Journal of Ethics and Social Philosophy
VOL. 14, NO. 1 · OCTOBER 2018
https://doi.org/10.26556/jesp.v14i1.359

THE RIGHT TO EXCLUDE IMMIGRANTS DOES NOT IMPLY THE RIGHT TO EXCLUDE NEWCOMERS BY BIRTH

Thomas Carnes

RECENT ARGUMENTS defending a state's right to restrict immigration argue from a certain notion of individual rights to a parallel collective state right to restrict immigration.[1] These so-called statist arguments for closed borders have each received their fair share of independent criticism. Recently, however, an interesting generic challenge has been advanced against statist arguments, one that, if correct, might undermine all statist arguments in one fell swoop. This challenge—call it the *newcomer-by-birth objection*—claims that statist arguments cannot consistently defend both their main conclusion that a state has a presumptive right to exclude prospective immigrants, and the conventional assumption that newcomers by birth ought to enjoy a right to membership upon birth.[2] If correct, all statist arguments in defense of immigration restrictions might become untenable, for they would seem to violate our intuition against the permissibility of denying membership to newcomers by birth.

This article argues that the newcomer-by-birth objection is not as problematic for statist arguments as it might seem. In what follows I briefly sketch the objection and the extent to which it applies to statist arguments. I then examine more closely the case of newcomers by birth, highlighting nuances about their situation that give reason to differentiate them from prospective immigrants in the way the newcomer-by-birth objection demands but alleges statist arguments cannot consistently do. To do this I consider the impermissibility of certain kinds of pernicious exclusion criteria with respect to prospective immigrants. I demonstrate that the view that exclusion criteria that objectionably harm members limit states with respect to their right to exclude prospective immigrants can successfully be adopted by statist arguments in response to the

1 Traditionally, arguments defending a state's right to restrict immigration have been grounded in a state's interest in maintaining a national culture as it sees fit. For an argument like this, see Miller, *Strangers in Our Midst*.

2 Brezger and Cassee, "Debate." See also Cox, "Three Mistakes in Open Borders Debates," 63.

newcomer-by-birth objection. Ultimately I argue that excluding newcomers by birth is wrong, not because it harms the newcomers by birth, but because it objectionably harms certain current members—namely, their parents. This move will allow statist arguments to overcome the newcomer-by-birth objection in what will likely be the vast majority of cases. Any remaining cases, however, will require statist arguments to bite the proverbial bullet. Although this may initially seem an uncomfortable result, I sketch a novel argument comparing such cases to international adoption to argue that it is in fact morally benign.

I

The newcomer-by-birth objection is concerned with showing that statist arguments, insofar as they are successful, prove too much. The point that must be made is that newcomers by birth are relevantly similar to prospective immigrants such that any argument establishing a right to exclude immigrants entails a right to exclude newcomers by birth. The problem is, of course, that this result violates a widespread intuition that people ought to be guaranteed citizenship upon birth by the state into which they are born.[3] According to the objection, statist arguments entail that newcomers by birth cannot plausibly be considered members unless and until the political community into which they are born accepts them as such and confers upon them the commensurate political rights. The relevant similarity between them and prospective immigrants, then, is that both a newcomer by birth and a prospective immigrant do not have any plausible presumptive claims to territorial access or membership rights against the state into which they either seek entry or are born. And since there are statist arguments that purportedly establish the permissibility of excluding prospective immigrants, those arguments also establish the permissibility of excluding newcomers by birth, which seems morally problematic.

Before moving on to consider the merits of the newcomer-by-birth objection, I would first like to note that this is not the only sense in which scholars have argued that statist arguments prove too much. Javier Hidalgo argues that "if it is morally permissible for states to restrict immigration because they have rights to self-determination, then it is also morally permissible for states to deport and denationalize their own citizens."[4] Taking the problem of compatriot

3 For a defense of this intuition, see Carens, "In Defense of Birthright Citizenship." For skeptical views about the practice, see Shachar, *The Birthright Lottery*; Shuck and Smith, *Citizenship without Consent*; and Stevens, *States without Nations*.

4 Hidalgo, "Self-Determination, Immigration Restrictions, and the Problem of Compatriot Deportation," 262.

deportation and the newcomer-by-birth objection together seems to present a high hurdle for statist arguments. However, I think Hidalgo's argument is easily overcome and I will not consider it in detail here, beyond pointing out what I take to be two key failures.

