Phil / Pol / Val 207
Global Justice

BILL TALBOTT
(WITH THANKS TO MICHAEL BLAKE FOR POWERPOINT SLIDES)
FEBRUARY 4-7, 2013
Plan for the week

1. More on gender and poverty: Amartya Sen and Kristof and Wudunn
2. Immigration: facts and arguments
3. Is there a right to exclude?: Carens, Wellman, and Blake
4. The rights of the undocumented: Carens
Have You Ever Been Told Not to Use the Pronoun “I” in your papers?

A. Yes
B. No

92% Yes
8% No
Should A Country Be Able to Place Any Limits on Immigration?

A. Yes
B. No

86% Yes
14% No
Should A Country Be Able to Limit Immigration By Education Level?

A. Yes
B. No

84% Yes
16% No
Should A Country Be Able to Limit Immigration By Level of Income or Wealth?

A. Yes

B. No

89%

11%
Should A Country Be Able to Limit Immigration by Race?

A. Yes
B. No

99%
1%
Family unification (80%) looks to bring families together.

Skills-based (almost 20%) looks to import scarce talents and skills.

Each of these is subject to restrictions based upon country of origin. The “diversity lottery” gives spaces to people from countries that don’t tend to produce immigrants.

Immigration can take a long time. In April 2012, the USCIS began processing applications from Mexico for adult children of American citizens that were filed in May of 1993.
Immigration has some aspects that make it especially vexing.

1. **There are many questions lurking here:**
   Do we have the right to exclude at all?
   Do some people have the right to cross borders even if exclusions are usually permissible?
   What principles can we use to decide who may enter?
   What rights, if any, should be guaranteed to those who are present within a country without the legal right to be so present?
2. Immigration is hard to conceptualize, because it involves changing the we of politics:

- We have to figure out how to balance the duties to those we stand in a special relationship with against the duties we owe to everyone.
- This is especially problematic when we look at the distributive effects of immigration.
3. The issue of immigration brings *race* and *community* closer to the foreground than they often are in political discussion.
Immigration Reform is Before Congress

S.744 The “Border Security, Economic Opportunity, and Immigration Modernization Act” has been passed by the Senate and is currently before the House of Representatives.
Joseph Carens

- Professor of Political Science, University of Toronto
- Focuses on immigration and theories of justice
"Citizenship in Western liberal democracies is the modern equivalent of feudal privilege - an inherited status that greatly enhances one's life chances. Like feudal birthright privileges, restrictive citizenship is hard to justify when one thinks about it closely" (Carens, p. 252).

What is Carens referring to by “feudal privilege”? Why does he use the term?
Borders Are Defended By Force

- In fact, it’s worse than simply a feudal inequality: we actually use force to prevent people from bettering their lives.
Three political theories

- **Libertarian (Nozickian):** people have property rights, and the government is obligated to respect these.

- **Utilitarian:** the government is obligated to use its policies to create the most overall well-being (not just the most overall well-being of its citizens).

- **Social Contract (Rawlsian):** the government must be run in accordance with principles of justice reached in the original position from behind the veil of ignorance. (Rawls did not apply his domestic theory of justice to international issues such as immigration.)

- **All three theories converge on open borders!**
The Libertarian state

Immigration issues are resolved by reference to property rights:

- Property owners could use their property rights to exclude all outsiders.
- Restrictive covenants were legally enforceable in the U.S. until the 1960’s.
- However, if a property owner in Texas wants to invite foreign workers from Mexico onto his/her property, the government would have no power to prevent it.
- On the libertarian account, “the state has no right to restrict immigration” (Carens, p. 254).
Utilitarianism

- The government must choose that course of action that is likely to maximize the well-being of all those affected.
- “If we focus only on economic consequences, the best immigration policy from a utilitarian perspective would be the one that maximized overall economic gains. In this calculation, current citizens would enjoy no privileged position. The gains and losses of aliens would count just as much” (Carens, p. 263).
Raw Data or Filtered Preferences?

