Immigration, Association, and Antidiscrimination*

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Christopher Heath Wellman has argued that freedom of association gives legitimate states a right to close their borders to even the most needy foreigners. I believe Wellman is wrong about freedom of association and thus is wrong about immigration. I use the history of antidiscrimination law to argue that freedom of association is not a simple trump right but is part of a complex package of rights—a package whose contents are in tension and whose use requires moral judgment. This means, I argue, that a proper respect for freedom of association need not entail Wellman’s stark conclusion.

Most of us accept the moral value of freedom of association; we may disagree about why this freedom matters, or what fully respecting it would entail, but we generally agree that the freedom itself is of value. Very few of us, I think, have considered the impact of this value on our theories about immigration. Christopher Wellman has done us an enormous service by insisting that immigration must be considered in light of what we believe about the freedom to associate—and the freedom to exclude. His argument, which is both simple and elegant, asserts that adequately respecting freedom of association entails giving political communities the right to close their borders against even very needy foreigners who want

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admission—a “stark conclusion” he understands may not find easy approval from those likely to pay attention to his work (109). To respect freedom of association is to respect the rights of individuals, both as individuals and in groups, to refuse to associate with others, and this entails that states may have something like an absolute right to keep out those they do not want as members. States may have strong duties to help needy outsiders, and these duties may entail a variety of constraints on those states’ actions; an obligation to admit foreign citizens, however, is not among them.

I think Wellman is likely right that freedom of association is relevant to our discussions of immigration; I do not agree, however, with his stark conclusion. There are, I believe, some cases—perhaps many—in which individuals have a right to be admitted to membership in a state, even when the inhabitants of that state would strongly prefer that they be excluded. The difference between Wellman and myself begins in a different account of what the moral right of freedom of association actually is. Wellman thinks that it is something very much like a trump card, which can be deployed to demonstrate that a given act of government is morally impermissible. I think the reality is that freedom of association is considerably more complex than this. The result is that a finding that some act has violated the norms of freedom of association is not quite so dispositive a finding as Wellman’s argument would suggest. In particular, the mere fact that a refugee’s admission into our society would run against our associative wishes does not settle the moral question of whether that refugee can be excluded. We can believe that freedom of association is valuable, and that this freedom will be a part of a convincing story about immigration, without thereby being convinced that any state necessarily has quite so strong a right to exclude as Wellman demands.

I will make this argument in three parts. I will first attempt to make a distinction between two ways in which we might understand the nature of a freedom of association as a political right. I will then attempt to show that freedom of association, as understood in recent American legal history, is best understood in terms other than those given by Wellman. I will, finally, try to show why it is that these facts make trouble for Wellman’s argument.

I have given only a thumbnail sketch of Wellman’s argument; for our present purposes, however, a thumbnail might suffice. Wellman argues that freedom of association is a central political value; this value is implicit in much of our current thinking about marriage choice and religious autonomy (109–10). This freedom, moreover, is as applicable to groups as it is to individuals; we care about the freedom of a group to determine its own membership, argues Wellman, precisely because we care about the freedom of that group’s members to choose their associations (111–12). This freedom, finally, consists as much in the right to refuse to
associate as it does in the right to associate. The right to freely associate with one’s fellow religionists, after all, demands the right to exclude those who reject the tenets of our religion (110). All this I accept. From these materials, however, Wellman asserts that we can derive a strong right to exclude unwanted foreigners from coming to our society—a right to reject “all immigrants, even those desperately seeking asylum from corrupt governments” (141). This last step I resist. How, though, can we resist this last step, when we agree with what has gone before?

