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978-0-521-76898-6 - Immigration and the Constraints of Justice: Between Open Borders and Absolute Sovereignty

Ryan Pevnick

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CHAPTER I

Introduction

Modern states claim enormous power over the lives of individuals within their territories. In order to bring into view the extent of these powers, I begin by recounting the story of an immigrant to the United States:

Mezei, a long-time resident of the United States who had journeyed abroad to visit his mother, was excluded on undisclosed security grounds when he returned. After some sixteen months in custody, the government announced that it had abandoned its futile efforts to find a country to which he could be deported. Thereafter, Mezei remained on Ellis Island in what Justice Black in dissent described as an “island prison” in which Mezei must “stay indefinitely, maybe for life.” The Supreme Court summarily rejected Mezei’s challenge to his exclusion.

Having never seen the government’s evidence, there was of course little for the Court to say. Mezei, it noted, was actually the beneficiary of “legislative grace”; as an excludable alien, the authorities could have kept him aboard the vessel that brought him here rather than extending “temporary haborage” at Ellis Island. Mezei’s complaint was with the countries that would not accept him, not with the American government. “An alien in [Mezei’s] position,” the Court concluded, “is no more ours than theirs.”¹ (Schuck 1998, 36)

Mezei’s story is at least a bit frightening because it vividly illustrates the power that others, through state institutions, regularly claim over us. With no charges presented to him (much less established before a jury of peers), Mezei was prevented from going about his regular life, from traveling, visiting family, and – more generally – building his life as he chose. Although the story is unusual and legal precedent in regard to it has shifted, the powers that allowed it are routine in the modern world and are at the core of the claims to sovereignty made by states.

Because quotidian and widely accepted claims of sovereignty can impinge so severely on the lives and dignity of potential immigrants, it is not surprising that many citizens feel genuinely torn about how to respond to the claims of would-be immigrants:

¹ See *Shaughnessy v. United States ex rel. Mezei* 345 US 206 (1953).

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Many Americans feel hostile toward faceless newcomers – less so toward immigrants, more so toward refugees, insisting, when asked, that the United States admits too many foreigners, too many refugees. But when these same Americans are presented with a prototypical immigrant or refugee, most will say they favor his admission. Americans, thus, may be hostile to a foreign group, but accepting of the individual stranger. We fear the hordes, while we welcome the family. (Zucker and Zucker 1987, xvii)

Thus, even if it is easy, generally speaking, to capitulate to the legitimacy of the state's claims to sovereignty, the issue is made more difficult when such claims are in tension – as they so often are – with important interests of foreigners.

Immigration thus raises difficult questions about the moral significance of shared citizenship, the types of claims that may be legitimately pressed by foreigners, the justifiability of a militarized border, limits on the obligations of the welfare state, and the proper scope of sovereignty and self-determination. It should not be surprising, then, that disagreements about the proper, fair, or just course for immigration policy are significant and contentious throughout today's major receiving countries. As Stephen Castles and Mark Miller note:

Immigration may lead to strong reactions from some sections of the population. Immigration often takes place at the same time as economic restructuring and far-reaching social change. People whose conditions of life are already changing in an unpredictable way often see the newcomers as the cause of insecurity. One of the dominant images in the highly developed countries today is that of masses of people flowing in from the poor south and the turbulent east, taking away jobs, pushing up housing prices and overloading social services. (Castles and Miller 1998, 13)

Indeed, immigration policy is now a major and divisive issue in US politics. Hundreds of thousands of people have turned out to rally against stricter immigration regulations. Similar protests, and even hunger strikes, have occurred in European states. US presidential candidates have built sizable followings by criticizing the government for failing to control movement across territorial borders. And, in other countries, nationalist political parties have gained substantial power by criticizing government – sometimes in racially charged manners – for their leniency toward immigrants.

Meanwhile, the United States has turned to the National Guard to aid in controlling the border (despite already budgeting nearly \$2 billion for border control in 2008). This further militarization of the border carries with it serious humanitarian risks. Indeed, since the US government increased forces devoted to border control in the early 1990s, the rate of deaths by those attempting to cross the border has tripled. It is estimated, for example, that in 1998 approximately 350 people lost their lives – primarily as a result of

suffocation, heat exhaustion, or drowning – attempting to cross the border (Massey *et al.* 2002, 114).

