Selecting immigrants: discrimination and the right to exclude

Hallvard Sandven

Thesis presented for the degree of
MASTER IN PHILOSOPHY

Supervised by
Professor Robert Huseby, Department of Political Science

University of Oslo
Department of Philosophy, Classics, History of Art and Ideas

Spring 2016
Selecting immigrants: discrimination and the right to exclude

Hallvard Sandven
Selecting immigrants: discrimination and the right to exclude

Hallvard Sandven

http://www.duo.uio.no/

Trykk: Reprosentralen, Universitetet i Oslo
Abstract

This thesis looks at the practice of selecting immigrants according to selection criteria. In particular, I ask whether selecting immigrants on the basis of socially salient traits – race, ethnicity, religion, gender, and sexuality – is always morally objectionable. That states are disallowed to differentiate between would-be immigrants on such grounds might be thought to follow directly from a commitment to liberal-democratic values. I argue, however, that given the *conventional view on immigration* – the view that states are morally entitled to exercise considerable discretionary control over their admission of immigrants – an objection to such criteria of selection is not as close to hand as it may seem.

Throughout the thesis, I argue that states are indeed disallowed from employing socially salient traits as criteria of selection in immigration – except in one particular circumstance. I look at various answers given in the literature, arguing that they are insufficient to establish a strong objection to selection on the basis of socially salient traits. In the course of doing so, I also argue against different arguments for the conventional view, which would, if valid, legitimise some of these insufficient answers. I then present a case for when and why selecting according to socially salient traits is impermissible.

The discussion in this thesis has three aims: firstly, it aims to review and assess the different answers to the issue of selection criteria currently on offer in the literature. Secondly and more substantially, it aims to provide an argument for what makes selection according to such traits as skin colour, religion, and sexuality morally objectionable. Lastly, it aims to show that a commitment to this conclusion lays restrictions on the arguments available if one wants to defend a state’s right to exercise considerable discretionary control over their borders.
Acknowledgements

Firstly and primarily, I want to extend my thanks to my supervisor, Robert Huseby. Without his thoughtful comments and more than generous use of time, the contents of this thesis would have been much longer and far less interesting. I am also grateful to the Centre for the Study of Mind in Nature at IFIKK, who generously supported my work on this thesis by way of granting me a master’s stipend.

Further, several of my fellow-students are owed thanks for their commentary on various drafts and for discussion of the ideas presented in this thesis. These are: Conrad Bakka, Sindre Fjeldstad, Åsne Grøgaard, Eivor Mæland, Nadia Noorman, Maria Seim, and Robin Solberg. I also want to thank my parents, Inger and Tore, for commentary and proof-reading of the thesis in its last stages. And, lastly, I want to thank Agnes, who is kind.
Table of Contents
Selecting immigrants: discrimination and the right to exclude........................................ III

Abstract ........................................................................................................................................ V

Acknowledgements ................................................................................................................... VI

Introduction: Selecting immigrants: discrimination and the right to exclude.......................... 1

1. Immigration, selection, and liberal values ............................................................................. 6
   1.1 The conventional view on immigration ............................................................................ 6
   1.2 The claims made by would-be immigrants ...................................................................... 8
   1.3 Discrimination and socially salient traits ........................................................................ 12
   1.4 Further comments on methodology .............................................................................. 17

2. Exclusions and the interests of citizens ................................................................................. 20
   2.1 The social cohesion argument ....................................................................................... 20
   2.2 Walzer’s sphere of justice .............................................................................................. 24
      2.2.1 The distribution of membership .............................................................................. 24
      2.2.2 Walzer and White Australia .................................................................................. 29
      2.2.3 The sociological critique of Walzer ....................................................................... 33
   2.3 Conclusion....................................................................................................................... 35

3. Selection criteria and the rights of minority members ............................................................ 37
   3.1 Selection criteria and the rights of minority members ..................................................... 38
      3.1.1 The limitation of member rights .............................................................................. 40
   3.2 Against freedom of association ....................................................................................... 42
      3.2.1 Freedom of association and the right to exclude .................................................... 43
      3.2.2 Exclusion and harm to others ............................................................................... 44
      3.2.3 The problem of the distinctiveness of the state ....................................................... 48
   3.3 Conclusion: the need for the perspective of the excluded migrants ............................... 51

Chapter 4: Moral equality and the conventional view ................................................................. 53
   4.1 The appeal to liberal-democratic principles ................................................................. 53
   4.2 Moral equality and reasons for exclusion ..................................................................... 58
      4.2.1 Relevant reasons for exclusion .............................................................................. 60
      4.2.2 The limitation of relevant reasons ......................................................................... 63
      4.2.3 Reproductive reasons ............................................................................................. 64
4.3 Positive discrimination in immigration................................................................. 66
4.4 Conclusion: the relevance of social salience....................................................... 67
Bibliography............................................................................................................. 69
Introduction: Selecting immigrants: discrimination and the right to exclude

Two undisputable facts about the current global order is that the world’s territory is divided into states, and that these states claim a right to control the flow of people who move across their borders, settle on their territory, and become members of their political communities. This right is so ingrained in popular discourse on immigration that it might appear to be a constitutive part of the concept of a state: As immigration remains one of the most hotly debated topics in modern liberal democracies, virtually all debate rests on the assumption that states hold a right to set their own immigration policy in their own terms. This entails that it is up to the states – and, ultimately, to their citizens – to decide on issues like how many refugees they wish to receive and grant asylum, what conditions are to be set for newcomers that seek to become citizens, and which groups of individuals may enter the state as economic immigrants. A crucial assumption that underlies the debates surrounding these issues is that the state is taken to have a right not to admit anyone. Even in the case of refugees fleeing their homes due to well-founded fear for their lives, this seems to hold: Governments, political parties and politicians that refuse to accept vulnerable groups of migrants are deemed by many to be ungenerous or selfish, but almost nobody suggests that they are advertising policies that the state is not within its judicial right to enforce.

Against this background, one might expect a case for the normative grounding of this right to exclude to be close to hand. However, upon inspection, no obvious case presents itself – at least not from a liberal-democratic perspective. Thus, there has been a substantial debate in political philosophy about what, if anything, can ground this right to exclude. What is at stake here is not trivial: Another fact about the current global order is that the world’s different states are characterised by severely different living conditions. As such, moving from one state to another may significantly impact a person’s prospect of living a rich and fulfilling life. Further and crucially, this move cannot just be done: If the state of one’s choosing decides not to grant one’s claim for admittance, then one is removed by means of force. Thus, Joseph Carens, in one of the first and seminal texts in the debate, writes:

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 privilege, restrictive citizenship is hard to justify when one thinks about it closely. (1987:252)
The central problem with defending the right to exclude from a liberal-democratic standpoint is that it seems to go against liberalism’s commitment to universalism and moral equality. In particular, it has been argued that coercive border control arbitrarily restricts freedom of movement: All state coercion must be justified and the coercion (or threat thereof) involved in immigration restrictions cannot be, since the would-be immigrants do not receive any of the goods that state has to offer. Further, the practice seems to let morally arbitrary factors, like the country in which one happens to be born, play a significant role in one’s chances and abilities to enjoy an autonomous life. Thus, some philosophers have argued that the practice of coercive border control ought to be rejected and open borders ought to be defended (Carens, 1987, 2013; Cole, 2000; Wellman and Cole, 2011. See also Dummett, 2001 and Kukathas, 2005). Relatedly, others have argued that commitments to democratic principles are in tension with border control, since “the demos of democratic theory is in principle unbounded” and, therefore, the act of exclusion is unjustified since liberal states must represent all those over whom they exercise coercion (Abizadeh, 2008:37).

Against these arguments for open borders, there have been developed several lines of defence for the state’s right to exclude. Some have argued for this right on the basis of the normative value of national culture (Miller, 2005, 2007), others on the basis of collective ownership of state institutions (Pevnick, 2011), some hold that the right can be located in the particular legal relationship in which the state stands to its citizens (Blake, 2013), and others still have invoked the right to self-determination to argue that a necessary component of this concept is a right to control who constitutes that “self” (Walzer, 1983; Wellman, 2008; Wellman and Cole, 2011).

What is being discussed in this debate is, in short, the claim that states have a right to control their borders. However, as most of the theorists of immigration recognise,¹ the issue of justice in immigration is by no means exhausted by the question how, if at all, states can be said to have a right to exclude. One may, like Michael Blake, hold that the state holds a right to exclude, but that this right “cannot justify anything like the exclusionary practices undertaken by modern wealthy states” (2013:104). In order to appreciate this, we ought to draw a distinction between the legitimacy of an immigration policy – holding the right to exercise border control – and the justice of that policy (Miller, 2015:392): legitimacy is a necessary, but insufficient condition for justice in immigration. As such, there are many issues clearly relevant from the perspective of justice that arise when people move, or attempt to do...
so, from one state to another. These include questions like: how states ought to respond to refugees and who should count as a refugee; what to do about irregular migrants (people who are living on the states’ territory without official permission); when – and for how long and under what conditions – it is appropriate to host temporary workers; how to treat people with some special claim, perhaps in view of a state’s colonial past, to being admitted as an immigrant; whether states, due to considerations of brain-drain, ought to deny entry to some migrants (or even restrict emigration); and, the topic of this thesis, how states may choose between those who seek admittance.

These questions remain crucial no matter what stance one takes regarding the state’s (alleged) right to exclude. If one holds that the state is entitled to control its own borders, reflection on these issues may help us specify how this right ought to be restricted in order to be carried out justly. However, even defenders of open borders – who hold that border controls are inherently unjust – have good reason for reflecting upon these issues. The most important of these falls out of the discussion above: The academic tendency to treat coercive border control with suspicion, let alone to advocate open borders, stands in stark contrast with our political reality. Therefore, debates on the topic of how states ought to carry out their claimed right to exclude may, at least, provide conclusions that apply directly to the institutions that, at least for now, seem to be firm fixtures of the world we inhabit. Since the questions concerning how the right to exclude ought to be carried out, in a sense, follow from the question of the right to enforce border control, this prior question might seem the most appealing to the philosopher who wants to tackle the question about immigration (Carens, 2013:12). However, the need to tackle these following questions philosophically, to locate the principles of justice that constrain them, should not be understated: The policies over which these principles govern affect real people, whose lives and interests matter.

***

This thesis looks at the practice of admitting immigrants according to criteria of selection, a central aspect of the right states claim to set their immigration policies in their own terms. I ask what principles govern this practice and in particular how, on the assumption that states have some right to exclude, we can formulate an objection to policies that pick out traits that liberalism typically holds to be arbitrary from a moral point of view: race, ethnicity, religion, sexuality and gender.
This focus might seem odd: In the midst of the widespread disagreement in the philosophical literature on immigration, most\(^2\) theorists agree that if coercive border control is going to take place—regardless of whether that control is justified or not—then it is impermissible for states to selectively choose immigrants according to these traits. One might object that a commitment to moral equality clearly disallows selecting immigrants according to the colour of their skin: Doing so would amount to wrongful discrimination, and thus go against our liberal-democratic values. On this particular point, even most (mainstream) public discourse about immigration seems to be in agreement. Whilst the right to choose immigrants according to criteria such as language abilities, professional skills and education, age, and financial status is actively advocated through most western state’s immigration policies,\(^3\) suggestions that states ought to select immigrants according to skin colour or religion are widely condemned—at least in public discourse.

In the context of the presumed right to exclude, however, it is not clear how this restriction is to be consistently formulated. After all, why should the state, when it could legitimately choose not to admit anyone, be disallowed from selecting according to whatever criteria its citizens collectively decide? Accordingly, in spite of the wide agreement in the literature that exclusions based on traits such as race or sexuality are objectionable—even “antithetical to liberal egalitarianism” (Blake, 2013:105)—there is no such agreement as to why states are disallowed from excluding on such grounds.

One weighty reason for this discrepancy between the almost unanimous agreement that selection on the basis of traits like race or sexuality is morally impermissible, on the one hand, and the state of disagreement with regards to why it is impermissible, on the other, is that many theorists have developed views about the moral legitimacy of coercive border control, and develop their theory of selection criteria accordingly (Fine, 2016). Thus, this thesis aims, firstly, to review and assess the different answers to the issue of selection criteria currently on offer in the literature. Secondly, it aims to show that states are, indeed, disallowed from employing criteria of selection that pick out this group of “socially salient” traits, with one notable exception. I argue that certain forms of discrimination in immigration do constitute a moral wrong, and that a defence of the right to exclude must be able to account

\(^2\) Though, as we shall see, not all.

\(^3\) The perhaps most clear-cut examples of this is the points-based system, first adopted in Canada, but now also practiced in Australia, the UK and the US. On this system, migrants are given points based on the extent to which they satisfy each of the mentioned criteria (these points are weighted differently in each state); only migrants that pass a certain threshold of overall points are eligible for immigration (See Government of Canada, 2016; BBC News, 2014).
for this wrong. Given the right to exclude, merely pointing out that an immigration policy is discriminatory does not sufficiently account for why we ought to object to it – even when the discrimination is based on traits that liberalism normally labels “morally arbitrary”.

I do not provide an account of a defence that meets this demand, but offer instead an account of exactly what makes these forms of selection wrong. Thus, the argument in this thesis has a third aim: To lay restrictions on the sorts of defences available to those who want to defend states’ right to set their own immigration policy in their own terms. This right, whether it can be justified or merely remain claimed, is nevertheless restricted by principles of justice.
1. Immigration, selection, and liberal values

In this chapter, I outline the issue of wrongful discrimination and the right to exclude. I do this, firstly, by spelling out some terminology that will enable us to locate and address the problem: I give an account of what I will label the conventional moral view on immigration; of the different types of would-be immigrants states may have to decide whether to admit or not; and of what I will label socially salient traits and liberalism’s commitment to holding these to be arbitrary from the moral point of view. I then move on to formulate the central problem of this thesis: how, on the conventional view, we might have difficulties explaining why choosing according to socially salient traits in immigration selection constitutes an injustice. In the next part of the chapter, I make some further methodological remarks, and justify the decision to carry out the entire discussion of this thesis from a major stipulated premise, namely, the conventional view.

1.1 The conventional view on immigration

There are many questions about immigration that are clearly relevant from the perspective of justice, but which, in a sense, rely on the question of whether there can be established a conclusive case for the right to exclude. The question of selection criteria falls clearly within this category: If the argument for open borders holds, then it follows that any selection of would-be immigrants is unjust, since the resulting exclusions of those who do not fulfil the criteria are unjustified. In order to discuss the issue of selection criteria, therefore, I will develop my argument by stipulating what Joseph Carens has labelled the conventional moral view on immigration. This view presupposes i) “the contemporary international order which divides the world into independent states with vast differences of freedom, security, and economic opportunity among them”, and holds ii) “that despite these vast differences between states, each state is morally entitled to exercise considerable discretionary control over the admission of immigrants” (Carens, 2013:10). It is important to note that the conventional view, actually involves three distinct rights: i) a right to exclude others from the state’s territory, ii) a right to exclude others from settling within that territory, and iii) a right to exclude others from membership of the political community (a right not to extend citizenship).

---

4 I will have more to say about this methodological decision, and its implications in 1.2 below.
(Fine, 2013:255). These rights are importantly different, and – as we shall see – arguments in the favour of one may not always secure either of the other two.

Having stipulated this major premise, I will proceed throughout this thesis to ask how extensive this moral entitlement – or right – to exercise discretionary control over the admission of immigrants can be said to be with regards to how states select their immigrants, once they have decided to admit some. Throughout this thesis, I will be talking interchangeably about selecting immigrants, excluding would-be immigrants and the employment of various criteria of selection. This requires some clarification. In my discussion, I assume that criteria of selection, set by states when selecting immigrants, are inherently exclusionary: If competence in a certain language is a criterion of selection, then being incompetent at speaking that language serves as a criterion of exclusion. This exclusionary component of criteria of selection is perhaps even clearer in the cases I will be most concerned with in this thesis – selecting according to traits such as race, gender and religion. It is important to point out, however, that there is another sense in which we may discuss criteria of exclusion. These are criteria that actively pick out persons who are unfit for immigration – either because of their threat to national security or because they stand in danger of causing severely negative effects on public health (e.g., through the spreading of contagious disease). I do not discuss such criteria of exclusion, but following Joseph Carens’ discussion, I take it that states, on the conventional view, are allowed to employ certain criteria of exclusion referencing public safety (2013:174–179). In order for these restrictions to be legitimate, the state must be able show evidence that individuals actually pose such threat.

One may, at first, think that the question of selection criteria is unproblematic – or rather a non-issue. If the state holds a right to exclude outsiders, one might hold, it may exercise that right in whatever manner – so long as the decision follows from legitimate democratic processes. Therefore, one might hold, selecting immigrants may be done according to whatever criteria the state sees fit. This sort of response is, of course, implausible as it stands. As we noted in the introduction, there is a distinction between holding a right to sovereignty and the claim that this right may be carried out unrestrictedly (Miller, 2015:392). This is something we already recognise in a wide variety of cases: Although we accept that legitimate states hold a large bundle of sovereign rights, we also recognise many restrictions on these rights. For example, we are comfortable in holding that a state has outstepped its sovereign rights if it chooses to annex another country’s territory, if its government decides to
cancel elections and impose martial law, if it enforces legislation that systematically
disfavours a group of its population, or if it restricts internal freedom of movement or the
possibility of exit. That they hold sovereign rights does not mean that states are allowed to
carry out those rights in any manner they like (see Pevnick, 2011:10). Therefore, it does not
obviously follow from the conventional view that states ought to enjoy the right to choose
their immigrants according to whatever criteria they see fit.

