Can the Right to Internal Movement, Residence, and Employment Ground a Right to Immigrate?

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Like many political theorists, I began my career by living out of a suitcase, moving from one temporary position to another. In the span of four years, I moved from Durham, North Carolina, where I completed my Ph.D., to Washington, DC, Blacksburg, Virginia, and St. Peter, Minnesota, before finally settling down in Lewisburg, Pennsylvania. Though personally exhausting, these moves were legally quite easy. As an American citizen, I could travel to each new location, establish a new residence, and work at my new job. I needed no permission from any government officials to travel to these new places, although police officers did monitor my compliance with traffic laws. Establishing a residence by signing rental contracts did sometimes require showing identification, and finalizing an employment contract did require proof of a legal right to work in the United States, but these were straightforward processes. My ability to move, reside, and work were never seriously in question, given my American citizenship. As a result, I was able to realize my aspiration of working as a professor of political theory, albeit after a rather circuitous route.

Such easy movement, residence, and employment would not have been the case if my moves had instead been from Durham NC to Tangiers, Morocco, Lima, Peru, and Lagos, Nigeria, prior to finally settling down in Pamplona, Spain. Each move would have required me to acquire a U.S. passport and receive a work visa from the new country, which would retain the discretion to deny my request. If one of the countries in my sequence of jobs denied me my visa, I might have been forced to find a non-academic job within the United States, ending my career aspirations. This discrepancy of foreseeable outcomes grounds the contention that the right to *internal* movement, residence, and employment justifies a similar right to immigrate, understood as the right to *external* movement, residence, and employment. If citizens enjoy the right to move within their own country in order to realize their aspirations, foreigners be able to move to other countries in order to realize theirs. It is simply illogical to grant one right while denying the other.

This type of argument depends on what David Miller (2016, 15-16) calls a cantilever strategy, which contends that it would be illogical to recognize one right without recognizing an analogous second right. Cantilever arguments are distinct from the direct and instrumental strategies for grounding human rights. The *direct* strategy contends that a right directly protects an essential human interest, while the *instrumental* strategy holds that a right is an instrumental means to protecting another human right, which in turn directly protects an essential human interest. The strength of a cantilever argument depends on the direct or instrumental foundations of the initial right and the aptness of the analogy between it and the new right that one seeks to establish.

Importantly, a right to immigrate requires more than a cantilever extension from an internal right to movement alone. This is because the international analogy with domestic movement is simply a right to travel across borders and visit for a temporary period. Immigration differs from international travel and visitation by including a right to reside indefinitely in the new country, while indefinite residence presupposes the ability to satisfy one’s basic needs. Employment is a typical means for satisfying basic needs, but it is hardly sufficient. Access to health care and, if one has children, access to elementary education will also be required. Thus, the right to immigrate must be derived from a bundled right to internal movement, residence, and needs satisfaction.

In this essay, I challenge Kieran Oberman’s attempt to derive a right to immigrate from the right to internal movement, residence, and employment. Although Joseph Carens advances a similar argument, I focus on Oberman for two reasons. First, Carens portrays his account not as a direct policy suggestion but as a thought experiment meant to prod rich countries to achieve of global justice, at which point it can be put into practice (2013, 229, 277-8, 285). Conversely, Oberman defends the right to immigrate as claimable in today’s world, though as a non-absolute right which, like all other rights, can be overridden for sufficiently strong reasons (2016, 33). Second, Carens grounds his right to immigrate on an analogy with a right to internal movement alone, never providing an argument for the rights to indefinite residence and needs satisfaction. Oberman recognizes that a right to internal movement can ground only a right to international travel and visitation, not a right to immigrate, and thus defends extending to all foreigners rights to indefinite residence and employment.
Although basic needs satisfaction, not mere employment, provides the third leg of the proper foundation for a cantilever extension to a right to immigrate, Oberman clearly improves on Carens. Therefore, I will focus on Oberman’s account, and for the sake of argument will accept his position that the right to immigrate only requires the right to employment.

My thesis is that Oberman’s defense of a right to immigrate becomes much weaker when we fully scrutinize the type of argument he advances. Whereas he ostensibly pursues a direct strategy for a right to immigrate, he actually relies on a combination of the cantilever and instrumental strategies. In Section I, I summarize Oberman’s argument, the foundations of which are scrutinized in Section II. In Section III, I challenge the analogy between rights to internal movement, residence, and employment and more highly protected rights like the right to free speech, while in Section IV I challenge the analogy between the right to internal movement and the right to immigrate. In Section V, I conclude that a right to travel and visit is a more convincing outcome from Oberman’s argument.

I. Oberman’s Argument

Oberman forthrightly states that the right to immigrate contains three components: the right to move across the borders of sovereign states; the right to establish residence in the new state (2016, 37); and the right to work there (2015, 244). Bundling these three components distinguishes the right to immigrate from the right to travel and visit, understood as the right to move across borders without rights to residence and work. Conversely, the right to immigrate does not include the right to citizenship and its concomitant right to vote (2016, 34), nor the right to special governmental benefits, such as higher education grants or small business loans (2015, 245). Oberman defends an ambitious right to immigrate without completely obliterating the political salience of borders.

He begins by stating that the right to immigrate stems from “essential interests” that ground other human freedom rights, “such as the human rights to internal freedom of movement, freedom of association, and freedom of occupational choice” (2016, 32). But this human right to immigrate remains a moral right, not a legal right, since it has not yet been included within international law (2016, 33-4). Legal human freedom rights include those found in the 1948 UN Declaration of Human Rights, which enumerates rights to marriage, religion, expression, association, movement and residence within a state’s borders, and the free choice of employment. His point is that a moral right to immigrate deserves recognition, even if it remains legally uncodified.

