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## Freedom of Association Is Not the Answer\*

*Sarah Fine*

Cosmopolitan liberals have long argued that, contrary to prevailing practices and assumptions, there is a tension between liberal principles, on the one hand, and the coercively enforced borders and exclusive membership practices that are familiar features of nation states, on the other hand.<sup>1</sup> In that vein, it has become common to emphasize the liberal commitments to universalism and moral equality and to highlight the moral arbitrariness of birth place in order to question the relevance of borders in relation to a person's rights and opportunities. It is notable, too, that liberal principles are often regarded as the universalist antidote to the more particularist or exclusionary tendencies of the other features (sovereignty, nationality, democracy) that make up the modern state.

This is one of the reasons why Christopher Heath Wellman's article "Immigration and Freedom of Association" is so novel and interesting: Wellman puts forward what appears to be a distinctly liberal case for the state's right to exclude would-be immigrants.<sup>2</sup> As Wellman points out, we must not overlook the potentially exclusionary implications of the liberal commitment to freedom of association. There is a widespread and apparently uncontroversial view of the relationship between free-

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1. See, e.g., Joseph H. Carens, "Aliens and Citizens: The Case for Open Borders," *Review of Politics* 49 (1987): 251–73; and Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh: Edinburgh University Press, 2000).

2. Christopher Heath Wellman, "Immigration and Freedom of Association," *Ethics* 119 (2008): 109–41. Page numbers in the main text refer to this article.

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dom of association and exclusion: few would argue with Amy Gutmann's statement that "the freedom to associate . . . entails the freedom to exclude."<sup>3</sup> Thus, if Wellman can establish that states—like individuals—should enjoy the freedom to associate and that this includes a right to exclude prospective members, then we would have clear foundations at least for the state's prima facie right to exclude.

In fact, Wellman's position appears to be doubly contentious; not only does he make a liberal case for a right to exclude voluntary immigrants, but he also maintains that states actually have the right to "close [their] doors to all potential immigrants, even refugees desperately seeking asylum from incompetent or corrupt political regimes that are either unable or unwilling to protect their citizens' basic moral rights" (109). In this respect he seems to go further than other progressive political philosophers who have offered more qualified defenses of immigration restrictions.<sup>4</sup> In short, this is a bold argument, which makes a significant contribution to a most topical debate.

I outline the key points of Wellman's two-stage argument in Section I. In Sections II and III, I develop an internal critique of Wellman's position. The main target of my response is his central claim that "the commonly prized value of freedom of association provides the basic normative building blocks for a presumptive case in favor of each legitimate state's right to exclude others from its territory" (119). I highlight the way in which exclusion has the potential to harm the interests of would-be immigrants, and I point out some crucial distinctions between the state and associations in civil society.<sup>5</sup> In Section IV, I contend that, beyond

3. Amy Gutmann, "Freedom of Association: An Introductory Essay," in *Freedom of Association*, ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 1998), 3–32, 11.

4. See, e.g., Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), chap. 2; and David Miller, "Immigration: The Case for Limits," in *Contemporary Debates in Applied Ethics*, ed. Andrew I. Cohen and Christopher Heath Wellman (Oxford: Blackwell, 2004), 193–206.

5. This is an internal critique insofar as it seeks to illustrate that Wellman's freedom of association argument in defense of a right to exclude does not succeed on its own terms. Given the purposes of this article and the limits of space here, I do not develop an important external line of criticism recently advanced by Arash Abizadeh. To summarize very briefly, Abizadeh argues that state border control regimes subject would-be immigrants to coercion and democratic theory demands that coercion is justified to all those subject to it, where justification means rights of democratic participation. This simultaneously challenges any appeal to collective self-determination as the normative core of the state's right to exclude would-be immigrants: if those subject to coercion are entitled to participate in the relevant decision-making process, and coercion extends beyond the boundaries of the state, then the "self" is not simply equivalent to "all residents of the state" or "all members of the political community." For the full argument, see Arash Abizadeh, "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders," *Political Theory* 36 (2008): 37–65. I also make the case that democratic principles do not support a unilateral right to exclude in Sarah Fine, "Immigration and the Right to Exclude" (DPhil diss., University of Oxford, 2009).

the issues of external harm and the distinctiveness of the state, a successful defense of the state's right to exclude others from its territory could not rest on the appeal to freedom of association alone: it also would require a justification of the state's territorial rights, something that is conspicuous by its absence from Wellman's argument. The search for the normative foundations of the state's purported right to exclude would-be immigrants continues: freedom of association is not the answer.

## I

There are two main steps on Wellman's path to the conclusion that states have the right to exclude all prospective immigrants. First, he seeks to establish that there is a *prima facie* case for the state's right to exclude; second, he aims to illustrate that the presumption in favor of a right to exclude is not outweighed by potentially competing "egalitarian" and "libertarian" considerations.<sup>6</sup>

Wellman's case for a presumptive right to exclude is quite straightforward. He begins with the claim that everybody seems to think freedom of association is important. Taking marriage and religion as his central examples, Wellman draws attention to the widespread agreement that people should be free to choose their own (willing) marital partners and their own (willing) religious associates. This, he suggests, is indicative of a common conviction "that each of us enjoys a morally privileged position of dominion over our self-regarding affairs," or, in short, a commitment to individual self-determination (110). The freedom to associate is part of what it means to be self-determining.