The answer, I think, begins with looking very closely at the idea of the right to freedom of association. There are (at least) two versions of what this might mean. Wellman argues that political rights such as this must be understood as something like moral trump rights; to have the right to freely associate means that those who interfere with our free associations wrong us, full stop. Wellman’s vision here is something very much akin to the idea of a human right, as used in the discourse of international human rights law: where such rights are not respected, we have sufficient reason to think that the individual whose rights have been abrogated has been wronged. The right in question need not be construed as absolute, of course: we need not insist that there could never be circumstances under which the right in question is legitimately suspended. What Wellman does insist upon, though, is that this suspension could only happen under truly catastrophic circumstances, in which rights that are compatible under normal circumstances begin to conflict. Wellman acknowledges at most that the right to freedom of association could only be validly infringed if the alternative is something essentially akin to global catastrophe and mayhem. (His example, which is instructive, is the abridging of one person’s right to marriage choice, when global warfare would result from the exercise of this right [117–18].) He insists, moreover, that he cannot even begin to offer a theory of when the right could be suspended—which, to my thinking, strongly suggests that he believes it could only be suspended under truly strange circumstances, in which the usual moral backdrop to human interaction has ceased to apply. All this suggests, to me, that in ordinary politics we can regard the right to freedom of association as a simple, deontic trump right, on Wellman’s construction. 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.¹

¹ Wellman does, in his discussion of the associative rights of the Boy Scouts, say that all he needs from his opponent is an acknowledgment that there can be “weighty reasons” in favor of allowing a group to determine its membership (111). I believe he is here best read as responding to the argument that groups can have no associative rights, by pointing out that most of us do in fact think that there are important reasons to allow such rights. Wellman’s full argument seems to demand not only that these rights are weighty, but that they outweigh all other considerations in nonemergency contexts.
Wellman imagines that the alternative to this deontic view is a consequentialist one, in which the maximization of human well-being is taken as the foundation of moral argument. I do not think this is the only, or even the most attractive, alternative to Wellman’s view. Imagine, instead, what might be called a complex deontic view of rights such as freedom of association. On this account, freedom of association is indeed comprehensible as a right, but it must be understood as one right in a complex set of political rights—each of which is derived from a more basic moral norm, which is that governments should treat all those affected by their actions with equal concern and respect. This norm is rather abstract; it might be thought to serve as a critical principle from which we argue for particular political and legal rights. We value freedom of association because we value persons and regard them as equally entitled to the circumstances under which they can develop and pursue projects and relationships they find valuable. Free association helps in this process, and states which refuse to allow such association do damage to the rights of individuals to develop their identities and plans. Free association, moreover, is best understood as a sort of political right—not just as a good—in that it is not to be denied in the name of some utilitarian calculus; the view I present here does not think that the values inherent in self-development or intimate association can be weighed against such consequentialist values as well-being. The difference between Wellman’s vision and my own, though, is that the complex picture I present here regards this right as one of a complex and contested set of political rights, all of which gain their moral importance from the more general (and foundational) moral right to treatment as an equal. It is this latter, more abstract right which is morally basic; political rights such as the right to free association are derived from this more basic moral right and are important only insofar as they provide means by which this basic right are specified and protected. Each of these political rights, again, is morally important, and none can be sacrificed for a greater quantity of well-being. These political rights, however, are not always easily harmonized with each other. Indeed, the tension between them is such that it is a matter of judgment and argument as to which right ought to be regarded as dispositive in any given case. On this analysis, any particular right can be regarded as trumped by another right—not only in emergencies or catastrophes, but as part of the general practices of even the most stable democratic societies. The complex deontic vision acknowledges the political right to freedom of association, but thinks of it ultimately as the beginning of an argument, rather than the end; asserting this right is an

2. I am, in the present context, more interested in laying out this possible alternative vision than in getting the precise content of this view exactly right; my guess is that the argument would be just as coherent if some other moral vision were made foundational. For now, I will simply assume that some such egalitarian principle would have to be accepted by any plausible political theory.
invitation to more fully engage with the core ideas giving this right its
moral importance, and to demonstrate why this right ought to be favored
over competing rights that might similarly be derived from these ideas.
Persons have a general, trump-like right to be treated as moral equals by
the political institutions ruling over them. The specific political rights
that give substance and specificity to this right, however, are best under-
stood as complex deontic rights, and circumstances are likely to emerge
in which balancing these rights is both necessary and appropriate.