But because the moral right to immigrate must be derived from the legal right to internal movement, Oberman must first demonstrate how the latter is indispensable to essential personal and political interests. He contends that individuals have a personal interest in accessing “the full range of existing life options” regarding “friends, family, civic associations, expressive opportunities, religions, jobs, and marriage partners.” The internal right to movement and residence facilitates making personal choices about life options. Conversely, a state ban on entering a region of the country means that “you cannot visit friends or family, attend a religious or educational institution, express your ideas at a meeting or cultural event, seek employment, or pursue a love affair, anywhere within that region” (2016, 35). Such state interference is unwarranted, since it trespasses on the “personal domain” within which the individual alone should determine “where she lives, with whom she lives, who her friends are, which religion she practices, which associations she joins, what work she does, and how she spends her free time” (2016, 44). The internal right to movement also facilitates the political interest in “enjoying a free and effective political process.” State restrictions on internal movement seem to undermine political interests associated with freedom of expression, such as “attending a demonstration” or “the collection of reliable information. And because “one needs to move in order to meet people,” limits on internal movement also undermine the political aspect of “free association,” along with “everything that free association makes possible, including political dialogue, conflict resolution, and the free exchange of ideas” (2016, 36).

Oberman emphasizes that the right to internal movement, residence, and employment, like other freedom rights, must grant individuals a full range of enjoyment, not merely an adequate range. He first notes that rights to freedom of religion, expression, and association all deserve a full range of enjoyment. If not, “Judaism could be banned… as long as an ‘adequate’ range of religions went unrepressed. The government could burn books in the town square…as long as there was an ‘adequate’ range of books left on the shelves.” And meetings and clubs could be closed, “as long as
an ‘adequate’ range of meetings and clubs remained open” (2016, 39). Returning to the freedom of internal movement, he suggests that if a country the size of Belgium provided an adequate range of life options, then the United States could sub-divide itself into a series of Belgium-sized regions and restrict people’s movement to within those regions (2016, 39). Since presumably any of these restrictions would shock us, Oberman concludes that all freedom rights must allow for a full, not merely adequate, range of enjoyment.

In addition, Oberman claims that states must extend human freedom rights to both citizens and foreigners. While all foreigners already enjoy rights to expression, religion, marriage, association, privacy, and internal movement (2016, 38), they are not granted rights to residence (2016, 37) and work (2015, 244). Because the right to immigrate includes these excluded rights, Oberman challenges these anomalies by citing international law’s interpretation of all human freedom rights as extensive, internally bounded and nonabsolute. Human freedom rights are internally bounded in that they are limited only by the free choice of others: my right to marry is limited by my intended partner’s free choice to refuse my offer. Human freedom rights are nonabsolute in that they can be overridden by strong justifications. So long as the right to work is internally bounded by the decisions of the employer and employee, Oberman sees no reason why it should not also be extended to all foreigners, absent any compelling counter-reasons (2015, 244).

Having ostensibly defended adding an expansive and extensive right to internal movement, residence, and employment, Oberman advocates a human freedom right to immigrate, understood as the right to external movement, residence, and employment. Both the right to internal movement and the right to immigrate equally protect personal and political interests. Just as the restriction of movement to a particular region precludes my personal interest in falling in love with someone in that region, so too do immigration restrictions prevent me from falling in love with someone in another country. Just as the restriction on internal movement precludes my political interest in attending a protest in another region, so too do immigration restrictions prevent me from attending a protest in another country. Oberman insists that these latter political interests should not be frustrated by immigration restrictions, “even if we assume the traditional view that people have no rights to political participation abroad. In order to make informed and effective contributions to the political process in one’s own country, one must have the freedom to talk to, learn from, and cooperate with people living elsewhere” (2016, 36).

Importantly, Oberman emphasizes that realizing these essential interests requires not merely a right to travel or visit, but a right to immigrate, reside indefinitely, and work. A “right to visit is not sufficient” because a “time restriction on a person’s stay restricts the range of options available to them in much the same way as an entry restriction does.” Not only does a time restriction limit the pursuit of “long-term projects, such as romantic relationships and employment opportunity,” they also limit “short-term activities such as visiting friends or attending a political meeting” to within the period validated by a temporary visa. Consequently, if “I wish to meet a friend or attend a meeting on Tuesday but face deportation on Monday, then I am denied these options, just as surely as if I would have been had I been refused entry in the first place.” He concludes that international visitation visas, just like domestic state permits allowing only temporary stay in a region of a country, “violate the underlying interests in personal and political freedom” (2016, 37). And because indefinite residence presupposes the right to work, Oberman concludes that “restrictions on employment are effectively restrictions on immigration as well” (2015, 244). The conclusion is that the realization of personal and political interests requires a bundled right to immigrate, reside indefinitely, and work.

As should be clear, a temporally unlimited right to immigrate, reside, and work depends on interpreting all human freedom rights as deserving of a full range of enjoyment. If humans have an essential interest in only an adequate range of life options “large enough to award us a decent choice of occupations, associations, religions, and so forth but nevertheless far smaller than the total number of options the world has to offer, …then the argument for a human right to immigrate collapses. States could offer this smaller range internally and no one would have an essential interest in entering a foreign state to access additional options” (2016, 38-9). Thus, all human freedom rights must be interpreted as worthy of a full range of enjoyment.

