

At the borders of political theory: Carens and the ethics of immigrationⁱ

Joseph Carens, *The Ethics of Immigration*, Oxford University Press 2013. (ISBN 978-0-19-993383-9; pp:364)

1. Introduction:

Joseph Carens' *The Ethics of Immigration* has been a long awaited book. Since the 1980s he has been the leading, and for a period probably the only, political philosopher writing about the ethics of immigration, and is still one of a small number prepared to argue for open borders. Those arguments have been published in different papers and book chapters, but now we have them in one place. However this is far from a book stitched together from disparate publications. Rather, it is a tightly argued text that works as a whole, and is a valuable contribution not only to research but also to the teaching of the subject in undergraduate and postgraduate courses. While he is best known as a theorist of open borders, Carens has written a book that covers the whole range of issues that fall under the ethics of immigration, with chapters on birthright citizenship, naturalization, temporary workers, irregular migrants and refugees, as well as the chapters on freedom of international movement. Each chapter is a valuable resource on its subject and so one does not have to have an interest in the open-borders question to get a great deal from reading the book. Indeed the issue of open borders is only discussed in two of thirteen chapters. The book is explicitly divided into two parts, the first framed by what Carens calls the Conventional View, the presumption that states have the right to discretionary control over their borders. In the second part he argues that this Conventional View is wrong and states have no such right, but that it is possible to accept all the arguments in the first part of the book without abandoning it. Therefore we can move to a far more liberal regime of immigration control and access to citizenship short of open borders without abandoning the Conventional View.

Carens says he is doing political theory from the ground up. Rather than take a specific theoretical framework as given, he says he draws on widely shared democratic ideas and principles that we find in the major liberal democratic nations

today. He is relying on an overlapping consensus on what democratic justice requires, and what emerges from this consensus is a set of democratic principles such as that all people are of equal moral worth, disagreements should be normally resolved through majority decision-making, that there is a duty to respect the rights and freedoms of individuals, that legitimate government rests on consent of the governed, that all citizens are equal under the law, that coercion must be in accordance with the rule of law, and discrimination on factors such as race, religion and gender are unfair (10).

The Conventional View that states have the right to control their borders is part of this overlapping consensus, and so Carens is committed to work with that view as long as possible. This is partly pragmatic in that if people are to be persuaded by any of the arguments in the first part of the book they cannot be tied to the open-borders argument. But it is also a commitment to a certain kind of democratic dialogue which involves adopting moral views which are widely shared by the political community even though we may not agree with them. Democratic deliberation depends upon people who may disagree over fundamental principles still finding common ground based upon shared interests and shared views on the right thing to do. On the question of immigration, there is still a point to participating in the discussion of the best way to implement a policy even if we think it the wrong policy. Without such a commitment democratic dialogue will not be possible and we will not reach any kind of agreement on any of the urgent issues of migration. Those of us convinced by the open-borders argument cannot refuse to engage in democratic debate on that wider set of problems on the grounds that other participants in that debate do not consider freedom of international movement as the solution. We may ask whether this is still not a form of pragmatism, but for Carens the difference is that we set aside the open-borders principle not only in order that we be heard on the other issues (pragmatism), but also because there are important ethical issues that need to be democratically settled amongst the citizenry and we are part of that citizenry and so need to contribute to that settlement (democratic deliberation). It may not be the settlement we believe would be right

under ideal conditions, but it is the settlement we believe to be right within this particular context.

And so in this review essay I am not going to examine Carens open-borders argument for a number of reasons. The first is to recognize that it is a small part of the book and a small part of his contribution to the debate around the ethics of immigration. The second is because I am an open-borders theorist too and so any arguments here would be fairly benign if not banal. The third is that it is the discussion of migration questions short of the open-borders position that reveal most about the book – that while it is accessible and readable it is also highly complex. And the fourth and final reason is that Carens is not only recommending a way of doing political theory, he is also recommending a way in which political theorists should engage with the world. And so I will focus on two of the issues that are discussed in the first part of the book, birthright citizenship and naturalization.