1.2 The claims made by would-be immigrants
In undertaking the task of interrogating the presumed right to exclude, to see which moral
principles it is restricted by, we must be aware of the particular theoretical challenges
immigration poses for theories of justice. As has been noted by many commentators (e.g.
Bauböck, 2012; Blake, 2003; Lane, 2006), enquiries about immigration and justice are
particular in that they extend beyond the realm of what liberal theories of justice have
typically been concerned with: “to figure out what principles could justify political power to
all those who live within the society such political power creates” (Blake, 2003:225). In our
present context, we are interested in the principles that justify political power to those who do
not live within that society. However, we are not – like in the debate about global distributive
justice – primarily interested in what states owe to all non-members, wherever they live;
rather, we are interested in the question of how states may legitimately act towards those non-
members who seek admittance, that is, towards would-be immigrants. It is, therefore, essential
to explicate exactly what claims migrants make when they seek to be admitted to a state, to
see what is morally at stake when states exercise coercive border control. As such, one may
usefully call liberal theories that support the conventional view “relational” theories of
immigration, since they stress the relationship between the would-be immigrants and the state
they wish to enter (Amighetti and Nuti, forthcoming: 3).

Following David Miller (2015; forthcoming), we may hold there to be three broad
categories of would-be immigrants, all of whom make different claims on the state. These are:
Refugees, whose claim for admittance is based on their basic human rights not being upheld in
their current state of residence; Particularity claimants, whose claim is based on a particular

---

5 Alternatively, consider this case given by Michael Blake: a state does not have an obligation to provide a good
like a new car to its citizens. However, if it still chooses to procure that good, it is clearly disallowed from only
giving out new cars to one group of people, in Blake’s example, white people (2008:970).
relationship between themselves and the state they are trying to enter; and economic migrants, who base their claim on their interests being served by living in the state in question.

Before we move on to consider each of these groups in more detail, it is important to reconsider the factual premise that grounds the conventional view: That the world is divided into territories governed by states. Due to this fact, it is impossible for anyone who, for whatever reason, wants to leave their state of residence to do so without having been granted admittance elsewhere. One cannot “just” leave. Therefore, there is a sense in which the human right to exit we all – normatively and under international law – enjoy is practically dependent, rather than universally enforceable. We may all agree that states clearly act beyond the scope of their sovereign rights if they actively restrict their citizens in leaving the state, but the right to leave can only be exercised in practice where another state is willing and able to admit the person in question (Fine, 2013:256).

In this context there is a particular group of migrants that present themselves as having a particularly pressing claim against other states: refugees. Refugees are by definition persons whose states fail to grant them the special concern they are owed. Under international law, a refugee is defined as a person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such a fear, is unwilling to avail himself of the protection of that country" (UN, 2010). I will, following arguments made by Shacknove (1985), assume for the sake of the present argument that the term “refugee” is defined in a wider sense, so that it includes a) people to whom all of the above criteria, except their being outside of their country of origin, apply (so called “internally displaced persons”), and b) people who are forced to leave their country of origin because of environmental conditions, like natural disasters, drought, etc. (so called “environmental refugees”). My reason for making this assumption is that it allows us to see that a refugee’s claim for admittance to a state is based on her human rights currently being under threat (Miller, 2015:395).

Indeed, Phillip Cole argues on the background of this factual premise that a commitment to the right to leave – which is essential to freedom of movement – entails a symmetrical right to enter another state: “Therefore if the moral right of emigration does amount to or entail the right to leave one’s state, the charge of incoherence is successful. There can be no such right without a corresponding right to enter another state” (2000:56).
There is a vast literature on normative issues relating to refugees, but what is important for our present purposes is the particular normative claim refugees hold against states. This claim, whilst morally pressing, is also limited. To see this, consider how the claims of the refugee are generated by her being in urgent need; this puts states under a collective obligation to assist the refugee so that their human rights are no longer threatened, but this does not entail that whichever state fulfils that obligation must also extend membership to them. This is partly because the claim the refugee holds against the state is limited in terms of time: it ceases to exist when the danger passes (Miller, 2015:395). Notice also that the claim of the refugee is impersonal. This is significant because it underlines the limitation of the refugee’s claim: If another country were to take responsibility for the refugee or their circumstances were to change, the state would no longer hold an obligation towards them. Thus, that migrant would not – in the absence of another claim – be in a position to insist that they be admitted to the state of their choosing. The claim of the refugee, therefore, is dependent on the condition of urgent need and not the nature of the relationship between her and a particular state.

The next category of migrants includes those who do hold a specific claim against a particular state. Particularity claimants thus ground their claim for admittance in a previously existing relationship, of reparation or desert, between them and the state they seek to enter (Miller, 2015:401). The logic behind the first of these claims is that the state in question has inflicted some harm onto the claimant, and that this injustice can be (at least partly) rectified by the migrant being granted membership. Such claim-generating harm can, for example, be a colonial past or – leaving aside issues of establishing responsibility for what pollution has contributed to particular harms – environmental damage caused by the receiving state. The rectification involved in retribution-based immigration can, of course, be fulfilled in other ways, and therefore the existence of a historical injustice does not grant one a free-pass into the particular state. However, the relationship of past injustice does establish a particular bond between the state and the would-be immigrant, and that bond is morally significant.

The other form of claim particularity claimants may make towards a state is one of desert. In explicating this claim, Miller points to the rule in the French Foreign Legion that

---

7 This literature discusses, amongst other things, how we should define a refugee; how states should distribute refugees amongst them; when it is appropriate to extend membership to refugees. For discussions and overview, see Gibney (2004).

8 Thus, there is a sense in which holding refugees to have some special case for admittance presupposes the conventional view, since one defines a case – of urgent need – that is to be an exception to the general rule of border control (Carens, 2013:194).
anyone that has served the legion for three years or more are thereby directly entitled to apply
for French citizenship (2015:403). The essential part of the claim is that one has made a
significant contribution or been of particular assistance to the political community one seeks
to enter. So, the claim for admittance particularity claimants make is generated by the
existence of some past event – whether of injustice on the part of the state or effort on the part
of the migrant – and it is in relation to that event the claim is being granted. In both cases the
state somehow owes the would-be immigrant particular consideration and it is this concern
that gives their claim weight.9

The last group, economic migrants, is characterised by their neither fulfilling any
condition of being in urgent need nor having a particular claim of rectification or desert
against a particular state. Their claim, therefore, does not hold anything more than the
admittance being in their interest: They could stay in their current state of residence without
any danger to themselves or their family, but they have an interest in moving due to the
prospects this involves, whether these are economic, religious, or cultural (Miller, 2015:398).
It is important to note that the threshold employed here is one of the ability to lead a
minimally decent life; so there still exist vast differences amongst the different migrants in
this group, and between the migrants and the states they seek to enter.

Miller’s division of groups of immigrants is useful for our purposes of investigating
the moral restrictions on selection criteria, in that it allows us to see that there are relative
strengths in the claims migrants make on states: A person who qualifies as a particularity
claimant has a stronger claim for entry than someone who does not, and amongst refugees, a
state may be obligated to prioritise those who also qualify as particularity claimants. States
may wish to invoke selection criteria in their admittance of either of these categories of
migrants. However, in the case of refugees and particularity claimants, there are
considerations that need to be made when evaluating if they should be allowed to do so at all.
For example, in the case of the latter, if a state were to start selecting particularity claimants
by criteria, they would need to justify that their obligations to those who failed to meet those
criteria – and who were thereby excluded – was sufficiently met in another way. And in the
case of refugees, many would take it to be morally dubious at best if a state agreed to meet its

9 One may be tempted to extend the notion of particularity claimants to include family of persons who are
already citizens of the relevant state, and thus argue that family reunification claims have the same logic has
particularity claims. However, family reunification claims are typically made by reference to the rights of
citizens to have their family close by, rather than the rights of the would-be immigrants. If you are a citizen of a
state, you are owed a right to family life and might thus claim entry for your family; your family, on the other
hand, is not owed a right to enter simply by virtue of your citizenship (Carens, 2013:186; Miller, 2015:401. See
also Lister, 2010).
humanitarian duties only if the refugees in question fulfilled certain criteria – although it has been suggested that this practice is defensible if the state plans to go beyond their moral duty to offer asylum and extend membership to the refugees chosen (Miller, 2015:397).

This suggests that, in order to interrogate the principles that govern the practice of selection according to criteria as clearly as possible, we ought to focus our discussion on economic migrants. Since this group holds no claim towards the state, except a stated interest in admittance, it is only towards economic migrants states may exercise their full right to exclude. In order to locate the minimal restrictions of this right, therefore, we should ask how states may act towards economic migrants seeking admittance. To be clear: Whatever restrictions on the right to exclude as regards this group will, of course, also be valid for the other two. (However, those restrictions that are valid for any of the other two may not be valid for economic migrants). The focus on economic migrants is, thus, a methodological decision, enabling us to strip away the additional moral concerns that govern the relationships between states, and refugees and particularity claimants.

1.3 Discrimination and socially salient traits

We ought now to proceed to spelling out exactly what is at stake when states select economic migrants. Having restricted our focus to this group of would-be immigrants, one might be led to think that states may employ whatever criteria they see fit when choosing whom to admit from this group: Again, these migrants hold no claim to admittance and the state is, therefore, fully within its right not to admit anyone from this group. This seems to be the response with regards to selection according to economic potential. As Ayelet Shachar’s interesting work shows, the increasingly restrictive border regimes of Western states are at the same time becoming more open to the world’s “best and brightest”, who are – due to their promise to these states’ economies – granted easy access and acquisitions of citizenship (2008; 2016).

Here, we may agree that it is unfortunate that we live in a world with vast differences in material wealth and, further, that it is unfortunate that these differences massively influence one’s prospects of moving between states, but still hold that – under the conventional view – such policies must (at least in general) be permissible.10 Joseph Carens thus writes:

---

10 Such considerations of global inequality amount to one form of argument one may employ for more open borders. However, these are less compelling than those based on the value of freedom of movement, since global inequalities may more efficiently be eradicated by other policies than open borders (Bauböck, 2012).
To be sure, the receiving country is not acting altruistically in adopting this sort of immigration policy. It is selecting immigrants on the basis of its perceived national interest. But since the country is morally free not to take any immigrants at all (...), the fact that it is guided by its own interests in its selection of some for admission cannot be a decisive objection. States are equally free to adopt a more generous policy, taking in those whom they judge to be in greatest need. That is an admirable cause, but it is not morally obligatory. (Carens, 2013: 183)

One important consideration to make here is the brain-drain thesis, which holds that states should be disallowed from selecting from their perceived interests whenever that involves picking out resourceful persons from developing states, thereby making the citizenry of that state worse off (Brock and Blake, 2015:2). About the brain-drain thesis we should note, firstly, that it is not an argument against selecting according to economic potential as such. It is an additional restriction, based on a factual premise about the results immigration policies have when they select certain individuals from certain countries as immigrants. Secondly, there is a great deal of debate surrounding the thesis, both in relation to the validity of its empirical premise, and with regards to whether this premise – if valid – can justify immigration restrictions (see Oberman, 2013). For our purposes, then, it suffices to note that if both the factual premise obtains and the normative conclusions can be derived from it, then states are restricted in choosing according to their perceived interests whenever their doing so would harm another nation. However, selection according to those interests remains unobjectionable in itself.

Economic interests are not the only standard states may employ when deciding whom they should admit as immigrants. They may appeal to their interests more broadly, for example by reference to national identity or culture. As such, a wide range of traits may be considered as relevant criteria of selection. The perhaps most striking in this case is language ability: States may favour would-be immigrants who speak their official language; the rationale plausibly being that language competence facilitates integration. We might here make a version of the same observations as we did with economic interests: Such a policy favours certain migrants over others – and many times it will favour those who are relatively well-off and can afford to learn a foreign language. Still, within the framework of the conventional view, this selection seems morally permissible. To deny that states are allowed to favour some migrants over others in this way would be a step towards rejecting the conventional view altogether.
The ability to speak the host language is not, however, the only thing states – and their citizens – mark out as relevant to their overall interests. In many debates about immigration, in particular those that invoke the social cohesion argument discussed below, it is argued that states ought to select immigrants according to their religion and ethnicity. And whilst they are less common in current public debates about immigration, most Western states have a rich history of selecting immigrants according to their skin colour and sexuality (Joppke, 2005; Carens, 2013:175). These traits, together with one’s gender, belong to a group with particular moral significance: In most domains we take discretionary selection on the basis of these traits to at least be in the need of substantive justification.

One explanation for why these traits – race, ethnicity, religion, sexuality, and gender – ought to be of particular interest when formulating a theory of just immigration, is that policies that select on the basis of these traits thereby pick out traits that are arbitrary from a moral point of view, and that it thus amounts to wrongful discrimination. This thought has its roots in Rawls, who writes about the system of natural liberty that its most obvious injustice is that it permits distributive shares to be improperly influenced by contingencies such as accident and good fortune, factors “so arbitrary from a moral point of view” (1999:63). According to Michael Blake this rejection of the relevance of contingent factors is the primary essential characteristic of liberalism: “No person or group of persons is to be arbitrarily excluded from the reach of liberal justice” (2003:225). This is why we object to stately institutions that favour people who happened to be born wealthy or those that favour the male gender, when these institutions have not been properly justified (e.g. through affirmative action).

The relevance to the topic of selection criteria is clear: Liberal justice demands that we do not give unequal weight to people due to arbitrary factors, and the primary examples of these are exactly traits like race, religion, and sexuality. A commitment to moral equality disallows factors like these having a significant impact on whether one is favoured or disfavoured by social institutions and a state’s immigration authorities is clearly such an institution. Further, the decision this institution makes with regards to one’s admittance is not trivial: It holds the potential to drastically change one’s future life.

I follow Lippert-Rasmussen in employing a value-neutral concept of discrimination – hence the specification of a wrongful discriminatory act. Discrimination, on this view, simply refers to the act of disadvantageous differential treatment (Lippert-Rasmussen, 2013:15). Discrimination in immigration policy is, to my knowledge, always discussed in a negative sense in the literature, that is, as potentially wrongful. For the most part of the thesis, I will therefore also discuss it in this way. However, one might imagine the employment of affirmative action policy, “positive discrimination”, in immigration selection. In the last chapter of this thesis, I look at the prospects of doing so.
In spite of its intuitive appeal, this explanation sits uneasily with the conventional view on immigration. An implication of the conventional view, which underlies its employment, is that states are justified in prioritising the interests of their citizens over those of non-members. If they were not, then they would not be justified in holding non-members out on the pure basis that they are non-members. Therefore, states are justified in discriminating on the basis of a factor that is quite clearly arbitrary: The country in which one happens to be born (Carens, 1987:252). Further, there is a clear sense in which the traits that determine one’s economic potential are arbitrary. In particular, one’s financial status is in most cases determined by factors over which one has no influence at all, the most important and crucial being to which family one is born. The conventional view thus already presupposes that states are justified in discriminating between individuals on the basis of some morally arbitrary factors. Holding traits like race and sexuality to be arbitrary from the moral point of view is not a sufficient explanation for why states are prohibited from selecting its immigrants on the basis of these traits.

We are, therefore, in need of a concept that better captures the particular nature of the group of traits that race, ethnicity, religion, sexuality, and gender compose. Following Kasper Lippert-Rasmussen’s discussion of group discrimination, I will refer to these traits as “socially salient” (2013:32). They can be labelled as such, because they are traits that, firstly, “structures social interactions in a wide range of contexts” and, secondly and for that reason, are likely to be central to the understanding of the holders’ sense of who they are (2013:32). Socially salient traits, then, are of a particular nature which renders them especially sensitive to the self-respect of the persons who hold them. Further, because of their particular histories – the reason why they structure social interaction in many contexts – these traits have a particular meaning. To use Lippert-Rasmussen’s own example of eye-colour: If a state were to select immigrants by way of criteria that excluded people with green eyes, that state would select their immigrants according to a criterion that seems completely arbitrary, but diminished self-respect would still not be “an automatic effect” on those excluded when told of this policy (2013:34). If the grounds for exclusion were based on religion or colour of skin, 12

12 Age and physical and mental disabilities also fit this definition of “social salience”. I leave them out of my discussion, however, because in the context of selective immigration, these may be counted as relevant to economic potential and may as such serve as legitimate grounds for selection. This is, of course, problematic, since it seemingly warrants a possible response where states claim to be employing legitimate criteria of exclusion, whilst systematically discriminating against these groups. Whilst a discussion of this clash between two concerns – morally legitimate criteria of selection and the socially salient traits age and disability – is vitally important, it remains beyond the scope of this thesis. I will note, however, that age and disability do seem distinct from the other socially salient traits in that they at least can be relevant from an economic perspective.
then presumably this would be different. Socially salient traits, therefore, may be described as 
particularly prone to harm the holder.