- Raw Data: If all preferences are taken as ‘raw data’ for the utilitarian formula, then the White racist’s preference to associate only with other Whites counts in the formula.

- Filtered Preferences: Only some preferences are included in the utilitarian formula. Racist preferences are excluded.

- “Even if one takes the raw data approach, which seems to leave more room for reasons to restrict immigration, the final outcome is still likely to favor much more open immigration than is common today. Whatever the method of calculation, the concerns of aliens must be counted too” (Carens, p. 264).
In his domestic theory of justice, Rawls “assumes a closed system in which about immigration would not arise” (Carens, p. 255). But Carens argues that “the purpose of the ‘veil of ignorance’ is ‘to nullify the effects of specific contingencies which put men at odds’ because natural and social contingencies are ‘arbitrary from a moral point of view’ and therefore are factors which ought not to influence the choice of principles of justice” (Carens, p. 256).

Therefore, Carens believes, like Beitz, that we have an obligation to address immigration from a global original position in which the parties are individual people, not states. In the OP in which the parties are individuals, the parties would agree on a right to freedom of international movement for the same reason they would agree on a right to freedom of domestic movement.
Carens Realizes that Rawls Himself Would Not Accept This Conclusion

Carens considers two objections that Rawls might make:

Conception of the Person: His theory is limited to societies with a conception of themselves as ‘free and equal’.

REPLY: Shouldn’t we treat others equally, even if they do not?

Constructivism: His theory is limited to liberal democracies.

REPLY: Carens argues that it is a mistake to limit the social contract theory of justice in this way.
The “Public Order” Exception

“Restrictions [on immigration] would be justified only if there were a ‘reasonable expectation’ that unlimited immigration would damage the public order and this expectation would have to be based on ‘evidence and ways of reasoning acceptable to all.’ Moreover, restrictions would be justified only to the extent necessary to preserve public order. A need for some restrictions would not justify any level of restrictions whatsoever. Finally, the threat to public order posed by unlimited immigration could not be the product of antagonistic reactions (e.g., riots) from current citizens” (Carens, p. 259).
“If a rich country like the United States were simply to open its doors, the number of people from poor countries seeking to immigrate might truly be overwhelming, even if their goals and beliefs posed no threat to national security or liberal democratic values. Under these conditions, it seems likely that some restrictions on immigration would be justified under the public order principle” (Carens, p. 260).

Even so, “this would surely imply a much less restrictive policy than the one currently in force which is shaped by so many other considerations besides the need to maintain public order” (Carens, p. 260).
Maximize the Position of the Least Well-Off Group?

Carens argues that if some immigration restrictions are necessary to maintain public order, in order to maximize the position of the least well-off, in immigration “we should give priority to the least skilled among potential immigrants” (Carens, p. 261).
A Communitarian Reply (Walzer): The Value of Distinctive Cultures and Ways of Life

Carens Replies: “Think of the differences between New York City and Waycross, Georgia, or between California and Kansas. These sorts of differences are often much greater than the differences across nation-states. Seattle has more in common with Vancouver than it does with many American communities” (Carens, pp. 266-267).
Walzer argues that “clubs may generally admit or exclude whomever they want, although any particular decision may be criticized through an appeal to the character of the club and the shared understandings of its members. So, too, with states” (Carens, p. 267).

This argument will be developed more fully by Wellman.
Carens’ Conclusion

- Open borders seem like such a threat to sovereignty only because we live in such an unjust world. If eliminate or reduce limits on immigration that will give the wealthy countries even more incentive to address global injustice, because that would reduce the number of foreigners who would want to be immigrants.
In Your Opinion, Which Alternative is Most Just?

A. Open borders
B. Some limitations on immigration, with priority to the least well-off
C. No change in the status quo.
D. Other.