2. The borders of the book:

As a whole the book is focused on how liberal democratic states should act towards those who cross their borders and enter their territory. This includes the discussion of migrant access to rights once they are resident in the country (the first part of the book) and the right to cross the border itself (the second half of the book, which therefore deals with asylum and refugees as well as the open-borders argument). Some issues of migration fall outside of the boundaries of the book, such as the ethics of emigration controls when it comes to tackling the issue of the 'brain drain', the problem of skilled workers leaving the Global South to work in the Global North. Carens does briefly discuss this issue but only in terms of policy implications for the liberal democratic states of the Global North. As these states are predominantly benefiting from this migration, receiving skilled labour at cheap costs, Carens asks whether there is any justification in these states keeping their borders closed in order to help the Global South keep its skilled workers. He argues not, but the question of the Global South using emigration controls to prevent their workers from leaving is not discussed. The book is clearly about the ethics of *immigration* and is addressed to the citizens of a limited range of liberal democratic states. The book

has its own borders and I will return to this below, because it is important that we understand what those borders are and why they are there.

The discussions of specific issues of immigration are framed by two arguments, the social membership argument and the democratic legitimacy argument (50). The social membership argument claims that living within the territorial boundaries of a state for a period of time makes one a member of the society, and this social membership is prior to citizenship. It gives rise to moral claims that deepen over time and eventually gives rise to the moral claim to citizenship itself. This social membership argument does a great deal of work throughout the book, as “almost every moral claim to citizenship rests upon facts and expectations about social membership” (160).

The second argument that runs through the book is the democratic legitimacy argument. “It is a fundamental democratic principle that everyone should be able to participate in shaping the laws by which she is to be governed...” (50). Therefore every adult living in a democratic community on an ongoing basis should be a citizen. “Democratic justice, properly understood, greatly constrains the legal distinctions that can be drawn between citizens and residents” (89). The democratic legitimacy and social membership arguments lead to the same conclusion: “The longer people stay in a society, the stronger their moral claims become. After a while they pass a threshold that entitles them to the same legal status as citizens...” (89). This is essentially a backward-looking approach to establishing citizenship.ⁱⁱ

3. Practical questions:

The application to these arguments to the question of birthright citizenship is immediately apparent. There is no necessary difference between the development of social membership of children born to settled migrants and that of children born to citizens. And so while children are not full social members at birth, the expectations we can have of the formation of their social membership over time are exactly the same regardless of the citizenship-status of their parents. If there is no good reason to delay citizenship acquisition for children born to citizens, there can

be no good reason to withhold it from children born to settled migrants. There is therefore a strong argument for birthright citizenship – *ius soli*—in liberal democratic states. This is to prioritize *ius soli* over *ius sanguinis* which grants citizenship on the basis of descent from other citizens.

So the application of the social membership argument leads us to the conclusion that the most ethical position for liberal democratic states is to enact birthright citizenship. However, the book has a pattern throughout: that what the ethical arguments demand is not necessarily what we should argue for, because context makes a difference. For example western European states that have traditionally relied on *ius sanguinis*, such as Germany, have introduced some versions of *ius soli* in the past few decades. Guest workers who arrived in the 1950s and 60s were expected to return home but instead settled and had children. Where only *ius sanguinis* operated those children were designated as foreign even though they lived all of their lives in their host state and had children of their own, who were also foreign. It was recognized that this growing population of resident foreigners was unsustainable, and that “excluding the descendants of immigrants from citizenship generation after generation is incompatible with any plausible account of democratic principles...” (34).

These states introduced an element of *ius soli* to allow this group of people access to citizenship, but this is still a restricted use of it which falls far short of what the ethical argument demands of liberal democratic states. That argument shows that there is a moral obligation to grant birthright citizenship to the children of all settled migrants, not just a select group of legally settled migrants to solve a particular social problem. However, Carens says he does not want to overstate this point. “The most important consideration from a moral perspective is that, by adopting some sort of *ius soli* law, these states have recognized the principle that descendants of immigrants deserve birthright citizenship when there is good reason to believe that they will grow up in the state where they were born” (36). This development is more important than the details of how states determine the threshold for the assumption that a child is likely to grow up in the community. Context makes a moral difference.

“Discussion of moral principles is not the only form of normative discourse. It is important not to move too quickly from an analysis of moral principles to conclusions about how we should act in the world” (39).