I have chosen to employ the concept of socially salient traits because it captures the 
nature of those traits we are after better than other competing concepts. For example, 
Christian Joppke employs in his analysis of selective immigration a widely defined descent-
based notion of ethnicity, where “race, language, religion, nationality, or even a joint political 
history” may serve as markers (2005:4).\(^{13}\) Joppke’s concept – which, of course, is well-suited 
for his purposes – is not completely satisfactory for our normative analysis, since its focus on 
descent and origin excludes “gay and other lifestyle cultures” because of their not being 
“encompassing”: “that is, lacking the power of self-reproduction” (2005:5). Elsewhere in the 
literature where the topic of selection criteria is discussed, authors either list various traits that 
fit the description of being socially salient (Blake, 2002, 2008; Carens 2013:174–175; Miller, 
2005, 2015; Walzer, 1983; Wellman, 2008; Wellman and Cole, 2011), or they restrict their 
discussion to the topic of race and ethnicity (Carens, 1988; Fine, 2016). Employing the 
concept of socially salient traits is useful because it unites these various concepts and allows 
us to see that they are of particular moral concern for the same reason: Their importance to the 
self-respect of the holders. Further, the concept of social salience is useful because of its 
contextual nature. Due to the focus on how these traits structure social interaction, it avoids 
the problematic consequences of holding these traits – especially race, ethnicity, gender and 
sexuality – to be natural kinds, or essential parts of human beings. It is thus able to give 
weight to how these concepts have developed historically, and to the fact that they may 
continue to change (see Fine, 2016:127–128).

When, then, is discrimination according to morally arbitrary traits in immigration 
wrong? Lippert-Rasmussen argues that “when we ask what makes discrimination wrong, what 
we are really asking is what makes discrimination morally worse than non-discrimination” 
(2013:104). As such, it might be useful to consider what non-discrimination would entail with 
regards to the selection of migrants. Complete non-discrimination in immigration may be 
fulfilled if a state chooses to adopt a “blind” policy of selection: Perhaps as a recognition that 
we live in a world with vast differences in opportunity and aiming to actively give persons 
born elsewhere the same resources as its citizens, such a state might decide to admit 
newcomers via a lottery. Again, such a policy may be seen as admirable, but not morally

\(^{13}\) When I talk about ethnicity in this thesis, I have two of Joppke’s “markers” in mind: nationality and a joint political history.
required, since states may choose to select according to language competence or education. Thus, what I aim to explicate throughout this thesis is the morally relevant difference between a policy that selects only according to these traits, and one that also picks out socially salient traits like skin colour. Here, one is morally worse than the other, but, as we have seen, a standard appeal to moral equality does not sufficiently tell us why. In this thesis, I offer an account of why one is worse than the other.

1.4 Further comments on methodology
Having spelled out the central question and some central vocabulary, I want to make some brief further comments on method. Significantly, the entirety of the discussion in this thesis is carried out from the stipulated premise of the conventional view. I do discuss substantial defences of the right to exclude, but only insofar as they have particular implications for the issue of selection criteria – and only to reject them. In this way of proceeding, I am largely indebted to Joseph Carens, who employs the same tactic for the first ten chapters of his *The Ethics of Immigration*, only to go on to refute it in the last three (2013). As mentioned in the introduction to this thesis, some may find it strange to stipulate such a central premise: After all, if it turns out that coercive border control cannot be justified, then it follows that *all* selection criteria are unjust. As such, it might be thought that we ought to focus on the question of whether border control can be justified at all, and that our question of permissible selection criteria is somehow philosophically secondary.

One useful way to think about the methodological decision to work from the conventional view, is offered by Michael Blake’s distinction between *institutional theory* and *noninstitutional theory* (see Fine, 2016:140). The latter of the two demands that we “abstract away” from our current institutions and practices in search of principles of justice, and is thus engaged in the project of asking if we ought to have adopted these at all (Blake, 2001:261). Institutional theory, on the other hand, takes our institutions as given and asks, instead, what they “would have to do to be justified”. These two ways of theorising map onto the debates about the ethics of immigration: The question of legitimacy invites to an engagement with noninstitutional theory, whilst the questions of how border control ought to be carried out

---

14 Carens does discuss the issue of selecting immigrants on the basis of socially salient traits (2013:174), but for reasons that will be explicated in chapter 3, I do not find his discussion to be satisfactory.
falls within the realm of institutional theory.\textsuperscript{15} Echoing this same distinction, Phillip Cole has recently argued that the reliance on “arbitrary and contingent features” such as the existence of states (that is, an unwillingness to engage in noninstitutional theorising), prevents the development of a fully formed theory of just immigration (2014).

Crucially, Blake’s distinction is not equivalent to that of Rawls’ between ideal and non-ideal theory, where the first refers to theorising that is unbounded by facts about our nature and the second takes these and other unfortunate real-world circumstances into account (Rawls, 1999:8; see also Valentini, 2012). Institutional theory does not involve accepting nonideal circumstances and construct the “best possible” rules of regulation – instead, it proceeds to explicate how our institutions may be justified under ideal circumstances (Blake, 2001). Thus, this essay can be understood as an attempt to formulate part of what it would take for the practice of coercive border control to be justified. As the discussion progresses, I will show how several arguments for the right to exclude fail. The conclusion of this thesis will thus stand as a minimal requirement that must be fulfilled by those who wish to defend this right. That the discussion proceeds from a stipulated premise does not render it somehow “less philosophical” or merely useful for pragmatic purposes. The arguments here are just as concerned with the concepts of justice and freedom as those that tackle the question of legitimacy head-on (Carens, 2013:12).

As is to be expected from this method, I do not present – or work from – a substantive account of justice, which I apply to the case of immigration: That project would not allow me to remain silent on the issue of the state’s right to exclude. Rather, I work from the very general premise of moral equality. The only substantive assumption I make about a theory of justice, is that such a theory cannot accept state action that treats people like they do not matter morally. As such, I presuppose what David Miller has named weak moral cosmopolitanism, the view that we owe all human beings “moral consideration of some kind – their claims must count with us when we decide how to act or what institutions to establish – and also that in some sense that consideration must involve treating everyone equally” (2007:27). This thesis aims to extrapolate what this “sense” means in terms of selecting immigrants.

Weak cosmopolitanism can, intuitively, be contrasted with a stronger version, which holds that equal moral consideration ought to be interpreted as a requirement for equal

\textsuperscript{15} Blake writes, “Noninstitutional theory is well-equipped to answer certain sorts of questions, just as institutional theory is well-equipped to answer others” (2001:262).
treatment in a substantiv e sense. Proponents of this stronger cosmopolitanism – those typically referred to as cosmopolitans in the literature on global justice – may argue that this entails that our institutions and practices should give equal weight to all those affected by them (as opposed to being primarily concerned with our compatriots). Or they may argue that we ought to apply a strong egalitarian principle globally to ensure, for example, equal access to opportunity (Miller, 2007:28). We should note straight away how uneasily this stronger cosmopolitanism sits with the conventional view on immigration. Since the conventional view holds that states are justified in exercising “considerable discretionary control” over their borders, it presupposes that states are justified in granting particular priority to their citizens, who are allowed to exit and return to their state at their will. As we will become apparent, this is has crucial implications for the type of objection we may formulate against the selection of immigrants on the basis of socially salient traits.
2. Exclusions and the interests of citizens

This chapter considers two views that argue for the state’s right to exclude in a way that opens for selection according to socially salient traits, and in particular to ethnicity. Exploring these arguments, and seeing why they ultimately fail, is therefore crucial to my overall aim. The first of these views, which is characterised by the employment of what I will label the social cohesion argument, holds that states may ground their right to exclude in an appeal to the negative effects (increased) immigration might have on the welfare state. Against this social cohesion view, I argue that it rests upon normative assumptions that fall short of providing a justification for the right to exclude, let alone a warrant for the employment of selection criteria that pick out socially salient traits.

The second of these views is presented in Michael Walzer’s seminal discussion of immigration in Spheres of Justice. Walzer argues that states have a right to self-determination, and that a crucial part of this right is to decide who shall become members of their political communities. I argue against Walzer, firstly, on the grounds that his view has morally worrying consequences with regards to what may count as morally legitimate immigration policy, and secondly because his defence of the general right to exclude is implausible in its own right.

2.1 The social cohesion argument

One view about immigration that features heavily in public debates is that increased immigration causes a disruption of social cohesion, and that this, in turn, has negative effects on the political community the state represents. This “social cohesion argument” comes in many forms, but always argues for restrictive immigration policy on the basis of the negative impacts increased diversity is likely to have on the political community. As such, social cohesion arguments point to an identity relation: They hold that some level of common identification between citizens is necessary for the good of society, and that increased immigration, and thus diversity, undermines such identification. In its most sophisticated forms, this good is linked to the functioning of the welfare state. It is these forms I will be concerned with in what follows. Here, the argument holds, firstly, that the welfare state is a good that ought to be protected; secondly, that the welfare state requires a high level of identification between citizens; and, thirdly, that the admission of immigrants undermines
these levels of identification (Holtug, 2010: 436–437; Pevnick, 2009:147).16 Therefore, the argument concludes, states are justified in restricting immigration because these restrictions secure the continuation of the welfare state.17

The “diversity” referred to by those who employ the social cohesion argument is most commonly described in ethnic terms, the rough idea being that “because members of different ethnic groups fail to identify with each other (…) they are also less motivated to practice justice towards each other” (Holtug, 2010:437). Being less motivated to practice justice towards each other means, in this context, that the citizens will be less willing to pay the high levels of taxes necessary to keep the welfare state going: Thus, increased diversity obstructs the realisation of justice (Pevnick, 2009:147). This factual premise is based on empirical findings about how diversity caused by increasing immigration tends to have negative effects on the development of various forms of social capital, in particular social trust.18 For example, Robert D. Putnam argues in an influential paper that whilst immigration followed by successful integration is likely to have positive societal effects in the long run, the short-term effects of immigration and increased ethnic diversity is a reduction of social capital and trust (2007).

In the introduction to this thesis, I assumed that we find there to be something problematic about immigration policies that pick out socially salient traits: Indeed, I suggested that it is a problem that we cannot straightforwardly account for this from the conventional view. One thing we should immediately notice about the social cohesion argument is that it might seem to invite selection according to ethnicity. Many of those who supports varieties of the social cohesion argument, perhaps most notably David Miller (2005:199), take it to mean that all immigration may have such disruptive effects on social cohesion – or, in Miller’s terminology, “common public culture” (ibid.). As such, the argument avoids warranting the moral permissibility of selection according to ethnicity. However, it is not hard to imagine how the argument might be used to that end: This is instantly recognisable from public debates about immigration and integration, where it is often claimed that states ought to admit only those immigrants that share “our” values and are

---

16 Recall that states, under the conventional view, are entitled to restrict the number of immigrants they admit. Any considerations of costs (of integration, e.g) relating to this admission and the effect that has on the welfare state is, therefore, separate from this discussion, which concerns the effects on social cohesion increased immigration will cause.

17 This presupposes, of course, that justice requires that we uphold the welfare state. I do not give an argument for that view here, nor do I need to, since this is also presupposed by the proponents of social cohesion. One common justification, however, is that the welfare state is better suited than its alternatives to uphold egalitarian ideals, required by justice (Holtug, 2010:438).

able to partake in “our” way of life. (Or, rather, that the state is justified in excluding those who do not). The argument is intuitive: With the added premise that some ethnicities undermine social cohesion, whilst others do not, one may reach the conclusion that, in addition to warrant a right to restrict immigration, considerations of social cohesion support a right to favour migrants of some ethnicities over others.

This argument is, however, not plausible. Regardless of the validity of the empirical observations that allegedly support the social cohesion argument,\textsuperscript{19} we may object that the argument fails to provide a justification for selection according to ethnicity – and more generally for restricting immigration. This is because the argument, which gains force from empirical findings in the social sciences, also contains a normative premise, which may pass unnoticed. To see this, consider what a state that restricts immigration (towards people of certain ethnicities) on the basis of the social cohesion argument would, in so doing, be stating. Following Ryan Pevnick, we can imagine two states, X and Y, one (X) where the empirical evidence obtains and another (Y) where it does not:

\textit{X says to those seeking entrance: ‘We cannot allow you to enter because doing so will erode the support of our current citizens for the welfare state. Our citizens will be unwilling to support the necessary institutions knowing that such institutions will partially benefit you. Thus, admitting you would undermine out welfare state and we are – as a matter of justice – committed to such institutions’.}

\textit{Alternatively, Y says to those seeking entrance: ‘We will grant you access to our institutions because we trust that you will see that they are fair and will, thus, be moved to support them. Likewise, we trust that our citizens will welcome you (even if you make demands on the state) because they trust that if the state accepts your requests, they must be legitimate ones’. (2009:151)}

What the example of X and Y brings out is that part of what makes the empirical component of the argument true – that diversity undermines social cohesion – is the unwillingness of citizens to support social institutions when they do not identify with all of those who benefit from those institutions. We may here recall G. A. Cohen’s argument that when an argument is presented by a group who make one or more of the premises of that argument true, then the character of that argument changes (1992:276). Whenever an argument for the justification of a policy P rests upon a premise about how (part) of the population will act when P is in force, that projected behaviour needs to be called into question: “And comprehensive justification of P obtains only if that behaviour is indeed justified” (Cohen, 1992:279). Our question, then, is

\textsuperscript{19} Both Holtug (2010:440) and Pevnick (2009:150) argue, however, that the evidence is inconclusive.
whether the citizens of X can be said to be justified in their assessment of their own future behaviour. And it seems that they are not – in fact, as Putnam points out, the same empirical evidence on which they rest their case suggests that if the integration of immigrants is successful, then increased ethnic heterogeneity will give important societal advantages (2007).

So, the proponents of the social cohesion argument depict what is essentially the will of citizens as simply a fact about sociology (Pevnick, 2009:152). Therefore, whilst they are successful in giving a *reason* for why immigration (of people of certain ethnicities) ought to be restricted, they fail to provide a *justification* for such a restriction: When seeking to support a normative conclusion, one cannot rely on predictions about one’s own future behaviour.

It might be objected that our criticism of the social cohesion view fails to acknowledge that most citizens do not consciously decide to make the social cohesion argument true. As such, one might hold that it is, indeed, wrong to use predicted future behaviour as a premise in a normative argument, but that in this case this restriction does not apply since this is a general fact in social science (as opposed to a fact relating to the wills of particular people). After all, this case seems to be relevantly different from Cohen’s kidnapper example, where it is clear that the kidnapper’s coercive will is what makes the conclusion (that the parents ought to pay for the release of their child) true (Cohen, 1992:277). This objection, whilst worth considering, is not able to save the social cohesion view, for the simple reason that the lack of intention in causing harmful effects does not directly free the agent from the responsibility of those effects. So without an argument to the contrary, we have no reason to presume that the evidence which shows that support for the welfare state declines when diversity increases justifies restrictive immigration policies. Oppositely, we might very well hold the evidence to be a reason to correct that response in the population (Pevnick, 2009:153).

Therefore, the social cohesion view fails to provide a normatively valid conclusion for a state’s right to restrict immigration by reference to the ethnicity of the would-be immigrants. In attempting to do so, the state employing this argument makes predictions about its own citizens’ (and thus its own) future behaviour, rendering the reason it provides for restricting immigration less than a *justification*. As such, we ought to keep our intuition that selecting according to socially salient traits is morally prohibited. The social cohesion argument does not succeed in providing a normative justification for why concerns about the negative effects of diversity may restrict immigration – let alone the practice of selecting immigrants according to their ethnicity.
2.2 Walzer’s sphere of justice
Having argued against the social cohesion argument, I now turn to Michael Walzer’s defence of the right to exclude, and its implications for selection criteria. As with so many other topics in the ethics of immigration, Walzer was the first theorist to discuss selection criteria from a perspective of justice. His *Spheres of Justice* develops a theory of just immigration that, in alignment with his general communitarian commitments, places emphasis on the value of political community and its integrity. Distributive justice, according to Walzer, presupposes a bounded world within which the distribution – the dividing, exchange and sharing – of social goods takes place: that world is the political community (1983). The most fundamental good that we distribute to one another is membership in “some human community”, since such memberships dictate all of our other distributive choices: “it determines with whom we make those choices, from whom we require obedience and collect taxes, to whom we allocate goods and services” (1983:31). In today’s world, where the relevant political communities are nations, the primary good that is distributed is membership in these nations – citizenship. Affluent and free democracies, “like elite universities”, receive enormous amounts of applications for membership, and must accordingly decide on how to respond to these: Should the communities agree to accept new members and, if so, according to what principles?

2.2.1 The distribution of membership
According to Walzer, these questions about the ethics of immigration are questions of the members of states deciding on the size and character of their political communities. What membership means in a particular community is defined collectively by its members, and distributing – or refusing to do so – membership to outsiders in immigration is an active part of this process since any potential newcomer will also be taking part in defining the community’s character: “Membership as a social good is constituted by our understanding; its value is fixed by our work and conversation; and then we are in charge (who else could be in charge?) of its distribution” (32). In deciding on immigration policy, therefore, the citizens are thereby determining what membership means for their particular community and how they want that community to be in the future.

The process of determining the size and character of the political community takes, in this instance, a particular form. Since the citizens are not distributing memberships amongst

---

20 For the remainder of this chapter, I will refer to Walzer’s text only by page number.
themselves – they are, of course, already members – the rules that govern this distribution are those that apply to our relationships with strangers (32), and these rules are much less stringent than those that govern our relationships with fellow-members. This contrast can be brought out by considering the similarity Walzer notes between immigration and birth: “People enter a country by being born to parents already there as well as, and more often than, by crossing the frontier” (34). One strategy for determining the shape and character of the political community could, therefore, be to adopt policies that aim to control procreation. Such policies could target only the size of the population, for example by providing subsidies for large families, but they could also aim to steer the community’s character in a certain way: “We might, of course, award the right to give birth differentially to different groups of parents, establishing ethnic quotas (like country-of-origin quotas in immigration) or class or intelligence quotas, or allowing right-to-give-birth certificates to be traded on the market” (35).