[Bar chart showing percentages for each option: Open borders 59%, Some limitations on immigration 29%, No change in the status quo 7%, Other 5%]
Christopher Heath Wellman

- Professor at Washington University in St. Louis
- Writes on immigration, global justice, and secession
Wellman Uses What Analogy to Explain His Position on Immigration? (Sample Question)

A. Choosing what to eat
B. Choosing a marriage partner
C. Choosing what car to buy
D. Choosing a nationality.
The first two steps in the argument:

1. Freedom of association is a central human right.
2. This right includes the freedom not to associate.
Why is it important? Because we develop our lives only in conjunction with significant other people. Associative rights can be directly and instrumentally valuable in this.

Marriage is Wellman’s most important example.

Freedom of religion is less relevant. Why?
Freedom of association includes the right to exclude

- Right to refuse to marry
- Right to refuse to join a religion
From Individual to Group Rights of Association

- The most compelling rights of association are individual rights (e.g., rights to marry).
- What about group rights?
- Right of Boy Scouts to exclude homosexuals or atheists (?)
- Right of August National Country Club to exclude women (?)
Should the Boy Scouts have a right to exclude homosexuals?

A. Yes
B. No

The chart shows that 82% answered Yes and 18% answered No.
Should the Boy Scouts have a right to exclude atheists?

A. Yes
B. No

75%
25%
Should Augusta National Country Club have a right to exclude women?

A. Yes
B. No
Even if the group right can be overridden in particular cases, there is a *presumptive* group right to decide on group membership and to exclude outsiders.

What does ‘presumptive’ mean?
Wellman defends only a *presumptive* group right of association for many reasons. One of them is that in the 1950’s and 1960’s, legalized discrimination in the Southern US against Blacks in public accommodations (restaurants and hotels) was defended on the grounds of a group right of association. The Civil Rights Act of 1963 made that kind of “association” illegal.

The Supreme Court also declared other forms of “association” unconstitutional—e.g., restrictive covenants on real estate.
States have presumptive rights of association too

- No state should be forced into any international agreement (e.g., NAFTA or the EU).
- Forcible annexation of one state by another is wrong.
- “The point is that people rightly care very deeply about their countries, and, as a consequence, they rightly care about those policies which will affect how these political communities evolve. And since a country’s immigration policy affects who will share in controlling the country’s future, it is a matter of considerable importance” (Wellman, p. 115).
Recall Carens’ argument that citizenship is like a ‘feudal caste privilege’. Wellman replies:

1. Injustice is not a product of bad luck (luck inequality), but of oppressive relationships (relational inequality).

2. Even if we do have obligations of justice to the foreign poor and oppressed, we can discharge them by helping them in other ways rather than then opening our borders to them.
“As implausible as it might initially seem, I suggest that, even in cases of asylum seekers desperately in need of a political safe haven, a state is not required to take them in” (Wellman, p. 128).
Wellman’s Conclusion

“I believe that most of us in affluent societies have pressing restitutive, samaritan, and egalitarian duties to do considerably more to help the masses of people in the world tragically imperiled by poverty, and I even think that one good way to provide this assistance is to allow more immigrants from poorer countries” (Wellman, p. 130).

He is not denying that we have any duties to the poor outside our borders. He is only arguing that the affluent societies have alternative ways to discharge their obligations other than by opening their borders to the less affluent.
1. Wellman notes that his theory is compatible with racist immigration policies. (What is the marriage analogy here? Does Wellman accept it?)

2. He objects to racist immigration policies not because of the claims of potential immigrants in the suspect category, but due to the claims of fellow citizens in the suspect category. (Compare to Kant’s doctrine of indirect duties to non-human animals.)
Wellman Thinks That We Have No Duties to Non-Citizens (Sample Question)

A. True
B. False
Michael Blake Responds To Wellman

Michael Blake,
UW Professor of Philosophy
And Public Affairs and
Director of the Program
On Values in Society.

Author of *Justice and Foreign Policy* and, with
Gillian Brock, a forthcoming book: *The Ethics of
Emigration: Debating Brain Drain*
In Michael Blake paper, which of the following ideas plays a central role in the argument?

A. Rights as agreed to in the original position
B. Rights as side constraints
C. Rights as pre-commitment devices
D. Rights as trumps
E. Rights as inalienable.