The difference between the two visions of rights, at the risk of some
oversimplification, might be understood as the difference between the
right to be free from torture, and the right to procedural democracy. The
right to be free from torture is (I think) a simple deontic right of the sort
imagined by Wellman, and any showing that something is torture gener-
ally ends the argument; we could, in theory, imagine cases in which
torture is justifiable, but under any normal set of circumstances an act of
torture is a violation of rights. The right to procedural democracy, on the
other hand, seems to be one of a set of rights that all emerge from the
general project of democratic self-government. As such, the right to
procedural democracy exists in tension with other political rights—such
as constitutionalism, the protection of minority rights, and so forth. We
can respect the right to procedural democracy, and respect it as a right,
without thinking that we are thereby committed to regarding this right as
giving us a final verdict in all cases about the political morality of a given
policy. If something is a violation of procedural democracy, that fact asks
us to begin a discussion and see whether or not what we propose might
nonetheless be in harmony with the values that make procedural democ-

As should be clear from the above discussion, I do not think that
either vision of rights is always more appropriate. There are cases in
which we do want our rights to serve as discussion-stopping trumps. There
are, however, cases in which political rights susceptible to balancing seem
more appropriate. The case of freedom of association, moreover, seems
like an especially apt case for the complex deontic model. To demon-
strate this, I want to turn briefly to the history of this idea as understood
by the Supreme Court. I do not have enough space (or knowledge) to
provide a full legal history of freedom of association; my purposes may

3. There is an analogy here, of course, between these derivative political rights and the
status of constitutional rights in the United States. See Robert Alexy, A Theory of Constitu-
be served, however, by simply noting in passing two of the most important recent cases in free association jurisprudence. These cases make it clear, I think, that the American court system explicitly regards freedom of association through the complex deontic model. Although this fact is not dispositive, it is instructive; the courts have chosen this model for a reason, and I hope this brief discussion will make that reason apparent.

So: in 1984, the Supreme Court held that the Jaycees had no right to exclude women from membership within their organization. The state of Minnesota had charged the Jaycees with violation of the state’s Human Rights Act, which prohibited discrimination against women in public accommodations. The Jaycees, for their part, argued that the application of this law to their organization violated their freedom of association. The Supreme Court held that the right to freedom of association required the organization in question to be either an intimate association, of a sort with intrinsic value for its participants, or an organization whose value was derivative of the First Amendment expressive rights of its members. The Jaycees, however, had neither aspect; it was “neither small nor selective” in its membership, and while the admission of female members might change the very nature of the Jaycees themselves, this burden could be justified with reference to the serious problem of sexual discrimination the Human Rights Act was designed to address. Discrimination against women “both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life,” ruled the court, and as such the Jaycees could be forced to associate with women despite their stated associational preferences.

In 2000, the Supreme Court returned to these issues, as they applied to the Boy Scouts of America (BSA). The BSA had (and has) a policy of excluding openly homosexual troop leaders; this was held by the state of New Jersey as a violation of the antidiscrimination portions of the state’s public accommodations law, which forbids discrimination against homosexuals in places of public accommodations. The BSA argued that their rights to free association demanded that they have the right to exclude those whose sexual lives diverged from the values identified as core virtues taught in BSA activities. The court reiterated its earlier finding that the avoidance of discrimination was a compelling state interest, but distinguished the Jaycees from the BSA: the latter, but not the former, was