Such policies, however, should clearly not be allowed. Firstly, they would be “indirect and inefficient” unless the state also regulated marriage and assimilation; and secondly, and more importantly, implementing such policies would require levels of state coercion that reach beyond the level of acceptability. Determining the community’s character by attempting to actively determine who gets born into it would require that the state puts the aims of the majority, given that the state is democratic, over the liberty of all of citizens: political power would dominate kinship and love (35).

Controlling and restricting who enters the political community through immigration, on the other hand, would not lead to any such domination, on Walzer’s view. This is because we only have “strong duties” towards people with whom we share a common life (33). What we owe to everyone else – independently of political, cultural, religious and linguistic barriers – is contained in the principle of mutual aid, which demands of us that we provide positive assistance to outsiders “if (1) it is needed urgently by one of the parties; and (2) if the risks and costs of giving it are relatively low for the other party” (33). We are obliged to help those in urgent need, but only insofar as our lives are not “shaped and determined” by encounters with the need of others. So, controlling who enters the political

21 It is worth clarifying that we are here talking about economic migrants. As we shall see, Walzer’s view entails a strong commitment to family reunification, so if immigration was restricted in a way that contradicted this practice, then the immigration policy would lead to domination.
22 This position concerning what the political community owes to outsiders is similar to that found in Michael Blake (2001) and Thomas Nagel’s (2005) statements on global distributive justice. Both authors argue that whilst absolute deprivation of non-members is a concern for all political communities, there are no obligations of
community by way of immigration is not objectionable unless it contradicts the principle of mutual aid.

These reflections on what is owed to strangers do not, however, establish Walzer’s central claim about immigration, namely that “countries have the right which they conventionally claim: to distribute membership for (their own) particular reasons” (35). In order to do this, Walzer argues that such a right is an essential part of what it means for a state to be self-determining: in order for the state to be self-determining, it needs to have control over who that “self” is. As he writes elsewhere: “Who is in and who is out?” is the first question any political community must ask itself (2007:81). To this end, he employs a series of analogies between the state and various associations: neighbourhoods, clubs and families.23

Neighbourhoods are “indifferent” spaces: there are no formal criteria that determine who lives in them. Instead, individuals and families move into new neighbourhoods for their own reasons, restricted only by market conditions (36). Several 19th century defenders of free trade, most notably Henry Sidgwick, argued that states should be like neighbourhoods, with people enjoying perfect global freedom of movement and contract (Sidgwick, 1891). This argument was, however, often presented as a “goal for the future” towards which utilitarians ought to strive, and Sidgwick gave several utilitarian considerations for why a policy of open borders should not be adopted by governments in the here and now.24 Considering Sidgwick’s argument, Walzer argues that a world of “state neighbourhoods” is far from an ideal; rather, he argues, the reasons we can think of for why a policy of open borders should not be adopted straight away are exactly the reasons why perfect labour mobility is “probably a mirage” (38).

Given that human beings – unless their circumstances are particularly difficult – tend to want to stay where they are, and form relationships with each other and their surroundings, if states became like neighbourhoods, then neighbourhoods would become like little states. Historically, Walzer writes, where borders have been open, neighbourhoods have become closed:

---

23 Walzer’s use of an analogy between state membership and family membership is telling: Rainer Bauböck, who – like Walzer – employs analogies between the state, and clubs and neighbourhoods, chooses explicitly not to include the family because “it illustrates one kind of ascriptive rules of membership, rather than the associational features of a liberal state” (1994:161, my emphasis).

24 The considerations Sidgwick gives are: i) the open border utopia would not allow for patriotic sentiment, and any smaller associations occurring under such circumstances would lack internal cohesion; ii) an open world could go against efforts to raise the standard of living of the worst off; and iii) a desirable public culture and official institutions might be continually worked against by heterogeneous populations (1891:295–6).
Neighbourhoods can be open only if countries are at least potentially closed. Only if the state makes a selection among would-be members and guarantees the loyalty, security, and welfare of the individuals it selects, can local communities take shape as “indifferent” associations, determined solely by personal preference and market capacity (...) The politics and culture of a modern democracy probably require the kind of largeness, and also the kind of boundedness, that states provide (...) To tear down the walls of the state is not, like Sidgwick suggested, to create a world without walls, but rather to create a thousand petty fortresses. (Walzer:38–9)

Given sufficiently strong global institutions, even these fortresses could be torn down. What would be left, according to Walzer, is a world of radically uprooted human beings, unable to sustain a distinctive culture. If distinctiveness of culture is a value, then some right to exclude others must be granted to political communities (ibid.).

The right to control entry into the political community serves to defend the liberty and welfare of those living within it (39). However, if the community also tries to control – and restrain – who leaves, then commitment to the community is replaced by coercion: unless there exists a state of emergency (where “everyone is bound to work for the survival of the community”) states may not hinder those who wish to leave (ibid.). In this sense, states are like clubs: They may choose who enters, but cannot restrain exit rights. Further, states are like clubs in that they may choose who they want to admit. Modern states do this by the employment of selection criteria: they establish “general qualifications, categories for admissions and exclusion, and numerical quotas (limits)” (40). Whilst Walzer holds this procedure to be “eminently defensible”, this does not mean that any set of criteria can or should be morally defended: “To say that states have a right to act in certain areas is not to say that anything they do in those areas is right” (ibid.).

One moral restriction on the selection criteria that states – and presumably also clubs – can legitimately employ is that they must adequately reflect the “condition and character” of the community and “the shared understanding of those who are already members”:

The claim of American advocates of restricted immigration (in 1920, say) that they were defending a homogenous white and Protestant country, can plausibly be called unjust as well as inaccurate: as if non-white and non-Protestant citizens were invisible men and women, who didn’t have to be counted in the national census! (Walzer, 1983:40)

[25 In his discussion, Walzer only makes reference to race, ethnicity, and religion, but I take it that his claims can be extended to cover the two other socially salient traits which I have singled out as of particular interest: sexuality and gender.]
America was, in the 1920’s, a pluralist society and those who advocated criteria that aimed to defend a white and Protestant society failed to acknowledge that morally relevant fact. Still, Walzer presses, decisions concerning the distribution of membership are political decisions: again, they are about what form of community the members want to create. So, outsiders may, like those who wish to enter a club, give reasons for why they should be admitted, “but no one on the outside has a right to be inside” (41).

That no strangers hold prima facie rights to be admitted to the political community, does not mean that those on the inside do not – or should not – feel obliged to admit at least some strangers. These are particular outsiders, recognised as “national or ethnic relatives” (41). States are, in this sense, like families: “morally connected to people they have not chosen” (ibid.). This is what is at work in the “kinship principle”, which gives priority in immigration to relatives of members. Further, people may in times of need turn up at the borders of people of “their kin”, with whom they share an ethnicity, “not only with hope but also with expectation” (42). And this expectation is, Walzer argues, warranted (ibid.): feelings of national connection and belonging may give rise to particular obligations towards particular groups of people. This last principle – “of nationality” – has one major restriction, namely, that although recognition of national affinity may be grounds for inclusion via immigration, nonrecognition may not serve as grounds for expulsion. This is because people may hold a territorial or “locational” right to the land over which the state claims territorial jurisdiction, despite of not being citizens of that state (43).

Walzer imagines this right to be similar to that formulated by Hobbes, who argued that even after the social contract was signed and various rights transferred, the rights to self-defence and to “the use of fire, water, free air, and place to live in, and … all things necessary for life” were retained by the subjects (Hobbes, cited in Walzer 1983:43). The state, which ultimately owes its jurisdiction to its inhabitants’ right to place, has an obligation towards those inhabitants “simply, without reference to their collective or national identity” (ibid.). The state is obliged to ensure that its inhabitants have rights to the land to which they are attached, where they – like their ancestors – have lived and built their lives. These attachments cannot be transferred to another place, which is why, on Walzer’s view, membership is at least initially given: whoever is there, with ties and relationships to the land,
Expulsions of people who belong, be they full members of the political community or not, are therefore always unjust (43).

2.2.2 Walzer and White Australia

Having established his defence of the state’s right to exclude, Walzer continues to consider how the principle of mutual aid might play out in terms of immigration: is the right to exclude so strong that it warrants the exclusion of foreigners in dire need, “just because they are foreigners” (45)? As we saw above, Walzer holds that the principle of nationality may put states under obligations to admit needy strangers when those outsiders share some common history of nationality. However, what about people with no such link to the state in question: Can they ever put the state under an obligation of admittance? Walzer begins his reply to this question by noting that the principle of mutual aid is much more forceful against political communities than it is against individuals. Since the second clause of the principle holds that one is only obliged to provide help when help can be given at a relatively low cost for the helping party, it seems clear that no matter how one chooses to define “relatively low”, individuals are not under an obligation to take needy outsiders into their homes or family units. This is different for political communities, where a wide range of benevolent actions are available where the community as a collective, or as individuals or families, will only be marginally affected (45). So even if the principle of mutual aid cannot put individuals under obligations to admit strangers into their homes, large communities like contemporary nation-states may very well be placed under such obligations, since the costs of admittance may be relatively low. The way we should understand this notion of costs to the political community, according to Walzer, is by invoking some notion of use of territory that is a variable between territorial extent and population density, so that a state cannot be said to hold rights to exclude needy strangers when their territory grants them superfluous resources (45–6).

In light of this discussion, Walzer moves to the issue of selection criteria by asking if the Australian government’s notorious “White Australia” policy can be said to have been within the state’s right to use immigration as a means to shape its own character. The policy was designed with the intention of creating an ethnically pure, white Australia, and as such

---

26 It should be noted that Walzer’s criteria for how we are to determine who belong remain somewhat vague. It is clear from his definition that groups who have been on the land for centuries are safe – but those who have been on the land for decades or less seem to have a less clear-cut case.

27 The question of whether states may actually have inhabitants who, due to their nationality, are less than full members is, of course, also a controversial topic, and Walzer ultimately rejects that states may legitimately deny full membership to some groups (1983:53–61).
used skin colour as a criterion for selection of immigrants (Australian Government, 2016). Were the Australians warranted in letting their goal of creating a homogenous nation dictate their immigration policy? No, is Walzer’s answer. But this has nothing to do with the moral character of that goal or the resulting racial discrimination in immigration it inspired: the problem with White Australia, as Walzer sees it, was that the Australians could not legitimately enforce restrictions that kept out strangers who were desperately trying to escape conditions of severe poverty, when they themselves were underusing the territory over which they claimed jurisdiction (46). The right of white Australians to the territory “rested on nothing more than the claim they had staked, and enforced against the aboriginal population, before anyone else”, and this right does not seem enforceable against masses of people who are fleeing poverty, even famine (ibid.). The notion of superfluous resources is defined so that holding more than what is a bare minimum for survival is not sufficient for rendering one’s claim to exclusionary rights over one’s territory illegitimate. Rather, the notion should be understood in relation to the needs of “particular historical communities” and their ways of life (47). Even if we take this approach to the notion of “things superfluous”, it is clear that nobody can reasonably claim that they need “hundreds or even thousands of thousands of empty miles for the life they have chosen” (ibid.). And wherever there is superfluous land, the claim of necessity by needy outsiders forces the state to make a choice: it can either i) extend membership to newcomers, or ii) the state can become denser by concentrating its population on a smaller area. Australia was therefore faced with a choice (it ultimately failed to recognise):

Its members could yield land for the sake of homogeneity, or they could give up homogeneity (agree to the creation of a multicultural society) for the sake of the land. And those would be their only choices. White Australia could survive only as Little Australia. (Walzer, 1983:47)

The striking aspect of Walzer’s discussion of the White Australia policy is, of course, that he does not hold the policy and the motivation behind the policy to be problematic in principle. It seems that political communities, on Walzer’s view, are completely within their right to aim to be racially pure, so long as they cannot be said to claim more territory than they can be said to need. Since the superfluous territory is the morally relevant condition, it is not merely that the Australians had superfluous territory; the other relevant condition was that the would-be immigrants were people lacking those things “necessary for life” (43). So, presumably, even when a state sits on more territory than its citizens can, on any reasonable account, be said to
need, it is only restricted in how it sets its immigration policy when there are people living in poverty trying to enter. The holding of “things superfluous” would, then, not disallow a state from employing racist criteria of selection so long as its pool of would-be immigrants came from relatively comfortable conditions. Indeed, one may even read the argument as holding that the state would be warranted in keeping its policy so long as it avoided excluding those living below the threshold of extreme poverty.

However, Walzer’s argument is restricted by more than the claims to territory. As we saw in the discussion of the regulation of birth, political communities are only allowed to carry out policies that aim to steer their character so long as those policies do not affect the liberties of those who are already members. This is perhaps part of what is at work in his above argument concerning recruitment to clubs: as we saw in the case of those who dreamt of a white and Protestant USA, a policy which aimed to achieve that goal would be “unjust as well as inaccurate” since it would fail to adequately represent the plurality of those who were already members of the state (40). Perhaps what makes it unjust and inaccurate is that this failure to adequately reflect “condition and character” of the community amounts to a violation of the rights of those members who are left out.28 We can conceptualise this rights-violation in Walzer’s terms by recognising that if such a policy was permitted in a state with racial minorities, then the majority culture would be allowed to dominate the political community and create it in its own image. The point of this, of course, is that Walzer’s stark conclusion has been significantly restricted. His position now seems to be that only when a state is homogenous in a relevant sense, can it adopt selection criteria that pick out race, ethnicity, or religion.

What should count as “the relevant sense” here is still unclear. Walzer explicitly argues that selection criteria based on race or religion would have been unjust in the US in the 1920s, but whether this injustice stems from the fact that other racial and religious groups were part of the make-up of the political community or some other, more substantial, factual condition that obtained in the US at that time is unclear. This seems to suggest that whenever any ethnic or religious minority is present in the state’s citizenry, it fails to be relevantly homogenous. However, one reason for thinking that “mere” minority presence is not sufficient to render racial selection criteria “unjust and inaccurate” on Walzer’s view, is his apparent neglect of the aboriginal population in his discussion of Australia racial immigration policy. Walzer does mention the aboriginal population, but gives no account of why their non-

28 As we shall see, this idea has featured heavily in the literature after Walzer.
white presence did nothing to render the policy unjust (Fine, 2016:137n45). Walzer is perhaps best read here as holding that the Little Australia he has in mind is more hypothetical than his choice of a historical example suggests; thus, (white) Little Australia is a place where the aboriginal population never were – since, according to his own theory, at least they belong on most of the land over which Australia claims jurisdiction and should, due to their long-term presence, be extended an offer of citizenship (1983:52–61).

Perhaps what is at stake in Walzer’s “unjust and inaccurate” claim is some form of premise about the pluralism present in the United States at the time when the policies were suggested, but if this is the case, it remains unarticulated.

Walzer holds that states have rights to shut their borders, but may, if they choose to do so, be placed under moral obligations to yield territory or to export wealth to foreign countries (48). When neither of these options can fulfil our duties of mutual aid – that is, when states are confronted with groups of refugees who need protection more than anything else – states may be put under obligations to admit outsiders. This further limitation on the state’s right to exclude binds the state to grant asylum to those in dire need when they come in fairly small numbers; however, if the number of refugees exceeds some number of capacity for the receiving state and the state is forced to choose amongst the persons at its borders, then it may rightfully do so according to criteria that pick out “connections” with its citizens “own way of life” (49). Communities, Walzer argues, “depend with regard to population on a sense of relatedness and mutuality. Refugees must appeal to that sense” (50). Part of this theory of relatedness and mutuality is, as we have seen, based on ethnicity: the principle of nationality not only allows for, but sometimes also demands, selecting for admittance those with whom we share ethnic traits.

The upshot of Walzer’s theory is that there is nothing inherently objectionable about an immigration policy that employs racial criteria of selection. Indeed, if there are outsiders in need with whom a society shares some bond “of nationality”, determined by considerations of ethnicity, then such a policy is not merely acceptable; it is morally required. Since there is no argument to the contrary – and since any such argument would fit badly with Walzer’s overall theory – this allowance on employing racial criteria of selection in immigration extends to all traits. Therefore, so long as there are no needy outsiders, the political community does not enjoy more resources than it can be said to need, and (maybe) the community is homogenous in the relevant sense, the state is free to employ whatever criteria of selection its citizens may perceive to be in the interest of their community. That these perceived interests result in
policies that pick out traits that are often described as irrelevant from a moral point of view is no objection to the policy. In fact, according to Walzer’s principle of nationality these traits are not irrelevant from that point of view at all; they are the kinds of things that the community might care about and choose, collectively and legitimately, to take into consideration when deciding how their community should look in the future. So, as opposed to the moral restrictions that govern how the state might legitimately act towards its citizens, employing discretionary policies that pick out traits over which their holders have no control is not, at the level of principle, objectionable when it comes to the state’s dealings with outsiders.

2.2.3 The sociological critique of Walzer

It is the aim of this entire thesis to argue that employing certain criteria of selection in immigration is unjust, unconditionally so. However, if one is swayed by Walzer’s overall argument and accepts that the state holds a right to determine its own character which might take precedence over any concerns for discriminatory and insulting immigration policies, then pointing out that this right entails that there is nothing inherently wrong with discriminatory procedures of selection is not likely to be effective. One might, for example, hold that there are weighty reasons to be weary of discrimination because discrimination is morally prohibited in many (or even most) cases, but that selection of new members to the political community is one where discrimination is allowed (even necessary to secure other weighty values). So, one might argue, our intuitions lead us to condemn such policies, when they are actually allowed, as Walzer’s argument has just shown. In order to counter such attitudes – to encourage any readers who are sympathetic to them to follow the rest of my argument – I want to conclude this part of the chapter by pointing out some inconsistencies in Walzer’s overall account of the right to exclude.