All that is required to overcome Hidalgo's argument is a plausible basis on which to make a principled distinction between compatriots and nonmembers such that the ability to exclude nonmembers does not entail the ability to exclude compatriots. (Indeed, this is essentially what is required to overcome the newcomer-by-birth objection.) Hidalgo acknowledges one such basis but too hastily rejects it. The reason we can say compatriot exclusion is unjust is that it would violate the political rights held by members, in virtue of their being members. Hidalgo recognizes that "this is one reason against compatriot deportation," but maintains it is possible to deport and denationalize citizens without denying them their political rights.[5] He specifically mentions, e.g., the possibility of retaining the ability to cast absentee votes and petition government officials, but fails to mention the most important political rights: the right to run for elected office and the right to fair opportunities to occupy positions of political authority or influence that seem obviously to require one's sustained presence within the state. Effectively denying these rights would be a severe violation of political rights that could be outweighed only by the strongest of countervailing considerations. And since nonmembers could not make this claim, we have a principled distinction to defeat Hidalgo's argument.

This may not be the most promising response to Hidalgo's objection. Hidalgo is surely correct that states can exclude compatriots without denying them *all* their political rights, although I have suggested that they necessarily deny some fundamentally important ones through compatriot exclusion, thus rendering compatriot exclusion unjust. Hidalgo could conceivably argue that the political rights I consider "fundamentally important" are either not important enough to render their violation unjust, or are not necessarily denied by compatriot exclusion.

There is another right, though, that is necessarily violated by compatriot exclusion—namely, excluded compatriots' occupancy rights. An occupancy right is one's pre-institutional right to reside permanently in a given territory for the purposes of pursuing and executing one's life plans.[6] One can claim an occupan-

5 Hidalgo, "Self-Determination, Immigration Restrictions, and the Problem of Compatriot Deportation," 280n3.

6 See Stilz, "Nations, States, and Territory," 579, 582–87, and "Occupancy Rights and the Wrong of Removal," 327. I would like to thank an anonymous reviewer for suggesting this objection to Hidalgo.

cy right if one resides there now or has previously done so, residence there is fundamentally important to the integrity of one's life plans, and one's connection to that territory was formed through no fault of one's own.[7] These conditions seem straightforwardly to hold for the compatriots Hidalgo has in mind in his argument. If a current member of a state, who presumably has legitimately built a life in that state, can claim an occupancy right, then the state would be prohibited from excluding that member. Since only compatriots have occupancy rights that would be violated by exclusion, and not prospective immigrants, this provides another principled distinction to defeat Hidalgo's argument.

The primary advantage of this objection to Hidalgo's argument is that it would be harder to override an occupancy right than political rights. An occupancy right is centrally connected to one's ability to live a minimally decent and autonomous life, whereas political rights are only centrally connected to one's ability to engage in political participation. The former seems more fundamentally important than the latter—indeed the latter does not even become important unless the former is adequately secured—thus presenting a greater obstacle to Hidalgo's argument. Even if one could successfully refute the first objection to Hidalgo's argument offered above, it seems difficult indeed to deny that current members have occupancy rights to reside in their state.

Although I think Hidalgo's argument ultimately fails to get traction, the newcomer-by-birth objection remains standing because it is not at all clear that either of these principled distinctions can hold between prospective immigrants and newcomers by birth. Hence the power of the objection and why I move now to consider it in detail.

II

Perhaps the best known statist argument is the argument from freedom of association, advanced most prominently by Christopher Heath Wellman. Wellman argues from an individual's right to freedom of association and the correlative right to refuse to associate, to a parallel collective right on the part of states to refuse to associate with, i.e., admit, outsiders.[8] He appeals to marriage to demonstrate the extent to which we should give deference to our presumptive individual right to free association, and then appeals to private clubs to show how that right can extend to groups choosing to refuse to associate with nonmembers. If it is true that "each of us enjoys a morally privileged position of dominion