II. Which Type of Argument is Oberman Adopting?
Miller (2016, 15-16) helpfully provides a typology of arguments for justifying a human right. A direct argument claims that a specific human right is necessary in order to fulfill an essential human need. An instrumental argument justifies a specific human right as a means to realizing other human rights, which themselves are directly grounded. Finally, a cantilever argument contends that, if we already recognize some existing right, it would be illogical not also to recognize the desired new right. The direct strategy provides the strongest justification for a right, but requires that the interests underlying it be sufficiently strong and that the new right be both empirically feasible and normatively compatible with other existing rights, except in all but the rarest circumstances (16-19). The instrumental strategy stands or falls depending on whether the new right really is the only and least intrusive means to the human right that serves as its end. If the instrumental right is either unnecessary to realizing the other human right or imposes unacceptable costs in doing so, then the instrumental argument fails (22). The cantilever argument holds only if the analogy is apt between the existing right and the new right.

Overall, using the right to internal movement, residence, and employment to derive a right to immigrate involves a cantilever argument. But because “a cantilever argument is only as strong as the foundation on which it rests” (Carens 2013, 245), Oberman must first defend the right to internal movement before extending it analogously to the right to immigrate. Oberman sometimes claims that the right to internal movement derives directly from essential human interests, but more often he relies on instrumental, and cantilever justifications. He then uses a broad cantilever strategy to extend this to the right to immigrate. Oberman’s argument thus looks like this.

P1. All humans have an expansive list of essential personal and political interests
P2. These essential interests must be protected by an extensive list of human freedom rights (e.g. freedom of speech, religion/conscience, privacy/intimacy, personal security, association)
P3. Human freedom rights must be expansive, granting individuals a full range of enjoyment, not merely an adequate range
P4. Human freedom rights must be extensive, granted to both citizens and foreigners (unlike rights owed only to citizens, such as the right to vote)
P5. Rights to internal movement, residence, and employment must be added to list of human freedom rights (Direct Argument or Instrumental Argument to realize P2)
P6. Rights to internal movement, residence, employment must be expansive, granting individuals a full range of enjoyment, not merely an adequate range (Cantilever Argument from P3)
P7. Rights to internal movement, residence, employment, must be extensive, granted to both foreigners and citizens (Cantilever Argument from P 4)
C. Right to immigrate (external movement, residence, employment) must be granted to all foreigners (Cantilever Argument from P 5-7)

Premises 1-4 are relatively uncontroversial. Political theorists of many stripes, from Kantian deontologists to Millian rule utilitarians to Rawlsian contractualists, provide direct defenses of human freedom rights, such as those to freedom of speech and conscience, most of which have become legal rights embedded in domestic and international law. Because these rights are so widely recognized and uncontroversial, I shall refer to them as primary human freedom rights. More controversial are Premises 5-7, which form the core of Oberman’s understanding of the internal right to movement, residence, and employment, which I will subsequently refer to as secondary human freedom rights. It is not always clear whether Premise 5 is directly grounded on human interests or instrumentally related to existing rights in Premise 2. Premises 6 and 7 rely on cantilever extensions from the expansive and extensive understanding of the primary rights found within Premises 3 and 4, but it is unclear whether the analogy between primary and secondary rights is apt. Finally, whether we can use a cantilever argument to extend internal secondary rights to the right to immigrate will depend on the collective strength of Premises 5-7. Below, I will challenge Premises 5-7, along with the conclusion that the right to internal movement, residence, and employment can, by cantilever extension, ground the right to immigrate.
III. Assessing the Right to Internal Movement, Residence, and Employment

Let us begin with Premise 5, the argument for adding the secondary rights to internal movement, residence, and employment to the standard set of primary freedom rights. The first question is whether the bundle of secondary rights is directly or only instrumentally grounded. In an earlier article, Oberman openly adopts an instrumental argument, stating that internal movement and residence within a state “play an essential role in securing the free exercise of all other human freedom rights” (2015, 244). Conversely, in a later article he tries to derive the right to internal movement directly from the personal interest in accessing “the full range of existing life options when they make important personal decisions” and the political interest “in enjoying a free and effective political process” (2016, 35-36). More precisely, Oberman lists essential interests in freedom pertaining to expressive opportunities; religious practice; marriage; family; friends; and civic association (2016, 35). He later adds interests in an individual’s freedom to decide “what work she does,” “where she lives,” and “with whom she lives” (2016, 44).

Note that secondary rights only directly protect interests in occupational choice (“what work she does”) and the right to residence (“where she lives”). All the other interests are already directly protected by other rights to freedom of expression, religion, and conscience and to privacy, marriage, and association. The right to internal movement, residence, and employment can help to realize these primary rights, but leads to an instrumental argument, not a direct one. Indeed, most of Oberman’s discussion of secondary rights are instrumental in nature. To this extent, secondary rights are compelling if they are the necessary, least intrusive, and least costly means to realizing directly justified primary rights. Still, a direct link between the rights to internal movement, residence, and employment and essential interests can remain if protection of the personal domain requires the government to stay out of decisions about where you move, where and with whom you live, and what work you do. But to what extent must the government stay out of these decisions?

This question is crucial for Premises 6 and 7, which use cantilever arguments to contend that secondary freedom rights must be expansive and extensive respectively. Oberman admits that Premise 6 is indispensable, because if an adequate “range of options is sufficient, then the argument for a human right to immigrate collapses” (2016, 38-9). He responds with a cantilever argument for expansive secondary rights. Granting only an adequate range of enjoyment to primary rights to religion, expression, and association would allow the state to ban Judaism, so long as an adequate range of other religious options were available; ban books, so long as an adequate range of other books existed; and shut down public meetings and social clubs, so long as others remained. So too granting only an adequate range of internal movement would allow the United States to divide itself into smaller units that restrict movement across their borders. Oberman uses a similar cantilever argument to ground Premise 7. Whereas foreigners as well as citizens equally enjoy primary rights to freedom of speech, religion, and privacy, along with the secondary right to free movement, they lack rights to employment and indefinite residence. He challenges these anomalies by noting that international law limits primary rights in only two ways: that they be internally bounded (limited only by the free choice of others) and nonabsolute (limited only via strong justifications). So long as these limits are obeyed, there is no reason why secondary rights to residence and employment should not also be granted to foreigners.