Firstly, the crux of Walzer’s account is that political communities depend, for their functioning, on a sense of “relatedness and mutuality”, in a way that warrants this sense legitimately taking the lead in determining the state’s immigration policy. He does not, however, specify or challenge the content of that sense in itself. The obvious reason for holding this to be problematic has already been alluded to above: not all cultural characteristics can be defended from a moral point of view, although they may be an essential part of a common understanding of membership. Political communities may be racist, sexist, classist or elitist, and it seems strange to hold that a desire to preserve those parts of the
community’s character can act as reasons in a moral argument for the right to exclude. These parts of a state’s cultural distinctiveness cannot be defended from a liberal-democratic viewpoint. A possible answer in defence of Walzer’s project is to hold that any “societal sense of self” which includes such oppressive cultural distinctions will – as a matter of necessity – yield unjust societies and that they cannot, therefore, be defended as characteristics that ought to be preserved. Thus, whenever a society has a cultural character that is incompatible with liberal-democratic values, there are internal injustices in that society calling for rectification. As Walzer himself argues, sexist, classist and elitist societies cannot be defended because these are clear violations of “complex equality” – instances of societal structures that allow advantages in one societal sphere to dominate in others (1983:12).

Whilst sufficient in the case of some characteristics that are incompatible with liberal-democratic values, this response falls short in the case of others: in particular racism and xenophobia with regards to religion stand out as clear examples of cultural characteristics that may prevail even if the state internally upholds Walzer’s ideal of “complex equality” – given that the state is sufficiently homogenous. This should come as no surprise once we recall the argument that Little Australia could legitimately exist as White Australia.

Further and more crucially, there is an oddity in Walzer’s insistence on drawing a parallel between the state and his idea (and ideal) of political communities. He writes:

> The political community is probably the closest thing we can get to a world of common meanings. Language, history, and culture come together (come more closely together here than anywhere else) to produce a collective consciousness. (Walzer, 1983:28)

Since Walzer’s defence of a normative right to exclude depends on the state having this role as a producer of a collective consciousness, this puts a lot of stress on the existence of one common culture that completely unites the state and its citizens. Sociologically, this factual premise seems to be on shaky grounds. Thus, Veit Bader argues that Walzer’s view entails that states are legitimate only if they qualify as “worlds of common meaning”, something which is “theoretically weak and historically more than dubious” (1995:218).

In addition to the fact that bi- or multi-lingual states seem to be excluded from this account, the argument fails because there are many (religious, professional, artistic, political) “infra-state units” that hold much stronger claims to fulfil the criterion of upholding a common meaning (ibid.). In a similar vein, Christian Joppke argues that Walzer’s reliance on a notion of a “master community” unified by a common way of life “does not adequately
describe the fragmented, chaotic, and multiple worlds we live in; it is sociologically naïve” (2005:11). Without a clear one-to-one correspondence between the state and some unifying national culture – that can serve as grounds for a “world of common meaning” – the theory falls short of explaining why states, as opposed to particular cultural groups or voluntary associations, hold a right to distribute membership according to their own choosing. In the case of many – or even most – states such a correspondence will be difficult to obtain. Whether or not Bader is right in his assertion that “a really homogenous “nation-state” is a theoretical fiction, not a historical reality, even after so many centuries of unifying and disciplinary state policies” (1995:237n21); it seems that Walzer puts a lot of stress on contingent empirical conditions that may very well not end up supporting a state’s right to exclude.

Finally, even if some state can be said to be a genuine world of common meaning that extends beyond these smaller units, this world has typically been created through a series of coercive, violent and dominant interventions. The cultures of modern nation-states come with long and complex histories of injustice, where the state has acted to eradicate minority cultures, and to create religious and linguistic homogeneity. These injustices run even deeper in those nation-states that have, through their past colonisation, acted as “large-scale cultural imperialists” (Bader, 1995:219). It is, therefore, strange to hold that the state as an institution can be the holder of rights to exclude and select outsiders for admission, because of its role in preserving meaningful distinctive cultures. If distinctive culture is what grants communities value, and gives rise to protective rights, then there is at least a need to explain why majority national cultures with direct links to the eradication of both internal minority cultures and external cultures should be preserved.

In short, there are several problems with Walzer’s defence of a right to exclude, in addition to the worrying consequences of his argument with regards to selection criteria. If we are going to accept that there is nothing inherently wrong with the selection of immigrants on the basis of skin colour or religion, then we need a better defence of the general right to exclude.

2.3 Conclusion: the impermissibility of selecting according to ethnicity
In this chapter I have looked at two views on the general right to exclude which entail that selection according to socially salient traits – and in particular according to ethnicity – is (at least often) permissible. In addition to pointing out this worrying consequence in each of
these views, I have argued against them, showing how they fail in their own right. Selecting according to ethnicity cannot be defended – at least not employing either of these arguments.

The social cohesion view fails to establish a general right to exclude based on considerations such as societal trust. This is because, I argued, the argument in its favour rests upon a hidden normative premise, and that it therefore fails to offer a moral justification for the restrictions it warrants. This also goes for Michael Walzer’s argument in favour of the state’s right to exclude. As we saw, Walzer holds that the political community’s right to self-determination ought to include a right to determine its own character. This right is, according to Walzer, so strong that it may include a wish to stay ethnically and racially pure – given one restriction: A particular political community, if it wishes to pursue its aim of purity, cannot occupy more territory than they can reasonably be said to need. I argued against Walzer that the sociological assumptions on which he bases his arguments are insufficient, rendering his strong conclusion inapplicable – at least to states as we know them.
3. Selection criteria and the rights of minority members

Walzer’s argument, laid out in the previous chapter, has received much critical attention ever since its publication. Selection procedures that discriminate on the basis of traits such as race or ethnicity, it has been objected, seem to be wrong independently of whether the states that carry them out are using their territory in some proportionately appropriate way. However, as we saw in the first chapter, conceptualising this moral complaint is not as straightforward as it first might seem, since the state holds (under the conventional view) a presumed right to exclude. It is not fully clear how states can be restricted from admitting outsiders according to whatever they think is in their interest, when they could choose not to admit anyone, given their right to exclude.

The perhaps most straightforward way to conceptualise this restriction, however, is what underlies Walzer’s insistence that 1920s USA could not employ racial selection criteria because this would somehow present an inaccurate description of the political community. White Protestant USA could, presumably, not even survive as Little USA. Whilst underdeveloped by Walzer himself, what this remark picks up on is what such an immigration policy would mean to those who are already members of the community, and in particular to those who would be denied admittance if they were not already members. What makes the employment of certain forms of selection criteria wrong, on this view, is their violation of the rights of members who belong to minority groups, since they, by the virtue of the instigation of the policy, are being treated like second-class citizens. Thus, I will refer to this argument as “the rights of members-view”.

This argument has been prominent in the literature, first introduced by Michael Blake (2002; 2003), and picked up by Christopher Heath Wellman (2008). Both authors have since left the view as exhaustive of the objectionable nature of selecting according to socially salient traits (Blake 2008, 2013; Wellman and Cole 2011), but understanding its appeal and its limitation is crucial to the project of establishing a theory of just immigration. The following will, therefore, consist in a review and critique of the argument, and of a view that seemingly warrants its employment. I will conclude that any theory of just immigration needs to give appropriate weight to the interests of the would-be immigrants.

29 David Miller has also employed a version of the argument (2007:228) – however, like Blake and Wellman, he does not hold that it is exhaustive (2015).
3.1 Selection criteria and the rights of minority members

In his first formulation of the argument, Blake argues that in _discriminatory immigration_ – that is, immigration where states, under the conventional view, may exercise discretion regarding whom to admit – there seem to be different moral considerations banning the employment of “chauvinist” selection criteria than in domestic cases (2002). Whilst differential treatment _inside_ the state is clearly banned by liberal considerations, Blake argues, the differential treatment of outsiders cannot be objected to on the same grounds, since outsiders do not hold the same rights as those who are already members of the state. Taking his cue from the United States Constitution, Blake notes that, whilst American citizens have a constitutional right to equality before the law, prospective immigrants do not hold such rights (2002:283). So whilst racial discrimination is forbidden within the state, choosing immigrants according to racial criteria is not, according to the US Constitution, prohibited. Blake argues that however tempting it may be to credit this discrepancy to straightforward moral incoherence, doing so would amount to a mistake. This is because, in the domestic case, we can easily establish an underlying premise in arguments about wrongful discrimination (in this case racial discrimination): “that the discriminating agent is under a moral compulsion to treat [the agents involved] as equals regardless of racial classification” (2002:283). This premise can straightforwardly be established, Blake argues, from the fact that members of liberal societies stand in an equal relationship towards the state. The state owes them “policies and principles they could not reasonably reject as bases for legislative authority”, and whatever these policies and principles are, it is clear that they cannot pick out traits like race as morally relevant (ibid.). Crucially, this form of argument cannot be employed in discretionary immigration, since would-be immigrants do not stand in the same relationship to the legal authority of the state as members do. They _seek_ to be in the same relationship, but are not yet. Blake writes:

> There may be some basic principle of distributive fairness governing which discretionary immigrants shall be admitted; but I do not think any such principles will get us very far. The powerful egalitarian principles found in the domestic context are difficult to apply in the absence of such a web of legal authority. (2002:284)

The issue, as Blake here sees it, is that without a shared web of legal authority, we cannot appeal to any state responsibility of treating individuals as equals. We therefore seem to have

---

30 Again, Blake no longer holds this position.
no means by which to make a principled objection to the selection of immigrants according to criteria that would clearly be disallowed if used by the state to differentiate its members.

However, even in the absence of a shared relationship to some legal authority, we can conceptualise a moral objection to certain forms of selection criteria. “Racially conscious immigration”, according to Blake, “can be understood as deeply problematic even if the rights and interests of the immigrants are taken off the table” (2002:284, my emphasis). This is because the employment of certain forms of selection criteria in immigration amounts a violation of the rights of minority members. By adopting an immigration policy that gives preference to certain groups of people, the state makes a statement about which groups it considers desirable, and this statement necessarily extends beyond the realm of immigration policy. By selecting certain groups over others, the state publicly announces that it holds some of its members to be more valuable to its interests than others. And when traits that are held to be morally arbitrary determine membership in the preferred groups, this amounts to a violating of the state’s obligation to treat all of its citizens with equal respect (Blake, 2002:284; Wellman, 2008:140). So, the argument runs, whilst the state does not violate any obligations of maintaining the social bases of self-respect if it publicly announces a preference for engineers, it clearly does violate such an obligation if it announces a preference for Caucasians. If the state makes such a public announcement, it effectively treats the disfavoured groups as having less worth, as second-class. Further, Blake suggests, minority groups may object to any policy that seeks to ensure that they stay a minority: “Minority group members have, I think, a legitimate claim when their governments seek to create demographic change of this sort” (2002:285).

The obvious objection to the rights of members-view is that it, like Walzer’s, seems to give no principled objection to certain forms of discrimination. Since the triggering condition of the restrictions on immigration policy it warrants is factual, it can only warrant objections to those policies that would – as a matter of fact – be insulting to some members. Whenever a society is homogenous in some sense, there seems to be nothing restricting it from using the relevant trait in the selection of immigrants. White Australia could, on this account, survive – so long as it was actually white. Replying to this line of criticism, Blake argues that whilst the account does grant a relevantly homogenous society the right to employ an immigration policy that would sustain that homogeneity, this would not constitute a moral wrong: “there is nothing inherently wrong” with a desire to preserve ethnical homogeneity (2002:285).

However, Blake argues, whilst a theoretical possibility, such immigration policies would
never be legitimate, since “there exists no such homogenous society in the world today” (ibid.).

Again, the triggering condition of Blake’s restrictions on selection criteria is factual: his account holds, firstly, that a policy of selecting immigrants based on morally arbitrary traits is wrong whenever doing so disrespects members of that state’s political community, and, secondly, that in modern democratic states there is – as a matter of fact – always some minority that will be disrespected by such a policy.

3.1.1 The limitation of member rights

The rights of members-view does provide us with a powerful argument against employing socially salient traits as criteria of selection whenever there are citizens who would be disrespected by such a policy. However, those who wish to employ is as the argument against selecting immigrants of such grounds fail to capture the only – indeed even the main – reason for why such policies are morally objectionable.

To see this, consider Blake’s argument that no state is homogenous in a way that would allow for racial selection criteria in immigration, the triggering condition on this restriction being that there is, in all modern states, some minority that would have their rights violated by such a policy. This is plausibly the case if we – as I assume Blake (and Wellman do)31 – conceive of the matter in terms of singular criteria of inclusion: This is most likely Blake’s rationale for arguing that “such racially conscious programmes are likely to be understood as most wrong in contexts in which the existing polity of a society is already multicultural and multiracial” (2002:285, his emphasis). So if a Northern European state were to start employing Caucasian ancestry as a criterion of admittance, then all of its racial minorities would be wrongly insulted by their own state. However, the state might, if it wanted to exclude people of particular origins or religious backgrounds, adopt explicit criteria of exclusion saying “persons of X origin or Y religious background will not be admitted” or, alternatively, adopt implicit exclusionary criteria by listing different inclusionary criteria (e.g. “persons of A, B, C, D, E, F (…) origins may be admitted”, leaving out X, Y and Z). The restraint on such implicit exclusion would be that the lists of inclusionary criteria must, minimally, include all of the minorities present amongst the citizenry. When these possibilities become apparent, it is not at all clear that Blake and Wellman’s empirical

31 In his discussion of a possible exception to the rule (which he ultimately rejects), Wellman discusses the possibility of Israel deciding to admit all and only Jewish people in immigration (2008:141).
requirement will, as they both claim, hold in the case of all modern states – or indeed even all liberal democratic states.

There is nothing in the account that suggests that either explicit or implicit exclusionary criteria should be under different ethical constraints than selection criteria, since the account is formulated explicitly without reference to any rights of the would-be immigrants. So it seems that, as long as they do not pick out any minorities present in the state, such exclusionary strategies must be acceptable. Under this new guise, in order for his empirical condition to go through, Blake is committed to the claim that all minorities are, as a matter of fact, present in all modern day nations. This is, I assume, much more than what one should want to ascribe to, thus rendering much less attainable the appealing position that all ethnic discrimination in immigration is morally objectionable.

One response to this line of criticism would be to suggest that, even if the state (implicitly) employs criteria of exclusion that would not directly affect its minority members, these minorities will still be wrongly insulted by criteria of exclusion that pick out traits such as ethnicity and religion. Exclusionary criteria based on ethnic origin or religion always constitute violations of the rights of minority members since such criteria are, in themselves, hostile towards minorities since they are – at least usually – employed to strengthen the majority culture.

Whilst a possible response to the above criticism, I think this line of argument is bound to fail. This is because it relies heavily on some notion of shared identity between all minority groups. If such a notion cannot be established, its central claim – that the criteria of selection will be relevantly insulting to current members – will not go through; and such a notion of shared identity, in the strong form needed in order for the argument to succeed, is dubious at best. Even though there are many examples of minority cultures uniting against the majority, the claim that they always or necessarily will do so is wildly implausible: cultural groups – whether ethnic, religious or otherwise – can and do disassociate themselves from others, in spite of being minorities in their respective societies. It is not impossible to think of a scenario where an ethnic or religious group are excluded from a state, without any ethnic or religious minorities in that state feeling disrespected in any way. In fact, such a scenario is quite easily imaginable.

Further, in order to bring the oddity of this case against chauvinist selection criteria in a different way, consider what the view would imply in terms of rectifying past injustice.
Since the account leaves out the would-be immigrants in conceptualising the badness of such policies, the people whose interests are directly disregarded by the policy have no explanatory role in why the policy is wrong. So, imagine a university that has enforced a discriminatory policy towards women, so that, unless of exceptional talent, women have not been admitted. As a result of this policy, those who have been admitted have met much stricter academic demands than their male peers and, further, many women with stronger applications than admitted male members have been excluded. Imagine that this university recognises that its admittance policy is unjust, and wants to start the process of rectifying this injustice by issuing an apology to those who were wronged by it. According to the view outlined by Blake, the university owes an apology only to the female students who were disrespected by the policy – everyone who had their interests directly disregarded due to the policy and were unjustly discriminated against are, on this account, owed nothing.

As the university example shows, this clearly puts the moral emphasis in the wrong place: “the primary injustice of a discriminatory immigration policy is the one done to those whom it excludes, while the signal it sends out to existing citizens is a secondary (though still important) matter” (David Miller:2015:399). So whilst the rights of minority members are violated by these criteria – and they have a legitimate complaint against the state – this does not exhaust the moral badness of immigration policies that selects immigrants by origin or religion. The rights of members-view does not, therefore, sufficiently explain the objectionable nature of selecting immigrants according to socially salient traits.