However, while there is widespread agreement that changes to existing policy must be made, there is little agreement regarding the *direction* reform efforts ought to take. Anti-immigration groups are furious about immigration of all kinds. One such group, the Federation for American Immigration Reform, declared in 2008 on its website:

Both legal and illegal immigration are grave and serious threats to the United States. The number of immigrants reaching our shores each year is staggering. The problems resulting from our ever-increasing numbers of people are myriad and they affect all aspects of our lives including the environment, our public schools, our political institutions, and the freedoms that we are losing every day.

A prominent like-minded commentator insists that “this is an invasion, the greatest invasion in history . . . We are witnessing how nations perish. We are entered upon the final act of our civilization” (Buchanan 2006, 5–6).

While immigrants present – according to this view – “grave and serious threats” to the country, pro-immigration groups regularly present such individuals as the country’s lifeblood – the very source of economic and cultural dynamism. In their view, generous admissions policies are an integral part of America’s historical promise. They cling to Emma Lazarus’s famous words, according to which part of the American project is to provide refuge for the world’s poor and oppressed:

Give me your tired, your poor,
 Your huddled masses yearning to breathe free,
 The wretched refuse of your teeming shore.
 Send these, the homeless, tempest-tost to me,
 I lift my lamp beside the golden door!

It is no doubt part of the self-image of the American state, part of its public conception of justice, that it is a country of immigrants. Moreover, advocates of this view regard restrictions on immigration as “the modern equivalent of feudal privilege” – a practice that coercively and illegitimately restricts the life chances of those who happen to be born to the “wrong” group (Carens 1987, 252). Behind these diametrically opposed attitudes toward immigrants lie very different conceptions of justice and objectives for public policy.

I SOCIAL SCIENCE AND POLITICAL THEORY

There is, of course, a vast social scientific literature addressing immigration policy. Such work importantly contributes to our understanding of the

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types of effects different policies will produce, and I will draw on it in what follows. However, such work is of little help in determining the types of *ends* at which countries may justifiably aim. Instead, the arguments of those who seek to advocate particular policies based on empirical research rely on implicit or submerged commitments to normative positions.²

For example, Otis Graham argues for a restrictive immigration policy by insisting that “mass immigration of low-skill, low-wage labor harms American workers and adds to poverty” (Graham 2004, 112). Adding labor to the US market indeed increases the supply of workers and thus decreases the wages of those who are forced to compete for jobs with immigrants. Without questioning this empirical claim,³ it is important to see that it hides a normative assumption.

While Graham rightly insists that low-skill immigration harms American workers and contributes to poverty (in the United States), the same phenomenon can be – still truthfully – *redescribed* as follows: mass immigration of low-skill, low-wage labor increases wages and decreases existing poverty. Indeed, the economist Lant Pritchett argues for open borders (that is, the *elimination* of immigration restrictions) in just such terms: “Because unskilled labor is the primary asset of the poor world, it is hard to even imagine a policy more directly inimical to a poverty reduction agenda or to ‘pro-poor growth’ than one limiting the demand for unskilled labor (and inducing labor-saving innovations)” (Pritchett 2006, 1). Pritchett portrays increased immigration as a way to decrease poverty and make opportunities available to workers by allowing the impoverished access to productive economies.

It is important to recognize that the dispute between Graham and Pritchett is not an empirical one, and thus is not likely to be settled by further social scientific research.⁴ They already agree – at least on the major points – about the likely effects of various immigration policies. Instead, Graham and Pritchett are at odds because they disagree about how to *interpret* the empirical information. Pritchett judges policy by how it affects poverty worldwide, while Graham assesses policy by how it affects the least

² Of course, many social scientists – concurring with this line of argument – already avoid making policy proposals as a result of empirical analysis.

³ Some do question this claim. Because economic activity is not zero-sum, it is possible that all could be gainers from immigration (Fix and Passel 1994). Partially the dispute depends on differing time horizons.

⁴ In principle, it is possible that it could be so settled *if* it turned out that some policy X is best for both the domestic and global worst-off. However, because the two groups are likely to compete for the same types of jobs, it is unlikely that such a policy exists. In any case, the criteria subscribed to by Graham and Pritchett for judging policy are just two possibilities of many. It could be that all plausible criteria would recommend the same policy, but such a scenario seems extremely unlikely.

