rawls, *Political Liberalism*, pp. 266-267 and p. 284.

capacity to provide basic health care to its citizens. But once we appreciate the way that this individual graduate's decision forms part of a broader *pattern* – medical brain drain – we will see that it contributes to the perpetuation of dire underdevelopment in Malawi and is for that reason deeply problematic.⁵⁴⁸

Due to the importance of the structural perspective, the crucial question is not – as Oberman supposes – whether individual skilled workers, taken one by one, have fully specified duties to stay in their home states in order to promote development there. Any ‘duty to stay’ on the part of skilled workers in developing states will be a duty to support and comply with developed-state immigration policies that are aimed at remediating essentially structural or institutional injustices in their home states. Provided skilled workers in developing states are not denied any independent entitlements they may have to be admitted to their prospective receiving state, they are not unjustly instrumentalized by counter-brain drain immigration restrictions.

VIII. CONCLUSION

I conclude with a review of my main claims in this chapter. My task has been to articulate principles of justice in immigration, guided by the commitments of cooperation-based internationalism. According to this conception of global justice, those who share a state are co-participants in a system of cooperation that generates the social goods required for the autonomy of each citizen. As a fair return on her cooperation, each citizen is owed by the others equal protection for her basic rights and liberties. These special duties among co-citizens have important implications for justice in immigration. First, since the duty to protect freedom of movement as a basic right is owed among co-citizens but not among all persons

⁵⁴⁸ This structural perspective on brain drain has been stressed by Eszter Kollar in her ‘Medical Brain Drain as a Structural Human Rights Violation’, unpublished MS.

globally, there is no duty to abolish immigration restrictions correlative to an individual basic right to international freedom of movement. Second, since co-citizens owe each other protection for the basic right to a family life, the non-citizen spouses and minor children of current citizens must receive special immigration eligibility to facilitate family unification.

Since immigration restrictions do not violate prospective immigrants' basic rights to freedom, states have some moral discretion in deciding which prospective immigrants to admit and which to exclude. The criteria of selection they use are nevertheless apt for justice-based evaluation, on three main grounds. First, selective criteria must not wrong current citizens by expressing a demeaning message about some citizens' fitness for citizenship or by forcing some citizens to join in promoting a private end they cannot be expected to endorse. Second, selective criteria must not wrong excluded migrants by restricting their freedom without offering them a reason they can accept. Third, selective criteria for labour migrants must ensure that the distributive impact of labour immigration is acceptable to all current citizens, benefiting all equally unless unequal gains favour worse-off classes and groups.

Given that international migration is often undertaken as a response to injustice, cooperation-based internationalism's non-ideal theory is also relevant for justice in immigration. Developing states lack minimally just institutions that produce and fairly distribute the social goods necessary for citizens' autonomy. In response to this injustice, the duty of assistance calls on developed states to provide short-term relief to members of developing states, and to promote reforms to establish minimally just institutions in developing states over the longer term. A just immigration regime must be sensitive to the demands of the duty of assistance, in two main ways. First, refugees whose basic human rights to civil and political freedom are unprotected in their home states should be granted a asylum or actively resettled. Second, immigration policies which result in brain drain that harms development prospects in sending states must be reformed. These non-ideal duties of justice

in immigration should be accompanied by wider measures to alleviate global poverty and to promote international development.

CHAPTER FIVE

Scepticism about the Legitimacy of Immigration Law

I. GUARDS AND GUNS

The overarching goal of this thesis has been to expose the deficiencies of the rights-based approach to the political theory of international migration, and to propose and vindicate an alternative approach which can better guide our moral response to international migration and immigration restrictions. I have suggested that we shift our attention from a debate about putatively competing rights, and channel our theoretical energies toward answering two basic questions: (1) the question of justice in immigration; and (2) the question of the legitimacy of immigration law. In Chapters 3 and 4, the focus of our attention was the question of *justice in immigration*. I developed and defended cooperation-based internationalism as an account of justice within and across borders, and proceeded to articulate principles of justice for the evaluation of immigration policy against the background of this conception of global justice.

In this chapter, our focus now pivots to the question of the *legitimacy of immigration law*. We are no longer concerned with evaluating immigration policy from the standpoint of how it affects the distribution of the primary social goods that individuals need to form, revise and pursue a conception of the good. Our evaluation of immigration law and policy will proceed along a distinct normative dimension, whose core concern is captured in an arresting passage by Joseph Carens:

Borders have guards and the guards have guns. This is an obvious fact of political life but one that is easily hidden from view – at least from the view of those of us who are citizens of affluent democracies... To Africans in small, leaky vessels seeking to avoid patrol boats while they cross the Mediterranean to southern Europe or to Mexicans risking death from heat and exposure in the Arizona desert as they try to evade

border patrols and enter the United States, it is quite different. To these people the borders, guards, and guns are all too apparent, their goal of exclusion all too real. What justifies the use of force against such people? ... What gives anyone the right to point guns at *them*?⁵⁴⁹

Carens is drawing our attention to the often-neglected fact that states' immigration policies are not simply requests, guidelines, or conventions. Compliance with immigration law is *enforced*: states police their territorial borders, and persons found entering without legal authorization may be forcibly deported; application and enforcement of immigration law also extend to current citizens, who are legally prohibited from, for example, hiring migrants who lack legal authorization to work and may face fines and other penalties for non-compliance.

The use of force or coercion in imposing compliance with immigration law on both migrants and existing citizens raises Carens's question: what *justifies the use of force* against these persons? To investigate this question is not a purely speculative or academic inquiry; our answer to that question will help us to elucidate the appropriate moral response to *irregular migration* – that is, the entry into and settlement in a receiving state of migrants who have no legal authorization to enter or settle in that state.⁵⁵⁰

I will argue that, in enacting, applying, and enforcing immigration law, states exercise *political power* over prospective immigrants and over current citizens. I proceed to show that establishing the legitimacy of this exercise of political power is surprisingly difficult. Aside from the writings of Arash Abizadeh – and implicitly in the arguments advanced by David Miller, Michael Walzer and Christopher Heath Wellman in defence of a state's right to choose its own immigration policy, as I argued in Chapter 2 – there have been few, if any, discussions in political theory dedicated to this distinct question of the *political legitimacy* of immigration

⁵⁴⁹ Joseph H. Carens, *The Ethics of Immigration* (Oxford: Oxford University Press, 2013), p. 225.

⁵⁵⁰ *Ibid.*, pp. 129-130.

law.⁵⁵¹ My hope is that the present discussion will represent a contribution towards remedying that neglect.

II. POLITICAL POWER AND POLITICAL LEGITIMACY

I begin by clarifying my understanding of two central terms: *political power* and *political legitimacy*. I will follow, at least as a starting point, the definitions provided by Allen Buchanan. For him, to wield political power is to ‘exercise supremacy, within a jurisdiction, in the making, application, and enforcement of laws’. We say that an exercise of political power is (politically) legitimate if and only if the agent wielding political power is ‘morally justified’ in doing so.⁵⁵² Applying this terminology to the case of border controls and immigration restrictions, we may say that a state exercises political power over prospective immigrants when it enacts, applies, and enforces its legal regime regulating the admission of immigrants, or more simply, its *immigration law*. This exercise of political power is legitimate when the state in question is morally justified in enacting, applying and enforcing immigration law.

Recall from the Introduction that in the current international state system, each state takes its sovereign political authority to extend to controlling movement across its territorial borders; therefore, a state’s sovereignty in the current international order encompasses the power to decide, by decision-making procedures whose outcomes are determined by internal political choices alone, which prospective immigrants will have the legal right to enter its territory.⁵⁵³ Following Abizadeh, we may say that these arrangements for enacting immigration law allow states to *unilaterally* determine the content of their laws regulating immigrant

⁵⁵¹ See Arash Abizadeh, ‘Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders’, *Political Theory* 36 (2008) and Arash Abizadeh, ‘On the Demos and Its Kin: Nationalism, Democracy, and the Boundary Problem’, *American Political Science Review* 106 (2012).

⁵⁵² Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), p. 235.

⁵⁵³ Seyla Benhabib, ‘The Morality of Migration’, *NYTimes.com*, 29 July 2012.

admission.⁵⁵⁴ The question of the *legitimacy of immigration law* can therefore be formulated as follows: When is a state morally justified in (1) unilaterally enacting immigration law; (2) applying immigration law to prospective immigrants; and (3) coercively enforcing prospective immigrants' compliance with immigration law?

Notice that the basic task of this chapter, as I have formulated it above, is to assess what I will call the *a posteriori* legitimacy, rather than the *a priori* legitimacy, of immigration law.⁵⁵⁵ We are not asking whether some essential feature of laws regulating movement across international borders makes it impossible for the exercise of political power over immigrant admission to ever be legitimate; rather, we are investigating whether, given *existing* arrangements in the current international state system for the making, application and enforcement of immigration law, *current* immigration law is legitimate.

I focus our attention on the *a posteriori* legitimacy of immigration law unilaterally enacted by states partly because, as we have seen in Chapter 2, this is the question of legitimacy that the existing theoretical debate has been concerned with: as we have seen, defenders of a state's right to choose its own immigration policy are in fact concerned with the legitimacy of unilaterally-enacted immigration law. But I also restrict this discussion to the legitimacy of immigration law unilaterally enacted by states for a further reason. If the task of political theory is to guide *us* in evaluating and deliberating about the institutions and social forms we participate in, then it is otiose to consider arrangements that are radically different from those we are familiar with.⁵⁵⁶ Indeed, it is difficult to even understand how such arrangements would function, let alone evaluate them; as Mathias Risse has rightly noted, we

⁵⁵⁴ See generally Abizadeh, 'Democratic Theory and Border Coercion'.