5. Ibid., 620.
6. Ibid., 625. I ignore, here, a great deal of detail in the case, including the diverse postures of the Minnesota and national organizations of the Jaycees, and the court’s discussion of the possibility that the act was void for vagueness.
8. Ibid., 647.
an organization devoted to the expression of a particular ideal—namely, a particular vision of ethical conduct, which regarded homosexual acts as morally wrong. As such, the forced inclusion of homosexual members would substantially impair the BSA’s ability to espouse and proclaim its ideal. The BSA had the right to exclude because, in the absence of that right, its “expressive freedom” to espouse its views would be illegitimately taken from it.9

I am not especially interested, in the present, in determining whether these cases were decided rightly. I want to use them, in present, only as exemplars of how the American legal system has dealt with the idea of freedom of association in the (recent) past. What I want to focus on, in particular, is what is common in both of these cases. While they arrive at what seem to be rather different conclusions, their methodology is similar: each one takes freedom of association and freedom from discrimination as having significant moral value. If the first case defends the application of an antidiscrimination norm, it does so only after acknowledging that freedom of association has value and trying to determine how much of that latter value is implicit in the present case. If the second case defends the freedom of association, it does so only after defending and accepting the idea that overcoming discrimination is a legitimate government purpose. In both cases, the court acknowledges that these two rights are, indeed, rights—they are norms that cannot be abrogated in the name of social benefit or well-being. The rights, though, exist in tension, and which will win in a given case depends upon more fine-grained analyses of what moral interests are currently at stake.10 The court, in sum, regards these rights as what I have called complex deontic rights. The right to freedom of association is not a simple trump, but rather a norm that exists in tension with other norms; deciding which norm shall win out in any given case requires further judgment and argumentation—precisely those things that the simple deontic model of rights denies.

Indeed, I think the court comes very close to developing a theory of how these two complex deontic rights could be understood as specifica-

9. Ibid., 640–41.
10. Indeed, in other cases, the American legal system has shown a willingness to make fairly precise determinations of what sorts of associations matter most. In September 2011, the Western District of Pennsylvania declared that an employee of the Department of Corrections might be fired for his friendship with a parolee, since “associations based on friendship, even close ones, do not satisfy the type of intimacy warranting constitutional protection.” Lord v. Erie County, 2011 U.S. Dist. LEXIS 101628, at HN6. Similarly, the Court of Appeals for the First Circuit declared in January 2012 that the right to freedom of association did not preclude laws designed to eliminate noisy parties, since the right could not be “stretched to form a generic right to mix and mingle.” URI Student Senate v. Narragansett, 631 F.3d 1 (2011), at *13. In both cases, the courts reiterated their contention that not all forms of human association were morally equivalent; whether a given law passed constitutional review therefore depended upon both the purposes of the law and the nature of the relationship.
tions of a more general and abstract right to equality in self-development. The court is keenly aware that freedom of association is important, in part, because we develop our identities only in relationship with other persons.11 It is also aware, however, that our identities can also be deformed by the free associative choices of others, when these choices reflect “archaic and overbroad” assumptions that force us to “labor under stereotypical notions.”12 Neither freedom of association nor freedom from discrimination is, by itself, comprehensible as a trump right that can be always regarded as the appropriate way to respect the process of self-development that is at the heart of individual agency.13 The court, therefore, regards each of these rights as part of a complex deontic picture, in which we balance rights based upon how their use in a given case would reflect the moral values these rights are intended to serve. We ask, for example, about the size and selectivity of the group, so as to understand whether or not the group is likely to have the intimate character that is frequently associated with our most important (and identity-creating) personal relationships. We ask about the purposes of the group, to see if the expressive function of the group could be preserved in the absence of the right to exclude. We ask whether the group is best understood as public or as private, and what those terms might mean to begin with. We ask these questions because we are trying, in this process of balancing, to provide individuals with the means by which they understand, develop, and express themselves; no right, on this picture, is a trump card by which this process of balancing might be brought to a halt. We need not agree with the conclusions reached by the court to think that the structure of its reasoning has been appropriate—indeed, perhaps even admirable, in its attempt to deal with the complexity of the moral issues dealt with here.14