3.2 Against freedom of association

The above discussion outlines the implications of attempting to solve the normative issues of selection criteria solely by reference to the rights of members of any given state. One possible response to the above arguments would be to deny that these are sufficient reasons for rejecting Blake’s view. These seemingly unfortunate implications, this response goes, are morally necessary and part of what we ought to mean by justice in immigration. Such a response would, of course, be implausible if unmotivated by any other concern than saving the Blake view. However, according to one much-discussed argument, namely Wellman’s freedom of association argument, it clearly follows that this view is the only way we can conceptualise moral restrictions on selection criteria. If Wellman’s argument is sound, then we do have a good reason for holding that Blake’s account exhausts what is wrong about chauvinist selection criteria. Therefore, in order to establish the claim that any theory of just
immigration needs to give appropriate weight to the interests of the would-be immigrants, it is necessary to see why this argument fails.

3.2.1 Freedom of association and the right to exclude
In his “Immigration and Freedom of Association”, Wellman makes the controversial argument that states are entitled to close its borders to all potential immigrants, “even refugees desperately seeking asylum from incompetent or corrupt regimes that are either unwilling or unable to protect their citizens’ basic moral rights” (2008:109). This right, Wellman argues, follows from a state’s right to self-determination and, more specifically, from its right to freedom of association. Freedom of association, importantly, includes “the right not to associate and even, in many cases, the right to disassociate” (ibid.); therefore, states may choose to exclude non-members from their political community. In order to arrive at his conclusion, Wellman builds a two-stage argument. In the first stage, he argues that there is a prima facie case for the state’s right to exclude non-members. Using examples from the private sphere, such as marriage and religious association, Wellman argues that we take freedom of association to be an integral part of individual self-determination: forcing marital partners or religious associates upon us, without our consent, is clearly a violation of our right to self-determination. Similarly, he argues, “just like an individual has a right to determine whom (if anyone) he or she would like to marry”, the citizens of a state collectively enjoy a right to associate – and thus also to disassociate – with whomever they want (2008:110).

Autonomous individuals and legitimate states alike hold rights to autonomy and this “means that they occupy morally privileged positions of dominion over their self-regarding affairs” (2008:114). Therefore, freedom of association does not require an elaborate justification, since it is clearly part of the concept of self-determination, which is owed to these autonomous individuals and legitimate states. In this sense, Wellman concludes, “the commonly prized value of freedom of association provides the basic normative building blocks for a presumptive case in favour of each legitimate state’s right to exclude others from its territory” (2008:119).

This presumptive case could, Wellman concedes, be outweighed by competing claims. So, in the second stage of his argument, Wellman proceeds to argue that the prima facie case is not outweighed by neither egalitarian nor libertarian concerns: as he sees it, the two foremost contenders of such outweighing claims. With regards to the former, Wellman’s main claim is that, even though states may hold stringent duties to outsiders living in poverty, these
are never strong enough to warrant an obligation to open its borders, since states may choose to “export justice” by transferring resources to those living in poverty (2008:127). With regards to the libertarian claim, Wellman argues that the state’s sovereignty over its territory must take precedence over individuals’ rights to invite others to their property if the state is to carry out its requisite functions (2008:131); and, further, that bringing outsiders into the political community has “real consequences” for the entire community, making immigration policy something that should be decided by “that group as a whole” (2008:134).

Given Wellman’s stark conclusion, one might plausibly be lead to believe that his account entails that states, if they choose to open their borders to outsiders, can do so according to whichever criteria they see fit. If the citizens of a state collectively hold a right to associate with whomever they want which is so strong that the state is never obliged to open its borders, then it seems that, when the citizens choose to admit new members, they may do so according to whatever criteria they perceive to be in their interests. After all, Wellman suggests that the US Boys Scouts are within the bounds of their rights in excluding homosexuals and atheists (2008:111–12); and since he also argues that states are, in the relevant sense, like private associations, it seems that there is nothing stopping states from employing similar forms of selection criteria. As we have seen, Wellman does not hold that states are free to employ whatever criteria they see fit: they are disallowed from employing selection criteria that disrespect current members, and in modern democratic states this includes all immigration policies that invoke racial, ethnic or religious categories (2008:140). However, it is important to note that this line of defence seems to be the only one available to Wellman, given his grounding the right to exclude in freedom of association. Therefore, if we want to reject the Blake/Wellman view on the grounds that it does not exhaust the badness of chauvinist immigration policy, then we must also be able to argue against Wellman’s defence of the conventional view, based on freedom of association.

3.2.2 Exclusion and harm to others

The first step in undertaking this task is to note that Wellman conceives the right to freedom of association as a trump right: it is a right with such moral force that it trumps all other relevant concerns. Wellman is explicit about there being other pressing moral concerns, for example the duties put upon us by the suffering of the global poor, which he – like Walzer – argues stems “most straightforwardly from Samaritanism” (2008:124); it is just that the right to freedom of association is so strong that it can never be outweighed and consequently
demand. Following Michael Blake (in his later writings), we can note that Wellman conceives of this right as a “simple deontic trump right”: “If we have a right to freedom of association, then anyone who forces an unwanted association upon us wrongs us – a conclusion which does not fail simply because the one who is being forced upon us is in circumstances of dire need” (Blake, 2012:750). Two interrelated questions thus present themselves: i) can the right to freedom of association be conceived of in this way? And ii) even if it can in the case of individuals and their voluntary associations, can it be straightforwardly extended to states?

With regard to the second question, it might seem that the answer is quite obviously no. David Miller has thus argued that, whilst it might be important for religious groups to exclude people who do not share their faith, and maybe even permissible for private associations like golf clubs to exclude people its members do not “want to rub shoulders with” so long as these have other viable alternatives, these arguments do not work for political communities of the size of contemporary nation-states (2007:211). This is because, unlike the aforementioned associations, states are not intimate associations where the members are forced to interact. Wellman’s argument thus fails, since he relies heavily on the value of not being forced into association with others against our will, and in a state, “if I dislike encountering people with particular characteristics, I can arrange my life in such a way that I will rarely if ever come across them” (ibid.).

However intuitively compelling, Miller’s argument should not be thought to establish more than it does: Although he is completely right in asserting that the “mere presence” of immigrants do not force all members of a society to associate with these newcomers – and thereby violate their associational rights – his argument does not get to the core of Wellman’s concern, which is the distribution of membership. Miller’s argument does challenge the claim that a right to associational freedom can be used in the establishment of a right to control – and enforce restrictions upon – who crosses the border and/or settles on the state’s territory. Wellman’s theory does, however, provide an account of why these exclusionary rights follow from the associational right to distribute membership (Fine, 2010:343). This account stems from the fact that Wellman – like Walzer – holds that long-term residents of a state must be given the option of acquiring citizenship. States, in order to function efficiently, must “nonconsensually coerce all those within their territorial boundaries” (Wellman, 2008:131). In order to protect long-term residents from oppression – to protect persons from being coerced into following laws over which they have no say – states therefore have a democratic obligation to extend citizenship to all such residents. So, as Sarah Fine notes, “the citizens’
collective freedom to associate (and to refuse association) does not extend to excluding long-term residents of the state from the political community” (2010:344), and their collective freedom of association therefore depends, in turn, on a right to exclude potential long-term residents.

Wellman’s argument for the right to control border crossing and settlement on a state’s territory thus ultimately depends both on the validity of his position that states hold a right to freedom of association and that they must extend citizenship to long-term residents. However, even if we leave both of these assumptions unchallenged, Wellman’s argument fails on its own terms. In her appropriately titled “Freedom of Association Is Not the Answer”, Fine develops an internal critique of Wellman that efficiently shows how it so does (2010).

Fine’s first thrust against the freedom of association argument begins by inspecting the notion of self-determination employed by Wellman, pointing out that he leaves out an account of harm to others in his construal of the presumptive case for our “morally privileged positions over our self-regarding affairs” (Wellman, 2008:110; Fine, 2010:345). Elsewhere, Wellman has argued that individual actions are purely self-regarding when they are not harmful to others, that is, causing others to be worse off than they would be otherwise (2003), and, Fine argues, we can from this account extrapolate an analogous account with regards to groups (ibid.).

There are ways in which groups clearly hold the potential to harm also non-members, and – as in the case of individual self-determination – whenever they do, then they their morally privileged position regarding their own affairs is at least questioned. Say, if a particularly enthusiastic rugby club’s weekly practices turn the grass of a public park into a pit of dirt – causing harm to all those who appreciate a grassy park – then the club’s right to “do as they please” can no longer trump all considerations and opinions from the outside. Whereas the club’s self-regarding practices ought to be defended in the interest of avoiding paternalism, whenever the group’s acts and practices may cause harm to others, their morally privileged position is called into question. This is not to say that the group necessarily will lose this position: Rather, the interests of the group ought to be weighed against the interests of the affected outsiders.

33 Although individual self-determination may be blurry in some cases – it is not always clear when my actions are purely self-regarding – the concept of group self-determination becomes particularly troubling when taking harm to others into account. This is partly due to the fact that groups hold the potential to restrict the liberty of their own members – a common response to which is that groups should be left to their own devices so long as their members hold rights to exit (and, in more sophisticated accounts, that they hold the potential of actually exercising this right without significant cost to themselves).
Crucially, this potential to harm outsiders is clearly at play when groups— as they often do – make decisions on who should be admitted as new members: as Walzer put it, deciding “who is in and who is out” is a central aspect of group membership. If a group decides not to admit someone, their act of exclusion – at least in most cases – thwarts the interests of the excluded, either by making them worse off than they currently are or by making them worse off than they otherwise would be (Fine, 2010:347). An example of such exclusions is a person who is excluded from undertaking studies at a prestigious university, (expectedly) making her worse off than she would be otherwise; another example of such exclusions come from people who are either unwilling (for some weighty reason) or unable to join trade unions and are thereby excluded from opportunities that would be available to them (or at least not available to their peers), making them (at least comparatively) worse off than they currently are. These examples are, of course, not thought to show that the groups should not be allowed to exercise their self-determination in these cases; they merely aim to show that the exclusions may be so substantial with regards to the interests of others that their morally privileged position regarding their own affairs may be called into question.

A group’s potential to harm outsiders by exclusion is relevant to the issue of the state’s right to exclude, and it is significant that Wellman does not directly address it in his discussion. As discussed in chapter 1, we may reasonably assume that the interests of the would-be immigrants are thwarted by a denial of their application of entry: the weighty costs attached to emigrating give legitimacy to the interest of those who are willing to make that choice. (In the case of refugees – whom Wellman explicitly includes in his argument – the interest is a matter of life and death.) Further, in the case of families and romantic relationships, exclusions from a state may also greatly damage the interests of some members of that state.34 Crucially, which the case of family reunification perhaps brings out most clearly: people do not always merely have interests in emigrating, but may have powerful reasons for wanting to settle in a particular country. Recall that a crucial premise of Wellman’s argument is that states may choose to “export justice” by transferring resources to needy outsiders instead of granting admittance to their territory or communities. However, even if this was a legitimate response in the case of outsiders failing to meet the conditions of

34 Indeed, Matthew Lister has argued that Wellman’s freedom of association argument may be used to support stringent rights to immigrate whenever there are members whose interests will be greatly served by associating with their family members (2010).
a minimally decent life,\textsuperscript{35} the above discussion has shown that it cannot fully explain – or resolve – the issue of harm to outsiders.

The very act of exclusion might come at significant cost, or even harm, to the would-be immigrants. This potential for harm – as in the case of the rugby club’s harm to communal areas – removes the presumptive case for the state to do as it pleases, and instead “represents a good, though not conclusive, reason against permitting the group to exclude some or all would-be members” (Fine, 2010:348).

3.2.3 The problem of the distinctiveness of the state

Wellman’s likely response to the “harm argument” above is to invoke his examples of self-determination in marriage and religious association. He might contend that whilst the discussion above has shown that exclusions hold the potential to thwart the interests of the excluded, this does not warrant the shift in presumption of the state’s right to exclude, since the outsiders have no rights not to have their interests thwarted in this way. So, a person may, understandably, be harmed by having their proposal turned down by the person they want to marry, without this fact ever challenging the view that the presumptive case lies with the person who declines the proposal (Wellman, 2008:110; Wellman and Cole, 2011:145). Unlike our case of the rugby practices, where both the team and the outsiders have equal claims to the communal areas, the resulting harm cannot be said to constitute a violation of rights.

We ought here to return to Miller’s above argument about the distinctive form of association the state is. Again, Wellman’s argument gains force, firstly, from the plausibility of the claim that persons and groups hold rights to (dis)associate in intimate or expressive contexts and, secondly, from holding the modern nation-state to be a relevantly similar association. For the reasons given by Miller above, the state clearly does not qualify as an intimate association: My fellow-citizens and I may share a legal status, but we are not forced to “rub shoulders” – we can organise our lives so that we do not have to spend time with those we do not like. However, Wellman argues that, whilst our intimate associations clearly are more important to us than our relationships with our compatriots, this does not undermine the presumptive case in favour of exclusion (2008:114). He thus writes:

\textsuperscript{35} Setting aside the issues of explaining how it could be in those cases where the failing to lead a minimally decent life is caused by well-founded fear of persecution and other forms of physical threat.
(...), to note the lack of intimacy among compatriots is to miss an important part of the story. It is no good to tell citizens that they need not personally (let alone intimately) associate with any fellow citizens they happen to dislike because fellow citizens nonetheless remain political associates (...). 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. (Wellman, 2008:114–115)

The state might, then, be thought to be an *expressive* association and thus warrant the firm presumptive case for the right to exclude. Religious associations are typically thought of as expressive, since in most cases religious worship does not demand that all members associate with one another closely. The essential part of an expressive association is that they are instrumental to the exercise of their members’ conscience (White, 1997:381); such associations are dependent on the right to exclude those who do not share the views which is their primary purpose. This is why religious groups are allowed to exclude atheists (at least the political kind), and women’s rights-groups are allowed to exclude anti-abortion campaigners: Their primary purposes would be undermined by admitting these new members and, therefore, they hold a strong presumptive case for the right to exclude.

Is this an accurate description of the liberal state? One might suggest that such a state – albeit perhaps lacking a clearly defined primary purpose – is committed to a core set of principles, such as liberty and equality before the law, and that this commitment might serve as grounds for the presumptive case to exclude (Fine, 2010:349). As Wellman writes, people care deeply about their political communities, and might as such see what they value as threatened by the prospect of newcomers.

Such a construal of the liberal state as an expressive association is, however, unsuccessful. Firstly, it fails to account for the factual condition that liberal states are places where many different – and often conflicting – conceptions of the good life are represented, some of which may even be antithetical to liberalism. As we saw in the critique of Walzer above, states are grounds for a variety of different “worlds of common meaning” and the attempt to locate one single purpose within this plurality is bound to fail. Secondly, such a response fails to normatively account for liberalism’s champion of this pluralism. The very reason we value the liberal state is for its guarantee that we can exercise our agency in order to form valuable and meaningful relationships, with individuals and groups; that guarantee cannot serve as such a relationship in itself. Further, as Fine very truly notes, whenever

governments mistake the state for an expressive association with a single purpose, “the result is often distinctly and disturbingly illiberal, as in the case of the American government’s clampdown on communist views in the McCarthy era or the suppression of political opposition in the former Soviet Union” (2010:350).

The liberal state, then, cannot be conceived of as an intimate or as an expressive association: the cases of marital and religious association are not analogous to the state. Thusly, the clear presumptive case in favour of the right to exclude outsiders seems to have been undermined. Yet, Wellman also maintains that states are relevantly analogous to golf clubs and, therefore, that if one holds that golf clubs hold a presumptive right not to admit new members, then this “straightforwardly applies” also to liberal nation-states (2008:114).

So it might be thought that it is their similarity to clubs that grant states the presumptive right to exclude. However, grounding the presumptive right to exclude in this way is less promising than holding the state to be an expressive association, because of the ways in which states are quite clearly not analogous to clubs. Crucially, states are unlike clubs because of the impossibility – in the world as we know it, where all territory is bounded by borders – for a group of migrants to set up their own state: If I am excluded from a golf club, on the other hand, I can start my own. Further and relatedly, clubs are generally relatively unimportant to the development of our lives, precisely because the goods they provide can be attained in another club that serves the same purpose. States, however, are not like this. Again, people may have powerful reasons for moving to a particular state, and their interests in doing so may not be fulfilled simply by being admitted somewhere.

Further still, their relative unimportance seems to be exactly why clubs do hold a presumptive right to exclude: Whenever a club gains a definitional power so strong that membership provides significant advantages to its members that outsiders cannot obtain elsewhere, our judgements about their presumptive right to exclude tend to shift. To illustrate this point, both Fine (2010:351) and Blake (2012:753) introduce the case of the 1984 US Supreme Court ruling against the United States Junior Chamber. The Jaycees (as the organisation is also known) had a policy of only extending full membership to men, and the court ruled that it was not unconstitutional to deny the organisation the right to exercise their freedom of association in this way, precisely because the exclusions came at significant costs to the excluded (because of the position the organisation had attained and the advantages its members enjoyed) and because the exclusion of women did not serve any clear expressive or intimate ends. This shift in presumptions according to the strength of a club, group or
organisation is something we can recognise in much more familiar contexts than court rulings: If two children are playing together and prefer to be alone, we would encourage the third child who wants to join to ask some of the other children outside if they want to play with them instead – but if all of the children outside are playing together and do not want the child to join, they ought not to be allowed. They cannot exclude “just because”.

All of this goes to show that Wellman is unsuccessful in establishing his clear-cut case for a state’s presumptive right to exclude. The state is not an intimate or expressive association, and can thus not be likened to our morally privileged position regarding our own marital or religious association. Nor is the state unimportant: unlike clubs, would-be members are unable to set up their own state and may have powerful reasons for going to one state in particular, and as such, the analogy between states and clubs does not hold either. The right to self-determination and, in turn, freedom of association, therefore, fails to warrant a strong case for the right to exclude. We ought to conclude, with Fine, that freedom of association is not the answer.