[Bar chart showing percentages: 40%, 26%, 18%, 9%, 7%]
How are we to understand the *presumptive* right to freedom of association?

Wellman calls it a *presumptive* right, but we don’t know how much is required to overcome the presumption.

Two versions of the right to freedom of association:

- **Simple deontic view:** it’s a *trump right* [from Ronald Dworkin; What is a trump?] that can only be overcome by moral catastrophe. (Blake attributes this view to Wellman.)

- **Complex deontic view:** it’s a right that is part of a package of rights we can press against the government. (Blake favors this view.)

- **NOTE:** ‘Deontic’ means NOT consequentialist (e.g., not utilitarian).
“The difference between Wellman’s vision and my own, though, is that the complex picture I present here regards [the right to freedom of association] as one of a complex and contested set of political rights, all of which gain their moral importance from the more general (and foundational) moral right to treatment as an equal” (Blake, pp. 5-6).
The US Supreme Court tends to subscribe to a complex deontic view—for example, in balancing the right to freedom of association against rights against discrimination:

- Freedom of association is important
- Overcoming the history of discrimination is also important
- Which one wins in a given case requires judgment and context
Examples of Rights Balancing in US Supreme Court Cases

• The Jaycees (Junior Chamber) may not exclude women (*Roberts v. United States Jaycees*, 1984).

• The Boy Scouts of America may exclude gay men (*Boy Scouts of America et al. v. Dale*, 2000).
Wellman has two options in how to articulate the right to freedom of association:

(1) Simple deontic right. If Wellman chooses this option, he must argue that the right to freedom of association should not be weighed against the right against discrimination. This would be a hard sell.

“The fact is that most of us – Wellman included, I suspect – value both rights against discrimination and rights to freedom of association” (Blake, p. 13).

[The US civil rights movement provides the historical background.]
Option 2

(2) Complex deontic right. If Wellman chooses this option, he would not be able to draw any general conclusions about immigration, because the appropriate conclusion would depend on a balancing of the rights involved in each case.
Implications of the Complex Deontic Right Option for Immigration

- The freedom to make a society comprised of who we want is important.
- The rights of individuals to be treated as individuals are also important.
- We might have to have a question of which one gives way in a given case – and it is not clear that the right to exclude will always be the winner.
- Blake’s examples: reuniting families and asylum seekers whose rights are being violated in their home countries.
Blake’s Conclusion

“Rights, on this account, do not serve as trumps in the manner required. What is demanded for any particular conclusion about the legitimacy of exclusion to work, instead, is a more wide-ranging argument about how states may respect the equality of all, citizen and foreigner alike, while not erasing the moral difference between the two” (Blake, pp. 19-20).
Facts about undocumented immigrants

- 11.5 undocumented immigrants in the U.S.
- Category includes illegal border crossers and visa overstays
- 86% of undocumented have resided for seven years or longer in the U.S.
- 80% decline in undocumented immigration from Mexico, 2004-2010; net flow now at zero.
States’ response to the undocumented

- **Arizona SB 1070**
  - State misdemeanor to be an immigrant not carrying documents on person
  - Police to determine immigration status if “reasonable suspicion” of undocumented status while in the course of being arrested for another crime
  - Police allowed to arrest people suspected of undocumented immigration
  - Criminalized searching for employment while undocumented
  - Penalties for sheltering undocumented immigrants
Federal Response to the Undocumented

- S. 744 (comprehensive immigration reform):
  1. Border security increased
  2. Crackdown on employers who hire undocumented labor
  3. Streamline legal immigration system
  4. Create a path to earned citizenship for some undocumented.
Two Simple Arguments for Deportation of the Undocumented

- The undocumented broke the law by entering the US.
- They knew they were breaking the law.
- If they are discovered to be here with documents, they should be made to pay the consequences for breaking the law, which include deportation.

- If someone takes something they are not entitled to, justice requires that they give it back.
- In breaking the law, the undocumented were taking something they were not entitled to (US residency).
- Deportation is simply requiring them to give back what they took (US residency), so they should give it back.
Carens makes two cases for amnesty for some undocumented

(1) Federal Dream Act: Amnesty applies to those undocumented who were brought to the US as minors and have resided here for 5 years or more. What is the argument in this case?

