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IMMIGRATION

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Across the world, large numbers of people who wish to move to another country are prevented or deterred from doing so by immigration controls, and many have moved or attempted to move *despite* such controls. To what extent should states have a right to exclude would-be immigrants from taking up residence (rather than merely from entering, e.g., as tourists)? Is the widely accepted belief that states have an expansive right to exclude would-be immigrants from settling¹ morally justifiable? In this chapter, we will explore four arguments in favour of the right to exclude: the *freedom of association argument*, the *liberal nationalist argument*, the *Kantian argument* and the *special obligations argument*. Our aim will be neither to provide a comprehensive survey of possible arguments for the right to exclude (there are, obviously, many more than four) nor a conclusive argument for or against any one of them. Rather, our aim is to canvass four of the arguments that we believe carry the most promise for establishing the right, and try to articulate their main strengths and weaknesses. Along the way, we will also make several distinctions that we believe require more attention than they have so far received, and that should help in bringing to light the main hurdles facing any argument for the right to exclude.

The “pure” case

We begin by discussing five assumptions that will help structure and limit our search for a viable right to exclude. While such assumptions may seem, at first glance, to assume away some of the most difficult problems at the root of current debates on immigration, they will enable us (as we will explain in more detail below) to focus on the normative core of arguments for the right to exclude. With that normative core in place, we will then be able to take a much clearer view of what the consequences of relaxing our assumptions might be.

First, we will not discuss refugees. We assume, for the sake of argument, that would-be immigrants are not suffering from severe forms of political, cultural, religious, personal or social persecution in their country of origin. Second, we assume that would-be immigrants are not suffering from severe economic deprivation. They are not so poor as to be in the kind of need that would trigger, at the very least, a duty of rescue or aid. Third, we assume that the number of those seeking entry is neither so large as to overwhelm the capacity of the receiving state to maintain the provision of central public goods (such as public security, education, access to healthcare, and so on) nor so small as to have a negligible impact on the host society. Fourth,

we assume that would-be immigrants have a strong interest in residing in the host state – strong enough for the choice to take up residence to be at least more than a mere “whim”. This interest could be based in the fact that would-be immigrants residing in the host state would have, for example, significantly better job opportunities, greater scope for religious or social association, or more wide-reaching political affinities with residents and citizens than they would in their country of origin. Fifth, we assume that would-be immigrants are not seeking to immigrate in order to reunite with their families.

Proceeding under this five-fold restriction is important for two reasons. First, it helps us to isolate the core of the normative case for the right to exclude. If the right to exclude has any weight at all in an all-things-considered calculation of whether it is morally permissible for a receiving state to restrict access, then focusing on this “pure” case – stripped as it is of further complicating factors – will aid us in assessing the grounds and force of the right with as clear a mind as possible. Put another way, to determine whether states have an *all-things-considered* right to exclude in a particular range of cases, we do best to begin our enquiry by asking: under what conditions, if any, do states even have a *pro tanto* right to exclude (a right determined by holding constant further complicating factors, such as the ones enumerated above)? If we are able to establish such a right, we can then wonder, in a second step: how weighty is this right? Is it weighty enough, for example, to override interests deriving from, for example, economic deprivation, family reunification, or political and religious persecution?

Second, and closely related, abstracting away (for the moment) from cases involving severe economic deprivation, political and religious persecution, and family reunification can help us to avoid confusing a *qualified* right to exclude and an *unqualified* one. Those who hold an *unqualified* right to exclude treat states’ right to exclude as a “trump” over all (or almost all) competing interests. When confronted with such an unqualified claim, many find it much too strong. Surely, they will say, those who have nowhere else to go, who will starve if they are not let in, who have been separated from their families, have a claim to enter (and take up residence) that no state can rightfully deny. It becomes tempting to conclude that states do not have a right to exclude *simpliciter*, and that, indeed, a policy of open borders (or nearly open borders) is the only way to give due consideration to such weighty interests. The problem is that the conclusion does not follow. At most, the argument demonstrates that an *unqualified* right to exclude is unpalatable. What it does not establish is that a more *qualified* right to exclude does not exist – a right, that is, that outweighs or overrides a range of competing interests, but not all such interests. Focusing on the pure case thus will help us to determine more carefully the weight, nature and grounds of states’ claimed right to exclude by establishing whether a more qualified right exists. If there is at least *some* right to exclude (however qualified), training our gaze on the core case will aid us in finding it.

It is also important to emphasize that the right to exclude which we focus on here is to be understood as a *moral* right. What *legal* rights might best promote or recognize or implement the moral right (if there is one) will not be discussed here. In this chapter, we do not discuss or defend any such legal rights, focusing only on the moral case.

We proceed as follows. In the next section, we discuss the *freedom of association argument*; in the following section, we turn to the *liberal nationalist argument*. The subsequent section focuses on the *Kantian argument*, and the final section on the *argument from special obligations*.

The freedom of association argument

One potentially promising line of argument in defence of the state’s *pro tanto* right to exclude would-be immigrants from settling is that states enjoy a right to self-determination, which

includes the freedom to associate, and, in turn, that the right to exclude outsiders is a constitutive element of the freedom to associate. This argument, which has been advanced by Christopher Heath Wellman, is potentially promising for a number of reasons (see Wellman 2008, Wellman & Cole 2011). First, as Wellman argues, the freedom to associate is a freedom that people take very seriously. What is more, it seems to include “the right not to associate and even, in many cases, the right to disassociate” (Wellman 2008: 109). Take the case of marriage. Marital freedom of association seems to include the right to marry a willing partner, the right not to marry a specific prospective partner, and the right to remain unmarried (but no right to marry unwilling potential partners) (Wellman 2008, Fine 2010).

Second, the connection between freedom of association and the right to exclude is already familiar to us. Within the context of civil society, associations of various shapes, sizes and purposes – sports clubs, youth groups, religious communities, and so on – often claim the right to exclude unwanted outsiders (and indeed even a right to exclude unwanted insiders). And they claim that right as part of their (and/or their members’) freedom to associate. Is not the same sort of argument applicable to the context of the state and would-be immigrants? Wellman certainly thinks it is:

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

(Wellman 2008: 116)

Third, one can defend an individual’s or a group’s freedom to associate, without condoning everything that they choose to do with that freedom, just as one can defend a person’s right to freedom of speech without condoning what the person chooses to say. In a similar way, Wellman defends what he sees as the state’s right to freedom of association, and its attendant right to exclude outsiders, while at the same time noting that, “if anything”, he is “personally inclined toward more open borders” (*ibid.*: 116–17). This may seem an intuitively attractive position, then, because a state’s decisions about who to exclude might not be to our liking, they might not be commendable, they might not be in the best interests of particular would-be immigrants – indeed, they might not even seem to reflect what is in the state’s best interests – but we might still think that states are entitled to make those sorts of decisions for themselves.