Therefore, our criticism of the rights of members-view with regards to selection criteria stands: Since the freedom of association-argument fails to be a plausible account of the conventional view, we can and should reject the violation of the rights of members as exhaustive of the moral restrictions that govern states’ immigration policies. A plausible account of the right to exclude, then, must be able to account for the injustice suffered by the excluded migrants who are excluded on the basis of socially salient traits.

3.3 Conclusion: the need for the perspective of the excluded migrants
In this chapter I have argued against the view that we can ground our case against selecting immigrants on the basis of socially salient traits in the rights of existing members. Whilst the rights of those members who would be publicly disvalued by such immigration policies provide a reason – and a forceful one – for why such selection is morally prohibited, this explanation is not exhaustive. As a consequence, the account seems to miss towards whom the injustice primarily is being done. Further, I have argued against an influential view of the right to exclude, which – if valid – would render the rights of members view our only available objection to selection criteria that pick out socially salient traits. I have argued against this view, on the basis that it wrongly depicts the right to freedom of association as a simple deontic trump right and that it thereby ignores the state’s potential to harm outsiders.
Throughout this chapter and the one before, my arguments have suggested that a just theory of immigration must give *some* weight to the interests of the would-be immigrants. The next and last chapter explores this notion further, and aims to give an account of what this “weight” ought to be. I do this by bringing in the perspective of the would-be immigrants, thus shifting the focus of our discussion from the ways in which states may permissibly exclude to what obligations a commitment to moral equality gives rise to in the realm of immigration.
Chapter 4: Moral equality and the conventional view

I begin this concluding chapter by restating the way in which the conventional view makes trouble for those who want to ground this restriction in a straightforward appeal to moral equality. I then argue that looking at the particular relationship that exists between states and economic migrants allows us to formulate some minimal restrictions the state must meet in order to treat would-be immigrants in accordance with moral equality.

These restrictions, I argue, disallow the employment of socially salient traits as criteria in immigration policy in the vast majority of cases. In a particular case, however, states may at least be permitted to select according to gender. I outline this case and clarify the conditions it must meet, before I, in the final section, consider the prospects of employing a policy of “positive discrimination” in immigration.

4.1 The appeal to liberal-democratic principles

In The Ethics of Immigration, Carens writes about exclusions on the basis of socially salient traits that they are simply “clearly morally impermissible”:

No state may legitimately exclude potential immigrants on the basis of race, ethnicity, or religion. (…) the moral impermissibility of this sort of overt discrimination is one of the clearest points of consensus today among those who accept democratic principles. (2013:174)

And later:

To the previous list (…) I would add the category of sexual orientation. For many years, homosexuality was grounds for declaring potential immigrants inadmissible to the United States. This is incompatible with respect for human freedom and human dignity. As with the case of race, ethnicity, and religion, the use of sexual orientation as a criterion of exclusion in immigration policy reflects deeply rooted prejudices that cannot any longer be defended publicly. (2013:175)

In what follows, I will argue that Carens is largely right in these assertions. However, in the context of the conventional view, the task of establishing these restrictions on permissible selection criteria is not as simple as he here seems to assume. In order for a widely defined notion of democratic principles – or, as he writes in the second paragraph, respect for human freedom and dignity – to straightforwardly ground restrictions on selection criteria, we would have to assume that these principles applied in the same way to citizens and outsiders alike.
The most obvious way to get to this conclusion would be to hold that a commitment to moral equality requires that states treat all human beings equally. This would, however, commit us to strong cosmopolitanism, which sits poorly with the conventional view. As we saw in chapter 1, the conventional view presupposes that states are justified in treating their citizens and outsiders differently on the basis of a fact that is clearly arbitrary – namely, where they happen to be born. Thus, the conventional view presupposes an interpretation of moral equality that is less rigid than what Carens seems to imply in his swift rejection of the permissibility of selecting immigrants on the basis of religion or sexuality.

It has been argued against Carens’ book that the discussion in its first ten chapters carry with it the conclusions of the last three: \(^{37}\) That a commitment to moral equality – and particularly to equal freedom of movement – entails that people ought to be able to move across borders internationally as they move across (provincial, etc.) borders nationally (2013). In the case of selection criteria this problem – *Das Carensproblem*, as David Miller names it (Abizadeh, Bauböck, Carens and Miller, 2015:387) – is well-founded.\(^{38}\) States, on the conventional view, are justified in treating citizens and outsiders differently and we are, therefore, in need of a more substantive argument for why a commitment to moral equality disallows selecting on the basis of socially salient traits. Again, simply stating that a commitment to democratic principles or respect for human freedom and dignity disallow such selection, does not provide us with an explanation as to why states may not differentiate on the basis of these traits, when they are justified in treating their citizens differently from all other human beings in other respects. And this is exactly what needs to be shown.\(^{39}\)

The problem of attempting to locate the impermissibility of employing socially salient traits as selection criteria in a straightforward appeal to liberal-democratic principles can be brought out in another way. Consider the following passage from David Miller’s early work on the topic:

> I have tried to hold a balance between the interest that migrants have in entering the country they want to live in, and the interest that political communities having in determining their own character. Although the first of these

\(^{37}\) Recall that Carens carries out the discussion in the first ten chapters of his book from the conventional view, which he goes on to reject in the last three chapters.

\(^{38}\) For discussions of this problem more generally, and in relation to other areas in the ethics of immigration, see the contributions in a recent review symposium on *The Ethics of Immigration* (Abizadeh, Bauböck, Carens and Miller, 2015).

\(^{39}\) For an argument against the suggestion that the human right to anti-discrimination can be extended to immigrations admissions, see Miller (2013). He here argues that, whilst a concern of justice, being unjustly discriminated against in immigration selection does not – unless one is a refugee – deprive one of the chance to lead a minimally decent life and can therefore not be understood as a human right (2013:14–19).
interests is not strong enough to justify a right to migration, it is still substantial, and so the immigrants who are refused entry are owed an explanation. To be told that they belong to the wrong race, or sex (or have hair of the wrong colour) is insulting, given that these features do not connect to anything of real significance to the society they want to join. (2005:204, my emphasis)

Taken as it stands here, it may seem that Miller is guilty of the same form of mistake as Carens. The argument is that race and sex fail to be relevant reasons for exclusion and, therefore, that exclusions on such grounds are insulting to the excluded would-be immigrants. Without a further account of why states are disallowed from insulting outsiders, however, it is not altogether clear that the fact that the excluded migrants are insulted by a criterion of selection renders that criterion impermissible. So whilst we may hold that states are disallowed from publicly insulting their citizens – this is what grounds the rights of members-view discussed in the chapter 3 – it is not clear, given that states are justified in treating citizens and outsiders differently, that they have such an obligation towards outsiders.

This criticism of Miller’s “insult-argument” is found in Christopher Heath Wellman’s later work on selection criteria (Wellman and Cole, 2011). Here, Wellman has moved away from the rights of members-view discussed in the previous chapter, partly because of the worry that this view fails to object to selection on the basis of socially salient traits whenever a state is relevantly homogenous (2011:149). Still, he is sceptical about the prospects of formulating a theory of why such selection constitutes a moral failure on the part of the state, and thus presents an argument that is meant to cast doubt on the whole enterprise of so doing. Referring to the passage from Miller cited above, Wellman argues that whilst “there is little doubt that migrants who are excluded on racist grounds are likely to find this

---

40 As we shall see in the next section, however, Miller’s full account is more complex.
41 He also worries, however, that the view might be too strict in some cases. Thus, employing a variety of the social cohesion argument, Wellman suggests that, in a case where a state has just received a significant amount of immigrants from a country, it might permissively decide not to admit any more immigrants from that particular country “because of the potential political and social issues that might arise from having a culturally distinct community that grew any larger” (Wellman and Cole, 2011:149–150). Here, it seems, the worry that such a policy would treat that community like second-class citizens ceases to be a problem.
42 It is worth bearing in mind that Wellman’s scepticism stems from the fact that, whilst he has left the right of members-view with regards to selection criteria, he still supports the freedom of association view as the proper defence for the state’s right to exclude (Wellman and Cole, 2011:13–56). As we saw in the last chapter, it is hard to give any significant weight to the rights and interests of the would-be immigrants on this view, since it holds that states are entitled to shut its borders even to refugees. I have already argued, however, we ought to reject the freedom of association view as the defence of the conventional view. Our arguments here are not, therefore, restrained by a concern to uphold this position.
“insulting”, it is not clear that the would-be immigrants have a right not to be insulted in this way (2011:145).

In order to make this point, Wellman once again pushes his analogy between private and public associations. He gives the example of a racist, Jane, who refuses to even consider marrying a person of colour because of her prejudice:

> We would expect blacks to be insulted by Jane’s racism, but does it therefore follow that Jane has a duty to marry a black person? As deplorable as her racism may be, I would presume that Jane’s freedom of association in the marital realm remains unrestricted. And if a racist individual remains within her rights when she refuses to consider marrying outside of her race, then why is a political community not equally entitled to exclude new members on these same grounds (Wellman and Cole, 2011:145–146).

Wellman thus holds that, just like Jane is not under an obligation to marry a black person simply because her criteria of a future partner are offensive to black persons; states cannot be said to be under any obligation to admit any particular group, although members of an excluded group may rightfully find that state’s immigration policy insulting. Therefore, whilst we may find racist immigration policies – just like we find the racism of individuals – to be “abhorrent”, it is not clear that this fact takes away a state’s right to conduct such policy.

Wellman’s Jane argument is quite clearly problematic. Even if we do not take into account the problems of how the state is distinct from private associations, the analogy between Jane’s marital decisions and a state’s immigration policy is unskilfully constructed. Firstly, Wellman implies that it follows from the insulting nature of Jane’s racism (and more generally from our objection to her racism) that she therefore has an obligation to marry a black person. This is not a plausible interpretation of the position that racism in the private sphere (and, by extension, that racism in immigration policy) is objectionable. A commitment to moral equality (and thus to anti-racism) does not entail that the objectionable outcome of a failure to respect moral equality gives rise to a corresponding positive duty to act in ways that directly contradicts that failure. To put it more simply, anti-racism does not entail that everyone has an obligation to become friends with, employ or marry someone with a different colour of skin; what anti-racism commits us to, is that we do not choose our friends, employees and marital partners because of their colour of skin. So what follows in Jane’s case is not that she is under an obligation to marry a black person; she is, however, under an obligation to consider all human beings as being worthy of her consideration when choosing a spouse.
Further, Wellman’s Jane case gains force from a conflation between two different ways we may talk about rights and obligations. As Wellman conceives of it, failing to uphold an obligation entails state action: If Jane holds an obligation not to be racist and fails to meet the demands of this obligation, then her freedom of association must be restricted accordingly (by way of forcing her to marry a black person). As he writes in his earlier paper, “as much as I abhor racism, I believe that racist individuals cannot be forced to marry someone (or adopt a child) outside of their race” (2008:138, my emphasis). So, if we do not want to commit ourselves to the claim that persons may legitimately be forced to marry someone, then it follows that black persons do not hold any rights not to be discriminated against on the basis of their colour of skin in the personal realm. This move, however, conflates the difference between moral and political obligation. We may consistently hold that we have many obligations by virtue of our status as moral beings, and that some of these obligations are not the proper subjects for legislation and thus state coercion.

A straightforward example of this distinction is found in Kant’s separation between duties of justice and duties of virtue (1996:383, 515). Duties of justice, because of their direct concern for the freedom of others, have external conditions and can, therefore, be coercively enforced. Duties of virtue, however, are also dependent on the content of our maxims in carrying out our actions, and thus on the intentions of the agent; since this content is only truly known to the agent these duties fail to be subjects for coercive enforcement (Guyer, 1998: sect. 10). So, Jane has an obligation not to select a marital partner on racist grounds, but since Jane’s reasons for selecting a marital partner are only available to her, this choice falls outside the sphere of justice and can thus not be coercively enforced. The only thing that can regulate Jane’s duties of virtue is, as Kant holds, her own conscience (Guyer, 1998). Jane’s obligation not to restrict someone else’s autonomy by means of force, however, lies firmly within the scope of justice – whether Jane is guilty of this does not depend on her intentions in so doing.

Once we have clarified this distinction between moral and political obligations, Wellman’s Jane example loses all force. We may consistently hold that Jane is under an obligation not to be a racist in the marital realm, without accepting (if this was what followed from such an obligation) the conclusion that she is thereby forced to marry a black person. Thus, Wellman is unsuccessful in his aim of casting doubt on the prospects of holding that

---

43 Wellman is, of course, committed to the view that states may not differentiate between its citizens on racist grounds, and may thus hold that in the public sphere black persons hold such rights.
would-be immigrants have rights not to be discriminated against on the basis of their colour of skin. This alone, of course, does not settle the matter. Therefore, we are in need of a substantial argument that establishes exactly what kind of wrong the state does when it selects immigrants on the basis of socially salient traits.

4.2 Moral equality and reasons for exclusion

In undertaking this task of explicating the particular kind of wrong states commit when selecting immigrants according to socially salient traits, we ought to return to the particular kind of relationship that exists between states and economic migrants. In particular, we ought to look at the exclusions from the perspective of the would-be immigrants. Again, these migrants hold no right to enter that state. Unlike refugees, they do not stand in a relationship where the state is capable of relieving the migrants of their state of urgent need. And unlike particularity claimants, the relationship between the migrants and the state is not defined by some past injustice or a claim of desert. Nor, of course, are the economic migrants in a relationship towards the state that resembles that of the state’s citizens: They do not live under the state’s jurisdiction and are thus not placed under the shared “web of coercion” constitutive of modern states with the duties and rights this relationship gives rise to (Blake, 2001:278). After all, it is this relationship the economic migrants seek to be in.

So whilst economic migrants do not have a right to enter the state to which they apply for admittance, they do, however, have a significant interest in so doing – because of the economic prospects the move represents, because of the possibility of partaking in a culture that flourishes in that state, because of the natural scenery the state has to offer, or because of the high degree of tolerance for different lifestyles present in that state. This interest, which constitutes their claim against the state, is significant because it renders the relationship between the would-be immigrants and the state as something beyond the relationship between states and non-members more generally. Through their own choices, the migrants have placed themselves under the state’s authority and have implicitly accepted the state’s right to determine whether they will have their claim fulfilled. Crucially, admittance to the state represents a good for the migrant, and the state is thus in a position where it is to decide whether the migrant in question is to receive that good. The state must carry out this decision in a way that is consistent with moral equality.

Our dissection of the different sorts of relationships states stand in with regards to different people is relevant here. Since citizens, refugees, particularity claimants, and
economic migrants stand in different relationships towards the state, a commitment to moral equality does not disallow differential treatment of persons belonging to each of these groups.\textsuperscript{45} However, it seems that a commitment to moral equality disallows treating people who stand in the same relationship towards the state differently in some relevant sense (Blake, 2008:970). So, whereas the state is justified in treating refugees and economic migrants differently due to their respective claims, it cannot arbitrarily choose between persons who hold the same sort of claim towards it. Selecting according to arbitrary conditions is, therefore, prohibited. This does not, of course, mean that the state cannot treat people differently. Amongst our fellow citizens we accept different distributions of resources whenever those are needed: Few complain that the state spends more resources on people with disabilities so that they, for example, can partake in classroom education. Similarly, we are prepared to accept affirmative action policy where we accept that these address societal structures that have systematically disadvantaged the group in question. The point, of course, is that the differential treatment must be justified.

The first step the state must make in order to meet its obligation of treating everyone in accordance with moral equality, therefore, is to offer justifications for all differential treatment. What constitutes a justification proper will depend on the claims the parties in question have towards the state. Whereas the state is (at least generally) permitted to select economic migrants on the basis of economic potential – and thus treat the applicants for immigration differentially – it may not differentiate between its own citizens on such grounds alone. To use a well-known example, Rawls argues that a principle of efficiency cannot in spite of its promise of economic gain “serve alone as a conception of justice”; rather, it must be restrained by the difference principle (1999:62). However, once considerations of efficiency are so restricted, they may be carried out – because their benefits to the least well-off serve as their justification.

The bar on what serves as a justification for differential treatment of economic migrants is thus much lower than what it is for citizens. Again, this is because the economic migrant does not hold any further claim than that admittance will be in their interest. Still, the migrant is owed a justification for their (potential) exclusion. A commitment to moral equality, at the very least, puts the state under an obligation to recognise that all applicants for admission are persons worthy of its consideration.\textsuperscript{46} A failure to provide any reason – which

\textsuperscript{45} Recall, again, from chapter 1 that this rejection of strong cosmopolitanism follows from the conventional view

\textsuperscript{46} Here, at least, the case of immigration selection is analogous to Wellman’s Jane example: She is also under such an obligation.
is, of course, a necessary condition for providing a justification – for why their application was unsuccessful clearly violates this obligation. The most clear-cut example of such failure would be if a state, which did not provide any information on how it selects its immigrants, never responded to the migrants’ application for admittance, or if the migrant was told that their application was, simply, “denied” without any further grounds for this rejection. In these cases, the migrant has no means by which to judge if their claim has been taken seriously: For all they know, their application could have been thrown unopened in the bin.