And what does a commitment to freedom of association imply? Wellman contends that it includes "the right not to associate and even, in many cases, the right to disassociate" (109). Freedom of marital association, for example, comprises a right to marry a willing partner but also the right not to marry a given suitor and even not to marry anyone. Freedom of religious association similarly means a right to associate with consenting others for religious purposes, as well as the right not to associate with anyone in particular or indeed anyone at all. Neither marital nor religious associational freedom includes a right to associate with nonconsenting others (110).

From these apparently uncontroversial liberal premises, Wellman reaches the following somewhat more controversial conclusion: "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.

6. In the final part of his article, Wellman explores the question of whether it is permissible for states to exclude would-be immigrants primarily on the basis of their race, ethnicity, or religion, but I do not assess that aspect of his argument here.

And just as an individual's freedom of association entitles one to remain single, a state's freedom of association entitles it to exclude all foreigners from its political community" (110–11).

Wellman then responds to a number of potential objections to his move from premises to conclusion. None of these objections deters him from confidently contending that he has established at least a *prima facie* case for a state's right to exclude all would-be immigrants (119). If the first part of Wellman's argument is correct, then, all other things being equal, we should favor states' rights to exclude over would-be immigrants' claims to be admitted.

The *prima facie* case, he acknowledges, could be outweighed by competing claims. First, the presumption in favor of a state's right to restrict immigration might be trumped by what Wellman calls "the egalitarian case for open borders." Wellman accepts that individuals and states have significant duties to outsiders living in abject poverty, and, in line with his relational view of equality, he maintains that, as relationships between insiders and outsiders become more "robust," the inequalities between them are a greater cause for concern (120–30). He argues, however, that states may choose to "export justice" rather than open their borders to immigrants.<sup>7</sup> Export options include, in Wellman's view, the transfer of aid to poor countries in place of admitting immigrants who are fleeing poverty, and, rather more contentiously, military intervention to protect those whose governments are "unable or unwilling to secure their . . . basic moral rights" instead of admitting refugees of corrupt or inept regimes (129).

Next, Wellman critically appraises "the libertarian case for open borders." Opponents might contend that the state's right to exclude illegitimately restricts the citizens' freedom to invite outsiders onto their property and/or the would-be immigrants' freedom of movement. Wellman argues that the state's "sovereignty over its territory" must take precedence over the individual citizen's right to invite others onto her property and, anyway, inviting people into the state for indefinite periods of time actually has far-reaching, costly consequences for one's fellow-citizens, which means that this sort of decision should not be made unilaterally. Furthermore, the right to freedom of movement is not absolute: I have no right to enter your house without permission, so why should I have a right to enter another country without its consent (130–36)? Yet he claims that states should not interfere with self-determining individuals "any more than is necessary" (134). Hence, states

7. Indeed, egalitarians may be committed to the conclusion that states have a duty to export justice rather than open their borders to "unfortunate people" if it is true that aid is a more effective response to poverty. See Wellman, "Immigration and Freedom of Association," 127–28.

can have no reasonable objection to individuals inviting outsiders onto their property or to foreigners entering the territory provided that these visits are for “duly limited” periods (136–37).

Despite these apparent concessions, Wellman does not shy away from his stark conclusion that “even if egalitarians are right that those of us in wealthy societies have stringent duties of global distributive justice, and even if libertarians are correct that individuals have rights both to freedom of movement and to control their private property, legitimate states are entitled to reject all potential immigrants, even those desperately seeking asylum from corrupt governments” (141).

Wellman’s defense of the state’s right to exclude rests on two debatable claims. The first is that the state has a right to freedom of association, which is a component of its right to self-determination. All liberals are familiar with the claim that individuals have associational rights, and many would accept that groups formed by consenting individuals also can have associational rights. However, Wellman does not elaborate on the precise sense in which the state has a right to freedom of association. He does not explain whether we should understand the state as the right-holder or whether the state exercises the right on behalf of its citizens. At times he refers to “the citizens’ right,” at others he refers to the “state’s right.” If the state acts on behalf of its citizens as a collective body, then presumably the state has no right to exclude those with whom the citizens collectively choose to associate. He also does not reveal exactly how this purported collective right relates to the individual right to freedom of association. The citizens’ (or the state’s) right to freedom of association does not emerge from the citizens exercising their individual rights and choosing to associate together as a group in the first place; as Wellman acknowledges, ordinarily membership of the political community is nonvoluntary (112). Moreover, as he points out, the citizens’ collective right to refuse to associate with outsiders may conflict with the associative rights of those individual citizens who wish to associate with the excluded outsiders (131). In lieu of a response to these questions about the nature of the state’s right to freedom of association, Wellman simply suggests that there are some unpalatable consequences of denying that states have such a right. For example, without positing that right, he argues, we would be unable to identify the wrong that occurs when one state forcibly annexes another state (112–13). Despite the lack of clarification, let us accept for the sake of argument that the state may have a right to freedom of association.