7 Stilz, "Occupancy Rights and the Wrong of Removal," 334–55.

8 Wellman, "Immigration and Freedom of Association"; Cole and Wellman, *Debating the Ethics of Immigration*.

over our self-regarding affairs," then we must have a presumptive (though overridable) right to exclude other persons from those affairs.[9] This includes our right to associate with whomever we want individually as well as collectively. Otherwise, such a position of dominion over our self-regarding affairs ceases to be privileged. This right extends to the state level: given the seemingly uncontroversial assumption that legitimate states have a right to self-determination, the rights established by appeal to private clubs extend, according to Wellman, to political communities as well. Although Wellman purports to establish the "stark conclusion" that legitimate states may refuse "all potential immigrants, even refugees desperately seeking asylum," he also acknowledges that the right is merely presumptive, theoretically capable of being overridden.[10] While his argument implies the right is more difficult to override than most would be willing to accept, it is nevertheless true that Wellman would concede the possibility, however remote, that states may have to admit some individuals under certain circumstances, even if only on a temporary basis.[11]

Michael Blake offers a statist argument similar to Wellman's. Instead of freedom of association, though, Blake appeals to individuals' presumptive right to refuse to accept new moral obligations.[12] Given the juridical nature of states, admitting a new immigrant "places the inhabitants of that [state] under an obligation to extend legal protection to that immigrant's basic rights. This obligation, however, limits the freedom of the current inhabitants of that jurisdiction."[13] And if we take freedom and liberty seriously, Blake contends, then we must acknowledge our "presumptive right to be free from others imposing obligations on us without our consent."[14] Qualifying the right as presumptive means Blake recognizes the tension between one's freedom and an incoming immigrant's need to have her basic rights protected. In the example Blake provides, it is a French citizen leaving a state that is willing and able to continue fulfilling the obligation to protect her basic rights who immigrates to the United States. In doing so, the French citizen thereby shifts the burden of that obligation to the United States, and the United States should have a say in whether and what additional duties can be imposed on it. But since her rights are adequately protected in France, the presumptive right of the United States and its citizens to refuse

9 Wellman, "Immigration and Freedom of Association," 110.

10 Wellman, "Immigration and Freedom of Association," 109.

11 Cole and Wellman, *Debating the Ethics of Immigration*, 122.

12 Blake, "Immigration, Jurisdiction, and Exclusion."

13 Blake, "Immigration, Jurisdiction, and Exclusion," 104.

14 Blake, "Immigration, Jurisdiction, and Exclusion," 115.

to take on any new obligations with respect to her holds, for asserting that right does not render her objectionably vulnerable.[15]

Ryan Pevnick offers a third statist argument, which he grounds in the notion of associative ownership. Since citizens of a given state have created or upheld the institutions that constitute their state, they can claim ownership of that state and its institutions. This claim to ownership entails a right to exclude others from the use of or involvement in the state's institutions, and hence a right to exclude outsiders.[16] As co-owners of their society and its institutions, based on their contributions (broadly construed) to the society and its institutions, current citizens of a state have a right to determine the future of their institutions, which includes who may be granted access and membership status. This is similar to Wellman's argument from freedom of association insofar as Pevnick's argument holds that, once a certain kind of association is established, that association is free to associate as it pleases. It is also similar to Blake's position insofar as such associative rights seem to imply a right against incurring any unwanted obligations that would emerge from granting co-ownership status to new individuals.

There is a worry here that all three statist arguments collapse into the same ultimate view, and Brezger and Cassee acknowledge the deep similarities of all three.[17] The critiques advanced against these arguments, however, have seemed largely to be unique to the specific argument against which the critique is offered.[18] The newcomer-by-birth objection is unique, then, insofar as it identifies an allegedly problematic entailment that all three views share irrespective of any substantive differences they may have. The arguments, moreover, are allegedly incapable of explaining why one group can be treated differently from the other.[19]

The upshot of each statist argument is that states have presumptive control over admittance and membership in their political communities. If this is true, then nonmembers just do not have any inherent or presumptive claim to be admitted or to be made members, and a collective decision to exclude them permissibly follows from the state's right to control admittance and membership. And as the newcomer-by-birth objection holds, newcomers by birth begin as nonmembers and thus are subject to the force of statist arguments. This certainly seems true regarding associations. Regarding Wellman's freedom of asso-

15 Blake, "Immigration, Jurisdiction, and Exclusion," 112–14.

16 Pevnick, *Immigration and the Constraints of Justice*.

17 Brezger and Cassee, "Debate," 376.

18 For criticism of Wellman, see, e.g., Fine, "Freedom of Association Is Not the Answer." For criticism of Blake, see Watson, "Equal Justice." For criticism of Pevnick, see Wilcox, review of *Immigration and the Constraints of Justice*.