The cantilever arguments for Premises 6 and 7 stand or fall on whether there is an apt analogy between primary and secondary freedom rights. Unfortunately, the analogy is not apt. Primary human freedom rights can be directly grounded in a way that justifies their entitlement to a full range of enjoyment, but secondary rights cannot. This becomes clear when we examine one framework for directly grounding human rights, the “harm principle” elucidated in John Stuart Mill’s On Liberty. While controversies surround the harm principle, there are two reasons for using it to assess Oberman’s cantilever arguments. First, Oberman explicitly cites On Liberty in defending Premise 6’s claim that each individual enjoy a right to access a full range of options with respect potential personal attachments (2016, 43). Second, Premise 7 implicitly relies on something like Mill’s harm principle in order to contend that freedom rights must be internally bounded by the free choice of others. An assessment of Mill’s harm principle suggests that the secondary rights to movement, residence, and work enjoy a less expansive range of protection than primary human freedom rights.
Mill’s harm principle states that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant” (1978 [1859], 9). In applying the harm principle, Mill is careful to distinguish between opinions, which rarely affect others and enjoy a virtually unlimited scope of liberty, versus actions, which can affect others and are more prone to legitimate governmental regulation. “No one pretends that actions should be as free as opinions” (53). The key question is whether the action in question affects only the individual actor, or whether it affects others. With respect to the former, Mill emphasizes that “the individual is not accountable to society for his actions in so far as these concern the interests of no person but himself.” However, Mill adds that “for such actions as are prejudicial to the interests of others, the individual is accountable and may be subjected either to social or to legal punishment if society is of the opinion that the one or the other is requisite for its protection” (93). So Mill’s harm principle provides operative distinctions between opinion versus action, and between self-regarding and other regarding actions. These two distinctions ground the unequal status of primary versus secondary human freedom rights.

The distinction between opinion and action provide a strong defense of rights to freedom of expression, conscience, and religion, since these primarily protect opinions, not actions. Of course, screaming fire in a crowded theater can serve as a dangerous action, while religious beliefs could lead to actions that harm others, as in Locke’s example of religious rituals involving infant sacrifice. But because most manifestations of expression, conscience, and religion pertain to opinion rather than action, they are clearly entitled to a full range of enjoyment. Exercising rights to marriage, association, and even privacy all involve actions, but because these are usually self-regarding or involve consenting adults, they deserve a nearly full range of enjoyment. Only to the degree that these actions affect others, such as children, can the state justifiably regulate them. From the liberty of opinion and self-regarding action, we have a provisional, direct argument for granting a full range of enjoyment to the primary rights to expression, conscience, religion, marriage, privacy, and association. This is why we would not allow the state to prohibit specific religions, books, or associations, even if an adequate range of these remained available.

The problem is that the rights to movement, residence, and work all involve actions that inevitably affect others. Because movement affects the personal safety and property interests of others, the state is almost always regulating it through regulations for driving, biking, and walking, and through property regulations that protect not only the owner (by prohibiting trespass) but also the mover (by granting easements for passage). Moreover, such regulation balances the interests of different parties in order to grant the mover an adequate, not full, range of movement. If a full range were the goal, then property rights would enjoy much less protection and traffic laws would not enforce speed limits. Liberal democrats readily accept a plethora of coercively enforced regulations of movement but far fewer on expression, conscience, or religion. I regularly see on-duty police officers on the roads on which I drive, but almost never in the church where I pray.

As the right to movement is highly regulated, so too is the right to occupational choice. Before examining these regulations, we first have to specify what is meant by this right. A minimal interpretation of a right to occupational choice would state that the government cannot choose your job or career for you, say by assigning you to a job. A maximal interpretation would state that the government cannot prevent you from practicing whichever occupation you prefer, wherever you prefer. The minimal interpretation is largely uncontroversial, but the maximal interpretation is untenable. This is because many occupations affect other people and are tightly regulated by the state through licensing and educational requirements. Just because I want to be a brain surgeon does not mean that I have a right to be one. The state can justifiably prevent me from doing so if I do not have the requisite qualifications. Moreover, it is also possible that the state can prevent me practicing brain surgery in the location where I prefer, even if I have the requisite qualifications. In rebutting the claim that a distributively just, national health care system deprives doctors of the basic liberty to practice wherever they prefer, Norman Daniels responds that the state can limit the number of medical licenses granted within a specific geographical area in order to facilitate an equitable distribution of medical providers across the entire country (1985, 121-2). So even if I have completed my medical training and have passed the medical board exams, the state can justifiably prevent me from practicing brain surgery in my preferred location of London, if brain surgeons are in oversupply there but lacking in
Newcastle. Conversely, the state cannot prevent me from choosing to worship in Westminster Abbey, even if there are too many Anglicans in London but too few in Newcastle.5