The second controversial claim is that the state’s freedom to associate includes a right to exclude would-be immigrants. In order to understand the basis of that claim, it is useful to distinguish between a state’s right to exclude outsiders from its territory (from simply crossing

its borders), its right to exclude them from settling within that territory, and its right to exclude them from membership of the political community (from acquiring citizenship status). Although Wellman obscures these distinctions by writing, interchangeably, of a state's right to "control immigration over its territorial borders," "close its doors," and "set its own immigration policy," it transpires that the central focus of his freedom of association position is actually the state's right to exclude would-be immigrants from obtaining citizenship status. Wellman's argument is that the citizens together ought to enjoy a collective right to determine the membership rules for their political community, and so it is the freedom of the citizens, as a group, to choose their fellow political associates that is at stake. Access to citizenship matters because "the country's course will be charted by the members of this civic association"—that is how Wellman connects the citizens' collective right to self-determination and their right to freedom of association (114–15). In short, Wellman is primarily concerned with the state's control of its "civic" boundaries, "which regulate membership."<sup>8</sup>

How does Wellman move from the contention that the state should have control of its civic boundaries to the argument that the state should have control of its "territorial" boundaries, "which regulate movement?"<sup>9</sup> At first it might appear as though the attempt to defend the state's right to exclude would-be immigrants from its territory by appeal to freedom of association is something of a nonstarter. David Miller, for example, swiftly dismisses this line of argument. According to him, it depends on the notion that "we have a deep interest in not being forced into association with others against our wishes," a notion that has little force in the context of the modern liberal state since it is implausible to claim that the "mere presence" of immigrants within the state's territory harms the (associational) interests of the citizens.<sup>10</sup> In that respect, Miller must be correct. The mere presence of immigrants within the state's borders cannot be a serious problem with regard to the associational rights of individual citizens—it is certainly compatible with their individual rights to associate freely within civil society, where they remain free to choose to associate, or not to associate, with newcomers and with other citizens in their private lives. In addition, it seems to be compatible with the collective right of citizens, as a group, to associate or not to associate with others in their political community.

The issue of movement across territorial borders and subsequent settlement (as opposed to full membership) only enters Wellman's ar-

8. Abizadeh, "Democratic Theory and Border Coercion," 38.

9. *Ibid.*

10. David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2008), 210–11.

gument insofar as he agrees with Michael Walzer that all long-term residents of a state should have the option of acquiring equal rights of membership to protect them against political oppression. For states to function effectively, Wellman contends, they must “nonconsensually coerce all those within their territorial borders” (131). The state, then, is both a nonvoluntary, coercive, territorial institution and the site (and representative?) of a self-determining political community. The requirement to offer citizenship status to long-term residents is a democratic one; in the absence of that guarantee, resident noncitizens are subject to the state’s coercive authority without any say over the state’s actions and they are comparable to “live-in servants,” governed by a “band of citizen tyrants.”<sup>11</sup> In other words, a democratic state is not entitled permanently to withhold citizenship status from those residing (for indefinite periods) within its territory. The citizens’ collective freedom to associate (and to refuse association) does not extend to excluding long-term residents of the state from the political community.

Thus, while Wellman cannot defend the right to exclude outsiders from the state’s territory by direct appeal to the citizens’ individual or collective rights to freedom of association, because their mere presence within the state’s territorial boundaries is not a problem from that perspective, the democratic state’s right to exclude would-be immigrants from settling indefinitely in the territory indirectly becomes a necessary extension of the right to exclude them from full membership of the political community. The citizens’ collective freedom to choose their political associates (their fellow citizens) relies on their freedom to exclude would-be long-term residents at the territorial borders. Wellman’s defense of a right to exclude would-be immigrants by appeal to freedom of association therefore depends both on the assumption that states have a right to freedom of association and on the validity of the claim that all long-term residents must be offered the option of acquiring the complete rights of full membership; if the latter claim is without substance, then Wellman’s argument would fail because the citizens could control access to membership of the political community and enjoy the collective right to freedom of association without controlling access to the state’s territory.<sup>12</sup> Furthermore, the citizens’ collective claim to freedom of association must be weighty enough to override not only the would-be immigrants’ claims to become members of the political community but also their claims to settle in the state’s territory.

11. See Walzer, *Spheres of Justice*, chap. 2.

12. For a challenge to Walzer’s (and thus also to Wellman’s) “bundling” of membership and residence claims, see Ryan Pevnick, “Social Trust and the Ethics of Immigration Policy,” *Journal of Political Philosophy* 17 (2009): 146–67.



Even if we do not challenge these two foundations of Wellman's position, the argument that the state has a right to exclude would-be immigrants by virtue of its right to freedom of association still fails on its own terms. In what follows, I raise three objections, focusing on harm to others, the distinctiveness of the state, and the absence of a justification for the state's territorial rights.