Carens makes a similar point in his discussion of naturalization. Although migrants have had their social membership formed elsewhere, living in their new community means they establish social membership here as well, and as time goes by they meet the threshold required for the right to citizenship. The two relevant measures are residence and length of stay. Carens admits these are limited, but they stand as proxies for a richer set of indicators that show a connection with the wider community. This means that citizenship testing as a gateway to naturalization is wrong in principle. We do not set a test of civic competence for those who are already citizens – citizens already enjoy all the rights of citizenship, including voting and standing for election, without having to pass a competence test. And it is obvious that setting citizenship tests for citizens would open up a hierarchy of citizens – passive citizens who do not have the civic competence to participate politically, and active citizens who do have it. Such a hierarchy is completely unacceptable for liberal democratic states. We should also recognize that this divide would correlate with class and other socio-economic variables, ensuring that only an elite could participate in governing society, and no liberal democratic state should allow socio-economic factors to determine the right to participate as an active citizen (58). The same principle should hold for competence tests for migrants. “Citizenship is not something that is normally earned. People acquire a moral right to citizenship from their social membership and the fact of their ongoing subjection to the laws” (59). This means that there are strong arguments against tests for civic competence as a boundary for naturalization.

However, once more Carens tells us he does not want to overstate the importance of this objection. The principle that citizenship should be easily accessible for immigrants is compatible with tests of linguistic and civic knowledge as long as those tests are set at modest levels. Some states in western Europe are moving away from a position where the state has absolute discretion over whether to grant citizenship

to particular immigrants, and replacing that power with objective measures such as tests for linguistic capacity and civic knowledge “that are set at reasonable levels and ask reasonable questions” (60). In this context, the test may be a step in the right direction, making citizenship more accessible for migrants. The important point is that the tests do not constitute a significant obstacle. Carens’ preference is for tests that focus on linguistic ability and civic knowledge rather than culture and history, and so the move in the United Kingdom towards a more cultural, historical focus on citizenship testing would not be something he would support. But still, the point is that “sometimes the crucial moral question is how a policy is designed rather than whether it satisfies a formal principle” (61). Context makes a difference to how we apply our moral principles to prescriptions for policy. However, the idea of context is complex. Here, we could read it as seeing a certain kind of citizenship test as an incremental step towards what our moral principles ideally demand, and so context here refers to a moment on a continuum from real to ideal. However, as I pointed out earlier, Carens’ democratic deliberation means that it is not so much that we are agreeing to something we think is wrong in the hope that it is a step towards what we think is right, but that we are agreeing to something we think is right in this context. Citizenship tests are wrong in principle but can be contextually right.

4. The difference of context:

This, as I have pointed out, is a recurring pattern. The two core ethical arguments of social membership and democratic principles lead us to conclude that liberal democratic states have clear ethical duties to allow migrants access to full membership, but the extent to which they do that and how they do it has to be judged in terms of context. And so measures that, ideally, would be condemned as immoral according to the ethical arguments emerge as not merely morally acceptable compromises, but morally right. This brings us to the question of the relationship between the real and the ideal in the book. Carens makes a distinction between the Just World Presupposition and the Real World Presupposition, which form a continuum between the ideal and the real, and his own Democratic Principles Presupposition.

The Just World Presupposition imagines what a just world should be like with the idea of justice as unqualified and absolute. Amongst other things, "...an exploration of what justice ideally entails with respect to immigration should take the whole world into account" (301). In other words, certain contextual constraints over what justice demands with respect to immigration are removed, such as the constraint of limiting our examination to a certain group of liberal democratic states. The Just World Presupposition allows us to critique the current world order to the extent that it fails to meet ideal standards of justice, but the disadvantage is that we are in constant danger of losing our bearings. In looking at what justice ideally demands in relation to immigration, we will find that we need a wider moral theory dealing with the human good in general. We can't propose what the right to freedom of international movement ideally demands without a general theory of human rights, and we know that it is notoriously difficult to ground a general theory of human rights.

The Real World Presupposition constrains us to thinking about what justice demands with respect to immigration in the context of the world as we find it, both institutionally (a world of nation-states) and ethically (a world in which the Conventional View is widely held). This Real World Presupposition is on the continuum near to where things actually are but is not right at the end, as there is still room to criticize how things stand. The advantage is that our arguments will be relevant to policy debates, but the disadvantage is that we may not see deep structural injustices.