19 Brezger and Cassee, "Debate," 367–68.

ciation argument, "if membership in states were to be regulated exclusively by principles of freedom of association, this would imply that states have a right to exclude" newcomers by birth as well as prospective immigrants.[20] Regarding Pevnick's associative ownership argument, "if a citizenry were to decide collectively that some or all members of a new generation shall not be [benefited] … current citizens are entitled to deny newcomers by birth access to co-ownership."[21] If current citizens of a state can exclude prospective immigrants based on their lack both of any contribution to the society they wish to enter and any overriding moral claim to enter, this implies a right to exclude newcomers by birth based on their lack of contribution and lack of any overriding moral claim to be admitted. This also holds with respect to accepting new obligations. If states have a presumptive right to refuse to take on new obligations, then they would also have a presumptive right to exclude people the inclusion of whom would generate those new obligations. So it would seem that statist arguments really do entail the permissibility of excluding newcomers by birth.

We must keep in mind, though, that these statist arguments are merely presumptive, which means the right to exclude that they establish can be overridden. Something like refugee status might be one example of an overriding consideration. Another consideration more relevant to the question at hand is that of statelessness, or being without access to membership in any political community and the various rights of protection that accompany political membership. All statist arguments seem to agree that if exclusion of an individual comes at the cost of statelessness for that individual, then the right to exclude fails to hold in that particular case. A right to have one's basic rights institutionally and systematically protected is surely more central than a state's right to freely associate, or avoid unwanted obligations, or exercise institutional ownership through exclusion.[22]

This seems to offer statist arguments a preemptive reply to the newcomer-by-birth objection. If excluding newcomers by birth results in statelessness, then statist arguments have a basis for explaining why they have a claim to membership upon birth, and thus a basis for treating newcomers by birth differently than prospective immigrants (at least those who are not stateless or refugees). But this would be too quick. It is possible that states that wish to exclude certain newcomers by birth arrange for other states to take them in as members of their political community, thus avoiding the statelessness worry. If statelessness were

20 Brezger and Cassee, "Debate," 372.

21 Brezger and Cassee, "Debate," 376.

22 See Cole and Wellman, *Debating the Ethics of Immigration*, 74–76; Blake "Immigration, Jurisdiction, and Exclusion," 119; and Pevnick, *Immigration and the Constraints of Justice*, 39–40.

the only consideration that could stop states from being able to exclude newcomers by birth, and states could get around this worry, then their right to exclude those newcomers would reassert itself, thus reviving the newcomer-by-birth objection in at least these cases. This presumably remains an unacceptable result for most of us. Many think newcomers by birth should automatically receive membership upon birth, and the thought that states have a right to deny this, even under limited conditions, is an uncomfortable one.

To this extent I think the newcomer-by-birth objection is clearly relevant and raises an important and serious challenge with which statist arguments must contend. But the primary thrust of the objection is that statist arguments are furthermore devoid of the tools to adequately respond to this objection. This is where, I argue, the objection fails. I think statist arguments in fact have a readily available tool to overcome the newcomer-by-birth objection, the basis for which can be found in Blake's earlier work. One reason I think this tool has not been noticed is that the newcomer-by-birth objection fails to distinguish between two sets of circumstances under which the objection would hold against statist arguments. The unnoticed distinction is that states can choose to exclude both prospective immigrants and newcomers by birth either with or without the consent of some current members. With specific respect to newcomers by birth, the relevant current members are the parents of the newcomers. Noticing this distinction helps us to think more carefully about the objection.