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well-off Americans. Thus, the disagreement regards the appropriate *ends* of policy, and therefore the normative criteria by which we ought to assess legislation. Because they agree about the relevant empirical data but disagree about how these data should be weighed, the only way to settle the dispute is to make clear and assess the normative assumptions underlying their views.

It is worth noting that the same problems will arise for an approach that aims to sidestep the difficulties of normative argument and instead push ahead with a cost–benefit analysis. Should we count the costs and benefits that apply only to citizens? Should the way policy affects foreigners count? The point is just that there is no empirical or value-neutral way of defending a given policy proposal. As a result, it is not fruitful to continue debate *solely* at an empirical level. Instead, proponents of different positions are stuck talking past one another because they are committed to disparate normative criteria. So, in order for opposing sides to present reasons that can be appreciated by others, the argument will have to be joined at the normative level. Understanding the effect various policies will have is insufficient (though still integral) if there is disagreement over how to assess those effects.

I should note that many empirical scholars of immigration accept the importance of normative debate to policy conflicts surrounding immigration. For example, in an article regarding the availability of welfare benefits to immigrants, two influential social scientists remark that the underlying issues “are more philosophical than legal . . . rais[ing] questions about the meaning of membership in US society” (Huber and Espenshade 1997, 1046). Likewise, a number of empirical scholars explicitly recognize that their public policy proposals grow from normative commitments (see, for example, Borjas 1999, 187; Cornelius 1981, 12; and Massey *et al.* 2002, 154–156).

Roughly, these types of normative disagreement might be settled in either of two ways. First, those with the power to do so might simply insist on the relevance of the normative assumptions they wish to privilege. This may be accomplished by presenting such assumptions as natural or beneficial to all. In *The German Ideology* Karl Marx insists that “the ideas of the ruling class are in every epoch the ruling ideas,” that “the class which has the means of material production at its disposal, has control at the same time over the means of mental production,” and that “the ruling ideas are nothing more than the ideal expression of the dominant material relationships” (Marx 1978, 172). In this extreme version of the view, there is relatively little point to (or even the possibility of) sorting out the conflicting

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normative criteria because it is material power that will ultimately determine which set of ideas wins out.⁵

Second, we might embark on a discussion regarding the justifications underlying the various normative positions. Rather than submerging the operative normative assumptions, we bring them into the light and attempt to defend the plausibility of one set of assumptions rather than another. This approach depends on sorting out the legitimacy of various criteria or underlying frameworks. It involves examining to what extent and in what type of circumstances frameworks for thinking about immigration are consistent with considered moral convictions.⁶ While, and indeed because, I do not doubt the importance of the material power behind a certain set of ideas, I regard it as worthwhile to pursue the second tack. One reason to do this is to help strip advocates of the first tack of the false legitimacy of having “the facts” on their side.

It is important to deny the putative naturalness of positions and instead assess the assumptions on which they rely. Justifying an immigration policy depends on making explicit and defending the normative assumptions underlying the position. The major task of this book, then, is to introduce and defend a novel approach for thinking about justice and immigration, which I call the associative ownership view. Throughout I will try to show that this approach provides a better framework for thinking about the issues than can existing alternatives.

It is worth pointing out that disagreements about the ethics of immigration policy are sometimes a reflection not of substantive disagreement but of a difference in the goals of commentators. It is thus useful to distinguish between and be cognizant of two different approaches to the problem. On the one hand, one might describe the ideal immigration policy. This approach picks out that policy that is preferable all things considered. Alternatively, one might set about trying to describe the *set* of acceptable policies by explicating the constraints imposed by considerations of justice. According to this view, although justice excludes from consideration some set of policies, its requirements do not specify a unique solution.

⁵ Even if one does not accept this vigilant subjugation of ideas to interests, one can still accept that ideas gain an important advantage by being promulgated by powerful and influential individuals. So much, at least, seems relatively uncontroversial. The fact that Marx spent his life trying to expose the ideas of the ruling class suggests that even he did not accept an extreme version of the materialist conception of history. Further evidence for this interpretation of Marx is provided by Engels’s “Letters on Historical Materialism” (Marx 1978, 760–765).