## II

The first central problem emerges on closer inspection of Wellman's conception of self-determination. As indicated in Section I, Wellman describes the individual right to self-determination in the following terms: "Each of us enjoys a morally privileged position of dominion over our self-regarding affairs," and this is a position "which entitles us to freedom of association" (110). Although he does not elaborate on the idea of self-determination in the immigration discussion, in a previous article he notes that "it is not always clear when any given action is purely self-regarding," but "many people believe that we should be allowed to choose freely when our behavior is not harmful to others."<sup>13</sup> Behavior that is harmful to others wrongly causes them to be worse off than they would be otherwise (where "worse off" means that their interests are set back or thwarted).<sup>14</sup> Wellman's omission of the harm clause in the immigration piece is significant because, as I will show, the potential to cause harm to others obstructs his path to the conclusion that the state enjoys a right to exclude.

To explain, there is no denying that Wellman's claim about the importance of individual self-determination has a good liberal pedigree. We are familiar with this as an argument in favor of allowing people the freedom "to be the authors of their own lives."<sup>15</sup> It is a "let them be" position and one that makes perfect sense with reference to the beliefs or actions of an individual. "You do not like the way that Ali chooses to live her life? If she is not harming anyone then you have no say in the matter. Let her be!" In Wellman's words, "it is *her* life."<sup>16</sup> The presumptive case lies with Ali.

From Wellman's conception of individual self-determination, we might extrapolate a comparable notion of group self-determination: groups enjoy a morally privileged position of dominion over their self-

13. Christopher Heath Wellman, "The Paradox of Group Autonomy," *Social Policy and Philosophy* 20 (2003): 265–85, 265.

14. Christopher Heath Wellman, *A Theory of Secession: The Case for Political Self-Determination* (New York: Cambridge University Press, 2005), 11 n. 7, 12 n. 9. Wellman is following Joel Feinberg's analysis of the harm principle. For a full discussion, see Joel Feinberg, *The Moral Limits of Criminal Law*, vol. 1, *Harm to Others* (New York: Oxford University Press, 1987).

15. Wellman, *A Theory of Secession*, 2.

16. Wellman, "The Paradox of Group Autonomy," 266, author's emphasis.

regarding affairs and should be allowed to choose freely when their behavior is not harmful to others. Matters become more complicated here because of the clear potential for groups illegitimately to restrict the autonomy of their own members. One common liberal response is to “let groups be” on the condition that the members of the group enjoy a right of exit.<sup>17</sup> The individual right of exit represents a form of safeguard against the group’s potential to abuse its power.<sup>18</sup>

Yet the actions of groups affect not only the autonomy of their members; just like the actions of individuals, they may (directly or indirectly) affect third parties as well. When a private club in a residential area regularly arranges noisy late-night gatherings, the group’s actions have spill-over effects for the local residents. In that way, while seemingly going about its own business, the private club has the potential to harm the interests of nonmembers. And, whereas a right of exit might go some way toward protecting the individual autonomy of the members, outsiders often are unwillingly exposed to the effects of a group’s decisions. In such instances, where the nonmembers do not seek to interfere in the affairs of others for paternalist reasons, “let them be” is not an appropriate response to their appeals. Clearly, it is not the case that every action with potentially harmful effects ought to be prohibited, but, once the potential for harm to others enters the picture, the presumption in favor of the group members’ freedom to do as they please is called into question, as is implied by Wellman’s claim that “we should be allowed to choose freely *when our behavior is not harmful to others*.”<sup>19</sup> In fact, the potential for harm represents a good, if not a conclusive, reason for intervening in the group’s affairs in order to prevent the harm.

There is also another way in which the actions of groups, unlike those of individuals, necessarily affect and even potentially harm third parties. As Wellman explains, “an important part of group self-deter-

17. See, e.g., John Stuart Mill, “On Liberty,” in *On Liberty and Other Writings*, ed. Stefan Collini (Cambridge: Cambridge University Press, 1989), 91–92, where Mill considers the example of Mormons; and Chandran Kukathas, *Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press, 2003), 95–96. It worth noting that this response is not considered sufficient by many (liberals and nonliberals alike), owing, e.g., to the possibility of crippling costs imposed on leavers—as in the case of “shunning.”

18. Wellman is alert to the possibility that groups might illegitimately restrict the autonomy of their members; on that basis, he has argued that liberal principles point to a presumption (though not a conclusive case) against the sort of group rights that grant groups control over their own members. See Christopher Heath Wellman, “Liberalism, Communitarianism and Group Rights,” *Law and Philosophy* 18 (1999): 13–40, esp. 33. Will Kymlicka refers to these as “internal restrictions,” in contrast to “external protections” that defend the group against the “larger society.” See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995), 35, cited in Wellman, “Liberalism, Communitarianism and Group Rights,” 14 n. 4.