⁵⁵⁵ I am adapting the distinction between *a priori* and *a posteriori* anarchism made by A. John Simmons in 'Philosophical Anarchism', in his *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001) pp. 104-105.

⁵⁵⁶ Aaron James, *Fairness in Practice: A Social Contract for a Global Economy* (Oxford: Oxford University Press, 2012), pp. 113-114.

hardly ‘understand what a world would be *like* where all state power..., ranging from border control to maintenance of social insurance, is replaced with other arrangements.’⁵⁵⁷

Having specified how I will understand political power and political legitimacy, and having clarified a posteriori legitimacy as the focus of discussion, I now seek to identify what is morally distinctive about the exercise of political power, and thereby to illuminate *why* the exercise of political power stands in need of justification. I suggest that, given certain basic commitments of liberalism, the exercise of political power wrongs, *prima facie*, those subject to it. The judgment that the exercise of political power is *prima facie* wrong is, as Shelly Kagan instructs us, ‘an epistemological qualification’: to say that the exercise of political power is *prima facie* wrong is to establish a presumption against it, but this presumption can be rebutted in particular instances if there is sufficient *justification* for wielding political power.⁵⁵⁸

I identify two morally distinctive features of political power make its exercise *prima facie* wrong. Firstly, those subject to political power are wronged *prima facie* to the extent that they are *coerced*. The distinctive moral challenge posed by this aspect of political power is its coercive character, and the question of political legitimacy is the question of how the use of force to implement political rules and secure compliance with the law can be justified. The use of coercion is not wrong in itself; it is not a *pro tanto* wrong that has ‘genuine weight’ in moral deliberation, even if it is outweighed by other considerations.⁵⁵⁹ Rather, the use of force is *presumptively* wrong; we might say that a state wrongs those subject to its laws when it aims to bring about compliance with those laws ‘by force *alone*’, rather than also by appealing to the capacity of those subject to coercion to exercise practical reason – to their standing as ‘beings capable of thinking and acting on the basis of reasons’ – by offering them *reasons* that provide a sufficient justification for the law in question.⁵⁶⁰

⁵⁵⁷ Mathias Risse, *On Global Justice* (Princeton, NJ: Princeton University Press, 2012), p. 305.

⁵⁵⁸ See Shelly Kagan, *The Limits of Morality* (Oxford: Clarendon Press, 1989), p. 17.

⁵⁵⁹ *Ibid.*

⁵⁶⁰ Charles Larmore, ‘The Moral Basis of Political Liberalism’, in his *The Autonomy of Morality* (Cambridge: Cambridge University Press, 2008), pp. 147-148, emphasis added.

Recall that in Chapter 3, I endorsed, for the purpose of developing principles of social and global justice, a conception of the person which identified moral personality with having the capacity for rational autonomy, that is, the capacity to form, revise and pursue a conception of the good life. While that conception of the person was appropriate to the task of developing principles of political justice, in this chapter, our focus on political legitimacy calls our attention to a more basic conception of moral personality. On this broader conception, the human person is conceived as possessing the *deliberative capacities*, that is, capacities to exercise practical reason. Specifically, a person has the capacity to deliberate about her own good, and the capacity to reason about the requirements of interpersonal and political morality – as I will also say, a person is conceived as capable of exercising *rational and moral agency*.

When one person coercively imposes a rule of conduct on another merely by issuing threats or by using force, the one wielding coercive power forces the one subject to that power to do what the latter would not otherwise have chosen to do. The agent wielding coercive power disregards and replaces the independent agency of the coerced agent with her own agency. Moreover, the replacement of her agency is in some sense *unavoidable* for the coerced agent: it is not up to her whether she follows the choices of her coercer. By thus *bending the will* of someone possessing rational and moral agency, coercion presumptively disrespects her qua moral person.⁵⁶¹

However, when coercion is applied to motivate conformity to a law which there are independent reasons to accept, the use of force does not disrespect those coerced in the same way.⁵⁶² In these cases, coercion may still have a role in solving assurance problems or in disincentivizing those who are tempted to free-ride on the compliance of others, but it is not

⁵⁶¹ See Andrea Sangiovanni, 'The Irrelevance of Coercion, Imposition, and Framing to Distributive Justice', *Philosophy & Public Affairs* 40 (2012), p. 85.

⁵⁶² Larmore, 'Moral Basis', pp. 148-149. See also Jeremy Waldron, 'Theoretical Foundations of Liberalism', in his *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993), pp. 42-43.

applied merely to impose on the weak the choices of the powerful.⁵⁶³ Thus, Thomas Nagel writes that ‘behind the coercion that has an unavoidable role in any political system there should be independent reasons for everyone to cooperate voluntarily in the maintenance of such a system and to respect its results.’⁵⁶⁴ On this view, when we offer reasons to justify a law that those who are forced to comply with it can reasonably accept, we do not simply replace, but engage and respect the deliberative capacities for rational and moral agency of those thus bound. Hence, the presumption against the coercion involving in enforcing law can be rebutted when those subject to that coercion are given reasons they can accept to support that law.

The coercive character of political power is not its only morally distinctive feature, and the permissibility of coercion – what we might call *legitimate coercion* – is not the sole concern of an account of political legitimacy. Many theorists of political legitimacy have argued that political power cannot be reduced to the application of coercion to enforce the law, since not all forms of coercion are political. These writers urge that the exercise of political power through law necessarily involves a claim to change the normative situation of those to whom the law applies. Joseph Raz, for example, argues that the law claims authority, in the sense that ‘it claims that there is an obligation to obey it whatever its content may be’.⁵⁶⁵ Raz urges that for a law to enjoy *legitimate* authority, it must be the case that its addressees do in fact have a content-independent obligation to comply with its requirements.

Likewise, A. John Simmons insists that political legitimacy does not merely consist in the morally permissible application of coercion to enforce compliance with the law. For Simmons, an account of political legitimacy must not only justify a state’s use of coercive force; a full account of the legitimacy of a state’s exercise of political power must show how it

⁵⁶³ See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 315.

⁵⁶⁴ Thomas Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991), pp. 36-37.

⁵⁶⁵ Joseph Raz, *The Morality of Freedom*, (Oxford: Clarendon Press, 1986), p. 77.

could have the ‘exclusive right to impose new duties on [its] subjects by initiating legally binding directives, to have those directives obeyed, and to coerce noncompliers.’⁵⁶⁶

I agree with Raz and Simmons that political power is distinct from the mere use of coercive force. The exercise of political power also involves a second feature: the issuing of directives through the enactment of authoritative laws, that is, through social rules which claim to be *morally binding* on all those to whom they apply, regardless of their views about the substantive merits of those rules; as we have seen in Chapter 2, the duty to comply with a legitimate law is *content-independent*. Political legitimacy is therefore partly concerned with investigating whether enacted laws really are morally binding qua laws – whether, that is, these laws have *legitimate authority* – at least in the following sense: others have moral grounds for valid compliance when an addressee of those laws withholds her compliance or support, on the grounds that that addressee failed to satisfy the distinctive duty to comply with the law qua law.

However, I disagree with Raz and Simmons that legitimate authority should be conceived in terms of an individualized, vertical relation between state and subject – what Simmons calls a ‘special moral relationship between [a] particular state and each particular ... subject’.⁵⁶⁷ If the question of political legitimacy is conceived as a search for some account which justifies a particularized – that is, individualistic – moral relationship between a state which enacts, applies and enforces law, and each of its subjects taken one by one, we are likely to agree with Simmons that the search fails, or to agree with Raz that the search ends with only a ‘piecemeal’ account of political legitimacy, with the extent of legitimate authority varying ‘from individual to individual’.⁵⁶⁸

Legitimate authority should not be understood in these individualistic terms, but rather in terms of the need to establish a framework which is *collectively* binding on the many

⁵⁶⁶ A. John Simmons, ‘Justification and Legitimacy’, in his *Justification and Legitimacy*, p. 137.

⁵⁶⁷ Ibid.

⁵⁶⁸ Raz, *The Morality of Freedom*, p. 80.

persons who are together engaged in some form of social and political cooperation but who may nevertheless have divergent views and interests. Legitimacy, or at least legitimate authority, as a distinctive normative dimension has a role when those joined together in cooperation must find a decision or rule that is ‘politically (morally) binding’ on all cooperating partners even if it ‘may not be thought the most reasonable, or the most appropriate, by each’.⁵⁶⁹

My suggestion that legitimate authority as a distinctive normative standard is concerned with evaluating decisions that are to bind all engaged in some common project, even in the face of disagreement, draws on Jeremy Waldron’s influential arguments. For Waldron, the ‘circumstances of politics’ obtain when there is a ‘felt need ... for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be’.⁵⁷⁰ This common decision or framework has legitimate authority, Waldron argues, when it is reached in a way that *respects* all cooperating persons it claims to bind, specifically in terms of how it treats their divergent beliefs and views about what the common decision or framework should be.⁵⁷¹

The idea that the exercise of political power aims at establishing collectively binding decisions points to a crucial sense in which human persons’ deliberative capacities may be disrespected by subjection to political power. A person’s deliberative capacities include not only the capacity to deliberate about and order *her own* life but also to deliberate about which *collective* decisions should be taken, and to order her conduct in accordance with collective rules for the regulation of cooperative life. This latter capacity, which I follow Rawls in calling the *capacity for a sense of justice*,⁵⁷² has been aptly described by Waldron as ‘the capacity of human

⁵⁶⁹ John Rawls, ‘The Idea of Public Reason Revisited’, in his *Collected Papers*, (ed.) S. Freeman (Cambridge, MA: Harvard University Press, 1999), p. 578.