Fourth, it looks as though we already grant that *states* have the right to freedom of association, in so far as we consider it impermissible to force them against their will to associate with other groups and institutions, or for one state forcibly to annex another or part of another. As Wellman writes,

no one believes that it would be permissible to force Canada into NAFTA or to coerce Slovenia to join the EU. (Of course, nor may Canada or Slovenia unilaterally insert themselves into these associations!) And the reason it is wrong to forcibly include these countries is because Canada’s and Slovenia’s rights to self-determination entitle them to associate (or not) with other countries as they see fit.

(*Ibid.*: 112)

In that case, is not the state’s right to exclude would-be immigrants just another aspect of the state’s right to freedom of association?

One possible line of response is to grant that states may have a *pro tanto* right to exclude would-be immigrants from settling within their territories, in virtue of states' rights to freedom of association, but then to emphasize that this does not get us very far, because the *pro tanto* right can be overridden by competing claims (*ibid.*: 19). The opponent might argue that the freedom to associate, important as it may be, is but one among a number of competing freedoms and other significant values. In the civil society context it does not always take precedence when it clashes with other values, goals and interests. For instance, sometimes states decide that it is legitimate to prohibit certain associations from excluding prospective members according to discriminatory criteria (e.g. on the basis of their sex or ethnicity).² Freedom of association is valuable, but it is not the only thing that is valuable. One might consider that, in the civil society context, non-members' interests in equality of opportunity and the state's interests in furthering the goals of sex equality are also important (Gutmann 1998). Similarly, in the context of states and would-be immigrants, we encounter a clash of values, goals and interests, and we should not just assume that the state's *pro tanto* right to exclude will override many or even most such competing considerations. Perhaps, for instance, one might think that individuals enjoy a right to freedom of movement, and that this is sufficiently weighty to override the state's interests in exclusion.³

Here, though, proponents of the freedom of association argument might respond that, while it is possible that the state's freedom to associate occasionally may be outweighed by *some* especially strong competing considerations, it is certainly not going to be outweighed in the "pure" case under discussion, with respect to would-be immigrants who are not in desperate need. In a conflict between the interests of someone wishing to immigrate in search of a better standard of living (for example) and the interests of the state in freedom of association, the interests of the state should take precedence. In fact, Wellman goes so far as to argue that, as long as states discharge their obligations towards outsiders, they are permitted to exclude even those would-be immigrants who *are* in desperate need (see e.g. Wellman 2008: 129–30). Think about the civil society context: if associations were not permitted to exclude would-be members whenever those individuals claimed to have a significant interest in being admitted, then there would be very limited room left for freedom of association. Or think of the example of marriage again. Antonio may have a substantial interest in marrying Beatrice, but that does not seem to be enough to outweigh Beatrice's own interests in freedom of marital association.

Yet, at this stage, we might start to wonder about whether enough has been done to establish the case for a *pro tanto* right to exclude on the grounds of the state's freedom to associate. After all, the opponent of the freedom of association argument could point out that the case of states is relevantly different from that of associations within civil society and from individual relationships in a number of significant ways. It is clear from the start that there are important differences. For instance, marriage is an intimate relationship in a way that sharing residence in and/or citizenship of a state is not. When it comes to an individual's life plan, lacking the liberty to reject an unwanted suitor seems to be in a different order of magnitude from lacking the liberty to reject unwanted prospective immigrants.⁴ On the other side, though, exclusion from a state is ordinarily far more significant with respect to life plans than exclusion from, say, a sports club. First, we cannot really avoid living under the jurisdiction of some state, because states have claimed all or nearly all the habitable surfaces on the planet, and so we need to be allowed to settle in one, somewhere. There is no option not to live in a state, in the way that we have the option not to be a member of a golf club or not to get married. Furthermore, it may be possible to set up a club of one's own, but it is not usually an option to establish a state of one's own, because that would require some territory not under the jurisdiction of another state or ceded by another state, and territory is not normally up for grabs (see Carens 1987: 267–68; Cole 2000: 70–73; Fine 2010; Seglow 2005).

But what this shows, the proponent may reply, is that everyone needs to be permitted to reside *somewhere*. As long as an individual is allowed to settle in one state, the individual's interests in settlement are satisfied, and all other states still may enjoy the *pro tanto* right to exclude that individual (for this line of argument see e.g. D. Miller 2005b: 197; forthcoming). However, this neglects another distinctive aspect of states as compared to associations in civil society. Residence within a particular state is a necessary condition for the pursuit of the majority, if not all, of the extensive benefits and opportunities (social, economic, political, romantic, educational, and so forth) specific to *that* particular state.⁵ Hence an individual who is excluded from settling in state A, even if allowed to reside within state B, is excluded from pursuing all the opportunities specific to state A. Generally, then, the stakes are likely to be far, far higher for excluded would-be immigrants (including in the pure case) than for excluded would-be members of associations within civil society. That does not necessarily undermine the freedom of association argument in defence of the state's right to exclude, but it does suggest that we should be very cautious when drawing analogies between the state's right to exclude outsiders and the rights of associations within civil society, especially when we think about how to weigh the state's interests against competing considerations.

But note that so far we have not directly questioned whether it is appropriate to assign the state, or to conceive of the state as having, a right to freedom of association. It is worth thinking about that in more detail, because it is not obvious that states do have a right to freedom of association. Even proponents of the freedom of association argument presumably would not wish to grant states the *full* rights of freedom of association. Whereas voluntary associations ordinarily claim the right to exclude *existing* members, would proponents wish to grant states the right to exclude existing citizens (from membership and/or residence) on the grounds of their right to freedom of association? This seems implausible: citizens should not normally be at liberty to deprive one of their number of the full rights of citizenship. But if this is true, then proponents of the freedom of association owe us an explanation for why we should not similarly restrict the right of states to exclude would-be immigrants. If we can curtail rights to full freedom of association in one case, why not in the other too?

Now, we are familiar with the idea of individual rights to freedom of association, and with collective rights to freedom of association – as when we discuss the associational rights of the Girl Scouts, for instance. The usual argument in favour of allowing voluntary associations to exclude unwanted outsiders (and, indeed, insiders) is that this respects the associational choices and rights of the individual members, without unduly burdening the interests of those excluded (who are usually free to join other similar associations should they want to). But, as Wellman recognizes, and most people seem to agree, states as we know them are not voluntary associations and “do not owe their membership to the autonomous choices of their constituents” (Wellman 2008: 112). And for some critics of this view, the simple fact that states are not properly conceived as voluntary associations and that membership within them is not ordinarily voluntary is reason enough to reject the freedom of association argument. Ryan Pevnick, for instance, contends that “it is a mistake to defend immigration restrictions by reference to the citizenry's claims of freedom of association when the relevant association is not freely entered into” (Pevnick 2011: 30).