This example is especially pertinent to the right to immigrate, since such state limitations on occupational choice apply precisely to location. In order to avoid a surplus in one location and a deficit in another, the state can restrict your pursuit of an occupation. Similar restrictions apply to the right to residence. Through zoning ordinances, states substantially limit one’s choice of residence. Zoning ordinances can directly prohibit people from living in certain locations for purposes of safety or environmental protection, and they can indirectly do so through limits on the number of occupants permitted per residence or prohibitions on apartment buildings. Zoning ordinances can also preclude transient residency, not only by prohibiting hotels but also by preventing homeowners from renting out rooms in their houses on a short-term basis.6 Zoning laws can even regulate with whom one lives. This is controversial, but not due to a putative right to freedom of residence, but because of potential state infringement on the rights to privacy, family, and intimate association.7 Even Justice Thurgood Marshall, defender of the most stringent constraints on governmental power to regulate cohabitation, nevertheless found it uncontroversial for municipalities to prohibit non-familial residences, such as fraternities or sororities.8

Enough has been said to suggest that the secondary rights of movement, occupational choice, and residence are substantially different from the primary rights of expression, religion, conscience, privacy, marriage, and association. While primary rights reflect limitations on the state’s ability to regulate opinions and self-regarding actions, secondary rights reflect the state’s broader latitude in regulating other-regarding actions. Oberman could respond that my account does not undermine the equal status of all of these rights but rather provides examples of the type of “strong justification” that states must give when intervening into “nonabsolute” rights.9 However, failure to attend to the different levels of justification required to limit primary versus secondary rights gets us into a slippery slope. If we treat all of these rights equally, then we might grant the state greater latitude in justifying dangerous limitations on primary rights of expression, religion, marriage, privacy, and association. The result would be a profound evisceration of the very understanding of a right as a higher order claim that requires greater protection and demands stronger justification for abridgment.

We gain traction on this slippery slope by following post-New-Deal American jurisprudence, which sharply distinguished the different levels of justification the state must provide in order to regulate different activities. When the state regulates primary rights, these laws are subject to strict scrutiny, and the state must provide the strongest possible justification that the law is a narrowly tailored means to achieving a compelling state interest.10 But when the state regulates traffic, residential arrangements, or occupational restrictions11 that do not also infringe upon more protected rights, then these regulations shall be assumed to be acceptable and the state need only demonstrate that the law is a rational means to a legitimate end. Not all governmental justifications need to be equally strong. Recognizing that the strongest justifications are needed when primary rights are at stake allow us to protect these rights more effectively. Equalizing primary and secondary rights runs the risk of lowering the state’s burden of justification in those instances when it must remain high.

Premise 6 fails. Only primary rights deserve a full range of enjoyment, through their direct justification as self-regarding actions and opinions. States can more easily restrict secondary rights, since they involve other-regarding actions. However, I have not disposed of Premise 7, which holds that human freedom rights must be equally extended to citizens and all foreigners, not just those with work and residence visas. Indeed, Premise 7 could survive an attack on Premise 6 by insisting that both citizens and all foreigners must be granted equally expansive primary rights and equally restricted secondary rights. Challenging Premise 7 requires showing that the state can defray the other-regarding costs of secondary rights when granted to residents but not when extended to all foreigners. If this can be shown, the analogy breaks down between the right to internal movement, residence, and employment to the right to immigrate.

IV. Challenging the Analogy between the Right to Internal Movement, Residence, and Employment and the Right to Immigrate

Although the right to internal movement, residence, and employment can be directly justified as deserving adequate enjoyment, the bulk of Oberman’s defense of them relies on the instrumental
argument that they help to realize the primary human freedom rights. However, to the extent that the
right to movement, residence, and employment is instrumentally justified, then its strength extends
only so far as it is the necessary and least intrusive means to realizing primary rights and does not
impose unacceptable costs on others. An obviously less intrusive and costly means for realizing
primary rights is the right to internal movement alone, without the right to establish a new residence
and acquire employment. Oberman admits that this narrower right allows you to “visit friends or
family, attend a religious or educational institution, express your ideas at a meeting or cultural
event…or pursue a love affair anywhere within that [other] region” of the country (2016, 35). But
because a right to internal movement alone will only provide a foundation for a cantilevered right to
international travel and visitation, not a right to immigrate, he rejects this option. As he puts it, an
international “right to visit is not sufficient,” since a “time restriction on a person’s stay restricts the
range of options available to them in much the same way as an entry restriction does.” So if “I wish to
meet a friend or attend a meeting on Tuesday but face deportation on Monday, then I am denied these
options, just as surely as I would have been had I been refused entry in the first place” (2016, 37).

With this move, Oberman imposes an extravagant extension on personal freedom rights that
are otherwise uncontroversial. He surreptitiously moves from a very basic, uncontroversial right to
choose one’s own friends, to a more expansive but still fairly uncontroversial right to visit my friend,
to an unreasonably gratuitous right to visit my friend whenever and wherever I and my friend wish. I
certainly have an essential interest in choosing and visiting my friend, but do I really have an essential
interest or a right to visit her while she is in an important job meeting? I certainly have an essential
interest in choosing to have children and living with them during their childhood, but if they are at a
sleepover camp, can I just show up and demand the bunk under my daughter’s, regardless of the rules
of the camp? In both cases, my rights to visit friends and live with my children are subject to
reasonable limitations that require relatively little justification to be upheld. My daughter’s camp does
not have to hire legal counsel to defend itself against my demand to bunk in her room, but it might if
it prevented me from seeing her during normal visitation hours or staying with her if she were
undergoing some sort of trauma.