The Democratic Principles Presupposition is committed to democratic principles, what justice requires in the contemporary democratic tradition. It enables us to constraint the question of immigration so that we do not have to deliver a general theory of the human good, but instead we can draw on an overlapping consensus of views that fall within the democratic tradition. To the question where his own position falls between the two extremes of the Just World and the Real World, Carens replies that it is somewhere in between but it does not stay in one place (306). The argument for open borders takes us towards the Just World position, but

the discussions of birthright citizenship and naturalization take us closer to the Real World position. And so his position is mobile. We could see it as moving dialectically along the continuum away from the Real World towards the Just World ending up with the open borders position. In that sense we could see everything discussed in the first part of the book as overshadowed by the closing chapters where we see the open borders argument established, so that the questions of birthright citizenship, naturalization and many of the others considered in the first part of the book simply disappear.

However, Carens does not mean us to throw out all the arguments of the first part of the book once we reach the open borders conclusion, because the fact is that very few of those arguments have been settled in any liberal democratic state in the Global North. They are all very much live issues, and the arguments about them are relevant and worth developing despite where the book will take us in the end. And so in another sense the argument does not move along a continuum from the real to the ideal – this is not a diachronic dialectical argument which moves through critique from contradictory starting position to consistent final truth. The first part of the book is not a ladder in Wittgenstein’s sense, which can be thrown away once we have used it to get to the second part. The two parts are synchronic, existing alongside each other, both simultaneously valid in their own context. Carens says: “Imagine a continuum of possible presuppositions that stretches from the way things are now to the way things ought to be. I want to show how it is possible to position oneself at different points along such a continuum in thinking about justice and immigration and why there are advantages and disadvantages to any point we pick” (300). And it is not as though we can judge where a position lies on a continuum between the real and the ideal in terms of ranking the advantages and disadvantages or the number of them. The disadvantages of the Just World Presupposition are just as difficult and complex as the disadvantages of the Real World Presupposition.

As we have seen, Carens’ own position has no fixed point upon the continuum – it moves along it. And if I am right about the synchronicity of the arguments it does not

move in one direction from real to ideal, but moves back and forth along all points of the scale. Carens is flexible such that where he is located on the continuum depends upon the context, and every point on the continuum always has context. Carens makes it clear that the Democratic Principles Presupposition is contextual because it is grounded in a commitment to democratic principles and to what justice requires in the contemporary democratic tradition, but also because it is limited to liberal democratic states in the Global North – the United States, Canada, Australia, New Zealand, and the democracies of western Europe. This is not to do with relativism, but a recognition that other democracies that lie outside of this range, such as Japan and India, work with very different political traditions with which Carens admits he is unfamiliar and therefore not confident to suggest policies when it comes to immigration. It is also to recognize that the conversation could engage with positions that have a completely different set of starting assumptions that have nothing to do with democracy. “For such a conversation to get off the ground we would have to search for some other shared assumptions, but what form those would take, how we might proceed, and where we end up is something that could be determined only in the course of an exchange. It is quite possible that the resulting conversation would not look anything like this book” (309).

5. What is to be done (by political theorists)?

And so this is a highly complex text. The relationship between the two parts is not a straightforward one of dialectical progression but rather synchronic arguments whose relevance is determined by contextual considerations. One of the questions this raises is whether the Conventional Assumption that states have the right to control their borders has more life in it than might be supposed when we move between the two parts of the book. Carens acknowledges this difficulty. His method is one of doing political theory from the ground up and as we saw the Conventional Assumption is a key part of the ground upon which the argument builds. Carens does not start with a general theory of freedom or equality, or a general theory of mobility, and try to deduce freedom of movement from those starting points (230), but begins with ordinary democratic principles and practices. He has also argued

that practices can contain moral insights theories miss, and so “we have reason to be wary of moral theories that conflict with our normal moral intuitions” (232).

However, in other cases, theory takes priority over practices, and the argument for open borders “is one of those cases in which the critical perspective of theory is right and conventional practices and intuitions are wrong” (232). The problem is, as he acknowledges, that he is “using some parts of our moral traditions to argue against others...” (232). The challenge of doing political theory from the ground up is that the foundational presuppositions on which we build do not necessarily determine a specific structure: we could end up with conflicting but internally consistent structures built on the same foundations. If it is necessary to remove one of those foundational presuppositions in order to build the structure we want, then surely others can equally remove other foundational presuppositions to build what they want. So doing political theory from the ground up still involves having an architectural blueprint before we start building, and how do we decide on the blueprint in the first place? An alternative story could be that Carens arrives at his open-borders position through reasoning from a general theory of, say, moral equality, and uses the ground-up method to persuade us that he is right. The ground-up method here not a method of theory construction but rather a method of persuasion. But then, of course, it might be replied that theory construction is always at the same time an attempt at persuasion. Another difficulty, though, and a more radical one, is that the assumption seems to be that we can remove the Conventional Assumption and the structure of liberal democratic theory and politics remains stable more or less as it is. Elsewhere I have argued that removing the Conventional Assumption is far more radical than this.ⁱⁱⁱ Freedom of movement may not be something we can add on to liberal theory and practice carry on as usual – it may be that it changes everything.