III

Consider first the claim that statist arguments entail the right of states to exclude newcomers by birth against the wishes of their parents, assuming protections against statelessness are in place. It is true that an entire political community cannot plausibly expect to achieve full consensus regarding the policies it implements. This is partly why states adopt more or less democratic procedures to successfully and justly adjudicate disputes that inevitably arise. Such disputes arise in every context, be it in a domestic context—as in the case of, say, taxation policy—or in an at least partly extra-domestic context—as in the case of immigration policy. Moreover, it is generally accepted that at least certain policy outcomes can be considered just even when a large number of members disagree with the policy and are even negatively impacted by it. It is thus possible that a policy resulting in the exclusion of newcomers by birth against the wishes of the newcomers' parents might be just insofar as it was implemented through procedurally just channels. This possibility seems to be at least one of the things that must be true for the newcomer-by-birth objection to be successful. My goal in

this section is to argue why such a policy would be unjust—specifically in a way that does not apply generally to prospective immigrants. This will allow statist arguments to overcome the newcomer-by-birth objection without having to let go of their exclusionary policies vis-à-vis prospective immigrants.

Thinking about this version of the problem brings to mind Blake's discussion of what he calls "cases of *suspect distributive principles*."[23] Blake focuses here on the legitimacy of states favoring certain ethnic or racial groups in determining which prospective immigrants to admit into their societies. The conclusions he draws about this issue are rather helpful in the present context.

Blake argues that because prospective immigrants are not presently under the coercive legal authority of the state but rather are attempting to put themselves under such authority, it cannot be considered inherently unjust to treat them differently from individuals already under the state's authority. Arguments for equal political treatment, he maintains, only have purchase when the individuals being treated unequally each stand in the same relationship to the state. For example, prohibiting some American citizens from voting in American elections while allowing others to is impermissible, but prohibiting a Canadian citizen from voting in American elections is not impermissible.

The point of an example like this is to show that arguments for equal treatment in the domestic context do not necessarily apply in the context of admitting prospective immigrants, thus raising the issue of whether racist admissions criteria might be permissible even though racist domestic policies are obviously wrong. Blake grapples with how to articulate why such admissions criteria are wrong, despite having just demonstrated that one cannot merely parrot arguments offered in the domestic context. He holds that race-based immigration policies are "of moral importance … more for what it says to those already present than for what it says to prospective immigrants.… The state making a statement of racial preference in immigration necessarily makes a statement of racial preference domestically as well."[24] And such statements are wrong because they, at a minimum, violate the political equality of at least citizens of the disfavored race because they make "some citizens politically inferior to others."[25]

Racially preferential immigration policies are wrong, not necessarily because they objectionably harm the prospective immigrants who are the policies' ostensible target, but because they objectionably harm current members of the state. They harm current members because they, intentionally or not, have the effect of politically marginalizing at least current members who happen to be of the

23 Blake, "Discretionary Immigration," 275 (emphasis added).

24 Blake, "Discretionary Immigration," 284.

25 Blake, "Immigration," 233.

disfavored race, if not all members who happen to be minorities, treating those members as second-class citizens.[26] So even when policies are meant to apply only to nonmembers, the effects those policies have on members can make a normative difference. Considering the impact certain policies directed toward nonmembers will have on current members helps us to understand why it will be wrong for a state to exclude newcomers by birth, at least if the families of such newcomers by birth do not consent to such exclusion.

In crafting his statist argument from imposed obligations, Blake acknowledges that a limit to it is when there is an "existing obligation to acquire … new obligations," and that the right, for example, to procreate "is more central than my right to avoid unwanted obligations."[27] To be clear, Blake is not addressing directly the newcomer-by-birth objection here, which Brezger and Cassee appear to assume.[28] Rather, this procreation example is offered as a way for Blake to explain why and how his argument is merely presumptive by contrasting the obligations that immigrants impose with a rather less demanding obligation to act in certain ways vis-à-vis a friend's new child—e.g., being willing to babysit, buy birthday presents, etc. The point for Blake is to show that his argument from imposed obligations does not prove too much: I cannot inhibit my friend's right to procreate by appeal to my own right to refuse trivial obligations to act in certain ways with respect to my friend's child. The right to procreate is so important that it imposes on me a presumptive obligation to acquire new obligations when friends or other loved ones procreate.[29]

The reason, relevant to our present purposes, Blake insists that one's right to procreate is more central than another's right to refuse unwanted obligations is that procreation is important to one's ability to pursue one's conception of a good life. Family is taken by most of us as fundamental to our happiness or well-being, and so our ability to flourish and exercise autonomy in a way meaningful to many of us depends on our ability to create and raise our own families.