⁵⁷⁰ Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), p. 102.

⁵⁷¹ *Ibid.*, pp. 108-113.

⁵⁷² See Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), pp. 18-19, pp. 49-50, pp. 53-54.

agents to determine for themselves how they will restrain their conduct in order to live in community with others.⁵⁷³

If human persons have the capacity for a sense of justice, then the selection of some proposed laws rather than others as authoritative and collectively binding *prima facie* wrongs those whose views have ‘lost’ by disrespecting them as persons with this capacity – they are to be bound by a law which embodies some view about how the common framework that regulates their cooperative life should be arranged, despite their rejection of that view. In order to reconcile an exercise of political power with a proper respect for those whose views ‘lose’ but must nevertheless be bound by the decision selected as authoritative for all, and hence to rebut the presumption that this exercise of power wrongs those subject to it, we should again insist that all whose compliance with a law is expected (and enforced) must be offered reasons they can accept to support the law, despite their disagreement.

I have been arguing that both of the morally distinctive features of political power – that it claims to morally bind persons to comply with collectively binding laws with which they may disagree, and that it enforces compliance through coercion – explain why the enactment, application and enforcement of a law *prima facie* wrongs its addressees. The question of political legitimacy, under the guise of both the search for legitimate authority and for legitimate coercion, asks whether this presumption can be rebutted by showing that those subject to political power have reasons they can accept to support and comply with the law in question.

I adapt from Rawls the following principle as a general formulation of this demand that an exercise of political power, if it is to be legitimate, be given a justification that reconciles it with the respect due to its subjects as moral persons capable of rational and moral agency, and in particular capable of exercising a sense of justice:

⁵⁷³ Waldron, *Liberal Rights*, pp. 42-43.

Liberal principle of political legitimacy (hereafter ‘Liberal Principle’): Political power is legitimate if and only if its exercise is sufficiently justified by those who wield it on the basis of reasons that those who are subject to it can freely accept as persons equally capable of rational and moral agency, and not merely under the pressure of coercion and domination, or under the influence of exploitation and manipulation.⁵⁷⁴

III. IMMIGRATION LAW AS AN EXERCISE OF POLITICAL POWER

As we have seen, political power is characteristically exercised through the enactment, application, and enforcement of law addressed to all persons within a given jurisdiction. Inspecting the arrangements states have established to regulate immigrant admission, it seems that states exercise political power over immigrant admission: states (1) enact laws regulating entry into and legal residence within their territories, (2) apply these immigration laws to prospective immigrants as well as to their current members, and (3) coercively enforced compliance with these laws. In this section, I defend the claim that immigration law constitutes an exercise of political power by showing that the processes by which states legally regulate immigrant admission involve the two morally distinctive features of political power we reviewed in the previous section. I further argue that immigration law therefore raises the questions of legitimate coercion and legitimate authority.

Observe firstly that states force prospective immigrants as well as current members to comply with their respective regimes of immigration law by using coercive force. Here I am in agreement with Abizadeh that ‘borders are one of the most important ways that political power is coercively exercised over human beings.’⁵⁷⁵ This raises the Liberal Principle’s demand for justification because this use of coercion is *prima facie* incompatible with respect for those

⁵⁷⁴ This formulation is indebted to Rawls, *Political Liberalism*, p. 137 and ‘Public Reason Revisited’, p. 578.

⁵⁷⁵ Abizadeh, ‘Democratic Theory and Border Coercion’, p. 46.

subject to coercion as persons with the capacity for rational and moral agency. We might say that the *primary question* of legitimate coercion is a search for some justification which can rebut the presumption that coercive immigration laws disrespect prospective immigrants as deliberative agents.

This primary question of the legitimacy of coercion is to be distinguished from various secondary questions concerning, for example, exactly what degree of physical force may be used in deportation proceedings, or exactly which kinds of sanctions may be threatened and imposed for non-compliance. My conjecture is that many of the particular methods used in border coercion – including so-called non-arrival procedures that states use to deter asylum seekers from reaching their borders, and harsh measures employed in the detention and deportation of irregular migrants and failed asylum seekers – impose disproportionate harms relative to any morally justified purposes these measures may serve. If so, such enforcement actions are illegitimate in a secondary sense even if, in principle, coercive enforcement of some form would be legitimate in the primary sense.

Observe furthermore that a state's regime of immigration law represents a common framework for the regulation of immigration into its particular territory, establishing collectively binding rules on (i) all prospective immigrants to its territory, and (ii) all persons currently resident within its territory. That a state's regime of immigration law aims to establish a common framework not only for prospective immigrants but also for those already resident on its territory has been rightly stressed by Hillel Steiner, who notes that laws regulating immigrant admission not only constrain the choices of persons *outside* a state's borders but also denies '*insiders* the option of (for example) housing or employing outsiders'.⁵⁷⁶

Immigration law not only aims to establish a common framework for the regulation of immigrant admission to a particular territory, but to establish this framework in the face of

⁵⁷⁶ Hillel Steiner, 'Hard Borders, Compensation, and Classical Liberalism', in *Boundaries and Justice*, (eds.) D. Miller and S. H. Hashmi (Princeton, NJ: Princeton University Press, 2001), pp. 79-80.

disagreement about what that framework should be. As Steiner also notes, a liberal state's citizenry is characterized by a '*plurality* of ... groups', raising the worry that collectively binding immigration law will be 'used to advance the interests of only *some* of those groups' at the expense of others.⁵⁷⁷ This point can be generalized: for a given state, its regime of immigration law seeks to establish a common framework, binding on current residents and on prospective immigrants, in the face of disagreements among both insiders *and outsiders* about what that common framework should be. Again, this feature of immigration law triggers the Liberal Principle's demand for justification, since the selection of the views of some, but not those of others, as authoritative and collectively binding *prima facie* disrespects the status of those whose views lose out as persons endowed with deliberative capacities, especially the capacity for a sense of justice.

It seems, therefore, that states exercise political power when they enact, apply and enforce their particular regimes of immigration law, and that this exercise of political power stands in need of justification at the bar of the Liberal Principle. Before we go on in subsequent sections to ask whether this demand for justification can be met, we should consider the arguments of those political theorists of immigration who claim that only justification to some weaker standard, rather than to the more stringent justificatory standard of the Liberal Principle, is triggered by immigration law. Their strategy is to resist the inclusion of immigration law within the general category of exercises of political power: they claim to show that what states do when they enact, apply, and enforce immigration law does not count as a standard case of wielding political power, which attracts a demand for justification to a weaker standard.

Consider first the claim, developed by David Miller, that immigration restrictions are not coercive.⁵⁷⁸ Miller insists that there is a morally significant distinction between *coercion*,

⁵⁷⁷ Ibid., p. 80.

⁵⁷⁸ I am grateful to David Miller for helpful discussion of the arguments set out in the following pages.

which occurs when ‘there is some course of action that the agent is forced to take’, and *prevention*, which occurs when ‘some course of action that might otherwise have been available is now blocked’.⁵⁷⁹ Coercion and prevention differ in their moral significance because while coercive acts ‘undermine the autonomy of the person coerced’,⁵⁸⁰ prevention only ‘reduces [an agent’s] freedom to act’.⁵⁸¹ For this reason, coercive acts ‘stand in need of the special justification’ that invasions of autonomy trigger, while prevention need only answer to the weaker standard that freedom should not be restricted ‘for no good reason’.⁵⁸² Since Miller holds that restrictive immigration laws constitute a case of prevention rather than coercion, on this view they trigger only this weaker standard of justification.

One response to Miller’s argument is simply to point out that even if we were to accept his proposed distinction between coercion and prevention, the *enforcement* of compliance with immigration law is still clearly coercive. Indeed, Miller himself is aware of this. He notes that if persons with no legal authorization to enter and settle in a state’s territory nevertheless attempt to do so, ‘they will, for example, be prevented from getting on to aeroplanes that would take them to their chosen destination, or if they succeed in entering physically, they may be arrested and deported’; these measures are ‘*coercive* means’ by which states ‘enforce’ their immigration laws.⁵⁸³ What Miller seems to be suggesting is that although states’ enforcement of compliance with what their immigration laws direct may be coercive, the directives of their immigration laws are not themselves coercive but only preventative.⁵⁸⁴

But notice that my claim has precisely been that in enacting, applying and *coercively enforcing* immigration law, states exercise political power over prospective immigrants and current citizens. My argument in this chapter has not appealed to any characterization of the

⁵⁷⁹ David Miller, ‘Democracy’s Domain’, *Philosophy & Public Affairs* 37 (2009), p. 220.

⁵⁸⁰ Ibid., p. 221.

⁵⁸¹ David Miller, ‘Why Immigration Controls Are Not Coercive’, *Political Theory* 38 (2010), p. 115.

⁵⁸² Miller, ‘Democracy’s Domain’, p. 225.

⁵⁸³ Miller, ‘Immigration Controls are Not Coercive’, p. 116, emphasis added.