19. Wellman, “The Paradox of Group Autonomy,” 265, emphasis added.

mination is having control of what the 'self' is," and this is why he is so concerned with the citizens' freedom to select their political associates (115). Having control of that "self" means choosing "who is in and who is out," which, in turn, means including some people and excluding others.<sup>20</sup> The very act of excluding people may thwart their interests, either making them worse off than they are at present, or making them worse off than they would be otherwise, if they were left to act on their own plans and the group did not act to exclude them. For example, when a patch of green land, open to the general public, is purchased by a private group which plans to reserve the land for the use of members only, then current users of the land who are excluded from the group are made worse off. In another case, if a necessary condition of securing work in the teaching profession is membership of a national teachers' trade union, then qualified teachers excluded from the union are made worse off than they would be otherwise—exclusion bars them from pursuing their chosen career. Again, though not every action with potentially harmful effects can or should be prohibited, sometimes the interests in question are so substantial, and thwarting them is so detrimental to the well-being of the excluded, that exclusion itself becomes a cause for concern.

The potential to cause harm to others has important implications for Wellman's argument regarding the state's right to exclude. Would-be immigrants seek to leave one state and to enter another for a variety of reasons. Some effectively have no choice but to leave their state of origin, while others elect to move. Here we might distinguish between those who are unable to live a minimally decent life in their present country and those whose basic needs are currently met but who wish to settle elsewhere in order to further their (various) interests. We know that emigration is generally accompanied by significant costs, including separation from family and friends, from a wider community, and from familiar surroundings, and often involves moving to somewhere unfamiliar, somewhere in which one is a stranger. It seems reasonable to assume, therefore, that those who are willing (or are forced) to incur such costs have substantial interests in living in another state and that thwarting their pursuit of those interests may be detrimental to the well-being of the excluded. This is particularly true if, as Wellman contends, in order to control access to membership of the political community, states must also enjoy a right to exclude outsiders from settling indefinitely within their territorial borders, because it means that those who are excluded from membership of the political community are unable to further any of their interests in long-term residence within the state

20. Michael Walzer, "Exclusion, Injustice, and the Democratic State," *Dissent* 40 (1993): 55–64, 55.

(just as teachers who are excluded from the teaching union are unable to further their career interests).

Those who cannot live a minimally decent life in their country have an interest in meeting their basic needs. Wellman maintains that states must not ignore that interest but are free to “export justice” to them instead of granting them access to the state’s territory and political community. Even if this were a plausible and legitimate option, it could not fully resolve the question of harm to would-be immigrants.<sup>21</sup> In a world where all the adverse political and economic (and, we might add, ecological and social) causes of forced migration had been eliminated, as Joseph Carens has emphasized, “people might have powerful reasons to want to migrate from one state to another.”<sup>22</sup> Most importantly for our purposes, the interests in living in state *A* are not always interchangeable with the interests in living in state *B* or state *C*. Prohibiting outsiders from settling in and becoming members of a particular state hinders or prevents their pursuit of all the many familial, social, religious, cultural, political, or economic interests tied to residence and citizenship in that state, despite the fact that some, if not all, of their basic needs could be met elsewhere. Once more, this potential for harm to others represents a good, though not conclusive, reason against permitting the group to exclude some or all would-be members.

Therefore, while we may grant that there is a strong presumption in favor of individuals enjoying “dominion over their self-regarding affairs,” group rights to self-determination are, by definition, always more troublesome, because groups consist of individuals who may be harmed by their group’s actions and because the very act determining the group “self” is necessarily exclusionary, possibly at significant cost, even harm, to the excluded would-be members. Wellman thinks he establishes that there is a presumption in favor of the state’s right to exclude prospective immigrants because he does not pause to consider the possibility that the act of exclusion is potentially harmful to them insofar as it thwarts the interests that they have in long-term settlement or in acquiring membership. And, as I have sought to illustrate, when the acts of a self-determining group are accompanied by potential harm to others, there does not appear to be a clear presumption on the group’s side—the potential for harm represents a parallel reason to interfere with the group’s actions.

21. Not to mention the various cases in which there is no apparent “export” alternative, as in the example of people who wish to emigrate to escape specific violent individuals.

22. Carens, “Aliens and Citizens,” 258.

### III

In response, Wellman might wish to invoke the examples of marriage and religion again to illustrate that the refusal of a marriage proposal or exclusion from a religious group both may “damage the interests of others” and cause “pain or loss” in some sense, and yet everyone appears to assume that there is a clear presumption in favor of the refuser and the excluder in those cases.<sup>23</sup> However, this only serves to highlight why Wellman’s inference from the examples of marriage and religion to the example of a state is problematic in the first place. While liberals are likely to accept that the presumption lies with the excluder in the marriage and religion cases despite the potential for causing “pain or loss” to the excluded, for many of them this is because there is something special about certain forms of association, which gives them a privileged status. They might argue, in line with Amy Gutmann and Stuart White, for example, that there is a particularly compelling case for freedom of association, and by extension exclusion, in intimate or expressive contexts.<sup>24</sup> According to White’s view, as quoted by Wellman himself, “if the formation of a specific association is essential to the individual’s ability to exercise properly his/her liberties of conscience and expression, or to his/her ability to form and enjoy intimate attachments, then exclusion rules which are genuinely necessary to protect the association’s primary purposes have an especially strong presumption of legitimacy.”<sup>25</sup> The idea is that it would be objectionable to compel individuals to form or maintain intimate attachments against their will or to betray their own consciences. Does the modern liberal state enjoy a privileged status on a similar basis?