We may, at this point, return to Wellman. If what I have said so far is convincing, it will convince us only of this: the American legal tradition

11. “Protecting . . . relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.” Roberts, 468 U.S., at 640.
12. Ibid., 620.
13. I do not mean to suggest, here, either that this is the only possible moral story we might infer, or that this story is adequately worked out in what I say here. I want only to use this story as a placeholder for some more well worked-out account and demonstrate how it makes the court’s process of reasoning comprehensible.
14. Stuart White similarly expresses the idea that court jurisprudence can be used to develop an analysis of freedom of association (“Freedom of Association and the Right to Exclude,” Journal of Political Philosophy 5 [1997]: 373–91). White compares what he calls the “integrity interest” of persons in associating with others in intimate relationships and communities of character, and the “opportunity interest” of persons in being able to achieve their goals of economic and political advancement. White notes that the conflict between the two is profound, but that preference should be given in most cases of direct conflict to the integrity interest. I think White’s analysis here agrees with my own argument that both freedom of association and freedom from discrimination are important norms
and Wellman treat the right to free association in markedly different ways. That is not, in itself, a criticism. Wellman might simply say that the American legal system has got it wrong, and the right to freely associate is not anything close to the complex deontic right I have here described. He might, instead, accept that the right to freedom of association does indeed take the complex character I ascribe to it here, but that the conclusions we reach in the area of immigration are unaffected. I believe, however, that there are difficulties either way Wellman turns. We can examine these alternatives in order.

So: Wellman might simply say that his account of immigration and his account of freedom of association may be accepted on their own merits, and that the court (and the legal system) have been working with a mistaken notion of freedom of association. This is not, of course, implausible; our legal history is rarely a complete guide to ethics. Notice, however, that this comes at a cost. In its original formulation, there was a nice structure to Wellman’s argument: we were told that something we might not have instinctively believed in—namely, the right to close our borders—was a valid inference from something we already accepted—namely, the right to freedom of association. If it now turns out that Wellman’s argument depends upon some notion of the right to freedom of association more demanding than that implicit in the uses of that term in our constitutional history, then we are being asked to accept two revisions in our moral landscape at once. We are no longer led from what we believe to what we do not (yet) believe; we are, instead, told to believe something new about two things at once. Much of the rhetorical power, I think, is taken away if Wellman were to accept this revision of his argument.

This is not, of course, a philosophically rich objection—we should not confuse rhetorical power with philosophical accuracy. We lose more than this, however, when we insist that the right to freedom of association functions in the simple deontic manner. The fact is that most of us—Wellman included, I suspect—value both rights against discrimination and rights to freedom of association. We do not want either of these norms to be given exclusive rights to determine which claims will be honored. The history of antidiscrimination in the United States, for example, is largely a history of progress—few of us mourn the absence of a fuller free-association norm, in which racial discrimination in restaurants and in places of employment was still legally permissible. This is true even though segregation laws were, in many cases, actually expressing the associative wishes of majorities. Segregated baseball, for example, was defended in the South with reference to the preferences of white patrons that must be included in the complex deontic picture. For my part, I have no particular vision of how these interests should be balanced; while I agree with most of White’s conclusions, I want in the present context only to show that—contrary to Wellman—the balancing should, in fact, be done.
for baseball played by their own racial group members. That we look back
upon these preferences as morally repugnant is neither here nor there;
the fact is that the preferences existed, and antidiscrimination norms
forced people to associate against their stated wishes.\textsuperscript{15} Antidiscrimina-
tion in general has forced people to associate with unwanted others, and
the fact that it does so is only justifiable because of the greater impact of
social marginalization upon the self-constitution of those individuals
marginalized. If we accept that freedom of association is a simple trump
right that can be deployed against all cases of unwanted association—in
circumstances other than those of global warfare—then we can deploy it
to prevent the exercise of all antidiscrimination norms. This would be, I
think, a bad result; freedom of association should sometimes give way to
other norms, when those norms do a better job of reflecting the values
animating our political rights.\textsuperscript{16}