Extending this to movement across borders, I may have an essential interest in visiting my
family or attending a conference in another country, but that does not ground a right to move there.
Rather, it is up to me to accommodate my interests within the bounds of the visa that grants me a right
to travel and visit. If my visa ends on Monday, it is up to me not to wait until Tuesday to visit my
family. Similarly, if my conference is on a Tuesday, then it is incumbent upon me to procure a visa
that will end after the conference. Of course, this will require a duty of reasonable accommodation on
the part of the country to which I wish to travel, but so long as this is the case, the right to travel and
visit suffices. The right to immigrate is neither necessary nor the least intrusive means to securing the
essential interests articulated by Oberman.

While Oberman’s application of a right to immigrate is tenuous in the case of short-term
interests in visiting friends or attending conferences, what about “long-term projects, such as romantic
relationships and employment opportunity, which often require more time than temporary visas
allow” (2016, 37). With respect to romantic relationships, the strength of the essential interest and the
type of right needed to protect it depends greatly on their character. We can represent this on a
spectrum. At one end are very short-term romantic or sexual encounters, such as dates or one-night
stands; at the other are marriages or other long-term, committed relationships. Whereas the right to
privacy protects short-lived intimate encounters from state intrusion, committed relationships with
greater temporal extension and emotional, associational, and financial depth ground more extensive
rights to privacy, marriage, and intimate association. Moreover, rights to marriage and intimate
association not only limit state interference but also incur state benefits, such as tax credits, visitation
rights, and privileges of confidentiality within judicial proceedings, along with state enforced
obligations, such as spousal support or alimony, if the union dissolves. Applying this to questions of
immigration, it is clear that marriage or long-term committed relationships implicate greater state
involvement and perhaps do ground a special right to immigrate to committed partners.12 But it is
hardly intuitive that individuals have a right to immigrate simply to pursue foreign flings.

The other mentioned long-term project – the pursuit of employment opportunity – reminds us
that the right to immigrate, unlike the right to travel and visit, involves not only the right to movement
across borders but also the rights to establish a residence and to work within the new borders. But if
these latter two components of the right to immigrate are understood as instrumentally justified and open only to an adequate range of enjoyment, they must be weighed against the costs they impose on others. Essential interests and the concomitant primary rights to expression, religion or conscience, privacy, or association impose few costs upon others or their collective representative the state. And even if the secondary right to movement, understood as a right to travel and visit, does impose infrastructure costs, the state can have foreigners offset these costs through taxes that are both general (tolls, gasoline taxes) and specific (hotel occupancy and airport taxes). This is not so easily done with the rights to residence and employment.

Establishing a residence almost always involves the state provision of basic residential infrastructure services, such as water, sewage, electricity, garbage disposal, and transportation access. Even if the resident must pay for all or part of these services, the state itself must first construct and later maintain the infrastructure that allows these services to be accessed. Moreover, if one chooses to reside within a location where housing is scarce, then the new resident is likely contributing to upward pressures on real estate and rental prices. Finally, if an immigrant arrives and resides with minor children, the state must also provide them with basic education. Unless we are assuming a libertarian state (and perhaps an infrastructure-free frontier), establishing a residence will incur cost on the state and on prior residents of the community.

A similarly libertarian set of assumptions seems to underlie Oberman’s minimalist recognition that a right to immigrate and work, could, by increasing the labor supply, suppress the wages of other workers (2016, 45-6). Overlooked by this framework is the much broader array of state arrangements entangled with employment. Working an occupation does not merely involve the employer, the employee, and other employees. It also involves the state, in both its legal-coercive, fiscal, and monetary functions. In terms of legal-coercion, the state regulates employment through occupational safety and environmental regulations, minimum wage standards, rights and restrictions on union and collective bargaining arrangements, along with the professional licensing requirements discussed earlier. In terms of fiscal functions, employment is widely linked to the provision of state pensions, while in the United States (and other countries) it is also indirectly linked to state subventions for private health insurance. Finally, in terms of monetary functions, note that the United States Federal Reserve Bank directs its monetary policy at the dual goals of mitigating inflation while facilitating full employment. Granting foreigners the right to work, which may hinder full employment, may require changes in monetary policy in response, taking us far beyond the mere supply and demand effects on labor markets. The complexity of the issues involved in employment is a good indication that we are moving beyond the domain of rights and moving into the realm of policy, where states face lower justificatory burdens and enjoy much greater latitude in basing their decisions on utilitarian calculations of costs and benefits (Dworkin 1985). If this is the case, an instrumentally justified right to immigrate bumps up against a variety of costs that prior residents may find unacceptable.

But what about the internal right to movement and residence? Does it not also impose such costs? Yes, but these costs can be born within a fiscally unified sovereign state. Oberman claims that recognizing a right to immigrate would result in a world that “would in fact resemble the contemporary United States and the European Union, both of which allow citizens to migrate freely from one member state to another, but also allow state governments to reserve certain benefits for their own residents” (2015, 5). This portrait is inaccurate. The United States is a fully functioning modern, capitalist, welfare state, with unified monetary and fiscal policies, including a unified pension and retirement health care system financed by nation-wide payroll taxes. As a result, the right to internal movement, residence, and employment anywhere within the United States, does not affect that country’s unified fiscal and monetary policy. Social Security and Medicare will receive contributions and dispense benefits regardless of whether an individual moves between jobs in Massachusetts, Ohio, and Texas before finally retiring in Florida. Internal movement, residence, and employment have little effect on this system, while monetary policy will seek to facilitate full employment and mitigate inflation for the whole country, not just any specific state.