Although the liberal state obviously cannot be viewed as an intimate association, perhaps it has more of a claim to be viewed primarily as an expressive association, certainly not in the sense that it subscribes to a particular religious doctrine but at least insofar as it is (supposedly) committed to a set of principles that represent its liberal character. While there is a great deal of debate between liberals about how comprehensive or perfectionist those principles may be, and liberals of various stripes will disagree about the basic list and ranking, it is uncontroversial to claim that a liberal state is committed, in some way, to toleration, equality before the law, and individual liberty, for example. However, the liberal state’s adherence to a basic set of common principles is not sufficient to suggest that it constitutes an expressive as-

23. Mill, “On Liberty,” 94–95.

24. See Gutmann, “Freedom of Association,” 7–13; Stuart White, “Freedom of Association and the Right to Exclude,” *Journal of Political Philosophy* 5 (1997): 373–91.

25. White, “Freedom of Association and the Right to Exclude,” 381, cited in Wellman, “Immigration and Freedom of Association,” 113.

sociation. The label 'expressive association' implies, as Gutmann notes, "that the primary purpose of an association is expression of a point of view."<sup>26</sup> The members of liberal states are a diverse bunch, many of whom do not see themselves as making any sort of principled statement by remaining resident within the borders of a particular state. Citizens in a liberal state may endorse a variety of liberal principles, or may be indifferent to them, or may reject them altogether. Freedom of association within a liberal state is supposed to facilitate the citizens' freedom to express various points of view, including views antithetical to liberalism. When governments mistake the state itself for something akin to an expressive association with a single, comprehensive point of view, the result is often distinctly and disturbingly illiberal, as in the case of the American government's clampdown on communist views in the McCarthy era or the suppression of political opposition in the former Soviet Union. Hence, since the liberal state cannot claim to be primarily an intimate or expressive association, the initial case for exclusion then must be weaker than in the examples of marriage and religion.

Wellman acknowledges that freedom of association is "much more important for individuals" in the examples of marriage and religion, but he denies that this imperils his position regarding a presumptive right to exclude because he believes that "there is a very natural and straightforward case to be made in favor of freedom of association in all realms" (114). He points out that freedom of association for members of a golf club is obviously not as important as marital and religious freedom of association, and yet, "if no one doubts that golf clubs have a presumptive right to exclude others, then there seems no reason to suspect that a group of citizens cannot also have the right to freedom of association, even if control over membership in a country is not nearly as significant as control regarding one's potential spouse" (114).

The freedom of association principle, Wellman maintains, applies collectively to citizens of a state, just as it applies to members of a golf club. This argument by analogy is awkward again, though, because one might be reluctant to accept that a state has a presumptive right to exclude precisely because of the ways in which a state differs dramatically from a golf club. As a number of theorists have emphasized over the years, states are not like clubs.<sup>27</sup> For one thing, it is not possible today for would-be immigrants to get together and set up a state of their own.

26. Gutmann, "Freedom of Association," 11.

27. See, e.g., Cole, *Philosophies of Exclusion*, esp. 70–73; Carens, "Aliens and Citizens," 267–68; Melissa Lane, "A Philosophical View on States and Immigration," in *Globalizing Migration Regimes: New Challenges to Transnational Cooperation*, ed. Kristof Tamas and Joakim Palme (Aldershot: Ashgate, 2006), 131–43; and Jonathan Seglow, "The Ethics of Immigration," *Political Studies Review* 3 (2005): 317–34, 322.

Moreover, it is generally fair to assume that exclusion from a golf club is unlikely to have a devastating impact on the life of the would-be member, whereas exclusion from a particular state—as the bearer of an enormous range of resources and options, many of which are not interchangeable with those on offer in other states and are not accessible to nonresidents and noncitizens—may have exactly that effect.

This suggests that there might well be a presumption in favor of a group's right to exclude would-be members in two quite different cases. The first case, as in the examples of marital and religious freedom of association, is when the associational freedom and accompanying exclusion are intricately connected to intimate attachments or expressive purposes. The second case, as in the golf club example, is when associations are not intimate or expressive but exclusion is generally fairly innocuous. Although Wellman invokes both sorts of case in his attempt to support the state's presumptive right to exclude, neither is relevantly comparable to that of the state, and so the examples do very little to help his cause. Interestingly enough, however, when particular clubs or associations start to look a bit more like states in the sense that outsiders have significant interests in becoming members and exclusion brings with it high costs to the nonmembers without serving clear expressive or intimate purposes, the argument in favor of exclusion seems weaker. That certainly appears to have been the view of the U.S. Supreme Court in the case of *Roberts v. United States*, 1984. The Court ruled that it was not unconstitutional to deny the U.S. Junior Chamber (Jaycees)—a nonintimate, nonexpressive, and formerly all-male association, which was understood to have clear career-enhancing advantages for its members—a right to exclude its regional chapters that chose to admit women as full members.<sup>28</sup> As Gutmann puts it, with reference to nonintimate, nonexpressive associations within civil society, there is no obvious presumption in favor of the excluders: "We cannot claim a presumption in favor of a right to exclude or a presumption in favor of a right not to be discriminated against without begging the question: which side carries the weight of argument in cases of conflict between the values of free association and those of nondiscrimination?"<sup>29</sup> With reference to the state and prospective members, we might rephrase Gutmann's statement and argue that we cannot claim a presumption in favor of the state's right to exclude or a presumption in favor of the would-be immigrant's interests in cases of conflict between the importance of free association and not harming others.