Wellman could, of course, choose the opposite approach and accept
that the right to freedom of association has the complex deontic charac-
ter I have given to it. There would be, I think, some significant advantages
to this approach. It would, most obviously, make it clear that what Well-
man means by the freedom to associate is closely related to what those
words mean in the legal context, and (I think) in their ordinary usage. I
think, however, that accepting this complex deontic picture would entail
abandoning the stark conclusion Wellman believes his argument sup-
ports. Indeed, I believe accepting a more complex deontic picture of the
sort I defend here would make it rather difficult to describe any particular
moral conclusions about immigration; since particular conclusions would
now await a more complicated story about how institutions best reflect
the values giving rise to these complex rights, our ability to talk about the
morality of immigration in the abstract is going to be rather curtailed.\textsuperscript{17}

\textsuperscript{15} I explore the case of segregated baseball in Michael Blake, “The Discriminating

\textsuperscript{16} Compare Wellman’s version of freedom of association to the argument given by
the attorney for a man arrested for refusing to seat an African American man in his theater
in 1873 Mississippi: “The white race do not desire to drink out of the same vessel, to eat out
of the same plate, or to sleep in the same bed with [black men], or to sit in places of
amusement, in the dress circle of theatres with them. And it is as unwise as it is un-
constitutional for the legislature of the state to attempt to control those matters of taste by
legislative enactment.” George Donnell v. Mississippi, 48 Miss. 61 (1873). Quoted in Andrew
Koppelman and Tobias Wolff, A Right to Discriminate? How the Case of Boy Scouts of America v.

\textsuperscript{17} There is, of course, another possibility: Wellman might simply say that the notion
of equal concern and respect runs only within the borders of the territorial state, so that all
the analogies I have drawn here with the Supreme Court simply fail to apply. This response,
though, seems deeply problematic. In the first place, Wellman himself acknowledges the
moral equality of persons; he accepts elsewhere the need to base his arguments on prin-
ciples that acknowledge the equal moral worth of all persons, rather than simply all citizens.
See Christopher Heath Wellman and Andrew Altman, A Liberal Theory of International Justice
(Oxford: Oxford University Press, 2009). The very notion of a right to freedom of associa-
It is not necessary for us to get into the details of a positive program, however, since at the moment I want only to defend the proposition that Wellman’s conclusions will be rather more difficult to reach on a complex deontic picture. Once balancing of rights, with relation to their importance for self-development enters the picture, it is going to be hard to say that closed borders can be justified simply with reference to the wishes of the local community. Look at this first in connection with simply the members of a given society—some of whom want to close the borders and refuse to associate with outsiders, and some of whom do not. It might be possible, on a simple deontic picture, for those who are asked to accept unwanted immigrants into their midst to simply cite their rights as a way of mandating that no such immigrants be admitted. They are being asked to mix with people they do not want, and they have rights to be free from such mixing. As such, they have the moral right to refuse to go along with the immigration program defended by those who seek to allow immigration. The simple deontic picture would give these people a veto—or, at the very least, give them rights they can cite as reasons to refuse the demands of the pro-immigrant camp. If we look at the rights of those who want to mingle with immigrants, we have what looks like a simple conflict of rights, in which we have no principled means of distinguishing between competing claims for associative liberties. On a complex deontic picture, we have the ability to ask about the relative importance of the rights to associate claimed in the two instances, and how these rights relate to the process of self-constitution. We have the ability to ask, in other words, the same questions asked by the court: Is the association asked one of ongoing personal relationships? Is it one best understood as a private form of association? Does forced association alter the structure or meaning of a group with some sort of expressive function? Once we start asking these questions, we may arrive at principles that may be rather surprising. Matthew Lister has recently argued that Wellman’s methodology might be used to defend a right to family immigration, even when this immigration is not desired by a majority; given the different sorts of relationship imagined, it is not implausible to think that my right to the company of my spouse is more important than your right not to have to see faces of my wife’s coloring in the public square.18 If we accept a more