26 Blake, "Immigration," 233. It should be noted that Wellman adopts this position for his own argument. See Cole and Wellman, *Debating the Ethics of Immigration*, 137–41. Pevnick takes a similar line as well. See his *Immigration and the Constraints of Justice*, 139. I do not mean to fully endorse Blake's view here. Although I think Blake is surely correct to argue that such policies objectionably harm certain current members, there must be more to the story of why such policies are wrong. David Miller, for instance, thinks Blake's argument puts the moral emphasis in the wrong place by not focusing on the direct targets of the racist policies. See Miller, *Strangers in Our Midst*, 104.

27 Blake, "Immigration, Jurisdiction, and Exclusion," 119.

28 Brezger and Cassee "Debate," 374–75.

29 For a recent argument that, nevertheless, Blake's argument proves too much, see Hidalgo, "Immigration Restrictions and the Right to Avoid Unwanted Obligations."

Additionally, the obligations that are imposed on others when one has, adds to, and raises a family are comparatively undemanding. Implied by this is that one's right to procreate is more central than a state's interest in enacting certain exclusionary policies when the two conflict, which would be the case when the state desires to exclude newcomers by birth without the consent of the newcomers' parents.[30] This is to say that it is incumbent upon states to protect their members' rights to procreate and raise families. States are therefore under a presumptive "existing obligation to acquire … new obligations" with respect to current members' families, including their newcomers by birth. Violating this obligation would constitute an objectionable harm to such members and their families.

We can now present a case that newcomers by birth cannot be excluded, at least without the consent of their parents, for state exclusion of newcomers by birth would constitute a genuine harm to those newcomers' parents. If one's interest in raising a family is central to one's conception of a good life, and pursuing that interest is not disproportionately burdensome to others, then one's state coercively frustrating that interest is presumptively wrong insofar as it constitutes an objectionable harm. A state's right to exclude nonmembers is constrained when that right conflicts with its members' more central right to procreate and raise families. This constraint is similar to the constraint that statist arguments already acknowledge with respect to statelessness: just as the harms created by statelessness are weighty enough to override the state's otherwise presumptive right to exclude outsiders when the two conflict, the harms created by excluding members' newcomers by birth without those members' consent are weighty enough to override the state's otherwise presumptive right to exclude outsiders when the two conflict. Two aspects of this are noteworthy: first, the wrong of excluding such newcomers by birth is grounded in the harm it does to current members, not the newcomers themselves; second, this kind of argument is therefore not standardly available to prospective immigrants. Thus statist arguments can indeed account for differential treatment between newcomers by birth and prospective immigrants, *contra* the newcomer-by-birth objection. But this line of argument assumes a lack of consent from the parents of the newcomers by birth that would otherwise be excluded by the state. Consent of the parents alters our assessment.

30 I set aside theoretically conceivable circumstances, such as severe overpopulation, under which one's right to procreate might in fact impose objectionably onerous obligations on others.

IV

How should we understand the permissibility of states to exclude newcomers by birth when the state secures the consent of the parents of the newcomers by birth to be excluded? This seems like a clear case of the newcomer-by-birth objection succeeding against statist arguments, and I concede that it is. My argument in the previous section located the wrong of excluding newcomers by birth in the harm it does to the parents of those newcomers. If they offer genuine consent, though, it would seem they are affirming that the exclusion of their newcomers by birth does not constitute an objectionable harm to them, and is thus permissible. And whereas I argued in the previous section that, in the context of parents not consenting, the permissibility of the newcomer-by-birth exclusion is not entailed by statist arguments, I acknowledge in the present context of genuine parental consent that the permissibility of the newcomer-by-birth exclusion *is* entailed by statist arguments. The question, then, becomes whether this entailment should be viewed as unacceptable, as the newcomer-by-birth objection apparently insists.

Assuming protections against statelessness are in place, it is difficult to identify any objectionable harms being imposed on the excluded newcomers by birth. An obvious skeptical response might be that the excluded newcomers by birth are wronged by being denied the opportunity to live with and be raised by their biological families, given that I defended the central importance of family in the previous section. To see why this response fails, compare excluded newcomers by birth to children involved in international adoptions.

