
Borders, Walls, and Crumbling Sovereignty

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Walled States, Waning Sovereignty, Wendy Brown. Brooklyn, NY: Zone Books, 2010. 167 pp. \$25.95 (hardcover).

Immigrants and the Right to Stay, Joseph H. Carens. Cambridge, MA: MIT Press, 2010. 114 pp. \$14.95 (hardcover).

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At the heart of Carens's careful exploration lies a core norm or belief: "The moral right of states to apprehend and deport irregular migrants erodes with the passage of time." This then leads him to the proposition that amnesty should be the result of that passage of time.

The passage of time represents attachments, a life well-lived, contributions to the community, the absence of a criminal record after years of residence. The determination of what length of time is meaningful in this domain is partly empirical in that it ought to capture actual life processes and societal connections, and these can vary enormously depending on the individual and the situation. "At some point a threshold is crossed, and they acquire a moral claim to have their actual social membership legally recognized" (Carens, p. 18). Legal recognition basically involves the right to permanent residence and all the rights that go with it, including eventually the right to citizenship.

It is easy to produce a vast number of counterarguments to this proposition about the consequences of the passing of time and the notion of actual social membership. It is more difficult to deny the validity of the core principle it signals, a norm that may well override the legal constraint.

This difficulty becomes clear in the responses of the six distinguished scholars from diverse disciplines and with diverse political, ethical, or policy positions. For some, Carens goes too far in his emphasis on time spent in the country and in his invocation of a norm that can override the law. For others, he does not go far enough in protecting the rights of migrants. Some of the respondents invoke more scholarly arguments or invite us to understand the historical details easily drowned out by political arguments.

Carens's basic proposition, one that carries normative weight, is that social membership does not depend on official permission. From a practical point

of view this is basically correct—except when official action can (lawfully or not) interrupt or cut short the process of *making* social membership. But Carens’s argument can account for this exception by seeing the act of interrupting this process as unjust/unjustifiable. Further, critical to his reasoning is the distinction between violation of a law and criminality. Indeed, though he does not necessarily rest his case on the distinction, illegal residence is a violation of the law, but it is not murder or stealing. Finally, length of time also plays at the other end of the spectrum in that social membership requires a minimum of time in residence, albeit a variable minimum depending on the person, the circumstances, and so on.

In her comment, Ngai reminds us of the enormous discretionary power of those who make the decision—in fact, at its worst, the decision as to whether time spent is enough to warrant legal recognition becomes a decision easily based on religious, ethnic, and cultural prejudice. Depending on the politics and the antagonisms of an epoch, many or a few get that legal recognition.

Jean Elshtain asks why not use the actual social membership, rather than the passage of time, as the indicator. But this clearly brings its own difficulties and ambiguities. Carens raises the issue of who would establish the depth of social membership, and the risks that such inquiries would violate the “normative commitment of liberal democratic states to respect individuals.” Further, how would different officials deploy their discretionary power to declare that a person’s social membership qualifies for legal residence.

Beyond the fact of social membership or the passage of time as a condition limiting the power of the state to expel irregular migrants, Carens discusses moral obligations that also limit that state’s right. One case is the state’s complicity in irregular migrations; the workers’ irregular status makes them cheaper and more controllable to employers. All it might take to achieve this outcome is failure to enforce existing law. Carens clarifies that this moral complicity only holds under specific conditions, such as, for instance, “when there is scope for state action (or inaction) to make some difference in the number of irregular migrants” (p. 29). There are flows states have difficulty controlling, but there are also flows states could control but choose not to. The United States has often done the latter when it comes to at least some migrations, such as those to large farms, notably in Texas and California.

Bosniak calls for a return to the foundational human rights of people that precede the right of states to control their borders, rights irregular migrants cannot easily invoke given their vulnerability to deportation. Carens agrees that this is a flaw in his proposal, but finds that a strong separation between the legal rights and the human rights of irregular migrants could address this flaw.