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complex deontic picture into our discussions about immigration, the

discussions we are thereby called upon to have are ones that may lead us

directions considerably unlike those argued for by Wellman.¹⁹

We should, now, look directly at Wellman’s stark conclusion. Well-

man argues that the state has a right, founded on the associative liberties

of its members, to not associate with any particular individual—even if

that individual is in dire need. This is because the rights of the members

are proof against utilitarian calculations, including the severity of the

need of the individual seeking admission. While Wellman is clear that we

may have an obligation to alter our terms of trade so as to provide more

goods for the global needy, we have no obligation to allow those needy to

take up residence (128–29). Does this argument survive the transition

from a simple to a complex deontic methodology?

I do not think it does. The complex methodology depends upon the

recognition that all the individual political rights we are examining are

ways of making specific a particular moral right, which is that right of

individuals to be treated as moral equals. The individual political rights

in question are not trumps, but rather must be balanced against one

another in an ongoing process by which we seek to understand how the

moral status of persons might be best defended. This process, when

applied to the case of the asylum seeker at the borders of our state,

seems unlikely to go in every instance in the manner Wellman’s argu-

ment demands. Let us imagine, to begin with, that the claim of the

individual in question is not one of mere disutility, but the violation of

rights. The individual is fleeing a state that is either indifferent or hostile

to her moral status, and asks us for admission. Imagine, further, that the

individual is presenting herself here and now for admission—there is no

prospect of foreign intervention or foreign aid fixing her home state’s

government at any time during which she is likely to benefit. Imagine,

finally, that she asks us for a justification for our refusal to admit her.

What can we say?

On the simple deontic model, we can say: we have a right not to have

you in our society. That ends the argument; there is no principle on

¹⁹. A reviewer has suggested to me that the right in question is attached to the state,

rather than the individual citizens; if the state has decided, by democratic means, not to

associate with a given prospective immigrant, then that should settle the matter. I do not

think this is entirely successful, as a means of saving Wellman’s program. The state’s right to

associate is ultimately derived from the rights of individual persons to associate. If my right

to associate with my spouse is more important than your right to be free from seeing my

spouse in public, then that might mean that the state does not have the right to exclude my

wife—even if those who think like you do are in the majority. We accept constitutional

constraints on majority rule precisely because we believe that some persons have interests

that should not be sacrificed even to the wishes of the majority; it would seem odd, I think,

for us to ignore these moral concerns here, and think that any decision of the state to

exclude is justified simply because a majority has voted for it.
which the would-be immigrant can rebut our justification for her exclusion. We might go further and say that this right exists as a trump against any attempts to force association upon us—even if that association is the only means by which someone else’s rights might be protected. It is much the same as if I have a pot of gold which you might use to prevent a third party from violating your rights; I might be a very nice person to give you the gold—and rather callous if I refuse—but you have no right to the gold itself. All of this is compatible with the idea that the policy of refusal treats all parties as moral equals, since our right to refuse you simply trumps whatever claims you might make against us. You matter just as much as we do, but your arguments will always fail to overcome the trump we have played by citing our rights to exclude you. We do not have to even raise the question of how our would-be immigrant might respond to us; whatever their arguments are, they cannot rise to the level of the simple deontic right not to associate with you.