⁵⁸⁴ See also Miller, ‘Democracy’s Domain’, p. 220 and Miller, ‘Immigration Controls are Not Coercive’, p. 114.

substance of what immigration laws direct, but to *how* states get prospective immigrants and other addressees of their immigration laws to do as those laws direct. States do not merely request that the addressees of their immigration laws comply with those laws – they *demand* compliance, and stand ready to apply force in order to compel compliance should, for example, some persons without the legal right to enter attempt to enter illegally. By applying these enforcement mechanisms, states do not leave it up to prospective immigrants and other addressees of immigration law whether they comply with these laws’ directives; rather, through the application of coercive measures, states bend their wills into compliance.⁵⁸⁵

This reply, taken on its own, decisively addresses Miller’s doubts that immigration law constitutes an exercise of political power which triggers the justificatory demands of the Liberal Principle. However, I also want to show why we should resist Miller’s suggestion that there is a morally relevant distinction between coercion and prevention when asking when the justificatory demand of the Liberal Principle, rather than some weaker standard, is triggered. In order to see why the distinction that Miller has putatively identified should be rejected, we first need to understand what is distinctively objectionable about coercion. I have argued that coercion *prima facie* wrongs those subject to it because it presumptively disrespects them as persons who possess the deliberative capacities for rational and moral agency.

Miller endorses an apparently similar account: he suggests that what is ‘normatively distinctive’ about coercion is that it ‘undermines autonomy’; coercive acts are presumptively wrong because when someone is coerced, her ‘standing as an autonomous agent is denied’.⁵⁸⁶ If Miller takes a person’s standing as an autonomous agent to be her standing as a person with what I have called the capacity for rational and moral agency, then it seems that our accounts of coercion’s normative significance should not differ. In fact, although he speaks at this one point of coercion as a denial of a person’s standing as an autonomous agent, suggesting that

⁵⁸⁵ See Sangiovanni, ‘Irrelevance of Coercion, Imposition, and Framing’, p. 85.

⁵⁸⁶ Miller, ‘Democracy’s Domain’, p. 219, p. 221.

coercion is distinctively wrong because it disrespects or violates the *status* of coerced persons as agents capable of exercising their own deliberative capacities, Miller's primary focus is on autonomy as a *condition* which coercion undermines.⁵⁸⁷

Miller seems to understand autonomy as a condition that an agent with the deliberative capacities can enjoy when (1) she has an *adequate set of options* to choose from; (2) she has some degree of *independence*, that is, she is not made the instrument of another's will.⁵⁸⁸ Miller takes an agent to be independent when her choices are not completely directed by another, that is, when she maintains some adequate degree of practical discretion. Coercion undermines independence by removing any practical discretion from the agent. As Miller puts it, the 'peculiar evil of coercion' is that it 'makes its victim into an instrument of the coercer's will'.⁵⁸⁹ Coercion achieves this by ensuring that the coerced person 'has no real choice but to do what the coercer commands'; the coercer reduces the coerced person's 'eligible set to just a single course of action', namely the course of action that the coercer intends that the coerced follows.⁵⁹⁰

This analysis of independence, however, is too lax, and focuses our attention in the wrong place. Firstly, it is unclear why we should accept Miller's very strong claim that an agent's independence is undermined only when her practical discretion is entirely removed, such that she is nothing more than a tool or instrument of the coercer's will; it seems equally plausible to see an agent's independence as undermined when her will is bent *to some degree*. If the distinctive wrong of coercion is that it undermines autonomy, and a necessary condition for autonomy is independence understood in this broader sense, then even when some act of interference does not reduce an agent's options to only one, she may still suffer autonomy-

⁵⁸⁷ For the distinction between a status and a condition, see Thomas Nagel, 'Personal Rights and Public Space', in his *Concealment and Exposure and Other Essays* (Oxford: Oxford University Press, 2002), p. 37.

⁵⁸⁸ See Miller, 'Immigration Controls are Not Coercive', p. 112 and p. 117. Although I share Abizadeh's worry that Miller effectively collapses the independence condition and the adequate options condition for autonomy, I will not pursue this point here. See Arash Abizadeh, 'Democratic Legitimacy and State Coercion: A Reply to David Miller', *Political Theory* 38 (2010), p. 126.

⁵⁸⁹ Ibid., p. 118.

⁵⁹⁰ Miller, 'Democracy's Domain', pp. 219-220.

undermining coercion. Endorsing this stricter understanding of independence allows us to reject Miller's proposed distinction between coercion, understood as 'forcing a person *to do* some relatively specific thing', and prevention, understood as 'forcing a person *not to do* some relatively specific thing while leaving other options open'.⁵⁹¹

Secondly, and more fundamentally, I suggest that the special significance of independence is better captured when we conceive of it as a status rather than a condition, and hence that the distinctive wrong of coercion is better understood in terms of the disrespect coercion displays for the status of the coerced as independent deliberative agents. It has often been remarked that the wrong of coercion cannot be reduced to its negative impact on the interests of the coerced person. Indeed, Miller himself recognizes this.⁵⁹² But it is difficult to make sense of this if coercion's distinctive wrong is taken to be its impact on the coerced person's independence understood as one aspect of her condition.

We should adopt a different understanding of the connection between coercion and autonomy or independence, one that is in line with the account I suggested in Section II: coercion invades the coerced person's independence not because of its consequences for that person's condition, but because of 'the *kind of treatment of others*' that it is.⁵⁹³ As Raz notes, (illegitimate) coercion expresses – it has a 'symbolic meaning' – an inappropriate attitude; it shows 'disregard and even contempt' for the coerced.⁵⁹⁴ Conceiving of human persons as having the status of independent rational and moral agents, we express that status and that conception of the person by our refusal to countenance treatment of them that displays disregard or contempt for their independent agency.⁵⁹⁵ Coercion is one form of treatment that

⁵⁹¹ Miller, 'Immigration Controls are Not Coercive', p. 114.

⁵⁹² Miller, 'Democracy's Domain', p. 221.

⁵⁹³ Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 378, emphasis added.

⁵⁹⁴ Ibid.

⁵⁹⁵ Frances M. Kamm, *Morality, Mortality*, Volume II: *Rights, Duties, and Status* (Oxford: Oxford University Press, 1995), pp. 260-261.

disrespects the status of persons as rational and moral agents, and its distinctive moral significance lies in this disrespect that it conveys.

Of course, this does not mean that every act that disrespects persons in their status as independent deliberative agents is coercive. I propose that we understand all those *interferences with others' actions* as coercive which, in the absence of sufficient justifying reasons, fail to respect their status as rational and moral agents. For Miller's proposed cut between coercion and prevention to pick out a distinction with real moral significance, then, it must be that someone's status as a rational and moral agent is only disrespected when another person forces her to take some specific course of action, but never disrespected when another person blocks one course of action (among many) that would otherwise have been open to her.

This does not seem plausible; there are at least some cases where a deliberative interference to remove some option from another person's eligible set conveys disrespect for her status as an independent deliberative agent. If I interfere with someone's actions, without sufficient justification, in order to force her not to act on some choice that she has made, I disrespect her independent capacity for rational and moral agency by (partially) replacing her will with mine – by bending her will to some degree – even if I may not reduce her set of eligible options to just one or otherwise to some level below adequacy. It seems then that coercive acts may involve forcing an agent 'not to pursue one option while being left with plenty of others to choose from', as Raz has pointed out⁵⁹⁶

This suggests that when an excluded would-be immigrant is forced not to act on her choice to enter and settle in some receiving state, as the result of that state's decision to block that particular course of action which would otherwise have been available to her, the excluded immigrant's status as a rational and moral agent is, absent sufficient justification, disrespected, notwithstanding the fact that other acceptable options may remain open to her. Contrary to Miller's arguments, the enforcement of restrictive immigration laws counts as a

⁵⁹⁶ Raz, *The Morality of Freedom*, p. 377.

coercive imposition, and triggers a demand for justification according to the standard set by the Liberal Principle rather than some weaker standard of justification.

Unlike Miller, Nagel seems to accept that immigration law is indeed coercively enforced against prospective immigrants, but nevertheless joins Miller in claiming that it is exempt from the justificatory standard specified by the Liberal Principle. Immigration laws, Nagel suggests, are ‘simply enforced against the nationals of other states; the laws are not imposed in their name, nor are they asked to accept and uphold those laws.’ For Nagel, since ‘no acceptance is demanded’ of prospective immigrants, ‘no justification is required that explains why ... their interests have been given equal consideration’. More generally, instead of the stringent justificatory demand contained in the Liberal Principle, it is a ‘sufficient justification’ of immigration laws and their coercive enforcement that they do not violate the ‘prepolitical human rights’ of prospective immigrants.⁵⁹⁷

There are two ways to read Nagel’s argument, and specifically his claim that prospective immigrants are not expected to accept and uphold the regime of immigration law that is applied to them. On one construal of his argument, Nagel is describing a particular attitude or stance that states adopt toward prospective immigrants when they enact, apply, and enforce immigration law: states view prospective immigrants not as persons with deliberative capacities, but merely as objects of ‘pure coercion’.⁵⁹⁸ According to this argument, the adoption of this attitude has the normative effect of exempting states from the demands of the Liberal Principle, since that principle is grounded in a conception of human persons which states believe does not apply to prospective immigrants – a conception of persons as capable of exercising rational and moral agency.

Construed in this way, Nagel’s argument does not succeed. While we often use the locution that liberals have a ‘conception of’ individuals as persons possessing the deliberative

⁵⁹⁷ Thomas Nagel, ‘The Problem of Global Justice’, *Philosophy & Public Affairs* 33 (2005), pp. 129-130.

⁵⁹⁸ Ibid., p. 129.

capacities, this conception of the person is not an attitude that creates reasons for us simply as a matter of the internal consistency of our avowed commitments. Rather, this conception of the person specifies an ideal of the proper relations between human persons that it would be unreasonable to reject. In our interpersonal or cooperative life, I trigger the justificatory demand of the Liberal Principle ‘just by intending to coerce you and regardless of any moral attitude that you or I bring to [our] encounter.’⁵⁹⁹ Hence, even if states, in exercising coercive power over prospective immigrants, are disposed to treat them merely as objects of coercion rather than to respect them as equals and as free agents, they do not thereby escape the requirements of the Liberal Principle.