In addition, the state's freedom of association and accompanying right to exclude appear to clash with the associational rights of its individual members, since the state may choose to exclude would-be immigrants with whom individual members wish to associate (see Steiner 2001: 79–88). So if we are taking freedom of association seriously, why should we conclude that the state's right to exclude should trump the right of individual citizens to associate freely with outsiders?

The defender of the freedom of association position might reply that these differences between states and voluntary associations are not actually significant in this context. What matters is just that states have a right to (or at least some of the rights involved in) freedom of association, and that this much is clear from Wellman's examples of forced association above: we do not usually think that it is permissible to force states into regional associations or for states to forcibly annex others. But it is not clear why we must accept that states have a right to freedom of association in order to believe that there are problems with forcing states to do things against their (and/or their citizens') will. We could believe that there are problems with forced annexation because forced annexation does not respect the rights of sovereign states to territorial integrity, for example. In short, there are other grounds for opposing these kinds of impositions (see Fine forthcoming: chapter 4).

At the same time, though, we should also note that it is possible to agree that states have *some* freedom of association rights, including the right not to be forced to associate with other states, without thinking that this commits us to the conclusion that states must also enjoy a right to exclude would-be immigrants as well (just as the proponents of the freedom of association argument seem to grant states some associational rights, but not the right to exclude current members).⁶

Lastly, the freedom of association argument is, in the first instance, an argument about access to *membership* in the form of citizenship, rather than residence. It is an argument about states (and their citizens) maintaining control over their membership rules, which in turn enables them to control the direction of policy and (to some extent) the future shape of the citizenry: to be in control of their own "association". And so, again, further work is needed to explain why (if at all) this argument, which is ostensibly about control over membership, should deliver something like a right to exclude would-be immigrants from settling within the state's borders. Freedom of association does not seem to do all the work on its own.

The liberal nationalist argument

The freedom of association argument in defence of the state's right to exclude does not depend on the state's members sharing a special, distinctive connection to each other or to the territory over which the state claims jurisdiction. But what happens when we consider the importance of just that kind of special, distinctive connection between fellow members and to a particular territory? So-called "liberal nationalists", for example, maintain that co-nationals share a special relationship with one another and with a particular territory, and this is a relationship which comes with a variety of special rights and obligations. Liberal nationalists generally conceive of national groups as sharing some combination of cultural features (such a common language, and historical points of reference), a national consciousness and subjective sense of their own distinctiveness, and a connection to a territory (see e.g. Tamir 1993, D. Miller 1995, M. Moore 2001, Gans 2003, Meisels 2005). How might a liberal nationalist approach the issue of immigration? Liberal nationalists appear to have at their disposal a powerful case in defence of the state's right to exclude would-be immigrants. There are four key arguments on which liberal nationalists draw (separately or in combination).

First, liberal nationalists point out that people have a strong interest in protecting and preserving the character of their national culture, and they argue that one of the legitimate roles of the state is to protect the national culture(s) within the state. While national cultures inevitably adapt over time in response to various internal and external forces, states should be entitled to control immigration and thus to exclude prospective entrants in the name of ensuring that the national culture is not put under too great a strain or forced to change at too fast a pace.⁷

Second, liberal nationalists argue that members of national groups have a special claim to the territory to which they have a particular attachment – which has been transformed by their presence, has become their “home”, and has symbolic significance for them (see D. Miller 2007: 201–30; Meisels 2005: 25–42). This special national relationship to the territory in question may seem to lend support at least to *some* of the claims that states make with respect to the territory under their control. As David Miller explains, “the case for having rights over the relevant territory is then straightforward: it gives members of the nation continuing access to places that are especially significant to them, and it allows choices to be made over how these sites are to be protected and managed” (D. Miller 2007: 219).

Third, liberal nationalists often argue that sharing a national identity has important instrumental benefits, such as engendering a sense of solidarity and trust between fellow nationals, and even that it may be necessary for the maintenance of a well-functioning democracy and the pursuit of social justice (see Tamir 1993: 121; Canovan 2000; D. Miller 2000: 31–33). If immigration represents a danger to the national identity and the benefits that it brings, then this might be a strong reason in favour of states enjoying a right to exclude would-be immigrants.

Fourth, liberal nationalists tend to argue that fellow nationals have special obligations to one another in virtue of their membership of a national community: these obligations are part of what it means to be members of a national group (D. Miller 2005c; Tamir 1993: 95–116). And these special obligations are not owed to non-nationals. If, for instance, fellow nationals have an obligation to protect each other’s interests over above those of non-nationals, then this might form the basis for an argument in defence of the state’s right to exclude would-be immigrants (but we will not explore this fourth argument in this section: the final section will introduce and assess the special obligations argument in more detail).

In response to the first argument, even if we grant that immigration might have an impact on the national culture or at least on the pace of change, and agree that members of national communities may have a significant interest in maintaining some control over the character and pace of change of their national culture, nonetheless we might wonder why this interest should be considered more weighty than the interests of would-be immigrants in being allowed to settle within the state’s borders. It looks as though we just have competing interests here, and so we need to know why one set of interests should take priority.

The liberal nationalist has a range of possible replies. The liberal nationalist might argue that one’s national culture is of fundamental importance to one’s individual identity, to one’s sense of belonging and place in the world, and/or to one’s individual autonomy, to the ability to make meaningful choices (see e.g. Margalit & Raz 1990; Kymlicka 1995: 75–106; and the discussion in Tamir 1993: 35–56). But, again, the opponent might just reply that following one’s own plans, even if that requires migrating across borders, and even in the “pure” case, is of fundamental importance to individual lives. Why does the importance of the role of national culture take precedence?

The second, territorial argument appears to offer a stronger basis for the claim that the state should enjoy a *pro tanto* right to exclude, as it seeks to establish a special, morally significant connection between nationals and the territory in question, a connection not shared by non-nationals. Yet, how do we identify those who have the right sort of special connection to the territory? In the case of Scotland, for example, is it just those who reside within Scotland, or also those who reside in the rest of the United Kingdom, or also those within the European Union, or also those who were born in Scotland but now live elsewhere, or those who have some kind of ancestral connection to Scotland even though they have never lived there? And why should this special connection deliver a right to exclude others from residing there rather than just a right to reside there? (On this point see Fine forthcoming: chapter 6.) Moreover,

given the complicated, conflict-ridden, contested histories of territorial borders, there are always going to be deep disagreements about which groups have the relevant connections to the relevant areas.