The same is not true for the European Union, which since the 2008 global financial has struggled with enormous imbalances in terms of trade, current accounts, employment and fiscal status among its member states. This has occurred precisely because the EU provides freedom of movement, residence, and employment without a unified fiscal policy. And although the EU does execute a
unified monetary policy within the Eurozone, that policy neither facilitates full employment nor has consistently been geared towards the common economic situation of the entire European Union, rather than the situation of its northern, more economically dynamic member states. One result is a pension crisis in Portugal, which has lost about 10% of its working age population to northern European states, and thus lacks sufficient workers to support its retirement pensions (Krugman 2015). Another result has been fiscal and unemployment crises in Spain and Greece, which have had to balance their own domestic budgets while suffering under EU monetary policies that have exacerbated unemployment through inadequate inflationary expansion (Pettis 2013, Chapter 6).  

So a right to immigrate, reside, and work, imposes substantial costs. Such costs might be justifiable in order to protect directly grounded rights that deserve expansive protection. The problem is that internal and external rights to movement, residence, and employment are not owed expansive protection and are primarily justified instrumentally. As a result, these rights are sensitive to costs and must prove to be the narrowest means to realizing the rights in question. While the costs of movement, residence, and employment are easily compensated by a fiscally and monetarily unified state, such compensation is not feasible across sovereign states, even relatively equal ones like those in the EU. So whereas a right to internal movement, residence, and employment can easily be granted on instrumental grounds, a right to immigrate cannot. The cantilever argument for the right to immigrate fails, because its analogy with internal movement, residence and employment is not apt.

V. A Right to Travel and Visit

Instead, the narrowest and least costly means for realizing primary human freedom rights across borders is a right to travel and visitation. This right allows individuals to visit family and friends, attend conferences and demonstrations, and participate in dialogue and learning. The right to travel and visit is aptly analogous to the right to internal movement alone, without the right to residence and employment. While the right to travel and visit, either internally or externally, imposes costs upon others and the state, these costs are smaller and easily compensated. A right to travel and visit will impose smaller, temporally limited infrastructure costs upon the state and its taxpayers, and it will not require the state to provide educational benefits to minor visitors. Moreover, the visitor can defray these costs through tolls, fees, and fuel taxes paid by domestic and international travelers, along with airport and hotel taxes paid only by the latter.

But how should we understand the broader right to internal movement, residence, and employment, a widely recognized legal right? Is this merely a right of citizenship, like the right to vote? If this is the case, can long-term immigrants be denied this right? Apart from narrow exceptions based on national security, I think not. Rather, the secondary rights to internal movement, residence, and employment are best understood as denizen rights, accessible only those legally within the country for an indefinite period.

Oberman and Carens draw a sharp dichotomy between the human rights accessible to foreigners versus narrow citizen rights to vote and hold office. Both emphasize that international law places the right to movement on the human rights side of the division. But international law does not grant foreigners rights to indefinite residence or to work. Descriptively, rights to indefinite residence and employment are granted not only to citizens but also to long-term immigrant denizens. Normatively this third category is defensible in light of the broader ways that movement, residence and employment implicate the state’s legal, fiscal, and monetary functions. Given the complexity of the functions involved, it makes sense that the state find ways to regulate the number of new denizens it contains, so as to ensure that the future contributions of those denizens match up well with the legal, fiscal, and monetary burdens imposed by their rights to movement, residence, and employment.

But if a bundled right to movement, residence, and employment is not a general human right, a disentangled right to internal movement alone may be a strong candidate for a general human right. As I have suggested in Section V, an apt analogy may exist between a more minimal right to internal movement and a right to travel and visit across borders. Whereas a right to immigrate must include the rights to reside and to work in a new country, the right to travel and visit does not. If foreigners are to realize their essential interests in visiting family and friends in other countries, then they should be allowed to travel to other countries to do so.
Of course, the right to travel and visit will be nonabsolute: this means that states can restrict this right to the degree that they have appropriately strong justifications to do so. But recall that the right to travel and visit, like the right to internal movement, is a secondary right that is instrumental in realizing other, primary rights that are directly grounded. Thus, the state must justify restrictions on the secondary right to travel and visit, but these justifications need not be as strong as the justifications required of the state when it regulates or restricts primary human freedom rights. So for instance, the recipient state may restrict a foreigner’s right to travel and visit if it fears that the visitor will impose financial costs, such as healthcare, during the visit. But these restrictions should be focused on the conditions of the individual visitor and their ability to offset foreseeable costs. While visas can justifiably be denied, doing so cannot be based on blanket judgements about visitors from certain countries. If this is the case, then blanket travel restrictions or barriers on people from poor countries become unjustifiable.

Similarly unjustifiable are blanket travel bans on people from Muslim countries. We can better understand why by examining the decision of the 9th Circuit Court of Appeals to block the Trump administration’s Executive Order 13780 banning visitors from six majority Muslim countries. According to this court, the President retains the statutory authority to suspend the entry and visitation rights of foreigners, but only after making a “sufficient finding that the entry of these classes of people would be detrimental to the interests of the United States” (State of Hawaii v. Trump [2017], 2). The Court vacated the Executive Order because there was “no sufficient finding…that the entry of the excluded classes would be detrimental to the interests of the United States” (Hawaii v. Trump, 36). For instance, a draft report by the Department of Homeland Security stated that citizenship was not a “reliable indicator of potential terrorist activity,” while the final version of this report, issued days before EO 13780, noted that “most foreign-born…violent extremists likely radicalized several years after their entry to the United States” (10-11). In addition, the Court noted that the Order’s use of nationality as the basis for creating a class of individuals excluded from traveling to and visiting the United States “could have the paradoxical effect of barring entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war” (41). As a result, the travel ban ended up being not only overinclusive (by excluding individuals unlikely to commit terrorism), but also underinclusive (by admitting those who may be likely to do so).