There is another reading we might give to Nagel’s argument. Nagel could be arguing that although immigration law is coercively enforced, it does not count as an exercise of political power since it lacks the distinctive feature of political power that distinguishes it from other uses of coercive force – namely, the attempt to establish a common, collectively binding, framework in the face of conflicting views about how that framework should be structured. In the case of domestic law, citizens are expected to accept the law’s authority, ‘even when the collective decision diverges from [their] personal preferences’; in this sense, the law demands the ‘active engagement of the will of each member’ of a domestic political society. This argument then contrasts the case of domestic law with the case of immigration law: it claims that a state’s regime of immigration law does not aim to achieve social and political cooperation in the face of disagreement and is to that extent ‘simply enforced’ against prospective immigrants.⁶⁰⁰

On this alternative reading, Nagel’s argument also fails. Recall my argument from the previous section: a state’s regime of immigration law seeks to establish a common framework, collectively binding on both insiders and outsiders, for the regulation of prospective

⁵⁹⁹ A. J. Julius, ‘Nagel’s Atlas’, *Philosophy & Public Affairs* 34 (2006), pp. 179-184. See also Arash Abizadeh, ‘Cooperation, Pervasive Impact, and Coercion’, *Philosophy & Public Affairs* 35 (2007), pp. 351-353.

⁶⁰⁰ Nagel, ‘Problem of Global Justice’, pp. 128-130.

immigrants' entry into that state's territory. A regime of immigration law establishes, as surely as a regime of domestic law does, a common framework binding on persons with divergent interests and views. In the former case, the regime aims at establishing common rules among prospective immigrants and current residents of a state's territory in respect of movement into the territory; in the latter case the regime aims at regulating and stabilizing a system of cooperation among current members for the sake of producing the primary social goods required for personal autonomy. It is false, then, to suggest that the moral significance of enacting, applying, and enforcing immigration law differs from the moral significance of enacting, applying and enforcing domestic law. Nagel's claim that immigration law does not trigger the justificatory demand of the Liberal Principle, or triggers a demand for justification to a weaker standard, does not succeed.

IV. CONSENT THEORY

I have argued that attempts by Miller and Nagel to characterize the enactment, application and enforcement of immigration law as distinct in its moral significance from paradigmatic cases of political power, and thereby to shield immigration law from the Liberal Principle's demands, do not succeed. I therefore join Abizadeh in insisting that 'enforced decisions about who is granted and who is denied [admission and] membership ... are among the most important instances of the exercise of political power'; significantly, such power is exercised 'over both insiders and those whom [the state's political boundary] picks out as outsiders.'⁶⁰¹

The question of the legitimacy of immigration law therefore remains: we must ask whether the presumption that states' exercise of political power in enacting, applying and enforcing immigration law can be rebutted by finding a justification that prospective

⁶⁰¹ Abizadeh, 'The Demos and Its Kin', p. 875. See also Abizadeh, 'Democratic Theory and Border Coercion', p. 46.

immigrants and current members can accept as persons capable of exercising rational and moral agency. In particular, we should ask whether there is a case for the legitimacy of the immigration law of states whose *domestic* system of law is granted to be legitimate – presumably, these are states whose basic domestic arrangements adequately satisfy standards of social justice, and whose procedures for enacting domestic law adequately satisfy standards of democratic legitimacy. As Mathias Risse has formulated this question, we should ask whether ‘the laws of morally acceptable states (including immigration policies) should be respected [and] obeyed *qua laws* (rather than because they are [directly] morally required).’⁶⁰² Over the next two sections, I will attempt to answer this question, asking whether the legitimacy of immigration law can be established by two of the most influential theories of political legitimacy – consent theory, and the natural duty of justice theory.

A plausible strategy in the search for political legitimacy, especially given the fact of inevitable disagreement about which collectively binding decisions to enact, is to show that those bound by a law might have reasons to accept it due to its *procedural source*. While unanimous acceptance of every *specific* law is a practical impossibility which cannot be expected, it may be more reasonable to expect that all those subject to some regime of law can accept the general *procedures* by which specific laws are enacted. This strategy was suggested by Rawls when he argued that the search for political legitimacy can be understood as a search for an ‘appropriate procedure for making decisions when the conflicts and disagreements in political life make unanimity impossible or rarely to be expected’; a ‘legitimate procedure’ is therefore one which ‘all may reasonably accept as free and equal when collective decisions must be made’.⁶⁰³

I propose that *consent theory* is best understood as a version of this strategy. Although I have gestured toward my support for the rival natural duty of justice theory in Chapter 2, my

⁶⁰² Risse, *On Global Justice*, p. 165.

⁶⁰³ Rawls, *Political Liberalism*, p. 428.

discussion in this section turns to examine consent theory for two reasons: firstly, consent theory is one of the most influential accounts of political legitimacy in the theoretical literature, with some writers claiming that it answers best to our pre-theoretical intuitions about the natural freedom of human persons; secondly, it may seem that consent theory can provide a straightforward account of the legitimacy of immigration law, even if it fails to establish the legitimacy of domestic laws.

A consent theory of political legitimacy holds that a state exercises political power legitimately only when those subject to its laws have consented to comply with the outcomes of its procedure for authorizing laws and to have their compliance coercively enforced. Adapting Simmons's conception of consent, I will understand an individual's consent to be her *voluntary and deliberate* commitment to be ruled by the outcomes of a particular legislative procedure. According to the consent theory of political legitimacy, therefore, compliance with the outcomes of some law-making procedure can be morally expected and coercively enforced only if the addressees of those laws have made a 'personal performance of a voluntary act' by which they have given a 'deliberate undertaking' to comply with the laws duly enacted by that procedure, whatever they are, and to waive their moral immunity to coercion when coercive force is employed to enforce their compliance.⁶⁰⁴

Consent theory may initially seem like a promising route for a defender of the legitimacy of immigration law to take. While it is notorious that citizens cannot be said to – even tacitly – agree to be bound by the general structure of political authority in their own society,⁶⁰⁵ it seems more plausible to claim that prospective immigrants tacitly agree to be bound by the regime of immigration law of the state they choose to migrate to. In particular, one objection that is fatal to any attempt to establish tacit consent in the domestic case seems to apply with less force in the case of immigration law. This is the objection that the acts

⁶⁰⁴ A. John Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979), p. 57.

⁶⁰⁵ *Ibid.*, pp. 75-100.

which have sometimes been taken to imply tacit consent to domestic law are not sufficiently *voluntary* to count as cases of freely given consent.

This familiar objection goes back to Hume, who attacked Locke's claim that continued residence within a state's territory constitutes tacit consent to be bound by its laws, noting that the costs of emigrating are too high to make such residence voluntary in the way required for valid consent.⁶⁰⁶ Adopting Serena Olsaretti's analysis of voluntariness, I will hold that a choice is voluntary 'if and only if it is not made because there is no acceptable alternative to it'.⁶⁰⁷ We can then formulate Hume's objection as follows: since most residents of a state have no acceptable alternative to remaining on its territory, their continued residence in its territory is not voluntary and cannot be taken to signal a voluntary and deliberate commitment to be bound by the state's laws.

Certainly, many prospective immigrants do not have acceptable alternatives to migrating – an obvious example here would be those who face violations of their basic human rights if they remain in their home states. Nevertheless, it seems that there are many others who do have an acceptable alternative to migrating – namely continued residence in states which house minimally just and effective systems of social cooperation – and for whom therefore migration is a voluntary choice. At least for this group of prospective immigrants, it may seem that a tacit consent theory might justify a receiving state's exercise of political power over them through its regime of immigration law: the idea is that the voluntary choice to apply for immigrant admission itself counts as a grant of tacit consent.

However, a serious problem remains for this suggested appeal to tacit consent. Even if many prospective immigrants voluntarily choose to migrate, the voluntariness of their choice is not sufficient for legitimacy: the commitment to be bound by the regime of

⁶⁰⁶ See David Hume, 'Of the Original Contract', in his *Essays: Moral, Political, and Literary*, (ed.) E. F. Miller (Indianapolis, IN: Liberty Fund, 1987).

⁶⁰⁷ Serena Olsaretti, *Liberty, Desert and the Market: A Philosophical Study* (Cambridge: Cambridge University Press, 2004), p. 139, emphasis removed.

immigration law that applies to them must be both voluntary *and deliberate* if it is to have the normative effects required for immigration law to be legitimate. Unless a putative grant of consent is a deliberate undertaking, it fails to actively engage the agent's deliberative capacities – an engagement that is needed to reconcile her subjection to political power with her standing as a rational and moral agent.⁶⁰⁸

It seems, however, that prospective immigrants do not deliberately undertake to be bound by immigration law. This is especially clear in the case of irregular migrants, who enter the state's territory by evading border controls. But even considering only the case of prospective immigrants who do not attempt to circumvent the established legal processes for immigrant admission, it is unclear that these migrants are deliberately committing themselves to be *morally* bound to comply with the relevant state's immigration law and waiving their *moral* immunity to be coerced into complying. It is crucial here not to confuse a prospective immigrant's act of putting herself in a situation where she will foreseeably be legally subject to the immigration regime of a particular state, and an immigrant's agreement to be morally bound to comply with that regime's legal requirements and to be coercively compelled to comply. Only the latter counts as an act of consent in consent theory; the former does not have the normative effect of obligating a prospective immigrant to comply with immigration law, nor does it license states to use coercion in enforcing compliance.