In summary, then, without denying that citizens have an interest in setting the rules of membership for their political community in order

28. For further discussion, see Gutmann, "Freedom of Association," esp. 8–9.

29. *Ibid.*, 11.



to maintain some control over the policy direction of their state, I have illustrated that, contra Wellman, the appeal to self-determination and freedom of association does not deliver a presumptive case in favor of a state's right to exclude would-be immigrants from settling within its borders and obtaining citizenship status. Excluding would-be immigrants from a state clearly has the potential to harm their interests to a significant degree, and this potential for harm also represents a good reason for challenging the citizens' right to exclude them. Groups may enjoy a presumptive right to exclude outsiders when the associations in question are intimate or primarily expressive or when exclusion is ordinarily reasonably "harmless," but the state does not meet the criteria necessary to qualify for that presumption.

Furthermore, once it becomes clear that the potential for harming the would-be immigrants' interests negates the case for the state's presumptive right to exclude based on the citizens' collective right to freedom of association, it is also apparent that Wellman's response to the "egalitarian" objection to the state's right to exclude is insufficient. Even if the state is able and willing to fulfill its duties to outsiders living in poverty or the victims of incompetent or brutal regimes by "exporting justice" abroad, excluding people who wish to pursue interests specific to that particular state is still potentially harmful, and that potential for harm remains an important challenge to Wellman's position.

Wellman might argue that he does directly confront that potential for harm to outsiders since he considers whether the citizens' right to exclude, grounded in their collective right to freedom of association, conflicts with the would-be immigrants' right to freedom of movement. In a sense, this is something of a red herring; as I emphasized at the outset, the citizens' collective right to freedom of association could not support a right to prevent outsiders crossing the state's borders anyway because their mere presence has no bearing on the citizens' individual or collective associational freedoms. Thus, it is not a surprise when Wellman concludes that the right to exclude is compatible with the rights of outsiders to enter the state's territory, provided that their visits are temporary. As the state is under no obligation to extend the full rights of membership to temporary visitors, their presence within the state does not pose a problem for the citizens' collective right to self-determination and freedom of association. Hence, he stresses that his argument "would leave much more room for freedom of movement than the status quo, since it would allow most people to travel freely around the world (as tourists, to family or doctors, or even to study or work) as long as they did not stay indefinitely in some place without the permission of the host political community" (137). Nevertheless, again, this response does not serve to mitigate the harms that may accompany exclusion from permanent residence and citizenship. People



who are not free to settle within a state are not at liberty to form or maintain long-term intimate relationships with citizens; to take advantage of the political, religious, and social options in that state; or, generally, to make a stable life for themselves there. The opportunity to travel “freely around the world” surely is of little comfort to those whose interests in settlement and membership are thwarted.

#### IV

Wellman does not deliver a conclusive case in favor of the citizens’ position—that would require him to explain why the citizens’ claim to self-determination is sufficiently strong to outweigh the harm to would-be immigrants. I will add that the argument in favor of preventing harm to the would-be immigrants seems more appealing once we recognize that we are not being asked to make a stark choice between self-determination and the interests of outsiders: while “having control of what the ‘self’ is” may be one element of group self-determination, it is not the only, or even a necessary, component. In the absence of full control over access to membership, a group still can be self-determining to the extent that it is free to set its own internal policy agenda without external interference. That freedom might be limited by the lack of control over membership rules, but liberal and democratic principles already constrain the extent of the citizens’ discretion to control the membership of their political community. Wellman accepts the democratic requirement that long-term residents are offered citizenship rights, and presumably that same requirement extends to prohibiting the arbitrary expulsion of existing members. Moreover, as Walzer argues, in theory, states also could control membership by regulating birth rates and selectively awarding the right to give birth, choosing between different ethnic groups, or setting “class or intelligence quotas.” This, he contends, “would require very high, and surely unacceptable, levels of coercion: the dominance of political power over kinship and love.”<sup>30</sup> Therefore, since denying a group full control over membership rules is not an automatic denial of its right to self-determination, the citizens are not forced to sacrifice all control over their common life in order to prevent significant harm to others.

Nonetheless, aside from the issue that Wellman’s argument about controlling the rules of membership is inconclusive, there is an additional difficulty for Wellman’s defense of the right to exclude based on a commitment to freedom of association. As Wellman contends that citizens must enjoy not only a right to exclude would-be members from the political community but also would-be residents from the state’s territory, his position calls for a further justification of the state’s pur-

30. Walzer, *Spheres of Justice*, 34–35.

ported rights over that particular territory. To see why the freedom of association argument is insufficient here, consider the example of a private club. The club members might enjoy the right to exclude outsiders from membership and from using the club's property and resources, provided that they have rights of ownership over the premises. However, while a yoga group that meets in Central Park might be free to reject prospective members, it is not entitled to bar them from making use of Central Park itself because the park is not the members' property. In other words, Wellman's position begs the question whether citizens and/or their states have the relevant rights over the territory from which they wish to exclude others and thus whether they are within their rights not just to control the rules of membership but also to control settlement within that territory.