The strength of the third argument depends on whether the empirical evidence actually supports the claim that sharing a national identity brings with it the various alleged benefits, whether it is important or even necessary for the pursuit and achievement of a range of goals, and indeed whether immigration does represent a threat to the national identity such that these projects would be undermined in the absence of a right to exclude would-be immigrants. Even if the empirical evidence supports any of these claims, we would still have to think about how exactly a shared national identity is supposed to perform that important role. What kind of overarching national identity could unite the diverse residents of today's states, such that it would promote solidarity and trust among them? Do such identities exist? Consider the British case. British politicians are constantly struggling to define what it means to be British, in a way that is supposed to generate pride and a sense of unity, without alienating members of minority groups and historically disadvantaged groups. How might it avoid being divisive and parochial, rather than cohesive and broad? But note that once we start thinking about how the state might foster the *right kind* of national identity, we are moving away from the idea that the state should protect the actual national cultures (messy, exclusive, divisive and contentious as they may be) that exist within their borders. Furthermore, as we know, states and nations are not perfectly overlapping (Fine forthcoming: chapter 3). There are multinational states (such as Britain and Belgium) and there are nations without their own states (such as the Kurds). This, of course, complicates the relationship between nationality and the *state's* right to exclude. In summary, then, while the liberal nationalist argument may do a fine job of explaining some of what lies behind many a state's *desire* to exclude large numbers of would-be immigrants, it does not appear to deliver anything like a decisive defence of the state's *right* to exclude, even in the pared-down "pure" case.

The Kantian argument

Another promising argument for the state's right to exclude begins with the assumption that states have rights to control and regulate the territory over which they have jurisdiction, and then goes on to claim that this set of rights must also include the right to exclude. In this section, we focus on a specifically *Kantian* argument for the extension from territorial rights of jurisdiction and control to territorial rights to exclude. (See above for the argument departing from a specifically nationalist account of territorial rights.) The reason we focus on Kant is that, although often mentioned in both the literature on territorial rights and the literature on Kantian cosmopolitanism, the argument has not yet received sustained attention in the immigration debate (though see Benhabib 2004). We also believe it is one of the more promising among territory-based arguments for the right to exclude.⁸

How do we get from territorial rights to jurisdiction and control, which *inter alia* entitle states to make and enforce law within their borders, to a right to exclude? We believe the most promising Kantian argument begins with an account of the grounds for granting states jurisdictional rights over territory, and then claims that such grounds also support granting states a moral right to control their borders. Let us unpack the argument step by step.

The Kantian begins by asserting a universal, "innate" right to freedom, which guarantees our freedom understood as independence from subjection to others' choices. In the state of nature, this freedom is insecure. Because there is no political agent capable of coordinating our wills, and because we cannot know with any certainty others' intentions or designs, we

are permitted, Kant says, to “do what seems right and good to us” (Kant [1781] 1991: 456; *Metaphysics of Morals* [hereinafter *MM*] Ak 6:312). Each one of us is permitted, that is, to protect our person and provisionally acquired property with violence if necessary. But for Kant there is a further problem in the state of nature, which creates an enforceable *moral* (rather than merely prudential) obligation to attempt exit from it. The problem is that, in each interpreting for ourselves what the protection of our innate freedom requires, we must *unilaterally* impose our will – our view regarding what right requires – on others. I sincerely believe that this particular piece of land is mine and your use of it counts as a trespass; you disagree. Because we are both authoritative interpreters of the rights that define the limits of our freedom, the actions we take under our own conception of freedom therefore necessarily subject the choices of others with whom we interact. This would be true even were we to agree with others what right (or a system of rights) requires of each of us. Because there is no mechanism available that can assure me that you will continue to comply with the currently agreed distribution of rights, there is an important sense in which I still remain subject to your choice to continue supporting the agreement. If you change your mind, and begin acting on a set of rights that I believe prejudices my freedom, then I have no recourse (Kant [1781] 1991: 408–10; *MM* Ak 6:255–57).

To emerge from this “lawless freedom”, we must set up a public authority capable of coordinating our wills under a system of equal freedom. When properly constituted, such a public authority – a state – will guarantee and protect each person’s right to freedom under “universal law”, such that each person’s sphere of freedom is defined by a set of rights equally enjoyed by everyone. The public will that coerces us into compliance with such a system of rights will not be *unilateral* but *omnilateral*: it will be the product of a united and coordinated will. When, in addition, (a) the public will rules in the name of the people, by protecting basic rights and giving everyone a say in its formation, (b) the people over whom it exercises authority have a (permission) right to occupy that territory (e.g. they did not acquire residence there unjustly), and (c) authority was not acquired via unjust annexation, the Kantian will say that the state’s exercise of jurisdiction over a specific territory is *legitimate*.⁹

In summary, on the Kantian view states acquire legitimate jurisdiction over a territory when they effectively provide a central class of public goods (including, most importantly, the rule of law), which together serves to protect a system of equal freedom. Once a state is discharging its public role, it acquires a robust right to non-interference: all those who are not subject to its authority (including other states and foreigners) must respect its autonomy. They must not interfere in its internal affairs, or annex its territory, or otherwise undermine its capacity to govern. But must such a capacity to govern also include the right to exclude?

To answer this question, we must turn to Kant’s argument for “cosmopolitan right”, which governs the relations between states and the citizens and residents of other countries, that is, the permissible ways in which citizens, residents and public institutions can treat foreign visitors, and (as we will see in a moment, more importantly for Kant) the permissible ways in which foreign visitors can treat the citizens, public institutions and land of the state they are visiting. And here we find there is only one cosmopolitan right, namely “universal hospitality”.¹⁰ “Conditions of universal hospitality” include:

the right of a foreigner not to be treated with hostility because he has arrived on the land of another. The other can turn him away, if this can be done without destroying him, but as long as he behaves peaceably where he is, he cannot be treated with hostility.

(Kant [1781] 1991: 329; *MM* Ak 8:358)

The right to hospitality therefore establishes, according to Kant, a right to exclude foreigners from settlement and residence but also imposes an obligation to allow foreigners to establish contact and trade. On what basis do states have a right to exclude but lack a right to keep foreigners and other states from establishing contact and trade? Why can we not simply refuse, on whatever grounds we like, foreign visitors who want to trade and communicate with us (but who are not in mortal danger) in the same way as we might refuse to answer someone ringing our doorbell? Why would such a refusal undermine their right to be somewhere (given that they can, we are assuming, just return home)?