Should the failure to establish that prospective immigrants consent to be bound by the regime of immigration law that applies to them lead us to conclude that immigration law is illegitimate? According to consent theory, it should. Recall from my earlier formulation of consent theory that consent, on this view, is understood to be *necessary* for legitimacy. As David Estlund has pointed out, many writers on political legitimacy who are not consent theorists accept that at least in some cases consent *can* establish legitimacy; hence, the

⁶⁰⁸ See Simmons, *Moral Principles and Political Obligations*, pp. 88-95.

distinctive claim of consent theory is that ‘there is no authority over a person without that person’s consenting to be under that authority’.⁶⁰⁹

I argue, however, that consent theory should be rejected. To require consent as a condition for any exercise of political power to be legitimate is to adopt a view that is ‘so extraordinarily demanding as to remain utopian in the worst sense.’⁶¹⁰ I am not simply pointing to the well-known problem that if consent is taken to be necessary for legitimacy, then all existing exercises of political power are illegitimate. The mere fact that the status quo fails to meet the demands of a normative principle should not lead us to revise or reject that principle. Rather, consent theory is objectionably utopian because it fails to respond appropriately to the fact of reasonable disagreement in the circumstances of politics and cooperative life. As Buchanan reminds us, ‘politics seems to be concerned, in some fundamental way, with how to get along when [unanimous] consent is lacking’ for the social rules and collective decisions which are imposed on all.⁶¹¹

Consent theorists have also offered only meagre motivation for the claim that consent is necessary for political legitimacy, especially relative to its ‘extraordinarily demanding’ implications. Many theorists of political legitimacy who hold that particular individuals’ consent to be ruled by a particular state – or at least some other freely chosen and morally significant relationship or transaction between individual subjects and particular states wielding political power – is necessary for legitimacy appeal to the idea of the *natural freedom* of persons. Simmons, for example, claims that to deny the necessity of consent or some other voluntary transaction is ‘to deny the natural freedom of persons, a basic and plausible Lockean premise.’⁶¹² He specifies the natural freedom of persons to mean that no one is morally bound by, or can permissibly be forced to comply with, the directives of another

⁶⁰⁹ David M. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, NJ: Princeton University Press, 2008), p. 119.

⁶¹⁰ Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 243.

⁶¹¹ Ibid., pp. 243-244.

⁶¹² Simmons, ‘Justification and Legitimacy’, p. 136.

unless she has assumed such an obligation, or has waived in this particular case her general moral immunity against coercion, by some voluntary action or transaction.⁶¹³

Due to its vagueness, whether the idea of the natural freedom of persons is indeed plausible will depend on the specific construal given to that idea. As Estlund has noticed, Simmons's interpretation of the idea of natural freedom simply asserts the claim that consent is necessary for legitimacy.⁶¹⁴ Hence, not only is an appeal to the natural freedom of persons unable to provide independent support for consent theory's central claim, the natural freedom of persons so construed is no more plausible than the 'extraordinarily demanding' claim that consent is necessary for legitimacy.

A more plausible construal of the natural freedom of persons, and one which does not beg the question in favour of any specific theory of political legitimacy, takes this idea to be the claim that 'there is no authority unless some positive moral case can be made for it.'⁶¹⁵ When understood in this way, the idea of the natural freedom of persons provides no special support for consent theory, or indeed any theory of political legitimacy, and simply expresses the core contention of the Liberal Principle: that political power is legitimate only if its exercise is sufficiently justified to those subject to it – leaving open the question of which reasons are sufficient to justify political power to its subjects.

On this plausible construal of natural freedom, not only does the idea of persons' natural freedom fail to motivate consent theory, it in fact casts doubt on the claim that consent is necessary for legitimacy. If the search for political legitimacy is the search for *some* justification for the exercise of political power over persons capable of exercising rational and moral agency and who are therefore, by default, free from any obligation to comply with the directives of others and morally immune from coercion to elicit their compliance, it seems

⁶¹³ Simmons, *Moral Principles and Political Obligations*, pp. 62-65.

⁶¹⁴ See Estlund, *Democratic Authority*, p. 120.

⁶¹⁵ Ibid.

especially implausible to claim that the *only* possible successful justification will appeal to some voluntary and deliberate agreement to be subject to political rule.

If some exercise of political power aims to establish a common framework which will regulate and stabilize a cooperative project that is independently morally required, it is unclear why its legitimacy should be beholden to the possibly idiosyncratic, misguided or unreasonable choices of some individuals to withhold their support for the cooperative project. Indeed, Simmons himself seems to accept that if compliance with a law or other political directive is ‘the only way we can fulfill one of our ... moral obligations or duties’, then this can be a ground of legitimacy even when consent is lacking.⁶¹⁶ Like Simmons, then, we should reject the theory that consent is *necessary* for legitimacy.

Hence, the fact that prospective immigrants to a potential receiving state and that state’s current citizens are all subject to its immigration law, despite having never consented to be bound by that law, does not conclusively establish the illegitimacy of that state’s regime of immigration law. Turning our focus away from trying to establish some voluntarily assumed special relationship between the subjects of immigration law and the authors or enforcers of immigration law, we should consider what other reasons prospective immigrants to a state and current citizens of that state might have to support and comply with the state’s general regime of law regulating immigrant admission. One obvious suggestion is that the addressees of immigration law have strong reasons to comply with its directives because doing so is independently morally required. It is to a theory of political legitimacy which draws on this suggestion that our attention now turns.

V. THE NATURAL DUTY OF JUSTICE THEORY

⁶¹⁶ Ibid., pp. 154-155, emphases added.

I have argued that although prospective immigrants and other subjects of immigration law do not consent to be bound by that law, the absence of consent alone does not conclusively establish the illegitimacy of immigration law, since consent is not a necessary condition for political legitimacy. In this section, I consider the argument that when a state's regime of immigration law serves justice in immigration, prospective immigrants and current citizens have a duty to support and comply with that regime of law, and have no valid moral complaint against enforcement measures such as deportation – independently of any voluntary agreement or deliberate transaction on their part.

The theory of political legitimacy this argument appeals to is the *natural duty of justice* theory of legitimacy, or as I shall also say, the natural duty theory. As I understand the current theoretical debate on political legitimacy, the natural duty theory is the main and most plausible rival to transactional theories of legitimacy, such as the consent theory we considered in the previous section. Rawls provided the most influential statement of the natural duty of justice theory when he claimed that all of us, simply as human persons, have a duty 'to support and to comply with just institutions that exist and apply to us'. This duty Rawls calls *natural* in the sense that it applies to us 'without regard to our voluntary acts', and are not grounded in social and political relations such as shared liability to coercive institutions or shared participation in social practices.⁶¹⁷ Natural duties are therefore duties with what I called, in Chapter 3, non-relational grounds; in this section, I will use the term 'natural duties' rather than non-relational duties in conformity with the usage common in the literature.

A simple way to motivate the natural duty theory is to begin with the almost undeniable claim that all human persons owe each other, just in virtue of their common humanity, a duty to do what will serve political justice. Given this basic natural duty to serve justice, if the addressees of some regime of law would better serve justice by complying with its directives than they would by withholding their support or my directly and independently

⁶¹⁷ Rawls, *Theory of Justice*, pp. 114-115 and p. 334.

trying to promote political justice, then they have a duty to comply with its directives, independently of any voluntary agreement or deliberate transaction. This latter duty would explain how that regime of law comes, by serving justice, to have legitimate authority over its addressees, and presumably would also explain why potential complaints those addressees might press against coercive enforcement of their compliance are disabled or at least seriously weakened, hence also establishing legitimate coercion.⁶¹⁸

This simple motivation for the natural duty theory – and indeed Rawls’s statement of the theory itself – may be too simple, however. Recall that the Liberal Principle holds that political power is legitimate only if its exercise is sufficiently supported or justified by reasons that its subjects can accept as persons who equally have the deliberative capacities for rational and moral agency. Since it aims to state conditions for the exercise of political power to be reconciled with a conception of human persons as free and equal, rational and moral agents,⁶¹⁹ the Liberal Principle does not simply require that the exercise of political power be in some sense justified tout court, but that it be justified *to* the subjects of power; a successful justification is one that is *acceptable* to those subject to political power. Following Estlund’s elaboration of this latter idea, we may say that a successful justification must lay out sufficient reasons ‘that do not violate [subjects’] reasonable moral and philosophical convictions, true or false, right or wrong.’⁶²⁰

In line with the Liberal Principle, the natural duty theory should therefore be formulated as follows: the addressees of a law are duty-bound to comply with its directives, and have no valid complaint against the coercive enforcement of their compliance, when the law in question can be shown to serve what they *reasonably believe* are the requirements of political justice. When a law serves justice, on their reasonable conception of what political justice requires, those subject to political power can freely see themselves, as equal rational

⁶¹⁸ See Jonathan Quong, *Liberalism without Perfection* (Oxford: Oxford University Press, 2010), p. 128.

⁶¹⁹ Abizadeh, ‘Democratic Theory and Border Coercion’, p. 39.

⁶²⁰ Estlund, *Democratic Authority*, p. 43.

and moral agents, to have sufficient and even decisive moral reason to comply, apart from any threat of coercion. By contrast, if a law is reasonably – even if mistakenly – believed by at least some of those to whom it applies to be unjust, then expecting and enforcing their compliance with it would disrespect the equal standing of these reasonable dissenters as persons with the capacity for rational and moral agency.