Though typically adoptions suggest unfortunate circumstances, at least for the families or individuals relinquishing rights to their children, that fact is not indicative of anything unjust occurring when adoptions take place. Indeed, often adoption constitutes the best possible outcome of a nonideal situation, and commonsense morality affirms that adoptions are not inherently morally problematic. Going beyond the mere defensibility of adoption, though, some might argue that adoption may even be morally better than procreation, because most reasons in favor of procreation tend to be self-referential—"i.e. they locate the value of having a biological child in the child's connection to one's own body or genes" rather than in the other-concern demonstrated in cases of adoption.[31]

The need for adoption could arise for many reasons. Irrespective of how the need arises, adopting a child typically constitutes an opportunity to meet, well beyond a minimum acceptable threshold, a basic need that the child has—the need for a caring and loving family—and that this need is being met by strangers

31 Rulli, "The Unique Value of Adoption," 110.

is taken to be a good thing. That is to say that adoption should not be seen as morally problematic, regardless of why a given adoption occurs. We may want to criticize the parents of the adopted child, especially if they are simply unwilling to take care of the child, but it is not clear that even then we ought to call such cases a miscarriage of justice.[32] As such it would seem inappropriate to insist that children have a basic right to be cared for adequately by specific persons (namely, their biological families). What is more appropriate is to insist that children have a right simply to be cared for adequately. If the need could only be adequately met by biological families, then presumably our attitudes toward the permissibility of institutional and foster care, as well as adoption, would be more condemnatory. That this is not the case speaks both to the fact that a child does not necessarily have a right to be raised by any family in particular, as well as the fact that strangers are capable of meeting children's basic needs, even strangers who live in different states. Hence the widely, and I think correctly, accepted permissibility of adoption, to include international adoption.

The case of an international adoption seems nearly identical to the case of a newcomer by birth being excluded with the consent of the parents. An international adoption amounts to a family or individual, unwilling or unable to fulfill the obligations the child would impose, transferring those obligations to another willing party in a different state. This transfer is permissible in part because the right secured by fulfillment of the obligation is a general right to be cared for adequately, and not a right to the care of particular individuals. Assuming again that protections against statelessness are in place, exclusion of newcomers by birth with the consent of the parents similarly amounts to a permissible transfer of obligations regarding the excluded newcomer. If, as I think is true, we have no reason to object to standard international adoptions, then we have no reason to object to the newcomer-by-birth objection holding only in the context of consenting parents of the newcomers to be excluded.

Such cases would presumably be quite rare. Moreover, the force of the newcomer-by-birth objection seems meant to come from the fact that it allegedly demonstrates that it holds generally, especially and most problematically when the parents of these newcomers would object to such exclusion. But consideration of both kinds of cases is important if we wish to examine fully the ramifi-

32 If it were unjust, of course, statist arguments would be able to avoid the newcomer-by-birth objection under these circumstances because parents could not permissibly consent to the exclusion of their newcomers by birth. I set this possibility aside for the sake of argument because I think statist arguments still have an adequate reply available to them.

cations and force of the newcomer-by-birth objection, and such consideration bolsters the notion that the objection fails to retain much force in any case.[33]

V

The newcomer-by-birth objection, meant to undermine statist arguments for a state's right to restrict immigration, does not apply in most cases. Assuming that the families of those newcomers by birth whom a state might wish to exclude do not consent to such exclusion, the objection fails because of the objectionable harms it inflicts on current members of the state—namely the newcomers' parents. But the objection does not fail to apply entirely. If the families do consent to the exclusion of their newcomers by birth, rare as this may be, then statist arguments would entail the right of a state to engage in such exclusion. This might seem to some an unacceptable entailment of statist arguments, and thus a means to show that statist arguments prove too much. However, this does not present a serious challenge to statist arguments: such cases are morally akin to international adoptions, to which we do not have reason to object. In the end, then, statist arguments easily survive the newcomer-by-birth objection.[34]