Perhaps a territorial argument is to be found lurking behind Wellman's claim that freedom of movement is not absolute: "My right to freedom of movement does not entitle me to enter your house without your permission . . . , so why think this right gives me a valid claim to enter a foreign country without that country's permission?" (135). The reason why one might agree that Ali's right to freedom of movement does not entitle her to enter Ben's house without Ben's permission is that one assumes Ben is the legitimate owner of the house and that this grants him a set of rights over that property, including a right to exclude unwanted visitors. If states are the legitimate owners of their territory, then we would have good additional grounds for concluding that they enjoy a right to exclude outsiders from that territory. Yet, ultimately, Wellman does not appear to conceive of the state's relationship to its territory as one of ownership since, as we have seen, he contends that "even legitimate states," presumably unlike the owners of private property, "do not necessarily have the right to bar foreigners from visiting for a duly limited period" (136). And if, as is implied by Wellman's claims about visitors, the state's relationship to its territory is not one of ownership, in what sense does the state enjoy territorial rights?<sup>31</sup>

Wellman does refer to the specifically territorial requirements of states when he claims that, in order for states to fulfill their functional imperatives, they must be "sufficiently territorially contiguous" and this, in turn, means that states must (nonconsensually) coerce those within their borders (131). Elsewhere Wellman explains why he considers that

31. For a selection of different arguments concerning the normative grounds for territorial rights, see Tamar Meisels, *Territorial Rights* (Dordrecht: Springer, 2005); Cara Nine, "A Lockean Theory of Territory," *Political Studies* 56 (2008): 148–65; Avery Kolers, *Land, Conflict, and Justice: A Political Theory of Territory* (Cambridge: Cambridge University Press, 2009); and Anna Stilz, "Why Do States Have Territorial Rights?" *International Theory* 1 (2009): 185–213.

it is legitimate for states to coerce their citizens in this way despite the value that he attaches to individual self-determination: “The reason that *I* have no moral right to be free from political coercion . . . is that, even if *I* would rather forego the benefits of political society, my state may permissibly coerce me in order to secure political stability for *my fellow citizens*.”<sup>32</sup> States, he asserts, are necessary for people to enjoy the benefits of political stability and states must be territorial in order to fulfill those functions. Wellman employs the territorial contiguity point against Hillel Steiner’s argument that individual citizens of a state should enjoy the freedom to associate with those not resident within that state and that the state’s right to exclude illegitimately restricts that freedom.<sup>33</sup> However, although the purported territorial requirement might support the state’s claim to coerce those within its borders, and thus may offer something of a general, consequentialist justification for a state’s authority over territory (though not for any particular state’s claims to its particular territory), it does not bear on the state’s right to exclude would-be immigrants from settling in a territory. Once individuals are within the state’s borders, they become subject to the state’s authority. It will coerce them, as it coerces all other residents—excluding them is not a necessary condition for maintaining the state’s territorial contiguity. Offering all long-term residents the option of becoming full members of the state may be “costly” for the existing citizens, as Wellman proposes, but that argument is not enough to support the state’s right to exclude outsiders from settling in its territory either: just as the yoga group in Central Park is not entitled to prohibit nonmembers from making use of the park despite its control over its own membership rules, so the citizens of a state are not entitled to stop noncitizens from settling there, despite their claim to control access to membership, without a further entitlement to control access to the territory in the first place. Wellman must engage with this question if he is to establish that states have a right to exclude outsiders from settling within their territorial borders.

## V

Wellman maintains that it is possible to defend a state’s presumptive right to exclude would-be immigrants by appeal to the liberal commitment to freedom of association. He draws attention to the widespread conviction that individuals “should be allowed to choose freely when [their] behavior is not harmful to others,” but I have argued that there

32. Wellman, *A Theory of Secession*, 16–17, author’s emphasis.

33. Hillel Steiner, “Hard Borders, Compensation, and Classical Liberalism,” in *Boundaries and Justice: Diverse Ethical Perspectives*, ed. David Miller and Sohail H. Hashmi (Princeton, NJ: Princeton University Press, 2001), 79–88.

is no clear presumption in favor of the state's position based upon the freedom to associate since exclusion from the state obviously has the potential to harm the interests of others—interests that would not disappear even if wealthy liberal states did, to use Wellman's words, "export justice" and thereby fulfill some of their duties to outsiders (128–29). The potential for exclusion to result in harm must be taken seriously, in line with Wellman's own argument, and more must be said about why the freedom of citizens takes precedence over the interests of the would-be immigrants, especially since states are neither intimate nor expressive associations. Moreover, freedom of association alone cannot deliver a right to exclude would-be immigrants from entering and settling within a state: absent a further argument in support of states' rights over the territory they claim for themselves, we are left wondering whether states are entitled to control access to their territory at all.