While the natural duty of justice theory is compelling as a statement of a sufficient condition for political legitimacy, it is unclear that an appeal to this theory can establish the legitimacy of immigration law. We can expect a reasonable consensus among prospective immigrants and current citizens that, especially under current circumstances, having *some* legal framework for the regulation and coordination of migratory flows into particular territories better serves justice-given goals than the immediate and total abolition of any form of border controls; as we saw in Chapter 4, even globalist liberals do not favour completely dismantling arrangements for the legal regulation of immigration, especially in the short term.

However, beyond this basic level of consensus, we cannot similarly expect unanimous agreement about which particular immigration laws and policies best serve justice in immigration. We have encountered, in the four preceding chapters of this thesis, pervasive disagreement about justice in immigration within the theoretical debate – a debate, we may assume, among interlocutors who are reasoning in good faith, and who have informed their moral reflection on international migration by a sound knowledge of the relevant social facts. In particular, I have argued that disagreements about justice in immigration are rooted in deep disagreements about the grounds, content and scope of principles of social and global justice between globalist liberals and internationalists. There is no reason to believe that *reasonable disagreement about justice in immigration* among the subjects of a receiving state's immigration law – prospective immigrants and current citizens – is any less deep and pervasive.

In the absence of a consensus among immigration law's subjects as to justice in immigration, it seems that immigration law's legitimacy cannot be established by the natural

duty theory. In fact, if we plausibly believe that reasonable disagreement about political justice more generally – its grounds, content, and scope – is ‘not unexpected, not unnatural, not irrational’ whenever there are ‘a number of distinct intelligences’ exercising their deliberative capacities and in particular their capacity for a sense of justice,⁶²¹ then it may seem that the natural duty theory is flawed in much the same way that the consent theory was flawed: it is unresponsive to the central problem of political legitimacy, which as we have seen is to justify the imposition of common rules to each individual subject to those rules, *in the face of disagreement* among them about which common rules should be selected as authoritative.

The *proceduralist strategy* for responding to the problem of moral disagreement, which we encountered when we discussed consent theory, also seems promising here: while moral consensus on the justice or injustice of specific laws cannot be expected due to the inevitability of reasonable disagreement about (the substantive requirements of) justice, political legitimacy can still be established if there is a procedure which can reach ‘decisions when the conflicts and disagreements in political life make unanimity impossible or rarely to be expected’⁶²² and which is beyond reasonable moral disagreement.

Such a procedure, to be legitimate according to this more developed account of the natural duty theory, must be one which only unreasonable conceptions of political justice would reject. Without being able to offer a complete account of how to distinguish between reasonable and unreasonable conceptions of justice, I suggest that a reasonable conception of justice must accept the Liberal Principle and the conception of the human person which grounds that principle. Hence, a procedure for reaching political decisions can only be beyond reasonable moral disagreement if it is itself able to meet the justificatory demand of the Liberal Principle: the procedure must be acceptable to those subject to its outcomes as persons with the capacity for rational and moral agency. Here I join Rawls in insisting that a

⁶²¹ Waldron, *Law and Disagreement*, p. 112.

⁶²² Rawls, *Political Liberalism*, p. 428.

legitimate procedure must be one that ‘all may reasonably accept as free and equal when collective decisions must be made and agreement is normally lacking.’⁶²³

An obvious candidate for a procedure that all individuals subject to political power can accept as persons endowed with the deliberative capacities is *majority rule*. In developing the natural duty theory, Rawls himself proposed ‘some form of majority rule’ as an ‘effective legislative procedure’, given the problem that ‘opinions of justice are bound to clash’. On Rawls’s proposed elaboration of the natural duty theory, a law enacted by a majoritarian procedure is legitimate even when some individuals to whom the law applies reasonably judge it to be unjust, as long as ‘certain limits of injustice’ are not exceeded. Unfortunately, while Rawls’s proposed elaboration is plausible, he offers no argument for majority rule as a legitimate procedure beyond assuming that it is a ‘practical necessity’.⁶²⁴

I suggest that not only must the natural duty of justice theory of political legitimacy adopt the proceduralist strategy to respond appropriately to the fact of reasonable disagreement about justice, the natural duty theory should recognize majority rule as the decision procedure which best meets the test for a legitimate procedure: majority rule is the procedure most acceptable, perhaps even uniquely acceptable, to persons with equal standing as rational and moral agents, since it is the procedure that persons so conceived will recognize as the most suited for reaching common political decisions among themselves, in the face of reasonable disagreement about political justice.

For them to accept majority rule as the most appropriate decision-making procedure, those subject to some law must first, of course, accept that political justice requires them to achieve *some* common framework or decision in the domain defined by the law’s claimed jurisdiction, and they must also recognize that moral consensus about the justice or otherwise of specific laws and decisions cannot be expected. In light of this, if each of them endorses a

⁶²³ Ibid., pp. 428-429, emphasis added.

⁶²⁴ Rawls, *Theory of Justice*, pp. 354-355.

conception of justice that is reasonable – and therefore recognize that the others as much as they possess the deliberative capacities for rational and moral agency – then no one will expect her beliefs about justice always to determine the content of the decisions which are to bind all. In this way, the acceptance of the outcomes of *some* procedure as legitimately binding on all seems to be beyond reasonable disagreement.

The recognition that this procedure aims to reach common decisions binding on persons each endowed with the deliberative capacities also constrains the particular *way* that common decisions are reached, if the procedure is to be legitimate. If all persons who are to be bound by the outcomes of the procedure are equally (in morally relevant ways) endowed with the deliberative capacities and in particular with the capacity for a sense of justice, then a procedure which gives the views of some greater or lesser weight – without sufficient justification for this unequal weighting – will not be acceptable to all who are to be governed by the procedure's outcomes, particularly from the standpoint of those whose views it is proposed should receive less weight.

Hence, a procedure which weights each reasonable view *equally* will normally be the procedure most or even uniquely acceptable to subjects of political power as rational and moral agents. As Waldron reminds us, majority rule is such a procedure: the 'method of majority-decision ... involves a commitment to give *equal* weight to each person's view in the process by which one view is selected as the group's.'⁶²⁵ If we are to establish the legitimacy of some law by appeal to the duty all persons have to serve political justice, it is necessary – though by no means sufficient – to show that the law serves what the majority of its addressees reasonably believe justice requires, typically by tracing the law to a majoritarian procedural source. Taking the democratic ideal of political legitimacy to require equal political

⁶²⁵ Waldron, *Law and Disagreement*, p. 114.

liberty for all those subject to political power, I will call this the *democratic elaboration* of the natural duty of justice theory.⁶²⁶

While this democratic elaboration of the natural duty theory is a plausible response to the fact of reasonable pluralism about justice, its insistence on a democratic decision-making procedure among all those subject to political power seriously undermines any attempt to defend the legitimacy of immigration law by appeal to the natural duty theory. The obvious problem is that current procedures for the enactment and application of immigration law are not democratic in the relevant sense: far from giving the (reasonable) views on justice of all addressees of immigration law equal weight in the determination of immigration law's content, existing procedures systematically give some of them *no* weight.

Certainly, in states whose domestic laws are legitimate – the focus of our inquiry – the procedures for enacting law will be *internally* democratic: current citizens will be given an equal vote in the selection of legislators who decide on the state's immigration laws. However, even in these states, the established procedures for enacting immigration law currently deny *prospective immigrants* any opportunity – let alone an equal opportunity – to participate in the political processes by which immigration law is debated and enacted. As we have seen, states *unilaterally* determine their immigration laws through procedures responsive only to internal political decisions. But, as I argued in Sections II and III, a state exercises political power over prospective immigrants to its territory when it applies its laws regulating immigrant admission to them and enforces their compliance with those laws' directives through the use of coercive force.

Since they exclude from participation many persons who are nevertheless subject to the decisions they authorize, the standard procedures by which immigration laws are enacted in the current international state system seem not to meet the test of the Liberal Principle and

⁶²⁶ For this characterization of democratic legitimacy, see Amy Gutmann, 'Rawls on the Relationship between Liberalism and Democracy', in S. Freeman (ed.), *The Cambridge Companion to Rawls* (Cambridge: Cambridge University Press, 2002), p. 169.

are not beyond reasonable disagreement. For this reason, it seems that the natural duty theory, when it is appropriately elaborated, cannot establish the legitimacy of immigration law as it is currently enacted, applied, and enforced. When prospective immigrants to a given receiving state are expected and forced to comply with that state's reasonably contestable immigration laws, without being given an opportunity to determine the content of those laws, they are illegitimately subject to political power without being given a justification that they can accept as rational and moral agents.⁶²⁷

VI. CONCLUSION

We have reviewed, in the course of this chapter, the two most influential theories of political legitimacy – consent theory and the natural duty of justice theory – and have found that neither of these theories supports the a posteriori legitimacy of a state's unilaterally enacted immigration law. We saw that prospective immigrants and current citizens do not consent to be governed by the immigration laws which apply to them, and we saw that, given the fact of reasonable disagreement about justice in immigration, because prospective immigrants are excluded from the procedures by which immigration law is enacted, receiving states fail to offer them a justification for their enforced compliance which they can accept. I therefore join Risse in expressing significant scepticism about the legitimacy of immigration law:

Perhaps the laws of morally acceptable states (including immigration policies) should be respected even if the state goes astray. However, the usual reasons why laws ought to be obeyed *qua laws* (rather than because they are morally required) only address members of the society. To those, one may say that their ongoing presence or participation in economic, social, or political life establishes a tacit acceptance of the country's law. Fair-play arguments might apply. Perhaps some people, such as

⁶²⁷ I am indebted to Jeff Howard for the formulation of this point.

naturalized citizens, have explicitly accepted the laws. But none of this gives would-be illegal immigrants reasons not to break laws that bar them *from entering* if they wish to participate in the society while abiding by its laws.⁶²⁸

My arguments have not, however, *conclusively* established the illegitimacy of immigration law that is unilaterally enacted according to the internal political choices of states. I have shown only that the ‘usual reasons’ that have been offered in defence of the legitimacy of *domestic* law do not support the legitimacy of immigration law; specifically, that two of the most influential theories that have been developed to evaluate the legitimacy of domestic law do not support the legitimacy of immigration law. However, this leaves open the possibility that further reflection will reveal some novel account which can vindicate the political legitimacy of unilaterally enacted immigration law. Nothing in my argument has shown that a *necessary* condition for political legitimacy is not met by current arrangements for the legal regulation of immigrant admission: consent though perhaps sufficient is not necessary for political legitimacy; similarly, the natural duty theory states a sufficient but not a necessary condition for legitimacy.