United States Military Academy
thomas.carnes@usma.edu

33 An anonymous reviewer has suggested that my argument in this paper might imply that members have a right to family reunification when the members' children (and perhaps other relatives as well) are foreigners. My view is that it ultimately depends on things like the nature and terms of the members' membership status (for not all members are full, permanent members), as well as the particular relatives with whom members may wish to reunite (my claim to reunite with my child will likely be stronger than my claim to reunite with, e.g., my adult brother). The reason it depends is my argument demonstrates not only that the fundamental rights of members limit the exclusionary policies a state may permissibly implement when those policies conflict with members' rights, but also that members can behave in ways that serve to waive the very rights that would limit the state's policies. This means that to answer the question of a right to reunification, we must discern whether the individual asserting a right to reunification has done anything to consent to being separated from relatives. Individuals who have gained membership rights as temporary workers or students, for example, might not have a right to reunification even with their children if they immigrated with full knowledge that their stays would be temporary. The right could emerge, however, if the state opts to grant temporary members permanent residency. Although I cannot pursue this in detail here, I do think that my argument (1) provides tools to help us determine the legitimacy of a member's assertion of a right to family reunification, and (2) most certainly implies such a right in at least some cases.

34 I would like to thank Courtney Morris for very helpful comments on a previous draft of this paper.

REFERENCES

Blake, Michael. "Discretionary Immigration." *Philosophical Topics* 30, no. 2 (Fall 2002): 273–89.

———. "Immigration." In *A Companion to Applied Ethics*, edited by R. G. Frey and Christopher Heath Wellman, 224–37. Malden, MA: Blackwell Publishing, 2003.

———. "Immigration, Jurisdiction, and Exclusion." *Philosophy and Public Affairs* 41, no. 2 (Spring 2013): 103–30.

Brezger, Jan, and Andreas Cassee. "Debate: Immigrants and Newcomers by Birth—Do Statist Arguments Imply a Right to Exclude Both?" *Journal of Political Philosophy* 24, no. 3 (September 2016): 367–78.

Carens, Joseph H. "In Defense of Birthright Citizenship." In *Migration in Political Theory: The Ethics of Movement and Membership*, edited by Sarah Fine and Lea Ypi, 205–24. Oxford: Oxford University Press, 2016.

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

Cox, Adam B. "Three Mistakes in Open Borders Debates." In *NOMOS LVII: Immigration, Emigration, and Migration*, edited by Jack Knight, 51–68. New York: New York University Press, 2017.

Fine, Sarah. "Freedom of Association Is Not the Answer." *Ethics* 120, no. 2 (January 2010): 338–56.

Hidalgo, Javier. "Immigration Restrictions and the Right to Avoid Unwanted Obligations." *Journal of Ethics and Social Philosophy* (August 2014): 1–8.

———. "Self-Determination, Immigration Restrictions, and the Problem of Compatriot Deportation." *Journal of International Political Theory* 10, no. 3 (2014): 261–82.

Miller, David. *Strangers in Our Midst: The Political Philosophy of Immigration*. Cambridge, MA: Harvard University Press, 2016.

Pevnick, Ryan. *Immigration and the Constraints of Justice*. Cambridge: Cambridge University Press, 2011.

Rulli, Tina. "The Unique Value of Adoption." In *Family-Making: Contemporary Ethical Challenges*, edited by Francoise Baylis and Carolyn McLeod, 109–28. Oxford: Oxford University Press, 2014.

Shachar, Ayelet. *The Birthright Lottery*. Cambridge, MA: Harvard University Press, 2009.

Shuck, Peter, and Rogers M. Smith. *Citizenship without Consent: Illegal Aliens in the American Polity*. New Haven, CT: Yale University Press, 1985.

Stevens, Jacqueline. *States without Nations: Citizenship for Mortals*. New York: Columbia University Press, 2010.

Stilz, Anna. "Nations, States, and Territory." *Ethics* 121, no. 3 (April 2011): 572–601.

———. "Occupancy Rights and the Wrong of Removal." *Philosophy and Public Affairs* 41, no. 4 (Fall 2013): 324–56.

Watson, Lori. "Equal Justice: Comment on Michael Blake's 'Immigration and Political Equality.'" *San Diego Law Review* 45, no. 4 (November–December 2008): 981–88.

Wellman, Christopher Heath. "Immigration and Freedom of Association." *Ethics* 119, no. 1 (October 2008): 109–41.

Wilcox, Shelley. Review of *Immigration and the Constraints of Justice: Between Open Borders and Absolute Sovereignty*, by Ryan Pevnick. *Ethics* 122, no. 3 (April 2012): 617–22.