⁶ I proceed via a process of reflective equilibrium (for more detailed considerations of this approach see Daniels 1979; Rawls 1951; and Scanlon 2003).

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The former approach aims to describe the policy that is ideal, while the latter aims to describe the range of policies that do not violate the constraints of justice.⁷ I will focus on describing the constraints imposed by justice and, thus, on the acceptable range of possibilities. I proceed in this way because, just as I doubt whether the demands of ethics can be properly seen as prescribing a uniquely acceptable line of action for individual agents, I doubt whether most interesting policy questions admit of only one acceptably just solution.

II STATISM, OPEN BORDERS, AND SOCIAL TRUST

As I noted above, our view of political controversies depends on the paradigm used to conceptualize them. Citizens of the United States are likely to think very differently, for example, of a president declaring that his first-born son will take office at the time of his death than would subjects of a seventeenth-century monarch. Part of the difference between these two scenarios is the paradigm that underlies the political thinking of the audience. It means something different to be a political executive in a seventeenth-century monarchy than a twenty-first century democracy. Different expectations are built into these descriptions regarding the proper way to pass on power. Thus, the way we respond to political events depends on the paradigm employed to think about or conceptualize them.

In the same way, we will respond very differently to developments regarding immigration depending on the paradigm, framework, or set of expectations that we use to conceptualize the issue. For example, our opinions on how to treat illegal immigrants or whether to militarize the border depend on underlying views about the nature of state sovereignty and the legitimacy of state control over territory. Thus, skipping over these deeper philosophical conflicts in order to get directly to policy issues promises to leave us begging the question against those with whom we disagree.⁸ Accordingly, once again, in order to adequately understand policy conflicts regarding immigration it is imperative to assess the various paradigms people use to conceptualize controversies surrounding immigration. It is in the arguments for these various paradigms that the crucial, if somewhat buried, disputes about public policy issues reside.

⁷ A similar distinction is urged by Carens (Carens 2005, 30).

⁸ This is why Rawls insists that ideal theory provides “the only basis for the systematic grasp” of “more pressing problems” (Rawls 1999b, 8).

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Although there is a wide array of positions in the literature addressing the ethics of immigration policy,⁹ three basic paradigms dominate debate: statism; open borders; and shared identity. In the remainder of this chapter, I introduce these positions and briefly indicate the key points I wish to make in criticizing them. First, however, it is worth noting that advocates of these views are not homogeneous. There are different types of open-border views just as there are different types of statist and shared-identity views. In the chapters that follow, we will have the opportunity to investigate such differences, but for now it will suffice to give a general sense of the main existing paradigms and the difficulties they face. This will help set the stage for arguments in favor of the associative ownership view.

A Statism

Advocates of *statism* hold that considerations of justice are inapplicable beyond state borders and, accordingly, that citizens should select that immigration policy which is best for current citizens. According to this view, little or no weight ought to be given to the interests of foreigners. For example, George Borjas insists that “immigration policy should be set in ways that further the national interest, and the nation’s interest may simply not coincide with giving any particular person or any particular ethnic group the opportunity to partake in the unrivaled opportunities that the United States has to offer” (Borjas 1999, xxii).

Consistent with this view, Borjas then outlines a set of policies, focused on recruiting potential migrants with specially needed skills (such as highly trained IT workers). This approach is meant to maximally benefit current citizens.

Indeed, advocates of this view often suggest that selecting a policy that fails to advance the national interest – however that interest is understood – is foolish, utopian, or even dangerous. For instance, an editorial in *The Washington Post* called current limits on recruiting skilled immigrants a “self-inflicted wound,” and argued:

The lunacy of the current state of affairs is exposed by the fact that from 2001 to 2003, Congress raised the number of visas for skilled workers to 195,000 annually, in recognition of marketplace realities, then allowed it to revert back to 65,000 through what amounted to inattention . . . But there’s no excuse for the current logjams . . . America’s knowledge-based economy is increasingly dependent on the best and brightest immigrants. (*The Washington Post* 2007)

⁹ For a recent survey of the literature see Seglow 2005.