The best response from within the Kantian framework, we believe, begins by questioning the analogy between individual private ownership (of, say, a house) and collective jurisdiction over territory. States do not “own” territory in the same way as an individual “owns” a house. First, houseowners only have conclusive rights in their houses, according to Kant, under civil law. They do not at any point (including the state of nature) exercise a unilateral right to control what laws apply to their house, including the laws which govern how they may bequeath, transfer, rent or sell their property. These jurisdictional rights are held exclusively by states that govern via an *omnilateral* will (recall the argument about the instability of the state of nature). At the same time, however, Kantian states do not have full *private* ownership rights over any part of the territory. Although Kant says that a state’s territory belongs to the state as “supreme proprietor” (or “lord of the land”), he denies both that the people *qua* state own the territory *collectively* and that the state can own any part of the land *individually* (as in a patrimonial kingdom). The upshot of this discussion is that the state’s sole function as “lord of the land” is to *regulate* the division and use of territory (including taxation, public roads, public spaces, etc.). As Kant writes,

one can say of the lord of the land that he owns nothing (of his own) except himself; for if he had something of his own alongside others in the state, a dispute could arise between them and there would be no judge to settle it. But one can also say that he possesses everything, since he has the right of command over the people, to whom all external things belong (*divisim*) (the right to assign to each what is his).

(Kant [1781] 1991: 466; MM Ak 6:324)¹¹

Jurisdiction is one thing, private property ownership, quite another. The direct inference from rights inherent in private ownership of, say, a house to the rights that a people exercises over a territory cannot, therefore, be made within a Kantian framework, and hence cannot be used to undermine cosmopolitan right.¹²

With this move blocked, the argument then points to the fact that the foreigner at our doorstep is, with respect to us and unlike the citizen ringing our doorbell, in a state of nature. There are no civil laws to which both we and he or she are a party; the omnilateral will does not speak in the name of the foreigner. This would not be a problem as long as none of our laws applies to the foreigner. But some of them do. In particular, laws which govern who and under what conditions foreigners can visit, traverse, settle, occupy and take up residence within our territory clearly apply to them as much as to us. From the point of the view of the foreigner, such laws must therefore count as *unilaterally* imposed. In enforcing them against the foreigner, we must then be wronging him or her, as Kant says, “in the highest degree” *unless such enforcement can be made compatible with the idea of a rightful condition*. Among states, the “lawless” character of the international state of nature can be (albeit always only partially) superseded by a voluntary congress of states which together can establish the definitive articles of perpetual peace. Such a congress makes the provisional control we claim over our territory conclusive

with respect to other parties to the contract (since by joining the congress they consent to that control). But what about the state of nature still existing between states and *foreigners*? Can *its* inherent lawlessness be superseded? Under what conditions?

The key is Kant's assertion of our "common possession" of the earth, which gives each of us an innate right to be "where nature or chance has placed him" (Kant [1781] 1991: 414; *MM Ak* 6:262). Our right to be somewhere entails that if, say, a shipwrecked sailor were to wash up on the shores of our country, we would have a duty to allow him entry until he was in a position to return home. The original right to common possession of the earth also sets limits on rightful appropriation (Risse 2012). As we have seen, Kant argues that individuals and groups are permitted to take possession of a tract of land (for example, by hunting on it or using it to plant orchards or in some other way by which they signal possession). In such cases, all other individuals acquire a provisional obligation not to hinder them in that possession. (We could hinder them, recall, only in cases in which their possession was a threat to us.) Notice, however, that their local possession of a part of the earth, though not a conclusive property right (which could only fully emerge in a civil condition), limits our previous right, as individuals, in a truly common and universal possession. Kant argues that such local possession (and hence exclusion) can be justified *but only if we, as individuals, retain the right to interact and exchange goods with the appropriators*. Such interaction preserves the "commerce" on their territory that would have been possible under our original communal possession of the earth. As we have seen, however, cosmopolitan right does not extend to the right to *settle* or *reside* on their land (which, *nota bene*, we also would have had had the earth remained in common possession).

The reason, we believe, has to do with Kant's concerns with European imperialism. Sankar Muthu (2003) has shown convincingly that the "foreigners" Kant had in mind when discussing cosmopolitan right were European settlers in the New World and European trading organizations like the Dutch East India Company. The right to hospitality was meant to protect their right to establish contact and trade with distant lands, but not to enslave, conquer or sequester land from the original inhabitants (even in cases where the original inhabitants did not live in a fully rightful condition). As Kant writes:

if the settlement is made so far from where that people resides that there is no encroachment on anyone's use of his land, the right to settle is not open to doubt. But if these peoples are shepherds or hunters (like the Hottentots, the Tungusi, or most of the American Indian nations) who depend for their sustenance on great open regions, this settlement may not take place by force but only by contract, and indeed by a contract that does not take advantage of the ignorance of those inhabitants with respect to ceding their lands.

(Kant [1781] 1991: 489; MM Ak 6:353)

The argument seems to be this: to allow any individual or private association a right to settle or reside in a territory that has already been provisionally appropriated (either by a state or by less organized forms of land use) would undermine the security required for that very appropriation eventually to sustain different modes of peaceful and civil life. By constantly threatening to return us to the state of nature, such an expansive right of settlement would thereby undermine the very ability to act on our moral duty to exit the state of nature. Restrictions on settlement and residence are therefore necessary in order to make the creation and maintenance of a civil condition possible.

In view of Kant's concern for the injustice of European settlement and conquest of native peoples, his account of the right to hospitality is laudable. But notice further that if Kant's argument were successful, it would establish a state right to exclude in the pure case. Because no

foreigner has a right to settle and reside, no wrong is done when the claims of those seeking to immigrate are rejected (as long as they are not in mortal danger). Is it successful? We want to argue that Kant's attempt to drive a wedge between the right to establish contact and trade, on one hand, and the right to settle and reside, on the other, fails *even if we grant his concern with imperialism and his concern that such a right would undermine the stability of the civil condition*. The argument is simple. Recall that the need for cosmopolitan right emerges because the state of nature still existing between states as moral persons and foreigners must be "wrong in the highest degree". It must be wrong in the highest degree because, as in the domestic case, such a state of nature allows the unilateral imposition of duties on others. The law of a state governing the legal rights of a foreigner to enter, visit, and so on, must count as a unilateral imposition because the foreigner plays no role in their formation. In the case of states, the wrongness inherent in remaining in an (international) state of nature can be superseded as long as states join together in a voluntary pact of mutual recognition and mutual non-aggression. While not fully omnilateral, this pact is sufficiently omnilateral to make what were previously only provisional rights to national control much more conclusive (at least with respect to other parties to the pact). In the case of relations between states and foreigners, we then saw that the wrongness of the unilateral imposition involved in the regulation of entry, visit, residency, trade, and so on, could be superseded as well, but only if states recognized a right to hospitality. Such a right would pay tribute to our original communal possession of the earth by granting every individual or private association a right to establish contact and trade *as long as they did so without hostility*. We then argued that this right did not extend to settlement or residence because such an extension, given the experience of European settlers in the New World, would threaten to undermine the capacity of peoples to create and maintain viable, self-governing states. But here is the thought: why not just say that states must grant a right to settle and reside to foreigners *as long as such residence or settlement does not threaten public peace or the stability of public institutions*? Why cannot we add, in other words, a rider similar to the one attached to the right to establish contact and trade? Such a rider would also serve as a bulwark against colonial imperialism, since settlement and residence that was established in order to subjugate or rob another people would be expressly prohibited.