The key point in addressing this case is not to show the moral and legal vacuity of Trump’s travel ban. It is rather to illustrate the type of justification that states must provide in restricting foreigners’ rights to travel and visitation. This justification need not satisfy the demands of the strict scrutiny required when a state abridges a primary right, like those to freedom of expression, religion, or privacy. Thus the state need not demonstrate that its restriction was the most narrowly tailored means to achieving a compelling state interest. Rather, the state need only show that the restriction in question is only a rational means to a legitimate state end, since the right to travel and visit is only a secondary right that is instrumental to realizing a primary right. As a result, the state must provide real evidence that such restrictions are in place in order to mitigate real costs. That the Trump administration could not provide evidence that its travel ban was a rational means to achieving national security, which is not only a legitimate end but the quintessential compelling state interest, speaks volumes about its mendacity and incompetence.
References


This is because a right should not be easy to override. If we inflate the concept of a right to include various other types of claims that are easily overridden by counter-claims, then the concept of a right is not really doing what we need of it. Instead of being a special, higher order claim requiring especially strong reasons to be overridden, it risks becoming just another claim to be weighed against others within a broader utilitarian or consequentialist calculus.

One controversy relates to the right to association. It is presently common for liberal-democratic states to prohibit foreigners from joining at least some political associations, most obviously political parties. This is of course because political parties are so closely linked to the citizen-specific rights to vote and hold office. Oberman never articulates an essential interest in the freedom to move for its own sake, but I suspect he would endorse Carens’s direct argument that you “have a vital interest in being free, and being free to move where you want is an important aspect of being free. It’s not everything, of course. But it matters greatly.” (249)

For Mill, (103) the potential effects on children justify state regulation of parenting and divorce (102-3), but that polygamy could not be directly prohibited so long as the parties willingly consented (89-90).

One might reply that the state can prevent you from worshipping in Westminster Abbey if on a given Sunday it has already reached its occupancy limit under the fire code. However, the government cannot tell me that I can never worship in Westminster Abbey, even if I show up early to beat the crowds. Conversely, by denying me hospital privileges in London, the government effectively prevents me from ever practicing brain surgery there.

Carens articulates this type of argument, suggesting that critics of the right to internal movement “are invoking an implausible standard, one that could be used to discredit any claim to a freedom right” (2013, 247). Just as the freedom of speech is subject to restrictions, such as time, manner, and place restrictions and prohibitions on libel, slander, and hate speech, so too is the right to internal movement. But this again seems to misunderstand the nature of justification needed to restrict a right. Restrictions on freedom of speech are quite limited, enforced post hoc, and are often controversial. Restrictions on movement are pervasive, constantly enforced prior hoc, and rarely controversial. The prohibition of any governmental “prior restraint,” on the other hand, is one of the least controversial and longest established doctrines within free speech jurisprudence, traceable back to Blackstone’s 18th century Commentaries on the Laws of England. In liberal democracies, there should be no speech police, also known as government censors, providing prior restraints on what you can say. Conversely, liberal democracies have lots of traffic police, who constantly enforce the prior restraints of traffic laws telling you where, how fast, and in which direction you can drive.

This jurisprudence originates in Footnote #4 of United States v. Carolene Products, 304 U.S. 144 (1938).

In Williamson v. Lee Optical Co., 348 U.S. 483 (1955), the Supreme Court unanimously upheld an Oklahoma law prohibiting opticians, defined as an "artisan qualified to grind lenses, fill prescriptions, and fit frames," from replacing or duplicating lenses without receiving a prescription to do so from an ophthalmologist, defined as "a duly licensed physician who specializes in the care of the eyes," or an optometrist, defined as a professional who "examines eyes for refractive error." Although Justice Douglas’s opinion entertains whether the law imposed “a needless, wasteful requirement in many cases,” the Court did not review the case under strict scrutiny since no fundamental right was at stake. Instead, the Court presumed that the law was constitutional and deferred to the state “legislature, not the courts, to balance the advantages and disadvantages of the new requirement.”

Denmark’s stringent restrictions on marital immigration thus deserve rigorous moral condemnation.

Carens tries to rebut my concerns about the effects of a right to immigrate upon fiscal functions. So on the one hand, he advocates imposing a waiting period before immigrants can access state welfare benefits. On the other hand, he claims that states with stingy welfare provisions have fewer grounds for restricting immigration (2013, 281). But as my examples suggest, even countries with weak welfare states like the United States will nevertheless be substantially affected by granting foreigners the right to work, since doing so burdens not only on their fiscal but also their legal and monetary functions.

Carens (2013, 272, 282) contends that a distributively just world would accept the level of inequality presently found among EU member states. If so, then the fiscal problems that presently result from the right to immigrate within the EU reveals important dangers in a general right to immigrate even under the favorable, counterfactual conditions that Carens imposes on his open borders argument.

My argument in the above section addresses Carens’s demand to explain why internal movement deserves a full range of enjoyment while movement across borders deserves only an adequate range (2013, 243-4). Similarly, Carens emphasizes that “freedom of movement within a state looks like…[a primary] human right,” since liberal-democratic states “do not normally claim a right to tell [noncitizens] where they may and may not go once they have been admitted or where they must reside once they have been given permission to
stay” (2013, 241). On the other hand, democratic states rightfully “don’t think that visitors and tourists ought to be able to vote” (242).

17 The discussion below refers to Executive Order 13780, which was issued on March 6, 2017, after the earlier ban in Executive Order 13769, issued on January 27, 2017, was blocked by multiple Federal District Courts. Instead of challenging these decisions, the administration instead issued a second Executive Order which it did defend when multiple district courts similarly blocked its enforcement.