It is important to appreciate that this, in itself, provides a very minimal restriction on a state’s selection procedures: It does not, for example, entail that would-be immigrants are entitled to comprehensive accounts of why their personal claims for admittance were not accepted. If the migrant is informed when making their application about the criteria the state employs for selecting its immigrants, or *at least* that this information is easily available, then this minimal condition is met.\(^{47}\) So, a commitment to moral equality places a requirement on states that they must provide reasons for their exclusion of the migrant – *and* that these reasons must be available to the would-be immigrant. A commitment to moral equality prohibits selecting according to criteria that are not known to the would-be immigrant.

So, one condition that must be met in order for a reason to be justifiable is that it is available to the would-be immigrant. This is, of course, not sufficient: Providing a reason does not make that reason justified. Our task at hand, then, is to show why reasons for selection that make reference to socially salient traits fail to be justified, even when they are given to the excluded migrants.

### 4.2.1 Relevant reasons for exclusion

At this point it may be useful to take up Lippert-Rasmussen’s point from chapter 1 and compare cases of immigration policy, asking why one that employs socially salient traits is “morally worse than the other” (Lippert-Rasmussen, 2013:104). So, let us imagine three states, A, B and C. Two of these states, A and B, select economic immigrants according to criteria that, under the conventional view, seem permissible. In state A, a recent discovery of a valuable natural resource has created a need for scientists and engineers with competence in handling and extracting the material. Therefore, A seeks out applicants with relevant educational backgrounds in its immigration policy. In state B, there is high demand for low-
skilled workers, due to a shortage in the labour-force for workers in kindergartens and nursing homes. Due to the low levels of foreign-language competence present amongst the population, B lists language-competence as a criterion of preference in its immigration policy. State C also has a high demand for low-skilled workers, in particular manual labourers. Due to the large degree of distrust towards people of different races present amongst its citizenry, C chooses to list skin colour as a criterion of selection. All of these states are explicit about their criteria of selection: They are listed on the application forms candidates for immigration must submit.

All of these states treat their applicants differently. However, C does so in a way that is objectionable. What does C do wrong that A and B do not? One possible answer would be to suggest that C discriminates on the basis of morally arbitrary traits, whilst the other two do not. As we have seen, however, this response is not satisfactory. Beyond the fact that the conventional view presupposes the moral significance of a clearly arbitrary fact, namely the place of one’s birth, there is a clear sense in which the restrictions employed by A and B also pick out arbitrary traits. For example, how most of us acquire language-abilities is largely due to completely arbitrary factors, such as the families and, again, states in which we happen to be born. However, there is another, closely related objection to C’s immigration policy. This objection holds that C, unlike A and B, employs a criterion of selection that is, in a sense, irrelevant to that state and that it is, therefore, objectionable.

Versions of this argument have been fronted by Michael Blake (2008) and David Miller (2005; 2015). Recall from the passage cited above that Miller holds that states are disallowed from employing race or gender as criteria in immigration, because to give that as a reason for exclusion is “insulting, given that these features do not connect to anything of real significance to the society they want to join (2005:204, my emphasis). In order for the state’s exclusion of would-be immigrants to be justified, therefore, the state must be able to offer “relevant reasons” for their decision (Miller, 2015:400). Similarly, Michael Blake argues that states owe excluded migrants reasons for their exclusions, and that these reasons must be so that they cannot be “reasonably rejected” (2008:970).

This response has clear force. When a state is going to list criteria that ground their discretionary policy, it must be able to give reasons for why that criterion contributes to something that is of significance to the state. Due to the considerable interests would-be immigrants have in entering the state, a state’s decision to select immigrants on the basis of reasons that cannot be defended – a state might say, for example, “your application for
admittance was not granted because we received your application on a Tuesday” – would fail to treat the applicant seriously as a moral person. Such a state would, to use Miller’s phrase, treat the would-be immigrants like they were “morally insignificant” (2015:400). Crucially, reasons that make reference to socially salient traits fail to provide such justifiable reasons. The wish to create a white – or, for that matter, blonde – society does not constitute something of real significance. Failing to provide such a reason, then, would amount to a direct disregard of the would-be immigrant’s moral equality – they would be denied equal consideration for reasons that cannot be defended.

So, according to this explanation, the injustice of state C’s policy is that it fails to pick out a trait that can be said to be of real significance to its political community. However, one might object that C does give a reason for employing race as a criterion of selection, and that this reason does make reference to something of real significance to the state, namely, the levels of social trust present in the state. This is, of course, a version of the social cohesion argument, which we rejected in chapter 2. So, employing the same argument we did there, we may reply that C does provide a reason and, further, that the reason provided does make reference to something that looks “more legitimate” than a mere wish for a racially pure political community, but that this reason still fails to be justified. An important normative constraint on what counts as a justified reason for exclusion is whether that reason relies on a premise that is made true by the attitudes of the citizens themselves. In the case of state C, this constraint appears not to be met: Their wish to work towards a racially homogenous society is supported by a reason, but that this reason cannot be defended – and thus justified – since the truth of one of the premises that make it true relies partly on the citizens themselves (assuming that the reason why state C wishes to avoid high levels of social distrust is because of its negative effects).

So, whenever a state provides a reason for exclusion that reason must, in order to be justified, somehow be relevant to a legitimate goal of that state. That relevant reason is subject to normative constraints and, as I have just argued, an important condition it must meet is that the reason cannot ultimately rest upon the unwilling attitudes of the members of the political community. Employing our argument against the social cohesion view gives clear objections to many other reasons states may employ for listing socially salient traits as selection criteria: Favouring people of a certain religion or ethnicity for the reason that these “fit” better with the national culture will thus also fail to be justified. Similarly, a state with a more far-fetched societal ideal, like a blonde-haired one, will have an even harder time
justifying their reason – or even coming up with one. These reasons can, clearly, be reasonably rejected. Thus, we ought to object to those goals and aims of states, legitimate though they may be in themselves (state C’s goal of maintaining high levels of social trust), whenever the argument in its support partly relies on the attitudes and convictions of the citizens themselves. If their attitudes and convictions cause the citizens to act in ways that indicate that some groups of people are worth more than others, then those attitudes cannot ground a policy in favour of a societal goal. Such attitudes cannot, as Carens reminds us, be defended publicly.

4.2.2 The limitation of relevant reasons
Our current line of argument holds, firstly, that due to the relationship between states and would-be immigrants – which is characterised by the strong interest-based claim the would-be immigrants make upon the state – states owe these migrants reasons for their potential exclusions. Secondly, these reasons are subject to normative constraint: They must be justified. The standard of this justification is not that all excluded migrants must accept the reasons they are given – they may, in spite of their claim to be admitted to the state in question, disagree on what that state chooses to prioritise when setting its selection criteria. Rather, this justification is set by what can reasonably be said to be a relevant concern of the state. And, lastly, a concern is relevant only if it does not ultimately rely on attitudes that fail to respect moral equality. Therefore, we may conclude – with Miller and Blake⁴⁸ – that selection according to socially salient traits is always prohibited when selecting economic immigrants: Such selection fails to treat the excluded migrants like they are agents whose claims are worth equal considerations.

This explanation is, however, in need of further clarification. This is because, as it stands, it cannot completely rule out selection according to socially salient traits. To see this, consider yet another state, D, which suffers from badly skewed sex ratios. In an attempt to influence this, D decides to select immigrants on the basis of their sex. Here, D is selecting immigrants on the basis of a socially salient trait⁴⁹ – and is thus excluding all of those who do

⁴⁸ Neither Blake nor Miller employ the concept of socially salient traits. However, due to the list the list of traits they take to be inadmissible, I take it that this is what they are getting at. Miller holds that the inadmissible traits are race, gender, and religion (2005:204; 2015:400–401); and Blake that they are ethnicity (nationality), race, and sexuality (2008:975–976).
⁴⁹ Or, at least, on the basis of a concept, sex, that at least superficially corresponds to the socially salient trait gender. I will have more to say about the normative significance of the distinction between sex and gender in the next paragraph.
not fulfil this criterion on the same basis. However, D’s reason for doing so does not fail to be justified in the same way as we saw in the case of C. D might, for example, maintain that their reason for selecting on the basis of sex is justified by making reference to the positive effects a more balanced sex ratio will have on population growth. Thus, state D might hold, they are giving the excluded migrants a relevant reason, with a clear link to something of real significance to their political community. As Melissa Lane writes, “sex is a good example of the sort of demographic factor that will in the aggregate have serious implications for the general interest and welfare of a society” (2006:140).

This justification does appeal to an empirical fact; however, its factual component does not seem to have the same hidden normative premise. It does not rely on a prediction about how its future citizens will behave if more strangers are admitted into their political community – to the contrary, the argument assumes that the increase of persons of one sex will have a positive societal effect. So, it seems that we have found a relevant reason that does make reference to socially salient traits. Here is a reason that meets our normative constraints, but allows selection according to the sex of the would-be immigrants. This exception holds and, therefore, shows that an appeal to relevant reasons cannot rule out all selection according to socially salient traits (recall that Miller, in the cited paragraph above, argues explicitly that the condition of providing relevant reasons rules out the possibility of selecting according to sex). As we shall see in the next paragraph, however, permissibly selecting according to sex is also restricted by normative constraints.

4.2.3 Reproductive reasons
Let us consider the policy of D once more. D has decided to only admit persons of one sex for demographic reasons: It wants to influence the balance of its sex ratio. Once that gender ratio is sufficiently balanced, it will stop employing this criterion of selection. D does this because of the positive societal effects a balanced gender ratio is thought to have; an example of such a positive effect is, as we suggested above, that it will contribute to population growth. As it stands, this seems like a reason that is justified. Recall that the standard we are after is whether migrants can be said to have been treated as if their claims for admittance are morally significant. If a migrant has their application turned down on the basis that the society they seek to join suffers from underrepresentation of the opposite sex in their population, this seems acceptable.
However, there is one thing about the policy of D that we need to notice straight away. If it specifies population growth as the specific societal effect it is aiming to achieve, then it seems that it is selecting immigrants on the basis of their prospective reproductive abilities. Thus, we may ask whether using demographic concerns as reasons in immigration policy may be extended to other socially salient traits. For example, if a society was looking to positively influence its population growth, would it be legitimate for that state to employ other criteria of selection that, as a matter of empirical fact, are likely to contribute to that goal?

Two suggestions that present themselves in this context are sexuality and fertility. State D might also list ‘heterosexuality’ as a criterion of selection, as heterosexual couples are more likely than other couples to contribute to positive population growth. Similarly, it might also ask the persons of the relevant sex – whichever is needed to balance its skewed sex ratio – to provide proof of their reproductive abilities. So, one might hold, if we want to say that demographic concerns may legitimise the selection of immigrants on the basis of their sex, then sexuality and fertility are also legitimate whenever states employ this reason. Thus, our allowing sex as a criterion of selection in this instance has suddenly given rise to selection according to another socially salient trait, sexuality.

Singling out a socially salient trait like sexuality for “neutral” reasons like demographic concerns should, at once, be recognised as problematic in light of the long history of oppression of sexual minorities – which have also influenced the immigration policies of western democratic states. In this context, however, we can formulate an objection on other grounds: The demeaning character of an immigration policy that differentiates according to their sexual preferences (or their ability to reproduce). States are under an obligation to select immigrants in a way that is consistent with moral equality, and asking would-be immigrants intrusive questions about how they lead their private lives fails to uphold a condition of respect of those private lives. The state cannot control the love and family lives of their citizens, and treating would-be immigrants as moral equals must entail a recognition that it cannot expect to control the private lives of those migrants either. Thus, the state is disallowed from employing sexuality and fertility as criteria of selection.

One important consequence of this argument against selection according to sexuality and fertility is that it also limits the way in which states may permissibly select immigrants according to their sex. This consequence is that states cannot, in fact, select according to sex; they must select according to gender. There are, of course, many controversies and debates about the relationship between these two concepts, but as I understand them here I take the
prior, sex, to refer to one’s biological make-up and the latter, gender, to refer to one’s social identity. My point is that asking would-be immigrants about their biological make-up amounts to the same form of intrusive behaviour that we objected to in the case of asking about would-be immigrants’ sexuality and reproductive abilities. Therefore, if a state selects immigrants in order to influence sex ratios, it can only permissibly do so on the basis of people’s gender identities. As a consequence, if a state adopts a policy that aims to increase the ratio of men in its population, it cannot exclude a person who was assigned the sex ‘female’ at birth, but who lives his life as a man.

4.3 Positive discrimination in immigration

The above discussion brings out an interesting dimension that is not normally discussed in the literature on selection criteria, and this is whether one may employ reasons of “positive discrimination” in immigration policy. In this section I want to consider, briefly, the prospects such concerns may have as reasons for selecting according to socially salient traits. In our example above, state D decided to only to admit persons of a particular gender due to the positive societal effects a balanced sex ratio is likely to have on the population. Thus, one might wonder if states may permissibly choose to actively select groups that have traditionally been discriminated against. May a state, for example, choose to give priority to non-heterosexuals, or to people who belong to religious groups that are minorities in their society? Such a state might, after all, argue that diversity is likely to have good societal effects, and further that these immigration policies do give weight to moral equality by way of recognising groups that have historically been on the other side of discrimination. Such positive discrimination in immigration might be seen as an admirable reason to select according to socially salient traits. However, on the whole, I think it will be largely impermissible. Recall, again that in order to uphold the demands of moral equality, each state must treat the claims of would-be immigrants as morally significant – as worthy of consideration. As we have seen, this puts states under an obligation to provide reasons for their exclusions of potential migrants and, further, these reasons must meet several normative constraints in order to be justified.

So, we must ask, can concerns about positive discrimination constitute such justifiable reasons for exclusion? In order to answer this question, it is important to recognise that positive discrimination – or affirmative action policy as it is also called – is typically justified by pointing out a societal structure that unjustly benefits holders of one socially salient trait
(for example, race or gender) and arguing that, because of these benefits the holders receive, they may legitimately be discriminated against in order to counteract those structures (see Arneson, 2013). Thus, one might argue, there should be quotas on company boards to ensure female representation, and the resulting discrimination against men is justified given the unfair advantages in professional life they – statistically – enjoy. A worry about applying such arguments to the case of selection criteria is that outsiders do not yet participate in the societal structures the positive discrimination seeks to correct. Therefore, whilst the state may point to the unfair structures that it seeks to correct by way of its policy, it seems hard for the state to justify that policy to the excluded migrants, since they have – due to their status as non-members – not even had the statistical chance of enjoying those unfair advantages. For example, although patriarchy exists internationally and cross-culturally, the state can only claim to be tackling its own patriarchal structures – and it is these structures the excluded migrants have never enjoyed the advantages of.

A state might, however, attempt to justify its positive discrimination on the basis of socially salient traits in other ways. For example, it might argue – as was done in the case of the positive effects of a balanced sex ratio – that, for example, increased levels of ethnic diversity is likely to have general positive societal effects. This is, of course, a possibility. Whatever these societal effects are, however, they have to be firmly based in empirical research – this is, of course, also a condition on whatever demographical reasons one may give for selecting according to gender. Even if the intentions are good, the claims of the excluded would-be immigrants demands that an immigration policy that picks out socially salient traits is backed by more than such intentions. Failing to provide such a strong empirical case would fail to take seriously the claims of all of those who are excluded on the basis of their race, ethnicity, religion, gender, or sexuality.

4.4 Conclusion: the relevance of social salience

In this thesis, I have presented an argument for why selection on the basis of socially salient traits is morally objectionable. My argument holds that such selection is impermissible in the vast majority of possible cases, due to states’ obligation to treat all would-be immigrants in accordance with moral equality. I have argued against various other accounts of the moral restrictions that govern the practice of employing selection criteria in immigration, and, further, I have argued against different arguments for the state’s right to exclude that give warrant to these accounts. The above argument stands as a further normative constraint on
what an account of the right to exclude might look like: Such an account must, at the very least, give weight to the claims for admittance made by all migrants, be they refugees, particularity claimants, or economic migrants. This is the only way an argument in favour of the conventional view – the view that states are morally entitled to a right to exclude outsiders – can be compatible with a commitment to moral equality. Any state ought, as a matter of justice, to take those who make claims upon it seriously, to treat them as they are morally significant.

Throughout my discussion, I have been particularly concerned with policies that discriminate on the basis of socially salient traits. However, as my argument has shown, selection according to these traits is objectionable for the same reason that selection based on other irrelevant factors, such as eye colour or whichever weekday the application was received, is objectionable. I want to end my discussion, therefore, by noting that we have good reason for still being particularly wary of any reference to race, ethnicity, religion, gender, and sexuality in debates and arguments concerning immigration: As the histories of virtually all Western democracies show, immigration policy was not long ago almost inseparable from a desire to keep out certain people with certain traits. These past policies, and the attitudes they reflected, are part of the reason why some of these traits have their socially salient nature. As I hope my discussion has shown, any mention of any of these traits in arguments about immigration should be met with extreme caution.
Bibliography


Bauböck, Rainer (1994), Transnational Citizenship: Membership and Rights in International Migration, Aldershot: Edward Elgar


Lane, Melissa (2006), “A Philosophical View on States and Immigration” in Palme and Tamas (eds.), *Globalizing Migration Regimes: New Challenges to Transnational Cooperation*, Farnham: Ashgate, pp. 131–143


Sidgwick, Henry (1891), The Elements of Politics, London: Macmillan


Walzer, Michael (1983), Spheres of Justice, New York, NY: Basic Books


Wellman, Christopher Heath and Philip Cole (2011), Debating the Ethics of Immigration: is there a right to exclude?, Oxford: Oxford University Press