More importantly, it also strikes us that such a qualified right to reside and settle follows directly from the original and motivating concern with unilateral imposition. Recall that the solution to the wrongness inherent in unilateral imposition within the original state of nature is to create a rightful condition. Indeed, Kant argues that our duty to exit the state of nature is enforceable: we can be forced to join a nascent state in order to establish (ideally) a system of equal freedom in which everyone's rights are equal, consistent and conclusive. But if that is true, then surely the solution to the unilateral imposition of our state laws on the foreigner must be *to give the foreigner the option of joining our state or return home* (i.e. to take up residence). By joining our state, the foreigner exits the state of nature that exists between him or her and us. To be sure, the foreigner may already be a citizen of another state, but *as long as he or she is within the scope of our coercive power* he or she remains subject to our unilateral will, and hence we do him "wrong in the highest degree". The conclusion is reinforced when we reintroduce the original right to communal possession of the earth. Just as Kant argued that the right to hospitality was necessary in order to compensate for the loss of our rights to travel freely and take up residence wherever we like across the globe, we can now argue that the right to settle and reside is also necessary *in exactly the same way*. While our right will now be circumscribed by the legitimate concerns for security and stability of the host state, the right would not be annihilated completely. Such a more expansive right of "hospitality" strikes us as much more consonant with the original universal right to communal possession than Kant's more truncated version.

Notice further that Kant's argument against imposing a duty on states to join a world state cannot be used in this instance to block the demand on a state to incorporate the would-be immigrant. Kant famously argues that states are not, like individuals, under an obligation to enter into a *world* state. He makes two main arguments. The first is that such a world state would be a "soulless despotism": the very freedom individuals had sought to protect by entering a (domestic) state would be annihilated once they entered into a world state with a truly global dominion. It is clear that such an argument cannot be made against our expanded cosmopolitan right: while an *unqualified* right to settle might warrant such a rejection (on the basis that truly open borders would undermine the capacity of a state to maintain a system of equal freedom), our cosmopolitan right is *qualified*, allowing states some (bounded) discretion in deciding when foreigners would constitute a threat to the security and stability of the civil condition. The second argument Kant makes against the requirement to join a world state is that, by joining, the domestic state must necessarily lose its political autonomy (to which it has a claim right given by its contribution to protecting the equal freedom of its subjects). Unlike individuals, internally states are already (ideally) domains of equal freedom. As Kant writes, "states already have an internal legal constitution, and hence have outgrown the coercion of others to subject them to a broader legal constitution according to their conceptions of right" (Kant [1781] 1991: 326; MM Ak 8:355–56). Once again, such an argument cannot be used against our expanded cosmopolitan right for the simple reason that our domestic state continues to exist even after the immigrant has joined it. Immigration does not require the dissolution of our political order in the same way as joining a world state would.

In sum, in this section, we have argued that the Kantian argument cannot be used to ground a right to exclude in our core case. According to our expanded version of cosmopolitan right, states have a moral duty to give immigrants who pose no threat to the stability or security of our public institutions the option of taking up residence (and hence, eventually, also citizenship). Even if states have some discretion in deciding whether immigrants pose a threat to the stability and security of public institutions,¹³ there is, on our expanded argument, a presumption in favour of granting the right to settle: states have the burden of proof in showing that a given immigrant (or class of immigrants) will constitute a significant threat to public institutions (in the way, say, the *conquistadores* did). We have shown, furthermore, that this conclusion is in fact forced by premises that the Kantian already accepts. The case, that is, was prosecuted from an entirely internal perspective.

The special obligations argument

One of the most popular and politically volatile arguments on behalf of a qualified right to exclude claims that immigration can be restricted if it harms the domestic worse off.¹⁴ The version of the argument that we will consider grounds the claim in a defence of special socio-economic obligations among fellow residents of a state.¹⁵ More specifically, all special obligations arguments (SOAs) of the kind we are considering hold that broadly egalitarian¹⁶ obligations of socio-economic justice apply among all and only residents of states. Although there may be significant, demanding and stringent humanitarian obligations to secure adequate access to sanitation, shelter and nourishment to all human beings, and also other socio-economic obligations arising from specific forms of international interaction among states (such as within, say, the World Trade Organization), demands of egalitarian justice among individuals only arise within states. There are three prominent versions of SOA, namely the *nationalist argument*, the *coercion argument* and the *reciprocity argument*. For reasons to be explained in a moment, we will treat them all under the same heading.

To fix ideas, we begin with a few general assumptions. First, although the claim is controversial, we assume for the sake of argument that the net effect of a given immigration policy

would in fact make the domestic worse off even worse off than they otherwise would have been absent that policy. This assumption is required: if an immigration policy left the domestic worse off better off or equally as well off as they would have been without the policy, then they would lack a reasonable complaint, from the point of view of SOA. (We return to this point below.) Third, we assume, again for the sake of argument, that there are indeed special egalitarian obligations among residents. This is because we want to evaluate the *implications* of SOAs for immigration, rather than evaluate SOAs *tout court*. Of course, if SOAs fail to establish the existence of special obligations, then they must also fail to establish a qualified right to exclude. But addressing arguments for or against special obligations among citizens would require forays into the global justice debates, which would take us far away from our primary interest in this chapter. Instead we evaluate the following conditional: if there are special egalitarian obligations of justice among all and only residents, then states must also have a (qualified) right to exclude. Whatever the truth of the antecedent, does the consequent follow?

Coercion-based versions of the SOA contend that obligations of egalitarian justice are only triggered among individuals who are subject to a comprehensive web of legally backed mutual coercion. While would-be immigrants are also coerced by domestic laws governing rights of entry, residence, and so on, they are not subject to the full panoply of laws governing property rights, taxation, administration, and so on, typical of any modern state (see e.g. Blake 2001, Nagel 2005, Risse 2006). Nationalist versions of the SOA include those which hold that obligations of egalitarian justice are only triggered among individuals who share a comprehensive public culture (for more on the content and specific structure of nationalist views, see above and see e.g. D. Miller 1995). And reciprocity-based versions of the SOA contend that such obligations are only triggered among those who share in the mutual production of the central class of collective goods supplied by any well-functioning modern state, including defence against physical attack, protection of property rights and the rule of law (see e.g. Sangiovanni 2007). Because we are, in this chapter, assuming that at least one or more of these arguments succeeds in establishing a necessary condition for triggering egalitarian social obligations, we will not discuss further their grounds or their differences. We proceed as if there are special egalitarian obligations among all and only residents, and seek to determine whether a (qualified) right to exclude follows.