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According to advocates of this view, immigration policy should seek out, and give preference to, those immigrants who will best promote the national interest (most commonly through their economic contributions).

Of course, the extent to which the recruitment of the most skilled immigrants is in the “national interest” is debatable because the benefits and burdens of immigration policy have effects that vary across the citizen population. Immigration raises distributive issues. As Borjas remarks, “before deciding how many and which immigrants to admit, the country must determine which groups of Americans should be the winners and which should be the losers” (Borjas 1999, xiv). However, before addressing Borjas’s question, we must ask whether it is justifiable to simply select that policy that best promotes the national interest.

Immigration policy affects not just citizens, but also potential migrants and those among whom they live. If it is thought that this is reason for allowing these individuals to creep onto the justificatory scene, this would substantially alter the picture. Most obviously, there can be no doubt that – in a comparative sense – access to the United States (and the developed world more generally) carries with it substantial advantages in terms of life expectations. Living in the developed world carries with it significant benefits in income, health, education, and a range of other areas. It is plain, then, that the immigration policies of wealthy countries have important effects on the life expectations of non-citizens. Who gets to pass through the “Golden Door” to the United States is extremely important to potential immigrants.

Recognizing the opportunities that come with admission to the developed world brings forth an obvious question for those, like Borjas, who advocate immigration policies dedicated to recruiting only the most skilled potential immigrants. In particular, because admission to the United States carries with it significant economic opportunities, there may seem to be a certain kind of unfairness in admitting only those who have *already* had the opportunity to receive significant education or training. After all, there are no doubt other individuals seeking admission who have not already had the good fortune of significant training. Do not such individuals have at least as strong a claim to admission as the highly trained? Are governments of developed countries entitled to make decisions that will so dramatically affect the life chances of outsiders in order to secure further economic advantages for their already comparatively well-off citizenry?

Although the access to opportunities seized by would-be potential migrants is perhaps the most obvious sense in which immigration policy affects outsiders, it is far from the only sense in which it does so. Additionally, for

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example, many development experts worry that policies that encourage the highly trained or most educated individuals to leave developing countries may contribute to the difficulty of economic development by robbing such societies of much-needed human capital (Collier 2007; Kapur and McHale 2005).

Issues regarding the effect of immigration policy on foreigners highlight the normative stance underlying statism. Remember that, in Borjas's view, we must decide "which groups of *Americans* should be the winners and which should be the losers" (Borjas 1999, xiv, emphasis added). This claim, however, masks an important normative assumption: namely, that policy should be determined just by assessing how it will affect *citizens*. Indeed, Borjas is well aware of this issue, remarking that "deep philosophical and moral concerns" are "raised by these questions"; he declines to discuss them, however, instead saying that he "will leave it to others to determine if the immigration policies implied by the country's desire to make its native population better off are morally defensible" (Borjas 1999, 187).

However, as we saw by juxtaposing the views of Graham and Pritchett, leaving these moral issues aside promises to leave the debate stalemated. Because various sides disagree about what counts as appropriate criteria for assessing arguments, leaving the issue to others amounts to withdrawing from debates regarding immigration policy. There is no fruitful way of ignoring normative issues since assessing or applying the empirical evidence requires a normative stance. Thus, Borjas can provide hundreds of reasons why it is in the national interest to admit certain types of workers, but none of these will strike those who disagree that immigration should be set in terms of the national interest (such as Pritchett) as significant. Instead, as we saw, if arguments are to provide reasons to those who disagree, questions regarding the appropriate criteria by which to judge immigration policy must be taken up. In order, then, to adequately substantiate the position, advocates must provide an account of *why* it is legitimate – given that immigration policy has effects that reach far beyond national borders – to focus exclusively on the needs and interests of current citizens.

Most often statism is defended with reference to state sovereignty. The initial difficulty is that we typically recognize a host of limitations on the sovereignty of states. We are perfectly comfortable saying that a state has overstepped the bounds of its sovereign rights if it seeks to violently persecute citizens who are part of a religious minority, if it cancels elections and imposes martial law, or if it invades a neighboring country. Thus, we already recognize a range of limits on the sovereignty of states. Accordingly, it is inadequate to say – when it comes to immigration – that states, because of their sovereign status, may design immigration policy in any manner they like.