But Carens is also criticized for an overly moral argument. Massey calls for a more pragmatic approach, one that recognizes the histories and specifics of migration to the United States, with the Mexican migrations as the critical historical relation. And Aleinikoff questions the focus on moral arguments and calls for justifying regularization on pragmatic arguments, notably the impossibility of deporting the irregular population as a whole.

There are many other arguments developed by Carens and his respondents. It is an extraordinarily rich text—so much said in such few pages.

And yet, much as the authors situate their arguments in larger histories, geographies and formal institutions they pass over the changing contents and locations for state sovereignty in our changing world. The authors certainly recognize that the traditional borders of the inter-state system, one fully formalized in the 20th century, are a critical and marking feature in modern immigration processes. What is not sufficiently worked into the debate is that borders, with all their practical and formal variability, are increasingly just one element in a larger emergent operational space that began to take shape in the 1980s. A critical consequence of this shift is the debordering of the modern interstate system in ways that go *beyond* older types of deborderings such as the presumptions of dominant powers to violate the sovereignty of weaker countries, something that continues to operate as well.

These emergent deborderings have received considerable scholarly attention over the past decade. In my own work I have developed two aspects of this larger subject. One of these concerns the shifting meaning of national state sovereignty. “Sovereignty and territory, then, remain key features of the international system. But they have been reconstituted and partly displaced onto other institutional arenas outside the state and outside the framework of nationalized territory. I argue that sovereignty has been decentered and territory partly denationalized” (1996: 29-30). Among the better known instruments that have enacted some of these shifts are WTO law, Human Rights law, the specialized regimes allowing firms to conduct themselves as if they were global even though there is no such persona as a “global firm.” More recently I have focused on what I think of as new bordering capabilities that produce bordered spaces across national borders (2009). One example is that workers who move through the WTO regime actually have a range of formal portable rights recognized in all signatory countries: this constitutes one of those transversal bordered spaces, one whose borders are far tighter than any traditional geographic border—no coyote can smuggle you across those borders. These and many other developments have all chipped away, through formal instruments, at state sovereignty and state authority over its borders.

This shifting meaning of national state sovereignty potentially carries implications for the current notion of how to govern/control immigration. Thus, Carens's position that the state has the right to control its borders and hence to deport irregular immigrants is at least partly destabilized in the post-1980 globalizing era: that "right to control" loses its full formal vigor compared to what it was in the twentieth century. This weakening may well further unsettle the already patchy effectiveness of formal state authority over its borders, no matter how brutal and increasingly militarized their patrolling. It would seem to add ground for the case made by Bosniak regarding the formal and principled ascendance of human rights, but also for the more practical approaches proposed by Massey and Aleinikoff. In my reading (2009), practical and informal adaptations of formal framings are proliferating at a time of significant operational shifts in key domains; I find this happening in domains as diverse as international finance, the handling of sovereign debt and deficits, or the implications of environmental treaty law for recognizing fisheries as a sort of jurisdiction that can override national borders.

In many ways these developments, even though not part of the discussion in the Carens et al. book, have the effect of strengthening both the rights/moral values arguments and, at almost the other end, the pragmatic calls for actionable understandings.

But it takes work to make that connection. Wendy Brown provides us with a critical contribution in her emphasis on the tensions between opening and barricading in current border politics. Using the case of walled borders, Brown shows that the walls of our present modernity are to be distinguished from those of the twentieth century. One critical difference is that they are not built as fortresses against other sovereigns, but against nonstate transnational actors—individuals, organizations, industries, movements, groups. She finds that these are rarely state-incited border crossers, and in this regard they are not linked to Westphalian logics.

I see in Wendy Brown's analysis some interesting intersections with the migration perspective on borders, even though they are not explicated. For Brown, the effect of all the forces she focuses on is not that we are entering a post-state or post-sovereign era. What is taking place is that the State and sovereignty "come apart from each other," which resonates with my earlier argument (1996: 29-30). But she takes it further with her assertion that States persist, but they do so as non-sovereign actors; this is a very forceful proposition, and one that can serve as a sounding board for a broad range of research that may well collectively qualify Brown's proposition yet in that process develop much needed knowledge about the current epoch. The theorist in me

finds this extremely exciting, even as I find the state is still one of the major sites for sovereignty, though increasingly not the only one (1996; 2009).