We unfold the argument via a dialogue between a representative of those would-be immigrants whose economic, social and cultural prospects would be greatly improved by moving, on one hand, and the state to which he wants to move, on the other.

STATE: We can't let you in because, if we do, then we will harm the worse off in our society.

A brief but important interlude: If we are not to be led astray, we pause to consider the causal mechanism by which the domestic worse off are, *ex hypothesi*, harmed by immigration. Imagine, for example, that there is a feasible institutional scheme available to compensate the domestic worse off post-immigration. With this feasible policy, call it policy *a*, the worse off would do no worse or even better than they would have without immigration. But say that policy *a* is never enacted (though it could have been). In that case, the worse off of course still have a justice-based complaint *but it would no longer be a complaint against the more open immigration policy; rather it would be a complaint against the domestic failure to implement the policy a*. Though there is still injustice, the injustice is not a result, in the relevant sense, of the more open immigration policy. The only kind of harm that legitimately grounds a complaint against a more open immigration policy would be one that it was infeasible to prevent. So when the "state" says that the worse off will be harmed, they mean that there is no feasible policy option available post-immigration such that the harm

would be prevented. We return to this important qualification below. With that interlude, we can now continue the discussion.

IMMIGRANT: Yes, but by not letting us in you harm us too, by making us worse off than we would have been had you let us in.

STATE: Let's grant that you are harmed in the sense you mention, but why would such harm be a violation of your rights, or otherwise impermissible? After all, by letting you in we also harm the worse off in our own society.

IMMIGRANT: Yes, it is true that by admitting us you would harm your domestic worse off, but we surely stand to gain much more than the domestic worse off stand to lose, so our interest in being let in is much stronger than the domestic worse off's interest in keeping us out. And, since your and our commitment to moral equality entails that all human interests are of equal importance, not letting us in is equivalent to treating our interests as having less worth than the domestic worse off. So you must let us in, or treat us as, in effect, subhuman.

STATE: You move too quickly. Your argument from moral equality elides the distinction between giving someone's interests special weight because of the morally relevant nature of a relationship, and giving someone's interests special weight because they are intrinsically of greater moral worth. Only the latter counts as a violation the ideal of moral equality. SOAs need not deny that all persons' interests are of equal worth. When proponents of SOA say that residents have special obligations of egalitarian justice to one another, this is not because their interests are somehow intrinsically more important or weighty than those of others. Rather, the argument is that the character and nature of the social relations in which such individuals stand gives them special moral reasons to reject inequalities that those not sharing in those relations lack. Consider a familiar analogy. When one claims that one has a special obligation to save one's daughter (rather than a stranger) from drowning, one does not believe this is because one's daughter's interests are intrinsically more morally weighty than those of others. One does not, for example, believe that others, unrelated to one's daughter, also have an obligation to save her rather than the stranger. The reasons stem from the moral significance of the relationship, rather than from her greater moral worth. So the reason we can deny your request to settle is not that your interests are somehow of lesser worth than the interests of the domestic worse off. Rather, the special relationship in which we stand to our domestic worse off gives us a special responsibility for their fate.¹⁷

So SOAs would seem to ground a (qualified) right to exclude. Here is a more schematic version of the argument we have just given, which is useful, among other things, for showing how heavily qualified an SOA-based *pro tanto* right to exclude must be.

Prove: If being a resident of the same state is a necessary condition for egalitarian obligations of type γ to apply, then states have a (qualified) right to exclude would-be immigrants.

- (1) Assume, arguendo, that being a resident of the same state is a necessary condition for egalitarian obligations to apply (but not a necessary condition for stringent humanitarian obligations to apply).
- (2) Therefore, if, under some policy z , I have fewer resources, opportunities or welfare than I would have had under a feasible and optimal egalitarian policy z' , then I am objectionably worse off, and hence have a claim in justice against z , and in favour of z' .
- (3) Assume: A more open immigration policy x makes some in the host society worse off (in the sense defined by (2)) than they would have been under a more closed immigration policy x' .
- (4) Assume: There is no feasible post-immigration scheme that could compensate those made worse off under (3), and that leaves no one else worse off (in the sense defined by (2)) than they would have been under x' . (If there were such a post-immigration scheme available, then there would be a justice-based complaint in failing to implement that further scheme, but none against x .)
- (5) Assume: (a) would-be immigrants are not so badly off that they would be subject to starvation or severe forms of political, social or cultural persecution were they not granted a right to settle and (b) there is no question of family reunification.
- (6) If (3), (4) and (5) are satisfied, those worse off in (3) have a claim in justice against x and in favour of x' .
- (7) If states ought, as a matter of justice, to implement x' , then this entails that they have a (*pro tanto*) moral right to exclude those immigrants that would have been accepted under x .

Conclusion: If being a resident of the same state is a necessary condition for egalitarian obligations to apply, then states have a qualified and *pro tanto* right to exclude would-be immigrants, namely a right to exclude immigrants when (3), (4) and (5) are satisfied. The argument implies that if any of (3), (4) or (5) are not satisfied, states do not have a right to exclude.

In bringing this section to a close, we note how important (3) (and hence (4)) is for the argument to succeed. The reason is this. It is sometimes assumed that SOAs ground an unqualified right to exclude, such that immigrants can be turned away *even if admitting them would harm no one domestically* (in the sense defined by (2)) (see e.g. Nagel 2005). If this were the case, then the argument would fail. To see the point, imagine the State in our dialogue responded to the Immigrant in this way:

STATE: We can deny you entry because you do not share in the relations that ground egalitarian obligations of justice (you neither share public culture, nor engage in the mutual production of public goods, nor are subject to jointly authorized coercion).

The immigrant could easily respond:

IMMIGRANT: Sure, but I would like to *join* your public culture, system of mutual production, system of authorized coercion. It is no argument against *that* claim to simply repeat that we do not belong to that scheme yet! Why shouldn't I be permitted to belong? After all, I have very strong interests in joining you, and hence we would be harmed – my interests would be set back – if you turned me down.¹⁸

The only reasonable response the proponent of an SOA can make here is to say, as the state said above, that a more open immigration policy would also *harm the domestic poor*. It is only if that is assumed (along with (4)) that the argument goes through. This crucial distinction is often overlooked.