Finally, Carens’ contextual approach means there is a tension running through the book between the real and the ideal which gives us conflicting messages, not so much about how to do political theory, but what we should be doing in response to political theory. To an extent, we have two Joseph Carens speaking to us. There is

the optimistic Carens who works out a radical set of moral principles in relation to birthright citizenship, naturalization, refugees, and so on. But then there is the pessimistic Carens who tells us that these principles will not find purchase in certain (real) contexts and therefore we should not only settle for less, we should argue for less. For example Carens argues that the current definition within the Refugee Convention is inadequate because it is too narrow and needs to be revised, but at the same time argues that this question cannot be pushed in the current political climate because political powers would revise it to make it narrower rather than wider (201).

On the face of it there is nothing contradictory in making these two claims, and others have made the same point. But on the other hand Carens tells us we should not push the question of revising the definition and at the same time he gives us strong arguments for such a revision. Sometimes it is argued that political theorists can establish a particularly radical argument on a social issue and agree that it is too dangerous to take that argument into the public sphere as it will be misunderstood and misused. But this rests on a flimsy distinction between our activity as political theorists and the public sphere – that activity takes place in the public sphere, not some hermetically sealed-off private space.^{iv} Carens' book is clearly within the public sphere and anyone can read it, including policy makers and politicians who may want to narrow the Refugee Convention definition. Carens has supplied us with a powerful argument for revising the Convention definition which motivates us to work for a revision, but then tells us not to do that work. But then what are the arguments for? This raises the question of what we think we are doing as political theorists and our relationship with political activism.

If we want to actually influence change in the real world of political policy, we know that our proposals need to be realistic and therefore modest. If we want to influence people's imagination about how the world could be systematically different our proposals can be radical and far-reaching. Both are equally valid aims and Carens does both in his book. This is not contradictory but it can be frustrating and there is still the question of what those radical arguments are for. Do we really intend them

just to plant seeds in people's imaginations, or do we intend them to be grounds for activism so that people start working now for radical change through political campaigning and activism. Can we really say: "Here is a radical argument for X, but do not push for X now". It might be replied that we can, because what we are saying is in effect: "Here is an argument for X, but we know that pushing for X on the basis of that argument here and now will actually make X less likely. I am telling you about this argument for X now, because I want to preserve the possibility that when X becomes more feasible, there will be arguments we can make for it, and because it'll help you to understand how much we must shift the grounds of political feasibility to be able to achieve what we must."^v But, as I pointed out above, this assumes that our radical arguments for X are confined to a select audience who will understand them and they will not enter the wider public sphere where they will do harm. And as political theorists do not run secret societies (if they do they haven't told me), then if we really do believe that pushing for X here and now will harm its prospects, then we as theorists should never propose X in the first place. We don't dare mention open borders, except in places where we are sure nobody is listening.

This means there is a dialectic running through the book, between the optimistic Joseph Carens and his pessimistic counterpoint. It is the optimistic Carens who speaks most loudly to me and motivates me both to write and to take action. Whatever the range of his writing, and the balance of this book, it is his radical contribution to the open borders argument that has been most influential and what he will be remembered for. In one sense I feel a sense of loss that the voice of the optimistic Joseph Carens does not stand out more clearly, but in another sense we all gain from the wide-ranging and rich discussion of some of the most urgent issues relating to immigration faced by liberal democratic states.

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ⁱⁱ In contrast, we could take a more republican forward-looking view, which judges access to citizenship on the grounds of entering into a commitment to fulfilling the responsibilities of citizenship, a commitment that can be entered into upon arrival. There is a contrast here between a liberal rights-based view, in which citizenship consists of rights which must be earned, and a republican responsibility view where citizenship consists of responsibilities that are entered into by the prospective citizen.

ⁱⁱⁱ See Cole (2000), and for a more recent examination of the problem of starting points and presuppositions see Cole (2014).

^{iv} See Jubb and Kurtulmus (2012).

^v Thanks to Robert Jubb for this example.

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