Indeed, the natural duty theory may yet be able to furnish support for immigration law’s legitimacy: recall that the procedural strategy to accommodate the fact of reasonable disagreement about justice insists only that *in the absence of a sufficient justification*, procedures which depart from equal weighting of reasonable views do not meet the justificatory burden of the Liberal Principle. If some justification for giving less weight to the voices of prospective immigrants in the procedures by which immigration law is enacted can be found, then the natural duty theory may yet vindicate the legitimacy of arrangements not fundamentally different from those found in the current international system: procedures for the enactment of immigration law that are primarily responsive to the internal political choices of independent states may be legitimate.

⁶²⁸ Risse, *On Global Justice*, pp. 165-166.

Without claiming that current arrangements for the legal regulation of immigrant admission adequately meet the Liberal Principle's demand for justification, I suggest that we have good reasons to continue the search for an account which can vindicate the legitimacy of immigration law as it is enacted in an international order of relatively independent states, rather than as it might be enacted in a global order housing democratic procedures with global scope. Not all theorists have agreed with this suggestion. Abizadeh, who joins Risse in expressing scepticism about the legitimacy of unilaterally enacted immigration law, draws a radical conclusion from his sceptical argument. He writes:

To be democratically legitimate, any regime of border control must either be jointly controlled by citizens and foreigners or, if it is to be under unilateral citizen control, its control must be delegated, through cosmopolitan democratic institutions giving articulation to a "global demos," to differentiated polities on the basis of arguments addressed to all.⁶²⁹

Abizadeh's response to the apparent a posteriori illegitimacy of immigration law is therefore to recommend a radical revision of current arrangements for the enactment of immigration law. There are powerful reasons, however, to resist this recommendation.

Certainly, the legitimacy of border controls is dubious in an international system – such as our own – in which public deliberation and political decision-making about immigration law and policy proceeds *solely* at the levels of separate states, and under conditions in which the just claims and interests of non-members are so rarely articulated and given serious consideration. When opinion polls reveal, for example, that 47% of the British public oppose the entry and resettlement of even 'a few hundred' persons recognized by the UNHCR as refugees fleeing Syria's murderous conflict, we can have little confidence that

⁶²⁹ Abizadeh, 'Democratic Theory and Border Coercion', p. 54.

non-members' most urgent claims of justice, let alone their views about justice in immigration, are taken seriously in the processes for the enactment of immigration law.⁶³⁰

However, we should be wary of conditioning the legitimacy of immigration law on the establishment of 'cosmopolitan democratic institutions' and the articulation of a 'global demos'. To repeat the warning from Risse we encountered earlier, we simply 'do not understand what a world would be *like* where all state power..., ranging from border control to maintenance of social insurance, is replaced with other arrangements.'⁶³¹ If a political theory of international migration is to offer 'guidance where guidance is needed',⁶³² it must address us in the context of a social and political world we inhabit or which we can at least understand.

This chapter therefore concludes in part with an invitation to further reflection. Although standard theories of political legitimacy, at least as they have been developed to establish the legitimacy of domestic law, are incapable of supporting the legitimacy of immigration law that is unilaterally enacted according to the internal political choices of states, the question remains whether some novel account may yet be able to establish the legitimacy of immigration law without recourse to globe-spanning democratic procedures.

Before such a novel account becomes available, we can ask what moral response to irregular migration is appropriate, assuming provisionally that unilaterally enacted immigration law is illegitimate. If current immigration law is illegitimate, then we should not morally condemn irregular migrants simply because they have violated the immigration laws that apply to them: prospective immigrants, on this assumption, have no duty to treat the requirements of immigration law as binding simply qua law, independently of their judgments about the substantive moral quality of the law. Moreover, any moral warrant that states might have to undertake coercive enforcement measures against irregular migrants in general is called in doubt.

⁶³⁰ William Jordan, 'Opposition to Syrian Refugee Plan', *YouGov.co.uk*, 23 January 2014.

⁶³¹ Risse, *Global Justice*, p. 305.

⁶³² Rawls, *Theory of Justice*, p. 20.

This is not to say, to be clear, that irregular migrants never do wrong by entering some state they have no legal right to enter – only that they do no wrong *simply* when and because they violate immigration law. As philosophical anarchists have stressed, the judgment that some regime of law is illegitimate does not imply that addressees of that legal regime are justified, all things considered, in withholding their compliance and support. Rather, their ‘practical stance’ with respect to the laws in question should be ‘one of careful consideration and thoughtful weighing of all of the reasons’ that bear on whether withholding compliance is justified: the illegitimacy of a law, Simmons reminds us, is ‘just one moral factor among many bearing on how persons ... should (or are permitted to) act’.⁶³³

In particular, if a prospective immigrant reasonably believes that the immigration laws of the receiving state she seeks to enter do in fact serve justice, then she has sufficient reason to accept that regime of law: her own deliberative capacities are leading her to conclude that the laws in question serve what, in her view, justice in immigration requires. In this case, on balance she should comply with the relevant receiving state’s immigration law, and indeed she would have no valid moral complaint against coercive enforcement measures to secure her compliance. In this way, the principles of justice in immigration that I articulated in Chapter 4 may offer guidance not only to the citizens of a state as they deliberate about which common immigration policies they should support for enactment into law, but may also offer guidance to prospective immigrants as they deliberate about how they should react to the border controls – the guards and guns – that confront them.

⁶³³ Simmons, ‘Philosophical Anarchism’, pp. 109-110.

CONCLUSION

I motivated my project in this thesis by reference to the serious doubts and controversies which have accompanied attempts to formulate a response to the urgent moral questions raised by international migration in a world order of territorial states plagued by obscene inequalities, mass poverty, and gross human rights abuses – and to the inadequacies of the current theoretical literature in helping to clarify these doubts and overcome these controversies. I indicted the right-versus-right framework that much of the current literature relies on as the main source of the unhelpful polarization of the existing theoretical debate. We should, I urged, abandon the tendency to frame the moral evaluation of immigrant admission policies in terms of a conflict between the individual's right to free international migration and the collective right of members of a state to unilaterally choose their state's immigration policy; we would do well to eschew an approach which weighs these putative claims of individuals against these putative claims of states and proceeds to settle on an ad hoc balance between them.

I urged that a novel approach would reveal the real joints of disagreement between rival views and conjectured that this approach would thereby offer better prospects for the resolution of those disagreements. This alternative to the rights-based approach, which I have endeavoured to develop in this thesis, distinguishes clearly between the question of justice in immigration and the question of the legitimacy of immigration law, and locates principles of justice in immigration within the background context of a conception of global justice.

In assessing what I have written in this thesis and in wondering if the preceding chapters have vindicated my initial conjecture, one obvious worry is that I have simply substituted one impasse for another: in place of a polarized debate between advocates of an individual right to free migration and defenders of a state's right to determine its own immigration policies, we have an equally intractable debate between globalist liberals and

globalist democrats, on the one hand, and internationalists of various persuasions, on the other. The political theory of international migration, when viewed from within the framework I have proposed, is reduced to a site of a proxy war between globalist and internationalist ideals of the world order.

Two replies seem appropriate. The first will note that by focusing on difficult questions of (in)justice and (il)legitimacy beyond the familiar context of the modern state, my proposed approach directs our attention to many of the most important reasons we in affluent and free societies have to care about immigration policy: we worry that the border controls our states impose reinforce (or perhaps even perpetrate) serious global injustices, or at least represent a callous and morally indefensible response to such injustices, serving to insulate us from the reality of human suffering endured by millions beyond our borders. The question of what we owe to the many human persons who live beyond our borders – and especially to those who live in the developing world – is therefore neither peripheral to, nor is it a distraction from, our deepest concerns in bringing moral reflection to bear on immigration policy.

The second will note that by bringing the immigration debate into closer contact with questions of global justice, we understand better what makes that debate so contentious, and see more clearly what is at stake in controversies about immigration policy. Our deep disputes about a morally acceptable immigration policy stem from our continuing disagreements about justice at home and abroad: disagreements about how to understand what we owe those with whom we share a state and those with whom we share a common humanity and an international order; disagreements about whether these duties are different, and if so, which should have greater claim on us when they come up against each other. Immigration policy is so controversial precisely because it represents, perhaps more starkly than any other area of public policy, the tension between the moral claims of our co-citizens, some of whom are

badly off, and the moral claims of those beyond our borders, many of whom are far worse off.

In this thesis, I have offered some thoughts on how we might begin to resolve that tension, although I have by no means delivered a full resolution. I hope that I have at least identified the deepest questions that should grip the attention of political theorists of international migration, and, in the form of cooperation-based internationalism and its associated conception of justice in immigration, provided one nascent account that can guide us in reaching immigration policies that answer to the distinctive claims of our fellow citizens, and of our fellow human beings.

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