On the complex deontic model, however, this response is not available. We do not have a (simple, trumplike) right to be free from unwanted association. Instead, we face a situation in which both parties to the interaction—the member and the would-be immigrant—have claims to have policies enacted that rely upon claims made in justice. The member claims that her right to free association precludes forced association. The would-be immigrant claims that her right to be free from illegitimate government coercion precludes her being sent back to their state of origin. These claims seem to each involve claims of right, and as such seem to be susceptible to being analyzed in the same manner as the competing norms discussed above by the court. This manner of evaluation involves balancing these rights, with the overall goal of treating the individuals affected with equal concern and respect. Thus, we ask: Which of these claims is most centrally connected with the interests? Which of these is more likely to be connected with other freedoms such as expression and speech? Which, put most simply, is more important? If these questions are asked, then I suspect that—as a first pass—we might conclude that the would-be immigrant has a stronger claim than the local member. The would-be immigrant’s claim to have her basic human rights protected would seem to be more important—more closely connected to the values making these political rights valuable—than the rights of the local member to avoid having to associate in public with the foreign-born.

I want to be very clear, here, that I am not saying that this first pass at a conclusion is necessarily true. I think there are some things that could be said by the local member to defeat the conclusion I have just now given. (There are also, to be sure, some things that are not possible rejoinders by the local member. The local member cannot simply assert that the foreigner is not as important, morally speaking, as the local
member; that would seem to be directly and obviously in violation of the egalitarian premise that animates this talk of rights in the first place.) Perhaps the local member can insist that the injustice facing the would-be immigrant is not one the local folk have created, and that therefore its burden should not be borne by the local political community. Perhaps the local member might argue that the relationship between the local state and the would-be immigrant is relevantly distinct from that of the local state and the local member, such that the state should take the latter’s interests as more urgent than those of outsiders.20 I do not, here, want to say whether or not I think these responses are strong or weak. What I want to insist upon, instead, is that—on the complex deontic model—they must be said, and evaluated, before we can arrive at any conclusion about the rights of the local community to exclude unwanted foreigners. Wellman’s stark conclusion insists that the associative rights of insiders simply trump whatever claims outsiders must have, but on the complex deontic vision this simply isn’t possible. Rights, on this account, do not serve as trumps in the manner required. What is demanded for any particular conclusion about the legitimacy of exclusion to work, instead, is a more wide-ranging argument about how states may respect the equality of all, citizen and foreigner alike, while not erasing the moral difference between the two. Wellman’s stark conclusion insists that the discussion of justice ends when the local community decides it wants to close its borders. If what I have said is correct, though, the discussion of justice continues, even after it is established that the local community wants to exclude outsiders. These outsiders have the opportunity to make claims of justice themselves, which may be pressed against the competing claims of insiders; neither set of claims serves as a trump, precluding further argument. Whether or not the local community’s wishes will outweigh those of the would-be immigrant is a matter for a fuller analysis of political rights and how they might work in the international realm; we cannot simply appeal to freedom of association and end the debate.

I want to end this essay by reiterating my conviction that Wellman has done us an enormous service by insisting that we take the idea of freedom of association seriously in our discussion of immigration. I think, in this, he is entirely right, and we have been entirely remiss in thinking that the latter topic could be dealt with in isolation from the former. Indeed, I think there are many contexts in which freedom of association will have a

20. I am avoiding, in this context, the question of whether or not the notion of equal concern and respect precludes the possibility of distinct rights for all and only local people. I do not think it does; the relationships between fellow citizens are important in such a way that they give rise to distinct rights and obligations held only between these citizens. These particular duties do not stand in conflict with the notion of global moral equality; the latter is the ground and justification for the former. See Michael Blake, “Immigration and Political Equality,” San Diego Law Review 45 (2008): 963–79.
great deal of relevance to the general question of who should be admitted to membership. What I have tried to show in the present context is only that there are contexts in which the concept of a right to free association will not do the work required by Wellman’s argument. Our best understanding of such a right does not take the simple form this argument demands. The invocation of freedom of association does not end the process of political judgment and argumentation; it begins it. If we want our stark conclusions, we will have to find their grounds elsewhere.

21. Where, for example, no individual immigrant has a claim on admission, I think freedom of association might have a great deal of relevance in the determination of immigration rights. See Michael Blake, “Discretionary Immigration,” Philosophical Topics 30 (2002): 273–90.