It is also important to emphasize that the SOA-based (qualified) right to exclude is only *pro tanto*. For all we have said here, it might be true that some other independent considerations can rebut the presumption in favour of the right to exclude even when (3), (4) and (5) are satisfied. This would be the case, for example, if we also adopted the Kantian argument for territorial rights adumbrated above (which is compatible with all of the variants of the SOA discussed above). If we did, then we would need to consider whether the right to original communal possession was strong enough to override the *pro tanto* right to exclude grounded in the SOA.¹⁹ Another independent consideration that might rebut the presumption in favour of the right to exclude would be the existence of a universal, human right to freedom of movement stronger than the rights of the domestic worse off.²⁰ Assessing the balance of rights in either case is obviously beyond the purview of the task we have set ourselves here. It is enough if we have clarified the issues that would be involved in any such attempt.

Conclusion

We have presented a selection of the most popular and powerful arguments in defence of the state's moral right to exclude would-be immigrants from entering and settling within their territories. We have illustrated some of the significant challenges faced by these arguments, and we have highlighted the empirical and normative conditions that are required for these arguments to succeed. In the case of the special obligations argument, for example, for it to support even a *pro tanto* right to exclude would-be immigrants we must assume: (a) that being a resident of the same state is a necessary condition for obligations of egalitarian justice to apply (and this is the subject of profound and enduring disagreement among political philosophers);²¹ (b) that a more open immigration policy would make some existing residents in the receiving state worse off (note that economists, for example, are divided on this question, but the existing empirical evidence suggests that we should be extremely wary of assuming that more open immigration policies do or would have this effect, particularly in the long run);²² (c) that there is no feasible post-immigration scheme which could compensate those made worse off under the more open immigration policy (and it seems reasonable to remain sceptical about that assumption); and, of course, (d) that we are discussing would-be immigrants in the "pure" case.

Once we relax the restrictions introduced for the "pure" case, though, each of the arguments in defence of the state's right to exclude would-be immigrants faces far more significant hurdles, as many proponents of these arguments acknowledge. Where the most basic interests of the would-be immigrants are at stake, the state's interests in, say, protecting its national culture(s) obviously pack less of a punch. Therefore, in the course of highlighting the challenges encountered by attempts to defend even something like a *pro tanto* right to exclude in the pared-down "pure" case, we have indicated just how difficult it would be for states to justify anything like an all things considered, and far less qualified, right to exclude would-be immigrants.

Notes

- 1 From now on, we will refer to the right to exclude would-be immigrants from settling or taking up residence as "the right to exclude" simpliciter. Note also that, in this chapter, we will not discuss under what conditions resident non-citizens should be granted full membership, i.e., citizenship (except in so far as it bears on argument for the right to settle).
- 2 An example often raised is the case of the Jaycees in the United States. See for example, White (1997: 376), Gutmann (1998: 8–9) and Fine (2010: 351).

- 3 See the discussion of this concern in C. H. Wellman (2008: 135). See also Phillip Cole's counter-argument (Wellman & Cole 2011, esp. chapter 15). While Wellman thinks that the state has a presumptive right to exclude, Cole disagrees.
- 4 For more detailed discussion, see Fine (forthcoming: chapter 4). See also White (1997) and D. Miller (2007: 211).
- 5 Presumably this is exactly why enforced exile is and has been considered such a significant punishment.
- 6 For further discussion of freedom of association and its connection to the right to exclude, see Fine (forthcoming: chapter 4).
- 7 See D. Miller (2005: 128). For further discussion of the immigration-related questions faced by liberal nationalists, see Tamir (1993: 140–67, esp. 159–67).
- 8 Other territory-based arguments for the right to exclude might depart from Lockean premises, or nationalist ones. We discuss the nationalist argument above. On Locke and territory, see Nine (2008) and Steiner (2008).
- 9 For this list of conditions, we are indebted to discussion in Stilz (2011: 578); these conditions are not explicitly stated as such by Kant, but, as Stilz convincingly argues, there are implications of his view.
- 10 This is no doubt because “extensive” lists of enforceable natural rights were associated, in Kant's day, with justifications for conquest and appropriation of the New World, much of which Kant was opposed to. See Muthu (2003). See also Benhabib's (2004) helpful discussion.
- 11 Cf. also Kant ([1781] 1991: 318; [1795] 1983; *MM* AK 8: 344).
- 12 Stilz (2011) makes a similar point. Can it made be made within a Lockean framework? For some doubts, see Brilmayer (1989). See also Nine (2008).
- 13 For further discussion of stability and security concerns, see Fine (forthcoming: chapter 5).
- 14 See e.g. Macedo (2007). But of course this kind of argument is pervasive in the domestic politics of every advanced industrialized nation.
- 15 We assume, for present purposes, that the scope of SOAs extends to all long-term residents (rather than to all citizens); this expansion in scope is most evident in the case of coercion- and reciprocity-based argument; we note in the text that it might not apply to nationalist ones, since there are residents who are not “nationals” in the relevant cultural sense. On a nationalist view, they would therefore fall outside of the scope of socio-economic equality.
- 16 By “broadly egalitarian obligations”, we mean to include obligations that require us either to narrow the gap between the well-off and those less well-off, or to give greater moral weight (but not lexical priority) to the well-being, opportunities or resources of the badly off in an overall calculation of how to distribute scarce resources, or to ensure that everyone has enough, where the threshold is set at a higher level than humanitarianism.
- 17 Think of another analogy: a student from another university (call him Jay) comes to your office and demands supervision for his dissertation (at the other university). You say you cannot give him supervision because it would be unfair to your own students, who would have less time than they otherwise would have for supervision. Jay then responds, “Yes, but I surely stand to gain much more than your students stand to lose by your supervision of me, so my interest in getting your supervision is much stronger than your current students' interests in keeping me out.” Surely the right answer is: “But I have a special responsibility to my own students that I don't have to you because of the nature of our (institutional) relationship.”
- 18 Abizadeh (forthcoming) makes a similar argument against SOAs.
- 19 For an argument for the view that communal possession might ground (rather than be used to refute) a limited right to exclude, see Blake and Risse (2009) and Risse (2012).
- 20 We thank Darrel Moellendorf for raising this possibility. There are, of course, many others that might also serve this role. In defence of a human right to international freedom of movement, see Oberman (forthcoming), and for the case against, see D. Miller (forthcoming). See also the discussion in Carens (2013: 225–54).
- 21 For the opposing view, see Beitz (1979), Moellendorf (2002) and Caney (2005b: 102–47).
- 22 See the fascinating discussion in Pandey *et al.* (forthcoming). For concerns about the future impact of immigration, see Collier (2013).