(2) What about those undocumented who came here as adults and have been here realized that they were breaking the law in doing so? Joseph Carens argues that those who have been here for a length of time have a right to remain.

Why? Time is, here, a proxy for the relationships they have formed.
“Irregular migrants should be granted amnesty—allowed to remain with legal status as residents—if they have been settled for a long time. Some circumstances—arriving as children or marrying citizens or permanent residents—may accelerate or strengthen their moral claims to stay, but the most important consideration is the passage of time” (Carens, p. 1).
Marguerite Grimmond and Miguel Sanchez

Marguerite Grimmond had lived in the UK from childhood to age 80. When she left the country, initially she was not permitted to return.

Miguel Sanchez is an example of a person whose life is greatly impacted because of his vulnerability to the pain of deportation. He, unlike his neighbors, faces terror at every traffic stop, cannot use an airplane to visit his family, and so on.

Carens believes that this sort of vulnerability is unjust. Miguel Sanchez should not have to live a life that has this sort of pain within it.
Hiu Lui Ng

- Hiu Lui Ng arrived in the US at 17 on a tourist visa. He got an education, married US citizen, and had two children.

- “People who live and work and raise their families in a society become members, whatever their legal status: that is why we find it hard to expel them when they are discovered” (Carens, p. 4).
“Fifteen years is a long time in a human life. In fifteen years, connections grow: to spouses and partners, sons and daughters, friends and neighbors, people we love and people we hate. Experiences accumulate: birthdays and braces, tones of voice and senses of humor, public parks and corner stores, the shape of streets and the way the sun shines through the leaves, the smell of flowers and the sound of local accents, the look of the stars and the taste of the air—all that gives life its purpose and texture. We sink deep roots over fifteen years, and these roots matter even if we were not authorized to plant ourselves in the first place. The moral importance of [this] social membership ought to have outweighed the importance of enforcing immigration restrictions.”
“The moral right of states to apprehend and deport irregular migrants erodes with the passage of time” (p. 4).

Most criminal laws have a statute of limitations. This would amount to a statute of limitations for immigration law.

What time period does Carens recommend?

5-7 years
The relevance of how someone comes into society fades as we get further and further away from the act of joining; past a certain number of years, someone like Miguel should be treated as equivalent to all other members of civil society.

“Even if we accept the state’s right to control immigration as a basic premise, that right is not absolute and unqualified. The state’s right to deport irregular migrants weakens as the migrants become members of society. Over time an irregular migration status becomes morally irrelevant while the harm it inflicts grows. Liberal democratic states should recognize that fact by institutionalizing an automatic transition to legal status for irregular migrants who have settled in a state for an extended period” (Carens, p. 9).
A Challenge to Carens’ Main Claim

Consider the hypothetical case of Morgan, a Canadian citizen who lives without documents in Portland. He is aware of the risks he faces, but chooses to stay there because of the higher wages and better art scene. He lives there for 20 years without being detected. One day he is stopped for running a red light. When he is discovered to be undocumented, he is deported.
Brute luck and option luck

- Bad brute luck is what happens to us without our having chosen a risky path; being struck by lightning is bad brute luck.
- Bad option luck is what happens to us when we choose to take the risk; losing at blackjack is bad option luck.
- If we think of Morgan’s case as a case of bad option luck, then we may not think of him as being treated as less than equal when he is deported; he is simply unlucky.
Should Morgan Be Allowed to Stay?

A. Yes, in 20 years he will have put down roots and built a life
B. No, he just gambled and lost.
C. Other.

60%
32%
9%
Should There Be a Time Limit on the Deportation of the Undocumented?

A. Yes, 5 years or less  
B. Yes, 5-10 years  
C. Yes, 10-20 years  
D. Yes, more than 20 years  
E. No time limit.

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<th>Option</th>
<th>Percentage</th>
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<td>Yes, 5 years or less</td>
<td>24%</td>
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