Brown posits that “features of sovereignty now grow and emerge” in two domains not considered by the Westphalian perspective as threats to that older form of state sovereignty: global capital and “religiously legitimated violence.” The radicalness of her perspective opens up a wide door for research and debate. In this regard, the chapters in the Carens book are an interesting and intelligent tempering of Brown’s argument in that their focus on the sovereign border brings to the fore its power to distort foundational norms (human rights) and to expel or criminalize many who are innocent.

Brown elaborates her thesis by marking several key distinctions with others working on these issues. She distinguishes her argument from Hardt and Negri’s proposition that nation-state sovereignty has transformed into a global empire, and from Agamben’s thesis that sovereignty has metamorphosed into the worldwide production and sacrifice of bare life (global civil society). In contrast she argues that features of sovereignty are migrating from the nation-state to the “unrelieved domination of capital and religiously sanctioned violence.” Neither “bows to another power”; both are indifferent to international law or use it in a subversive way, for their aims; and both recover the promise of sovereignty for their project. For Brown, sovereign nation-states no longer have the exclusive authority to define the field of global political relations or monopolize much of the organizing of that field.

While I do not completely agree with the definitiveness of Brown’s argument, I do find in my research over the past ten years multiple empirical elements of her argument. Brown writes of walls as a part of an ad hoc global landscape of flows and barriers both inside nation-states and in the larger constellation. They divide rich parts of the globe from the poorer ones. In addition to this, I see a transversal pattern as well: the formation and strengthening of new types of geographies of centrality that cut across the ongoing divide between global south and global north. Brown brilliantly sees how states resorting to policing and blockading signal a “blurring between the inside and the outside of the nation-state, and not only between criminals inside the nation-state and enemies outside.”

I want to end this review essay by addressing the one argument in Carens’s book that I have not yet included in this discussion. In her response to Carens, Carol Swain raises a difficult question when she points to the economic injustice that is rampant in the United States vis-à-vis its own minority citizens and legal immigrants: their high unemployment and their ruthless replacement by lower paid and controllable irregular immigrants.

This is an issue that cuts across diverse positions regarding the treatment of state authority over its borders. We will not solve the immigration question if we allow rampant minoritization, growing inequalities of all sorts, permanent unemployment for growing numbers, and impoverishment of the modest middle classes. Most immigrants are part of our society, our economy, our neighborhoods; criminalizing immigrants and minority citizens is not a solution—it has a boomerang effect that will hit back.

The burden of redress should not fall on the divide of immigrants versus minority citizens and the unemployed of the host society. I see Swain's question as going beyond this either/or. I think Swain signals that it goes to the fundamentals of our political economy and our social order, and that isolating immigration from that broader order is not going to take us very far. Mae Ngai gives us a historical account that points to the ambiguity of the distinction citizen/immigrant when minoritization enters the picture—some immigrants may be far more protected than some minority citizens. In short, I see in these two responses a reminder of a deeper systemic logic that we will have to address.

In terms of the two books under discussion, there are dynamic interactions between the question of how to govern immigration and the question of the twenty-first century liberal state with its diluted sovereignty. Our global modernity, one I see as taking off in the late 1980s, is to be distinguished from the modernity of the twentieth century that saw the elaboration of the regulatory state in much of the world. I see an epochal shift that is producing structural approximations in the position of, on one hand, minority immigrants, both legal and irregular, and on the other, a growing share of citizens, not only the minoritized but also the sons and daughters of once robust middle classes who are rapidly losing economic ground. Citizens are losing rights, as are legal immigrants, and irregular immigrants are subject to increasingly acute exploitation. Yes, there are sharp differentiations in life chances and privileges among these diverse groups, but most of them are facing variable degrees of impoverishment and loss of entitlements. This structural approximation coexists with heightened nationalisms and virulent antiimmigrant sentiment. The tragic effect is to obscure the fact that the source of this impoverishment and losses is a larger political economy, which has also hurt immigrants, both legal and not. We will not solve the immigration question if we do not address these larger losses.

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